APPEAL

1. Common law writ of certiorari - When municipal legislative bodies reserve to themselves the power to grant or deny permits through an ordinance containing a rule or standard to govern them, a later decision implementing this authority is regarded as administrative, as opposed to legislative

See also CONSTITIONAL LAW (U.S.) - Due process (procedural) - Octopus Group has failed to show that it possessed a protected property interest - Procedural due process requires state and local governments to employ fair procedures when they deprive persons of a constitutionally protected interest in life, liberty, or property, but procedural due process protections do not prevent deprivations of life, liberty, or property but rather guard against substantively unfair or mistaken deprivations of property - Octopus Group is challenging the denial of a special use permit and its inability to reapply as of right for five years - Octopus Group fails to cite to any authority showing that being unable to reapply for a permit deprived it of a protected property interest, nor has Octopus Group asserted that it was entitled to the permit such that it had a property right in the permit itself - Octopus Group has failed to adequately show that it had a protected property interest in the permit or that it has been deprived of the physical property at issue - No due process violation - The determination of whether the Council acted illegally, arbitrarily, or fraudulently is a question of law- illegal, arbitrary, or fraudulent actions include: 1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards - Statutory rules of construction - Council acted pursuant to one of its published rules of procedure, which provided for reconsideration of a matter before the minutes of the previous meeting had been finalized - It is plain from the rules of procedure that, prior to the approval of the previous meeting's minutes, any matter which has appeared on the agenda and has been acted upon by either a majority vote for approval or rejection, may be brought before the Council for reconsideration - As a general rule, every citizen is presumed to know the law, so Octopus had notice that reconsideration was a possibility, page 135.

PEOPLE FIRST AUTO SALES, LLC ET AL. v. CITY OF MEMPHIS, TENNESSEE ET AL.
COURT OF APPEALS No. W2024-00323-COA-R3-CVFiled February 11, 2025

"A business sought a special use permit from the City of Memphis to operate a used car lot. At a meeting of the city council, the council voted to remand the business's application back to the local land use control board. At the next meeting, the council reconsidered the application and denied it. The business filed a writ of certiorari challenging the denial, alleging due process violations and stating that the council failed to follow its rules of procedure. The trial court found that no due process right applied and that the council had properly followed its rules of procedure. We affirm."

"This appeal concerns an attempt by People First Auto Sales, LLC ('People First') and Octopus Group Inc. ('Octopus Group') to obtain a special use permit from the City of Memphis ('the City') to operate a car dealership on Old Austin Peay Highway. On December 1, 2020, People First applied to the Shelby County Department of Planning and Development ('the DPD'). The DPD's staff evaluated the application pursuant to the Memphis and Shelby County Unified Development Code ('the UDC'), produced a report finding that the application was not consistent with the requirements of the UDC, and recommended the special use permit be rejected. On February 11, 2021, the Shelby County Land Use Control Board ('the LUCB') held a public hearing on the application and recommended approval so long as Octopus Group met certain conditions. Octopus Group's owner, Fred Sengstacke, was present at this meeting."

"The application was placed on the Memphis City Council's ('the Council's') March 16, 2021 regular agenda for consideration. Octopus Group's representatives attended this meeting via telephone. At this meeting, the Council voted to table consideration of the application so that the local council member could hold community meetings on the application. On July 20, 2021, the Council considered the

application, again with a representative of Octopus Group present. At this meeting, the Council voted to remand the application back to the LUCB for further consideration."

"The Council's actions that are the subject of this appeal occurred at its meeting on August 3, 2021, when the Council took up approving the minutes of the July 20 meeting. Prior to the vote, a member of the Council made a motion to reconsider Octopus Group's application. As his reason for reconsidering the application, the council member stated that he had received several emails from the community opposing the proposed use. Several other council members voiced concern that the Council was acting without a representative of Octopus Group present and without sending formal notice to Octopus Group that the Council would be reconsidering the application. The council member who sought reconsideration, however, argued that Octopus Group had been fully heard on the application. The Council then voted to reconsider the application and disapproved the special use permit application."

"On October 1, 2021, Octopus Group filed a petition for writs of certiorari and supersedeas in the Chancery Court for Shelby County. In the petition, Octopus Group asserted that the Council violated its due process rights under the Fourteenth Amendment to the United States Constitution and the similar rights granted under the Tennessee Constitution by voting to reconsider and subsequently disapprove its application without notice. Octopus Group also asserted that the action violated the Council's own rules of procedure. After a hearing on the petition, the trial court entered a writ of certiorari on February 9, 2022."

"In its trial brief, the Council asserted that neither People First nor Octopus Group had standing to challenge the actions at issue because Octopus Group had transferred the property to another entity after filing the lawsuit. The Council also argued that its actions did not violate Rule of Procedure 40 because the Council followed the procedure set forth in Rule of Procedure 39(b), which governs motions to reconsider."

"A final hearing was held on the petition on June 22, 2022. On September 16, 2022, the trial court entered an order finding that People First lacked standing to challenge the Council's actions and dismissed People First's claim. Therefore, Octopus Group proceeded as the sole petitioner. After determining that Octopus Group had no protected property interest in the permit, the court found that the Council had violated its own rules of procedure and that the Council's actions were, therefore, arbitrary. The court reversed the Council's decision and remanded the matter back to the Council."

"On October 14, 2022, the Council filed a motion to alter or amend the final judgment pursuant to Tennessee Rule of Civil Procedure 59, arguing that the court's final order contained clear errors of law. The Council asserted that the court erred by failing to give adequate weight to the wording of the Council's rules of procedure and by considering evidence not in the record before the court. The Council asserted that the language of Rule 39, which governs motions to reconsider, provides the only requirements for the Council to vote on a motion to reconsider and that, therefore, Rule 40's requirements were inapplicable to a motion to reconsider. The Council also asserted that the court's finding that the Council 'selective[ly] enforce[s]' Rule 40's requirements was not based on evidence in the record. On February 9, 2024, the court entered an order granting the Council's motion and dismissing Octopus Group's petition, stating in relevant part that the court interpreted Rule 39(b) as allowing the Council to reconsider a matter after it appeared on the agenda and was acted upon by a majority vote before the minutes of the majority vote have been approved. The court interpreted Rule 40 as requiring new items proposed by council members to be submitted to the council office to be placed on the agenda. Further, the court found that Rule 40 did not apply to a member's 'parliamentary motion' to reconsider a matter under Rule 39(b)."

"The remedy of certiorari provided in Tenn. Code Ann. §§ 27-8-101, 27-9-10 to -113, is the proper method by which individuals may challenge or overturn administrative decisions, which are judicial or quasi-judicial in nature. *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990). 'In order to qualify as an administrative, judicial, or quasi-judicial act, the discretionary authority of the government body must be exercised within existing standards and guidelines.' *Id.* Our Supreme Court

has instructed that when municipal legislative bodies reserve to themselves the power to grant or deny permits through an ordinance containing a rule or standard to govern them, a later decision implementing this authority is regarded as administrative, as opposed to legislative, in nature. *Id.* (citing 8A E. McQuillin, THE LAW OF MUNICIPAL CORPORATIONS, § 25.217, at 160-61 (3rd ed. 1986))." …

"The trial court found that Octopus Group had not put forward an interest entitled to due process protection. On appeal, Octopus Group continues to assert it was denied due process under both the United States and Tennessee Constitutions. Octopus Group puts forward two actions by the Council that it asserts violate due process: the reconsideration of its application without prior notice and the Council allegedly accepting new evidence (the emails from the community opposing the proposed use). Octopus Group also argues that a protected property interest is not necessary for procedural due process protections to apply here. For the reasons given below, we do not accept Octopus Group's argument that it need not assert a property interest as compelling. Moreover, Octopus Group has failed to show that it possessed a protected property interest."

"'[P]rocedural due process requires state and local governments to employ fair procedures when they deprive persons of a constitutionally protected interest in 'life, liberty, or property.'' *Parks Props. v. Maury Cnty.*, 70 S.W.3d 735, 743 (Tenn. Ct. App. 2001). However, '[p]rocedural due process protections do not prevent deprivations of 'life, liberty, or property' but rather guard against 'substantively unfair or mistaken deprivations of property.'' *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972)). Our Supreme Court has provided the analysis courts are to undertake for a procedural due process claim:

> When a person asserts a procedural due process claim, the court must first determine whether he or she has an interest entitled to due process protection. If the court determines that the person has an interest that is entitled to constitutional due process protection, then the court must determine 'what process is due.' Once the court determines minimum procedural due process protections to which the person is entitled, the court must finally determine whether the challenged procedures satisfy these minimum requirements.

Heyne v. Metro. Nashville Bd. of Pub. Educ., 380 S.W.3d 715, 731 (Tenn. 2012) (citations omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))."

"Octopus Group asserts three arguments for why it should have been afforded due process protection. First, it asserts that 'due process is an intrinsic part of the writ of certiorari review.' Second, it asserts that the Council's action affected a property interest because of Octopus Group's inability to apply for a permit for five years. Third, it asserts that all judicial and quasi-judicial proceedings must comport with procedural due process regardless of whether a life, liberty, or property interest is affected."

"We begin our analysis of whether due process protections applied to the present case with the first step in the analysis our Supreme Court has laid out: whether Octopus Group asserted an interest entitled to due process protection. *See id.* Octopus Group asserts that it possessed a property interest that was affected by the Council's decision because it cannot reapply for a special use permit for the next five years." …

"The City has not dispossessed Octopus Group of anything. Rather, Octopus Group is challenging the denial of a special use permit and its inability to reapply as of right for five years. Octopus Group fails to cite to any authority showing that being unable to reapply for a permit deprived it of a protected property interest, nor has Octopus Group asserted that it was entitled to the permit such that it had a property right in the permit itself. 'When seeking a permit or authorization, a developer has a protectable property interest in a permit or authorization only if it can prove that it has a legitimate claim of entitlement to the permit or authorization.' *Parks*, 70 S.W.3d at 746 (citing *RRI Realty Corp. v. Inc. Vill. Of Southampton*, 870 F.2d 911, 915 (2d Cir. 1989)); *see also Durham v. Eley*, 507 F.Supp.3d 956, 963-64 (M.D. Tenn. 2020) (applying the legitimate claim of entitlement test in the context of

procedural due process). We have found nothing in the applicable caselaw supporting Octopus Group's assertion that the inability to apply for a permit alone is sufficient to establish a property right.

"Octopus Group has failed to show that it was being deprived of a protected property interest in either the permit itself or the subject property.5 Absent a protected property interest, Octopus Group asserts two arguments for why due process protections applied to the Council's actions. To succeed in these arguments, Octopus Group must establish a constitutionally protected interest other than a property interest. We begin with Octopus Group's first remaining argument that 'due process is an intrinsic part of the writ of certiorari.' Octopus takes this argument from the standard of review courts employ when reviewing actions under the writ of certiorari. The Tennessee Supreme Court has stated the scope of review in these actions as 'whether 'the inferior board or tribunal (1) has exceeded its jurisdiction, or (2) has acted illegally, arbitrarily, or fraudulently.'' *McCallen*, 786 S.W.2d at 638 (quoting *Hoover Motor Exp. Co. v. R.R. & Pub. Utils. Comm'n*, 261 S.W.2d 233, 238 (Tenn. 1953)). In a later opinion, the Supreme Court further clarified what constitutes an 'illegal, arbitrary, or fraudulent' action as '1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards.' *Harding Acad. v. Metro. Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d 359, 363 (Tenn. 2007). Octopus Group interprets this language as the Supreme Court integrating due process rights into certiorari review. Respectfully, Octopus misunderstands these standards."

"Under the certiorari standard of review, courts are directed to consider whether the lower tribunal 'follow[ed] the minimum standards of due process.' *See id.* However, the 'standards of due process' remain controlled by applicable constitutional law, i.e., that a protected interest is required. Property interests that may be afforded protection from deprivation under the due process clause 'are created and their dimensions are defined by existing rules and understandings that stem from independent sources such as state law.' *Parks*, 70 S.W.3d at 745 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The certiorari standard of review does not meet this requirement. State law is quite clear that, when an individual asserts a due process claim, the threshold step for a court to undertake is whether the individual has asserted an interest entitled to due process protection. *Keller*, 602 S.W.3d at 357; *Heyne*, 380 S.W.3d at 731; *Rowe v. Bd. of Educ. of City of Chattanooga*, 938 S.W.2d 351, 354 (Tenn. 1996). For this Court to allow a standard of review to supplant the due process analysis outlined by both the United States Supreme Court and the Tennessee Supreme Court would be untenable."

"Octopus Group's remaining argument that due process rights applied to the Council's reconsideration of its application is that procedural due process rights apply to all judicial and quasi-judicial proceedings, regardless of whether a life, liberty, or property interest is affected. In support of this, Octopus Group cites to the case *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and its statement that '[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is 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.' However, Octopus Group's reliance on this quote overlooks the prerequisite to due process applying found earlier in the opinion, that 'there can be no doubt that at a minimum [the words of the Due Process Clause] require that *deprivation of life, liberty or property* by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Id.* at 313 (emphasis added). The opinion then discussed how the party was deprived of its property. As explained above, Octopus Group has failed to adequately show that it had a protected property interest in the permit or that it has been deprived of the physical property at issue. We, therefore, are unpersuaded by this argument."

"The remaining cases cited by Octopus Group in support of this argument all fail to negate the requirement that Octopus Group show as a threshold matter that it is asserting an interest sufficient to be entitled to constitutional protection. Therefore, we agree with the trial court's conclusion that due process, whether under the United States or Tennessee Constitutions, did not apply to the Council's reconsideration of Octopus Group's special use permit application."

"Octopus Group asserts that the Council acted fraudulently when it voted to remand its application back to the LUCB but then reconsidered and denied its application at a subsequent meeting. The determination of whether the Council acted illegally, arbitrarily, or fraudulently is a question of law. *Harding Acad.*, 222 S.W.3d at 363. As stated above, illegal, arbitrary, or fraudulent actions include: '1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards.' *Id.* Although our Supreme Court has provided the above list of four examples of fraudulent actions, we find little other guidance on determining whether a city council has acted fraudulently, and the parties provide none. However, this Court has discussed what constitutes fraud in other contexts, stating, '[t]he essence of fraud is deception.' *Lopez v. Taylor*, 195 S.W.3d 627, 634 (Tenn. Ct. App. 2005). Generally, 'fraud is a trick or artifice or other use of false information[.]' *Id.* (citing *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 301 (Tenn. Ct. App. 2001))."

"From the record before us, we cannot say that the Council acted fraudulently. Octopus Group asserts, 'The Council's sudden about-face amounted to fraud or deceit that misled Octopus Group and resulted in a surreptitious rejection of Octopus Group's application.' However, as discussed below, the Council acted pursuant to one of its published rules of procedure, which provided for reconsideration of a matter before the minutes of the previous meeting had been finalized. It is plain from the rules of procedure that, prior to the approval of the previous meeting's minutes, 'any matter which has appeared on the agenda and has been acted upon by either a majority vote for approval or rejection, may be brought before the Council for reconsideration[.]' MEMPHIS CITY COUNCIL R. P. 39(b). 'As a general rule, every citizen is presumed to know the law.' *Burks v. Elevation Outdoor Advert., LLC*, 220 S.W.3d 478, 492 (Tenn. Ct. App. 2006). Similarly, reconsideration of a matter at a subsequent meeting is a recognized parliamentary procedure. *See, e.g.*, 59 AM. JUR. 2D *Parliamentary Law* § 18 (discussing the requirements for a motion to be reconsidered at a later meeting). Therefore, Octopus Group was presumed to know that the Council's vote on its application could be reconsidered at the start of the next meeting."

"Finally, Octopus Group asserts that the Council acted arbitrarily by failing to follow its rules of procedure because Memphis Council Rule of Procedure 40 required all motions to be submitted in writing the Thursday before a hearing, and the Council failed to follow this rule when it took up the motion to reconsider. For the reasons below, we find that the Council acted in accordance with its rules and, therefore, did not act arbitrarily."

"Courts are empowered to review whether an acting body followed its own procedures. *Steppach v. Thomas*, 346 S.W.3d 488, 499 (Tenn. Ct. App. 2011). We apply the general rules of statutory interpretation when construing administrative rules, such as the Council's rules of procedure. *See Hammond v. Harvey*, 410 S.W.3d 306, 310 (Tenn. 2013) (stating that general rules of statutory construction applied to a county board's administrative rules). Applying this principle, the construction or interpretation of the Council's Rules of Procedure is a question of law." …

"The central disagreement between the parties is whether the trial court erred in finding that 'Rule 40 does not apply to a member's parliamentary motion to reconsider a matter under Council Rule 39(b) that has already appeared on an agenda and has been acted upon by the Council.' We begin our analysis with the text of the rules."

"Rule 40 of the Memphis City Council Rules of Procedure is titled 'ADDED Items for Agenda by Council Members' and provides in pertinent part that 'All proposed ordinances, resolutions, motions, and other matters submitted by Council Members shall be submitted in writing to the Council Office by 10:00 a.m. THURSDAY[.]' The rule further provides that 'Only items involving extreme emergencies may be added to the agenda after the Thursday, 10:00 a.m. deadline[.]' MEMPHIS CITY COUNCIL R. P. 40. Rule 39(b) provides, in relevant part, that:

> Any matter which has appeared on the agenda and has been acted upon by either a majority vote for approval or rejection, may be brought before the Council for

> reconsideration upon proper motion of a Council Member and seconding motion by another Council Member.
> The only requirements for this action are:
> 1. The Member making the motion for reconsideration must have voted on the prevailing side of the initial vote. A Member, regardless of how he voted on the Motion to be Reconsidered, may Second the Motion.
> 2. Such motion for reconsideration must be made prior to approval of the Minutes in which the first vote was cast.
> 3. The Motion to Reconsider is not amendable.
> 4. No question can be reconsidered twice unless it was materially amended during its first reconsideration.

We conclude that Rule 40 only applies to matters that will be placed on the Council's agenda and not to oral motions that are made during a council meeting, such as a motion to reconsider." …

"… '[T]he legislative body of a municipal corporation, like all deliberative bodies, possesses the undoubted right to vote and reconsider its vote upon measures before it[.]' 4 McQuillin THE LAW OF MUNICIPAL CORPORATIONS § 13:73 (3d ed.). 'If the law does not forbid, the legislative body may adopt its own rules or parliamentary practice as to the right and method of reconsideration.' *Id.* Therefore, under our interpretation of the rules of procedure, Rule 40 applies to motions that will be placed on the Council's agenda. Rule 39, however, governs the reconsideration of matters previously placed on the agenda and voted on by the Council. The two rules, therefore, do not conflict, nor do they necessarily overlap."

"Even if we were to interpret the rules as potentially in conflict, we would also apply the rule of statutory construction that, when two statutory provisions are in conflict, the more specific of the two provisions will control. *Tennessean v. Metro. Gov't of Nashville*, 485 S.W.3d 857, 872 (Tenn. 2016)."…

"This interpretation of the rules is also in harmony with several other rules of statutory construction. First, as both rules include that they govern motions, depending on their interpretation, there is potential that they may overlap or involve the same subject matter. A common rule of statutory construction is that statutes that involve the same subject matter should be construed harmoniously to avoid conflict. *State v. Turner*, 193 S.W.3d 522, 526 (Tenn. 2006). Because Rule 39's provision provides the only requirements for a motion to reconsider, to subject these motions to Rule 40's provisions would necessarily make the rules conflict. Interpreting Rule 40 as governing placement of items on the agenda avoids this potential conflict. Second, this interpretation follows the rule of statutory construction that courts should not 'apply a particular interpretation to a statute if that interpretation would yield an absurd result.' *State v. Sims*, 45 S.W.3d 1, 11 (Tenn. 2001). To interpret Rule 40 to require all motions to be submitted in writing to the Council office would create an absurd result as oral motions are a standard part of parliamentary procedure. We, therefore, decline to adopt Octopus Group's interpretation of the rules and affirm the trial court's order altering or amending the judgment."

2. **Notice of appeal was not timely filed – Because it resolved all of the parties' rights and claims and left nothing for the trial court to adjudicate, the September 20, 2023 order was a final judgment that triggered commencement of the thirty-day period within which to file a post-judgment motion or notice of appeal - If timely a motion to alter or amend, will toll commencement of the thirty-day period for filing a notice of appeal until the trial court enters an order granting or denying the motion - The last day on which Appellant could file either a timely notice of appeal, or a timely Rule 59 motion, was October 20, 2023, *i.e.*, thirty days from entry of the trial court's final order on September 20, 2023. Appellant filed his Rule 59.04 motion on October 23, 2023 - Because Appellant's Rule 59 motion was untimely, it did not operate to toll the running of the**

thirty-day period for filing a notice of appeal because the trial court lacked jurisdiction to rule on the motion

JOHN SCHMEECKLE v. HAMILTON COUNTY, TN ET AL.
COURT OF APPEALS No. E2024-00422-COA-R3-CV Filed May 29, 2025

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."

"Appellant's Tennessee Rule of Civil Procedure 59.04 motion to alter or amend was untimely and did not toll the time limit for filing his notice of appeal. As such, Appellant's notice of appeal is untimely, and the appeal is dismissed for lack of subject-matter jurisdiction."

"Appellant John Schmeeckle's original complaint and amended complaint are not contained in the appellate record; however, we glean from the trial court's orders that the underlying lawsuit involved a forcible entry and detainer action whereby Appellant was evicted. Thereafter, Appellant filed suit against Appellees, Sheriff Austin L Garrett, Sergeant Ron Rice, Sergeant Gregg Carson, and Hamilton County, Tennessee. On September 20, 2023, the trial court entered an order dismissing Appellant's lawsuit. On October 23, 2023, Appellant filed a Tennessee Rule of Civil Procedure 59.04 motion to alter or amend the September 20th order. By order of February 26, 2024, the trial court denied Appellant's motion to alter or amend as untimely. Although the trial court determined that Appellant's untimely motion to alter or amend did not extend the time for filing his notice of appeal, on March 26, 2024, Appellant filed a notice of appeal seeking review of the trial court's September 20, 2023 order and its February 26, 2024 order denying the motion to alter or amend. Because Appellant's notice of appeal was untimely, this Court does not have subject-matter jurisdiction over the appeal, and it is dismissed."

"Turning to the question of subject-matter jurisdiction, the filing of a timely notice of appeal is mandatory and jurisdictional in all civil cases. ***Hutcheson v. Barth***, 178 S.W.3d 731, 733 (Tenn. Ct. App. 2005). If the notice of appeal is not filed in compliance with the requirements of Tennessee Rule of Appellate Procedure 4, the appellate court is without jurisdiction to consider the issues raised by the parties on appeal. ***Id***. at 733. When, as here, the record presents a question regarding the timeliness of a notice of appeal, we must address that question before proceeding to the remaining issues."

"As discussed above, the trial court's order dismissing Appellant's amended complaint was filed on September 20, 2023. Because it resolved all of the parties' rights and claims and left nothing for the trial court to adjudicate, the September 20, 2023 order was a final judgment that triggered commencement of the thirty-day period within which to file a post-judgment motion or notice of appeal. Tenn. R. App. P. 4(a) ('In an appeal as of right to the . . . Court of Appeals . . ., the notice of appeal required by Rule 3 shall be filed with and received by the clerk of the trial court within [thirty] days after the date of entry of the judgment appealed from[.]'); ***Ball v. McDowell***, 288 S.W.3d 833, 836 (Tenn. 2009) (citing Tenn. R. Civ. P. 59.04; Tenn. R. App. P. 4(a)-(b)) ('The date of entry of a final judgment in a civil case triggers the commencement of the thirty-day period in which a party aggrieved by the final judgment must file either a post-trial motion or a notice of an appeal.'); Tenn. R. Civ. P. 59.04 ('A motion to alter or amend a judgment shall be filed and served within thirty . . . days after the entry of the judgment.')."

"'If timely . . . [a] motion to alter or amend, will toll commencement of the thirty-day period for filing a notice of appeal until the trial court enters an order granting or denying the motion.' ***Ball***, 288 S.W.3d at 836 (citing Tenn. R. App. P. 4(b); ***Binkley v. Medling***, 117 S.W.3d 252, 255 (Tenn. 2003)); Tenn. R. Civ. P. 59.01 (noting that motions under Rule 59.04 are among the motions that will 'extend[ ]

the time for taking steps in the regular appellate process'); ***Tenn. Farmers Mut. Ins. Co. v. Farmer***, 970 S.W.2d 453, 453 (Tenn. 1998) (holding that a motion under Rule 59.04 tolls the statute of limitations for filing a notice of appeal 'until entry of an order granting or denying the motion'). Unfortunately, in this case, Appellant's Rule 59.04 motion was untimely. The last day on which Appellant could file either a timely notice of appeal, or a timely Rule 59 motion, was October 20, 2023, *i.e.*, thirty days from entry of the trial court's final order on September 20, 2023. Appellant filed his Rule 59.04 motion on October 23, 2023. Because Appellant's Rule 59 motion was untimely, it did not operate to toll the running of the thirty-day period for filing a notice of appeal because the trial court lacked jurisdiction to rule on the motion. *See* ***Ball***, 288 S.W.3d at 836 (citing ***Binkley***, 117 S.W.3d at 255) ('If a posttrial motion is not timely, the trial court lacks jurisdiction to rule on the motion.'); ***Albert v. Frye***, 145 S.W.3d 526, 528 (Tenn. 2004) (citing Tenn. R. App. P. 4(b)); ***Binkley***, 117 S.W.3d at 255) ('[A] motion to alter or amend pursuant to Tennessee Rule of Civil Procedure 59.04, **if timely filed**, toll[s] commencement of the thirty-day period [for filing a notice of appeal] until an order granting or denying the motion is entered.') (emphasis added))."

"In view of the untimely Rule 59 motion, which did not operate to extend the thirty-day period, Appellant's notice of appeal was untimely as it was filed on March 22, 2024, which was well beyond the October 20, 2023 deadline. Because the notice of appeal was untimely, this Court lacks subject-matter jurisdiction over the appeal. Tenn. R. App. P. 2 (stating that appellate courts may not suspend the thirty-day period for filing a notice of appeal); Tenn. R. App. P. 4(a); *see also* ***Cobb v. Beier***, 944 S.W.2d 343, 344 n. 2 (Tenn.1997) (holding that an untimely filed notice of appeal deprives this Court of jurisdiction)."

3. Brief did not comply with court appeals rules, so appeal was dismissed – Plaintiff's case citations largely are irrelevant to the question of whether the trial court erred in dismissing his petition for writ of possession, and ther are no citations to the record - Moreover, Plaintiff failed to address any of the grounds the trial court relied on in granting Appellees' motion to dismiss

JEREMY JAMES DALTON v. BLOUNT COUNTY ET AL.
COURT OF APPEALS No. E2024-00904-COA-R3-CV Filed April 15, 2025

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."

"Because Appellant's brief fails to comply with Tennessee Rule of Appellate Procedure 27 and Rule 6 of the Rules of the Court of Appeals of Tennessee, he has waived review. Appeal dismissed."

"'Appellant Jeremy James Dalton is an inmate in the custody of the Tennessee Department of Correction. On October 7, 2021, Mr. Dalton filed a 'Petition for Writ of Possession' in the Chancery Court for Blount County ('trial court'). The petition, which was filed against the Blount County Sheriff and Blount County, Tennessee (together, 'Appellees'), states that it is brought 'in accordance with T.C.A. § 29-30-103,' which governs actions to recover personal property. It is undisputed that Mr. Dalton was held in the Blount County Detention Facility pending his criminal trial in Fentress County. The criminal matter concluded with Mr. Dalton's conviction."

"By his petition in the trial court, Mr. Dalton sought possession of a 'Twin Lakes telephone book being illegally held by [Appellees].' … Mr. Dalton does not dispute that the phone book was returned to him when he was transferred from the Blount County Detention Facility."

"On November 4, 2021, Appellees filed an answer to Mr. Dalton's petition, wherein they asserted that Mr. Dalton failed to state a claim on which relief could be granted. As such, Appellees asked the trial

court to dismiss the petition under Tennessee Rule of Civil Procedure 12. After the answer was filed, Mr. Dalton took no more action in his case. On December 8, 2023, the trial court entered an order of retirement, removing Mr. Dalton's petition from its active docket. Although there is nothing in the record indicating that the petition was reinstated, the parties do not dispute that, on Mr. Dalton's request, the trial court removed the case from its retired docket."

"On May 3, 2024, Appellees filed a motion to dismiss." …

"… Appellees maintained that Mr. Dalton's petition was moot because: (1) '[b]y the time [Mr. Dalton] filed his Petition on October 7, 2021, he had already been convicted'; and (2) all of Mr. Dalton's personal property, including the phone book, were returned to him when he was transferred from Blount County."

"Appellees contend that Mr. Dalton has waived appellate review due to his failure to properly brief the issue. We agree."

"… Mr. Dalton's case citations largely are irrelevant to the question of whether the trial court erred in dismissing his petition for writ of possession. Furthermore, there are no citations to the record. Moreover, Mr. Dalton fails to address any of the grounds the trial court relied on in granting Appellees' motion to dismiss. As discussed above, the trial court dismissed the petition on its findings that Mr. Dalton: (1) failed to verify his petition or attach an affidavit thereto as required by statute; (2) sought relief through an 'improper legal process'; and (3) failed to take action to prosecute his case. The 'argument' section of Mr. Dalton's brief addresses none of these grounds. Rather, from our reading, Mr. Dalton's 'argument' is merely a reiteration of the averments he made in support of his petition, *i.e.*, that the Appellees' keeping the phone book from him resulted in an improper conviction because he could not adequately prepare for his defense in the criminal matter. In short, Mr. Dalton makes assertions, but he does not address any specific error in the trial court's ruling." …

4. Denial of line of duty disability benefits - Because the record does not contain evidence showing that the board entered a final determination Court lacked subject matter jurisdiction - For the Court to have subject matter jurisdiction, Plaintiff must have first submitted an application to the pension board and the board must have ruled on that application - However, the record does not contain a document memorializing the pension board's final decision - Here, there is nothing contained in the record even resembling a final determination of the pension board - The record does contain a transcript from the pension board meeting in which a vote was taken - However, there are no official minutes of the pension board meeting in which a vote was taken to deny Plaintiff's application and no letter or other document in which the board notifies Plaintiff of a final decision on his application - Therefore, although the board may well have rendered a decision, there is nothing in the record showing that a final decision of the pension board was ever entered

CITY OF MEMPHIS v. MALCOM GARY
COURT OF APPEALS No. W2023-01486-COA-R3-CV Filed March 5, 2025

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."

"This appeal arises from the denial of line of duty disability benefits to the appellee by a pension board. The denial went before an administrative law judge who reversed the decision of the pension board and determined the appellee was entitled to benefits. The appellant filed a petition for judicial review in the chancery court, which affirmed the ruling of the administrative law judge. This appeal

followed. Because the record does not contain evidence showing that the board entered a final determination, we are without subject matter jurisdiction. Accordingly, this appeal is dismissed."

"Mr. Malcom Gary was a firefighter employed by the City of Memphis. Mr. Gary suffered two workplace injuries in January 2016, which resulted in him receiving treatment from two on-the-job injury treating physicians. Mr. Gary applied for line-of-duty disability benefits on September 28, 2016."

"As part of the benefits application process, Mr. Gary underwent two independent medical evaluations ('IMEs') in late 2016 and early 2017 as required by the City's pension ordinance. Both of those resulted in a determination that Mr. Gary's employment was not the primary cause of his diagnosis, and he was not permanently and totally disabled.2 As the IMEs did not result in two physicians stating that Mr. Gary was totally and permanently disabled because of his employment with the City, Mr. Gary was scheduled for a third IME. Mr. Gary refused to attend this IME on the advice of his attorney and, as a result, Mr. Gary's application was 'closed' thereafter."

"It is unclear from the record what occurred in the interim, but sometime later, Mr. Gary attempted to 'extend' his line-of-duty benefits application. While doing so, he was informed that his application had been 'denied' and thus, he filed a new application on November 20, 2018. There were some initial issues with the second application, but after these were resolved, Mr. Gary was again scheduled for an IME. However, Mr. Gary again informed the City that he would not submit to any additional IMEs on the advice of his attorney. Subsequently, the City sent Mr. Gary a letter dated August 7, 2019, in which it 'denied' his request 'due [to] the lack of medical evidence from two qualified physicians' which 'certifie[d] [him] as totally and permanently disabled and unable to perform the functions of [his] position with the City of Memphis.'"

"Candidly, it is again unclear from the record what took place in the interim, but beginning in February 2021, Mr. Gary's treating physicians and the physicians who conducted IMEs were deposed.3 The final deposition was taken on May 19, 2021, and on July 14, 2021, the parties appeared before administrative law judge George Brown, ('ALJ') prepared for a hearing, although nothing in the record indicates what was filed to bring the parties before the ALJ. The City raised concerns regarding whether the appeal was proper, claiming that Mr. Gary had not completed the administrative process and thus, there was not a contested case ripe for review. After arguments from both sides on the issue, the ALJ instructed the attorneys to discuss how to move forward with the case. The parties then agreed for the application to be reopened and for the medical evidence developed over the litigation to be included in the file. The parties also agreed that Mr. Gary's on-the-job injury treating physicians would be sent forms in which they could give their opinions regarding whether Mr. Gary was permanently and totally disabled, and whether any disability was caused by his employment. On August 4, 2021, a written order formally staying the proceedings was entered, pending the application being reopened and evaluated 'in light of the medical evidence adduced herein.'"

"Both treating physicians submitted checklists containing their opinions. One physician indicated that he believed that Mr. Gary did not have a condition which made him permanently and totally disabled, but next to this he handwrote that Mr. Gary was unable to run or to repetitively lift more than 40 pounds. The second physician indicated that he believed that Mr. Gary was physically disabled, the disability prevented him from performing his job, and the disability was caused by his employment. Sometime later, it appears that Genex, the City's third-party administrator, determined that the opinions differed and closed the file."

"On March 16, 2022, the parties came back before the ALJ.4 The ALJ determined that the City had not followed the previous order as the matter never went before the pension board. The ALJ directed that the matter be resolved quickly, and Ms. Regina Lucas, the City benefits manager, agreed to place the matter on the agenda for the pension board's next meeting. According to a transcript in the record, on March 31, 2022, the pension board took up the claim at its meeting and voted to 'uphold the decision of the Benefits Manager to deny line-of-duty disability based on medical evidence only.' However, nothing is contained in the record preserving the decision of the pension board as a final

determination. The record does not contain the minutes of the meeting or any subsequent approval of the minutes. The parties went back before the ALJ on June 15, 2022, for an evidentiary hearing."

"On July 6, 2022, the ALJ announced his decision. The ALJ determined that Mr. Gary had complied with 'the spirit' of the City's process and found there was evidence in the record sufficient for findings to be made. Accordingly, the ALJ ruled in Mr. Gary's favor. A written order was entered on September 26, 2022, in which the ALJ found that the medical evidence, when supplemented with the doctors' testimony, satisfied the requirement that two physicians attest to a permanent disability caused by Mr. Gary's employment as a firefighter. The ALJ also found the pension board's decision to be arbitrary and capricious because the medical depositions and other medical evidence were not considered."

"On October 27, 2022, the City filed a petition for judicial review in the trial court, again claiming that the issue was not ripe for review because Mr. Gary had not completed the administrative process and, alternatively, that the ALJ's findings regarding the medical evidence were erroneous as they were unsupported by 'substantial and material' evidence." …

"Prior to addressing the City's issues regarding the merits of the chancery court's decision, we must first consider whether we have subject matter jurisdiction. *See* Tenn. R. App. P. 13(b). 'Subject matter jurisdiction concerns the authority of a particular court to hear a particular controversy.'" …

"Here, the case is governed, at its core, by the Memphis City Ordinance which establishes the pension review board. Code of Ordinances, City of Memphis, Tennessee at § 4-8-1. The ordinance empowers the pension board '[t]o make *a determination* as to the right of any person to a benefit under [title 4].' *Id.* at § 4-8-7(E) (emphasis added); *see Best v. City of Memphis*, No. W2021-00020-COA-R3-CV, 2021 WL 4190775, at *3 (Tenn. Ct. App. Sept. 15, 2021). Decisions regarding line-of-duty disability benefits under the City's Pension Ordinance are reviewed pursuant to Tennessee Code Annotated section 4-5-322. *Taylor v. Bd. of Admin., City of Memphis Ret. Sys.*, 681 S.W.3d 751, 754 (Tenn. 2023)."

"Pursuant to Tennessee Code Annotated section 4-5-322, for this Court to have subject matter jurisdiction, Mr. Gary must have first submitted an application to the pension board and the board must have ruled on that application. *See Best*, 2021 WL 4190775, at *4 ('Because the Pension Board is tasked with 'determin[ing] the amount, manner and time of payment of any plan benefits,' Plaintiff was required to formally present the disputes alleged in the complaint to the Pension Board in the first instance.') (quoting Code of Ordinances, City of Memphis, Tennessee at § 4-8-7). The record shows that Mr. Gary did file an application for pension benefits and that, after a great deal of back and forth with the City and several appearances before the ALJ, the application was brought before the pension board. However, the record does not contain a document memorializing the pension board's final decision. Here, there is nothing contained in the record even resembling a final determination of the pension board. The record does contain a transcript from the pension board meeting in which a vote was taken. However, there are no official minutes of the pension board meeting in which a vote was taken to deny Mr. Gary's application and no letter or other document in which the board notifies Mr. Gary of a final decision on his application. Therefore, although the board may well have rendered a decision, there is nothing in the record showing that a final decision of the pension board was ever entered."

"Tennessee Courts have previously noted the difference between rendering and entering a judgment. *Jackson v. Jarratt*, 52 S.W.2d 137, 138 (Tenn. 1932); *Carter v. Bd. of Zoning Appeals of City of Nashville*, 377 S.W.2d 914, 916 (Tenn. 1964). Rendering a judgment ''is the act of the court'' and means to ''return or give judgment.'' *Jarratt*, 52 S.W.2d at 138 (quoting *Anderson v. Mitchell*, 58 Ind. 592, 594 (Ind. 1877)). Conversely, '[t]he 'entry' of judgment is the ministerial act by which enduring evidence of the judicial act of rendition of judgment is afforded.' *Carter*, 377 S.W.2d at 916 (citations omitted) (quotation marks present in original). In the context of a board decision, we have similarly held that 'something more than simply a vote taking place is required before a judgment or order will be considered as having been entered.' *Grigsby v. City of Plainview*, 194 S.W.3d 408, 413 (Tenn. Ct. App. 2005)."

"However, on appeal, we vacated the trial court's decision, as we were unable to determine when the board's decision was entered because the information was not contained in the record. *Id.* at 414. Specifically, we acknowledged that the board's vote to revoke the beer license qualified 'as the 'rendition' of the Board's judgment' but 'it [fell] short of qualifying as the 'entry' of that judgment.' *Id.* at 413 (quotation marks present in original). There was no proof contained in the record 'establishing whether anything else happened on February 20th which would [have been] sufficient to properly characterize the Board's judgment as having been entered on that day.' *Id.* at 413-14. We noted that the trial court stated that ''the City made a record of this proceeding by way of a court reporter and filed the record as the minutes'' and that this was 'all the city has to do to record their judgment.' *Id.* at 414 (quotation marks present in original). However, as we pointed out, there was 'absolutely no proof in the record showing that a record was made of the proceedings and subsequently filed.' *Id.* at 414. We also noted that the record lacked 'something more' which would have served as ''enduring evidence' of the Board's rendition of judgment.' *Id.* at 414 (citing *Carter*, 377 S.W.2d at 916)."

"Here, there is a transcript of the pension board hearing contained in the record, but it was not filed as a substitute for the official minutes for the meeting.7 Additionally, there is no final document generated by the pension board. Further, there is no other evidence of 'something more' that occurred after the board's vote, which formalized the rendition of the decision as the entry of the decision. *See Grigsby*, 194 S.W.3d at 413-14. The record contains only sparse references to Mr. Gary contesting the outcome of case. One comes from the trial court's order, which states only that the board 'denied Mr. Gary's application and this denial was properly returned to the ALJ for review.' We would note that it is possible that a final determination from the pension board may exist. Regardless, those documents are not contained in the voluminous but yet substantively sparse record. Accordingly, we are left with no choice but to dismiss this appeal."

5. **No final order from the trial court so the appeal was dismissed - The order appealed was entered on June 4, 2024, and Appellant filed a timely notice of appeal on July 5, 2024 -Also on July 5, 2024, Appellant filed a motion titled 'Employer's Motion to Correct Error in Final Judgment' with the trial court - There is no indication in the record that the trial court ruled on the aforementioned motion, so in the absence of a ruling on the pending motion in the trial court, subject matter jurisdiction does not attach in this Court on the filing of the notice of appeal**

CITY OF MEMPHIS v. SAMUEL CROUT
COURT OF APPEALS No. W2024-00989-COA-R3-CV Filed April 14, 2025

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."

"Appellant, City of Memphis, has appealed an order of the Shelby County Chancery Court that was entered on June 4, 2024. We determine that the trial court's order does not constitute a final appealable judgment. As a result, this Court lacks jurisdiction to consider this appeal. The appeal is, therefore, dismissed."

"Pursuant to Rule 13(b) of the Tennessee Rules of Appellate Procedure, we reviewed the record on appeal to determine whether this Court has subject matter jurisdiction over the appeal. Upon review, it appeared that the instant appeal is not ripe for appellate review. A party is entitled to an appeal as of right only after the trial court has entered a final judgment. Tenn. R. App. P. 3(a). A final judgment is a judgment that resolves all the claims between all the parties, "leaving nothing else for the trial court to do.' *In re Estate of Henderson*, 121 S.W.3d 643, 645 (Tenn. 2003) (quoting *State ex rel.*

McAllister v. Goode, 968 S.W.2d 834, 840 (Tenn. Ct. App. 1997)). An order that adjudicates fewer than all the claims between all the parties is subject to revision at any time before the entry of a final judgment and is not appealable as of right. Tenn. R. App. P. 3(a); *In re Estate of Henderson*, 121 S.W.3d at 645."

"The order appealed was entered on June 4, 2024, and Appellant filed a timely notice of appeal on July 5, 2024. However, also on July 5, 2024, Appellant filed a motion titled 'Employer's Motion to Correct Error in Final Judgment' with the trial court. There is no indication in the record that the trial court ruled on the aforementioned motion. In the absence of a ruling on the pending motion in the trial court, subject matter jurisdiction does not attach in this Court on the filing of the notice of appeal. *See* Tenn. R. App. P. 4(e)."

6. A final judgment is one that resolves all the issues in the case, leaving nothing else for the trial court to do – The appeals court does not have subject matter jurisdiction to adjudicate an appeal s of right if there is not final judgment – It is well-settled that a pending claim for attorney's fees prevents a final judgment – There is no indication that the trial court treated appellee's claims for attorney's fees and prejudgment interest as waived or abandoned by appellee

CRAIG WILLIAM JOEL v. CHATTANOOGA FIRE AND POLICE PENSION FUND
COURT OF APPEALS No. E2024-00681-COA-R3-CV Filed January 7, 2025

> **I was not able to reproduce the case as it was on the Court's website on in a picture format, so I included the summary paragraph and the information I would have used in the summary above.**

"Because the order from which the appellant has filed an appeal does not constitute a final appealable judgment, this Court lacks jurisdiction to consider this appeal."

BILLBOARDS

1. Denial of billboard permits – Common law writ of certiorari versus a declaratory judgment action - City had a moratorium on billboards at the time the plaintiff filed for sign permits for billboards - A direct action for declaratory judgment is available and appropriate to challenge the validity, including the constitutionality, of an ordinance, or to determine whether an ordinance applies - It is not, however, available to challenge the decision of a local zoning administrator or board in actually applying, enforcing, or executing a zoning ordinance – Elevation properly alleged a claim for declaratory judgment in its complaint because Elevation has challenged the validity of the ordinances rather than any quasi-judicial or administrative application of an ordinance - Elevation has not challenged the validity of the New Sign Regulations but rather asserts that no valid billboard ordinance was in effect when it filed its sign permit applications - As Elevation has presented questions of law regarding the validity of the ordinances, Elevation's decision not to pursue administrative remedies did not preclude its declaratory judgment action – City raised whether a justiciable controversy exists and the matter moot to which the court said Elevation questioned whether any of the City's ordinances were valid and enforceable when Elevation filed its sign permit applications – The court emphasized that at this point in the proceedings, when a motion for judgment on the pleadings is at issue, Elevation's complaint must be construed liberally in favor of Elevation as the non-moving party - The City's justiciability argument is unavailing

ELEVATION OUTDOOR ADVERTISING, LLC v. CITY OF PIGEON FORGE, TENNESSEE

COURT OF APPEALS No. E2024-01258-COA-R3-CV Filed May 30, 2025

"The plaintiff, Elevation Outdoor Advertising, LLC ('Elevation'), submitted six applications for billboard sign permits to the defendant, the City of Pigeon Forge, Tennessee ('the City'), and all six were denied by the City's Planning Commission. In this action, Elevation sought a judgment (1) declaring the City's former sign regulation ordinance and temporary moratorium on sign permits void and unenforceable, (2) declaring the City's new sign regulation ordinance inapplicable, and (3) compelling the City by injunction or writ of mandamus to issue permits for Elevation's proposed signs. Upon the City's motion to dismiss, the trial court dismissed Elevation's complaint with prejudice. The trial court determined that the proper relief for Elevation would have been via common law certiorari review, for which Elevation had not met the procedural requirements of timeliness and filing under oath. Elevation has appealed. Upon careful review, we determine that Elevation's complaint properly stated a claim for declaratory judgment rather than writ of certiorari. We therefore reverse the trial court's dismissal of Elevation's complaint and remand for further proceedings consistent with this Opinion."

"On November 6, 2023, Elevation filed its complaint in the Sevier County Chancery Court ('trial court'), seeking 'injunctive and declaratory relief,' as well as a writ of mandamus. Elevation had submitted four applications for billboard sign permits to the City on March 11, 2021, and had then supplemented those applications and added two more on March 15, 2021. On May 4, 2021, Elevation received six letters from the City's Community Development Director notifying Elevation that the City's Planning Commission ('the Planning Commission') had denied all six applications. Elevation alleged in its complaint that the denials were improperly based on an ordinance containing a new set of sign regulations that had not been in effect when the applications were filed. When Elevation submitted its applications, a temporary ordinance had been in effect that proclaimed a moratorium on the issuance of new sign permits until a new ordinance could be enacted or sixty days had passed, whichever occurred first. In its complaint, Elevation specifically challenged the validity of the moratorium ordinance, claiming that it had been enacted in violation of Tennessee Code Annotated §§ 13-7-201, *et seq*. Elevation stated that it did not attempt to follow the administrative procedure of appealing its application denials to the City's Board of Zoning Appeals ('the Zoning Board') because the Zoning Board members were the same individuals as those serving on the Planning Commission. Elevation averred that an appeal to the Zoning Board would have been futile."

"This case involves four city ordinances. The first is Section 14-405 ('Outdoor Billboards') within Chapter 4 ('Outdoor Advertising Signs') of Title 14 ('Zoning and Land Use Control') of the City's Municipal Code. The parties refer to Section 14-405, which was in effect in early 2021, as 'the Billboard Code.' Elevation noted in its complaint that the same sign regulations were also located in the City's Zoning Ordinance, which is the second ordinance at issue and is referred to by the parties as the 'Former Sign Regulations.' Elevation averred that it had prepared its sign permit applications with the requirements of the Billboard Code and Former Sign Regulations in mind."

"In 2017, a plaintiff had challenged the constitutionality of the Billboard Code in an unrelated lawsuit brought before the same trial court. *See Reagan v. City of Pigeon Forge*, Sevier Cnty. Chancery Ct. No. 17-4-115. On February 23, 2021, the trial court entered an order granting summary judgment in favor of the *Reagan* plaintiff upon finding the Billboard Code to be invalid because it had not been submitted to the Planning Commission prior to its enactment. The court determined that the Billboard Code was 'clearly tantamount to a zoning ordinance' and therefore should have been submitted to and approved by the Planning Commission before going into effect. The court thereby found that the Billboard Code violated Tennessee Code Annotated §§ 13-7-201, *et seq. See Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 471 (Tenn. 2004) ('[T]here is no doubt that the statutes reflect the legislative intent that all zoning plans and zoning amendments must be scrutinized by municipal planning commissions and the public prior to their enactment.')."

"Following the decision in *Reagan*, the City enacted the third ordinance at issue here, Ordinance No. 1105, imposing a temporary moratorium on the issuance of any new sign permits ('the Moratorium Ordinance'). The Moratorium Ordinance became effective upon its second reading before the City's

Board of Commissioners ('the City Commission') on March 8, 2021, three days before Elevation had submitted the first four of its sign permit applications. Section 1 of the Moratorium Ordinance provided:

> A moratorium upon the issuance of permits for new sign applications in the City of Pigeon Forge, in order to allow for the City to conduct a comprehensive study on sign management, shall be in effect for a period of sixty (60) days, from March 8, 2021 to May 7, 2021, unless the moratorium is terminated at an earlier time by the City adopting a new ordinance addressing how signs shall be regulated within the City.

In the instant complaint, Elevation asserted that the City had violated the procedural requirements of Tennessee Code Annotated §§ 13-7-201, *et seq.*, by failing to (1) submit the Moratorium Ordinance to the City's Planning Commission ('the Planning Commission') for review, (2) conduct a public hearing, or (3) properly publish notice of the ordinance."

"The City enacted the fourth ordinance involved here, Ordinance No. 1107, when it lifted the Moratorium Ordinance and passed a new sign ordinance ('the New Sign Regulations'). The New Sign Regulations were recommended for passage by the Planning Commission on March 2, 2021; passed on first reading before the City Commission on March 8, 2021; and passed on second and final reading before the City Commission on April 12, 2021. On appeal, the City maintains that the only portion of the New Sign Regulations affected by the *Reagan* decision was City Ordinance § 14-405, which now permits off-premises advertising, subject to certain restrictions, whereas in the Billboard Code and New Sign Regulations, it did not."

"In its complaint, Elevation sought a judgment declaring:

> (1) the Billboard Code and the Former Sign Regulations are void, invalid, and unenforceable for failure to comply with T.C.A. § 13-7-201 *et seq.* and/or for violation of the First Amendment; (2) the City was prohibited from evaluating Elevation's sign permit applications under the New Sign Regulations because those regulations were not in effect or legally pending at the time the applications were submitted; (3) the Moratorium was tantamount to zoning and was void, invalid, and unenforceable due to the City's failure to comply with T.C.A. § 13-7-201 *et seq.* in enacting the Moratorium; (4) the Moratorium was not a valid exercise of the City's general police power; and (5) Elevation is entitled to build the signs described in its six permit applications.

Elevation also requested a mandatory injunction directing the City to issue permits for Elevation's six proposed signs. Alternatively, Elevation requested a writ of mandamus compelling the City to issue the six sign permits. Elevation attached to its complaint copies of the ordinances involved, the *Reagan* decision, and the letters notifying Elevation of the application denials."

"On December 18, 2023, the City filed an answer, contending that Elevation's complaint should be dismissed for failure to state a claim upon which relief could be granted. While admitting that the City had analyzed and denied Elevation's sign permit applications under 'the City's Sign Ordinance in force at the time of the denials,' the City denied that the processing of the applications 'violated Tennessee law in any fashion.' The City averred that the 'Planning Commission considered sign applications already pending before it at the time of the enactment of the new Sign Ordinance, and denied them pursuant to staff recommendations based on noncompliance with height and size restrictions in the new Sign Ordinance.' The City also 'affirmatively averred' that Elevation had 'failed to exhaust its administrative remedies.' Regarding administrative remedies, the City asserted that Elevation had failed to appeal the Codes Enforcement Officer's decision to the Zoning Board, as provided for by city ordinance, and had failed to timely seek judicial review via common law writ of certiorari."

"On June 3, 2024, the City filed a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Tennessee Rule of Civil Procedure 12.02(6). The City asserted that no matter

how Elevation had styled its complaint, it was 'in actuality seeking review of the administrative or quasi-judicial decision' of the Planning Commission. The City argued that the 'sole remedy for review of a quasi-judicial or administrative decision of a governmental body or official is through the common law writ of certiorari' and that Elevation had failed to timely file a petition for writ of certiorari and had failed to support its claim by oath or affirmation as required by Tennessee Code Annotated § 13-7-203(a)."

"In its answer, the City also asserted collateral estoppel and *res judicata* as defenses based on a decision rendered by the United States District Court for the Eastern District of Tennessee. *See Elevation Outdoor Adver., LLC v. City of Pigeon Forge*, No. 3:22-CV-105-TAV-JEM, 2023 WL 2058651 (E.D. Tenn. Feb. 16, 2023). The City attached a copy of the district court's decision to the motion to dismiss. In the federal case, Elevation had alleged that the City had violated its free speech rights under the First Amendment to the United States Constitution and Article I, Section 19 of the Tennessee Constitution and that the City had violated Elevation's procedural due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution. The district court granted summary judgment in favor of the City on these claims, finding in part that Elevation lacked standing to bring the free speech claim."

"In the instant action, Elevation filed a response opposing the City's motion to dismiss on July 18, 2024. Elevation insisted that a declaratory judgment action was the proper remedy because it was seeking to invalidate the Billboard Code, the Former Sign Regulations, and the Moratorium Ordinance rather than overturn the Zoning Board's decision. Elevation also posited that the City's motion to dismiss was in effect a motion for judgment on the pleadings pursuant to Tennessee Rule of Civil Procedure 12.03."

"Following a hearing, the trial court entered a 'Final Order' on August 13, 2024, granting the City's motion to dismiss with prejudice. The court found that the Commission's decision to deny Elevation's sign applications was a quasi-judicial or administrative decision and that 'the sole and exclusive remedy for the review of a quasi-judicial or administrative decision is through the common law writ of certiorari.' The court thereby dismissed Elevation's complaint for failure to comply with the verification requirement of Tennessee Code Annotated § 27-8-106 (West 1932 to current) and the sixty-day filing requirement of Tennessee Code Annotated § 27-9-102 (West 1932 to current). The court declined to address the City's collateral estoppel or *res judicata* defenses, but it did note the federal district court's observation that the sign applications would have been denied under either the Former Sign Regulations or the New Sign Regulations. Elevation timely appealed."

"Elevation correctly posits, as it did before the trial court, that the City's motion to dismiss should have been filed as a motion for judgment on the pleadings, pursuant to Tennessee Rule of Civil Procedure 12.03, because the City had filed a responsive pleading prior to the filing of its motion to dismiss. *See Edwards v. Urosite Partners*, No. M2016-01161-COA-R3-CV, 2017 WL 1192109, at *3 (Tenn. Ct. App. Mar. 30, 2017) ('A motion for judgment on the pleadings is filed pursuant to Tenn. R. Civ. P. 12.03 and is similar to a motion to dismiss for failure to state a claim except that it is made after an answer is filed rather than before.'). However, Elevation acknowledges that a motion to dismiss may be treated by a trial court as a motion for judgment on the pleadings and that the appellate standard of review is the same. *See id.*; *Harman v. Univ. of Tenn.*, 353 S.W.3d 734, 736 (Tenn. 2011) ('The motions, being essentially the same, are reviewed under the same standards.'). In its final order, the trial court did not address the distinction between a Rule 12.02(6) motion to dismiss and a Rule 12.03 motion for judgment on the pleadings. Given the identical standards of review, we deem any error in the trial court's treatment of the motion to have been harmless."

"This Court has previously explained the standard of review for an order addressing a motion for judgment on the pleadings pursuant to Tennessee Rule of Civil Procedure 12.03:

> When reviewing orders granting a Tenn. R. Civ. P. 12.03 motion, we use the same standard of review we use to review orders granting a Tenn. R. Civ. P. 12.02(6) motion

> to dismiss for failure to state a claim. *Waller v. Bryan*, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999)." …

"Elevation contends that the trial court erred by treating its action as one for common law writ of certiorari and thereby dismissing the action for noncompliance with the writ's procedural requirements. On appeal, Elevation states that its action 'contests the City's enforcement of zoning ordinances which were void, not properly in effect, or inapplicable to Elevation's applications—not the way in which the City applied any existing ordinance to the facts presented in Elevation's applications . . . .' Upon thorough review, we determine the distinction between a declaratory judgment action and a writ of certiorari to be dispositive of this appeal."

"'Where the relief sought in a declaratory judgment action is the same relief that is available under common law writ of certiorari, the action will be treated as a certiorari action, and the requirements of such an action will be applied.' *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 581 (Tenn. Ct. App. 2005). As this Court recently explained:

> A writ of certiorari is the vehicle by which a party may seek judicial review of the decision of an inferior tribunal, board, or officer exercising judicial functions, to determine whether that entity 'has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.' Tenn. Code Ann. § 27-8-101. We have previously stated that, '[a] party subject to the decision of a local zoning board may seek judicial review of that decision 'by filing a petition for a common law writ of certiorari pursuant to Tenn. Code Ann. § 27-8-101.'' *Swann v. City of Kingsport*, No. E2023-01679-COA-R3-CV, 2024 WL 4678009, at *2 (Tenn. Ct. App. Nov. 5, 2024) (*quoting Cash v. Wheeler*, 356 S.W.3d 913, 915 (Tenn. Ct. App. 2011)).
>
> Conversely, 'a declaratory judgment action is a mere procedural device by which various types of substantive claims may be asserted.' *Dehoff v. Att'y Gen.*, 564 S.W.2d 361, 363 (Tenn. 1978) (citing *Luckenbach Steamship Co. v. United States*, 312 F.2d 545 (2d Cir. 1963)). A declaratory judgment action permits a party 'interested under a deed, will, written contract, . . . or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise' to 'have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.' Tenn. Code Ann. § 29-14-103.

Trezevant Enters., Inc. v. City of Germantown, No. W2024-00420-COA-R3-CV, 2025 WL 1013956, at *4 (Tenn. Ct. App. Apr. 3, 2025)."

"Specifically concerning challenges to zoning ordinances, this Court has delineated:

> A direct action for declaratory judgment is available and appropriate to challenge the validity, including the constitutionality, of an ordinance, or to determine whether an ordinance applies. It is not, however, available to challenge the decision of a local zoning administrator or board in actually applying, enforcing, or executing a zoning ordinance. As discussed above, such a decision is an administrative decision, subject to review by the common law writ of certiorari, after exhaustion of applicable administrative remedies.

State ex rel. Moore & Assocs. 246 S.W.3d at 581. As our Supreme Court has held:

> It is our opinion that an action for declaratory judgment, as provided by T.C.A., §§ 29-14-101—29-14-113, rather than a petition for certiorari is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative

> action of county, city or other municipal legislative authority enacting or amending zoning legislation.

Fallin v. Knox Cnty Bd. of Comm'rs, 656 S.W.2d 338, 342 (Tenn. 1983)."

"In its complaint, Elevation asserted a declaratory judgment claim based on its allegation that 'the Billboard Code and the Former Sign Regulations are invalid and unenforceable and that the City wrongfully processed [Elevation's] permit applications under the New Sign Regulations in violation of Tennessee law.' Elevation alleged that neither the Billboard Code nor the Moratorium Ordinance was adopted in compliance with the procedural requirements of Tennessee Code Annotated §§ 13-7-201, *et seq*. Specifically, Elevation asserted that the City had not complied with Tennessee Code Annotated § 13-7-203(a) (West 1984 to June 30, 2024), which, at the time of the instant complaint's filing, provided:

> Before enacting the zoning ordinance or any amendment thereof, the chief legislative body shall hold a public hearing thereon, at least fifteen (15) days' notice of the time and place of which shall be published in the official municipal journal or in a newspaper of general circulation in the municipality."

"Citing the trial court's *Reagan* decision, Elevation maintained that the trial court had already found that the City had failed to comply with these statutory requirements when it enacted the Billboard Code (Section 14-405 of the City's Municipal Code)."

"Significantly, the Moratorium Ordinance had been enacted three days before Elevation filed its first four sign permit applications and was purportedly in effect at that time. 'It is the general rule in Tennessee that a properly filed application must be considered under the zoning ordinance in effect at the time an application is filed, and it is not subject to later amendments to that ordinance.' *Wright v. City of Shelbyville Bd. of Zoning Appeals*, No. M2011-01446-COA-R3-CV, 2012 WL 5378267, at *7 (Tenn. Ct. App. Oct. 31, 2012) (citing *Harding Acad. v. Metro. Gov't of Nashville & Davidson Cnty.*, 222 S.W.3d 359, 363 (Tenn. 2007)) (footnote omitted). Elevation alleged in its complaint that the Moratorium Ordinance was invalid because when enacting the Moratorium Ordinance, the City had failed to conduct a public hearing with notice as required by Tennessee Code Annotated § 13-7-203(a). It is undisputed that the City complied with the procedural requirements of Tennessee Code Annotated § 13-7-203(a) when enacting the New Sign Regulations and that Elevation has not challenged the validity of the New Sign Regulations. Instead, Elevation asserts that no valid billboard ordinance was in effect when it filed its sign permit applications."

"Upon thorough review of the record and applicable authorities, we conclude that Elevation has properly alleged a claim for declaratory judgment in its complaint because Elevation has challenged the validity of the ordinances rather than any quasi-judicial or administrative application of an ordinance. *See State ex rel. Moore & Assocs.* 246 S.W.3d at 581. Furthermore, inasmuch as Elevation has presented questions of law regarding the validity of the ordinances, Elevation's decision not to pursue administrative remedies did not preclude its declaratory judgment action. *See Ready Mix, USA, LLC v. Jefferson Cnty.*, 380 S.W.3d 52, 64 (Tenn. 2012) ('[T]he exhaustion of an administrative remedy is not required when the party seeking judicial review presents questions of law rather than questions of fact.'). We therefore reverse the trial court's dismissal of Elevation's complaint, which was predicated on the court's treatment of this action as one for writ of certiorari."

"Elevation urges this Court to decide the questions of law presented by its complaint and requests a writ of mandamus directing the City to issue the sign permits. However, having reversed the trial court's dismissal of this action, we determine the reversal to be dispositive of this appeal. *See, e.g.*, *Holdredge v. City of Cleveland*, 402 S.W.2d 709, 713-14 (Tenn. 1966) (reversing the trial court's treatment of a zoning complaint as one for writ of certiorari upon determining that 'the validity of the ordinance amending the zoning ordinance may be tested under our Declaratory Judgments Act' and remanding to the trial court upon concluding that it would be 'premature' for the appellate court to

rule on the merits of the challenge). Accordingly, we remand this matter to the trial court for further proceedings consistent with this Opinion."

"On appeal, the City raises an additional issue regarding whether Elevation's action, even when taken as one for declaratory judgment and mandamus relief, is justiciable. The City argues that because the ordinances challenged by Elevation were not applied to its sign permit applications and because it is undisputed that Elevation's proposed signs would not have met the requirements of the Former Sign Regulations or New Sign Regulations, no justiciable controversy exists and Elevation's complaint is moot. We disagree."

"The City's justiciability argument aligns with its postulate that Elevation is, in essence, challenging the administrative decision to deny Elevation's sign permit applications. However, we have determined that Elevation's complaint presented a challenge to the validity of the Moratorium Ordinance under which the City undisputedly held the applications until the New Sign Regulations had been enacted and could be applied. Taken together with its challenge to the Billboard and Former Sign Regulations, Elevation questioned whether any of the City's ordinances were valid and enforceable when Elevation filed its sign permit applications. We emphasize that at this point in the proceedings, when a motion for judgment on the pleadings is at issue, Elevation's complaint must be construed liberally in favor of Elevation as the non-moving party. *See Young*, 130 S.W.3d at 63. The City's justiciability argument is unavailing."

CIVIL RIGHTS

1. Qualified immunity denied - Plaintiff spent 15 years in prison for a crime he did not commit - 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 - The Fourteenth Amendment requires prosecutors, police officers, and forensic scientists to disclose favorable evidence to a criminal defendant that is material to their defense - Police officers must turn over evidence with apparent exculpatory value to the prosecutor, who must then disclose that evidence to the defendant - To sustain a *Brady* claim based on withheld evidence, plaintiff must show: (1) the government withheld evidence from the plaintiff, either willfully or inadvertently; (2) the evidence favored the plaintiff, either because it is exculpatory, or because it is impeaching; and (3) the evidence was material, such that its nondisclosure prejudiced plaintiff - In assessing reliability of the identification the court looks at the totality of the circumstances based on five factors: (1) the witness's opportunity to view the suspect, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated by the witness at the time he identified the suspect, and (5) the time between the crime and the identification

AARON SALTER v. CITY OF DETROIT, MICHIGAN
SIXTH CIRCUIT COURT OF APPEALS No. 22-1656 Decided and Filed:o March 21, 2025

"Aaron Salter spent 15 years in prison for a deadly shooting he did not commit. Salter's conviction rested on a single eyewitness's testimony identifying him as one of two shooters. There was no physical evidence or other witness tying Salter to the murder. Instead, the eyewitness identified Salter when the lead investigator, Detective Donald Olsen, showed him a single mug shot of only Salter and said that police had already arrested one of the shooters. That same eyewitness testified that he also identified a different man as the shooter from a photo array. And that man more closely resembled the witness's description of the shooter than Salter. The investigator's file also contained a separate closeup photo of that man, suggesting he was a suspect. Salter claims that Detective Olsen failed to disclose any of this information, leading to an unfair trial and his wrongful conviction."

"In this civil rights lawsuit, Salter contends that Detective Olsen violated his constitutional rights in two ways: *first*, by withholding favorable evidence pointing to a different suspect, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and *second*, by conducting an unnecessarily suggestive identification process that led to the eyewitness's false identification of Salter. Detective Olsen moved for summary judgment on both these claims, arguing that he was entitled to qualified immunity. The district court denied the motion, and Detective Olsen appealed."

"Because we do not have interlocutory jurisdiction over several aspects of this appeal, we dismiss in part. For the parts we review on the merits, we affirm."

"In the early morning hours of August 6, 2003, Jamar Luster and two of his friends were 'hanging out, drinking, and 'getting high'' on a porch in Detroit, Michigan. Op. & Order, R. 44, PageID 1060–61 (citation omitted). Then gunshots rang out. Luster had an obstructed view from the porch, but he managed to get a view of two shooters 35 to 40 feet away from him. One of the shooters was shorter and fired a pistol, and a taller man fired a long gun. Luster escaped by jumping over the porch banister and crawling to safety, though he was wounded. Tragically, a man standing near the porch died of a gunshot wound."

"Rookie homicide detective Donald Olsen responded to the shooting and spoke with Luster in the hospital about four hours later. Luster told Detective Olsen that one of the shooters was 'Rob,' a 5'7' Black man in his mid-20s armed with a pistol whom Luster had seen in the neighborhood. *Id.* at PageID 1062. Luster said he'd never seen the second shooter who fired the long gun but described him as 'thin.' *Id.* Luster also informed Detective Olsen that a man named Earland Collins had shot up the same house about a month before. Luster described the two shooters in a similar way to another police officer a few hours later: (1) 'Rob,' a 5'7' Black man in his 20s, weighing between 150 and 170 pounds; and (2) an unknown Black man also in his 20s, standing about 6'0' with a thin build."

"Thus far, Aaron Salter had no role in the story. And at 6'4' and 250 pounds, he was much bigger than both suspects Luster described. Yet, with admittedly no articulable basis, Detective Olsen developed a 'hunch' that Salter was 'Rob.' *Id.* at PageID 1062–63. Detective Olsen went to Luster's house that same morning and showed him a single black-and-white mug shot of Salter—that is, not in an array of other suspects. At the time, the Detroit Police Department had a policy that said '[w]itnesses should never be shown only a photograph of the suspect.' DPD Policy, R. 36-20, PageID 935. Detective Olsen also told Luster 'the police had picked up the guy with the rifle.' Op. & Order, R. 44, PageID 1063. Then Luster signed a statement written by Detective Olsen identifying the man in the black-and-white mug shot (Salter) as 'Rob.'"

"At the same meeting, after Luster identified Salter, Detective Olsen showed him a six-person photo array that did not include Salter. Luster later testified that he identified two more individuals as shooters from the photo array, one of whom was Earland Collins, the man Luster said had shot up his house about a month before. Law enforcement records listed Collins at 6'2' and 200 pounds—a close match with Luster's description of the taller shooter."

"Detective Olsen did not disclose Luster's identification of Collins as a shooter to Salter or his defense attorney." …

"Detective Olsen decided to submit the case against Salter to the prosecutor, even though he later explained that he had always thought it 'sucked.' Interview Mem., R. 36-18, PageID 930." …

"At a pretrial hearing, Luster reversed course on a few key details. He identified Salter as the *taller* shooter with 'the big gun'—not the shorter shooter named 'Rob.' Prelim. Exam Tr., R. 36-9, PageID 814. Luster also said that he'd seen Salter 'once or twice' before the shooting, which departed from his earlier statement that he'd never seen the taller shooter before. *Id.* at PageID 818. For his part, Detective Olsen testified that Luster didn't identify anyone from the photo array as responsible for the shooting. He also admitted that he could have put Salter's mug shot in a photo array but inexplicably

chose not to. Salter objected to Detective Olsen's single-person show-up as suggestive and moved to suppress Luster's identification at the pretrial hearing, but the judge denied his motion."

"At trial, Luster and Detective Olsen testified about Luster's identification of Salter. Luster again identified Salter as the bigger shooter with a 'long gun,' even though he first identified Salter as the smaller assailant with a pistol. Trial Tr., R. 36-11, PageID 838–39. He said he never meant to label Salter as the shorter shooter named 'Rob,' and that Detective Olsen had misquoted him in recording his identification. Detective Olsen testified that while he showed Luster a photo array without Salter, the array had 'nothing to do' with the shooting and was 'directed towards other cases.' Trial Tr., R. 36-12, PageID 895. Salter was convicted and sentenced to life without parole. Salter never knew that Luster had identified Collins as a shooter before he was convicted and sentenced."

"Salter proclaimed his innocence in a letter to the trial judge in the aftermath of the trial. He also maintained his innocence throughout the post-conviction process, but his appeals and collateral attacks failed. Eventually, one of his attorneys discovered that the closeup photo of Collins had been withheld. An investigation by the Wayne County Prosecutor's Conviction Integrity Unit followed. The CIU investigation yielded evidence that Collins was probably the taller shooter. When a CIU investigator asked Collins who shot Luster, he responded, 'If I tell you, I could get arrested basically.' CIU Investigator Dep., R. 36-24, PageID 995. In his CIU interview, Detective Olsen admitted that the case against Salter 'sucked' because it depended on Luster's shaky identification. Interview Mem., R. 36-18, PageID 930. Detective Olsen commented, '[I] would not be shocked or upset if the case is overturned, and I hope you do something with it.' *Id.* at PageID 931 (cleaned up). In addition, Luster later recanted his identification of Salter."

"Based on the findings of the CIU investigation, the Wayne County prosecutor joined Salter's attorneys in moving the trial court to vacate Salter's convictions. Following a stipulation by the parties, the Michigan court that oversaw Salter's trial vacated the judgment against him and ordered him released from prison. Salter had been incarcerated for 15 years."

"Detective Olsen brought this interlocutory appeal, arguing that we should reverse the district court's decision because: (1) Salter's claims are barred by the *Heck* doctrine, (2) Salter has failed to overcome Detective Olsen's qualified immunity defense, and (3) Salter is collaterally estopped from pursuing a suggestive identification claim. We address these arguments only to the extent our limited jurisdiction permits."

"Generally, an order denying summary judgment is not a 'final decision' that we have jurisdiction to review under 28 U.S.C. § 1291. *Plumhoff v. Rickard*, 572 U.S. 765, 771 (2014). There are two exceptions to this general rule that allow for interlocutory appeals from a denial of summary judgment: (1) the collateral-order doctrine, and (2) pendant appellate jurisdiction."

"We can review an issue under the collateral-order doctrine if it would be 'effectively unreviewable' at the end of the case. *Chaney-Snell v. Young*, 98 F.4th 699, 708 (6th Cir. 2024) (quoting *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009)). One example is qualified immunity: under the collateral-order doctrine, a defendant can immediately appeal the denial of qualified immunity because summary judgment is the last opportunity to assert immunity from trial. *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024). But even then, our interlocutory review of qualified immunity denials is limited. We can generally review 'purely legal' questions but cannot resolve quarrels with a plaintiff's record-supported facts. *Id.* at 909 (citation omitted)."

"Detective Olsen argues that Salter's convictions weren't properly vacated, so under *Heck v. Humphrey*, Salter cannot prevail on either of his due process claims. 512 U.S. 477 (1994). The *Heck* doctrine restricts a plaintiff's ability to bring a civil rights claim under § 1983 if success on that claim would imply the invalidity of the plaintiff's conviction or sentence. *See Chaney-Snell*, 98 F.4th at 707. To pursue a § 1983 claim under those circumstances, the plaintiff must first show that their conviction or sentence has been favorably terminated. *See Heck*, 512 U.S. at 486–87. That means that the

conviction or sentence must have been 'reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus.' *Id.* at 486–87. Detective Olsen says that Salter hasn't made that showing."

"At this stage, we lack jurisdiction to address Detective Olsen's *Heck* argument. In *Chaney-Snell v. Young*, we held that we have no jurisdiction to review *Heck* challenges on interlocutory appeal from a denial of qualified immunity. 98 F.4th at 708. Unlike qualified immunity, 'the denial of a *Heck* claim is not 'effectively unreviewable' at a suit's end,' so the collateral-order doctrine does not apply. *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985)). We also lack pendant appellate jurisdiction over *Heck* challenges because the resolution of qualified immunity 'says nothing about the merits' of a *Heck* claim. *Id.* at 709–10. Therefore, we do not have jurisdiction over Detective Olsen's *Heck* argument, dismiss that part of his appeal, and express no view on its merits."

"Detective Olsen also maintains that the district court improperly denied him qualified immunity on Salter's constitutional claims. Salter claims that Detective Olsen violated his clearly established Fourteenth Amendment due process rights in two ways: (1) by failing to turn over evidence pointing to another suspect, in violation of *Brady*; and (2) by using a single-photo show-up during the criminal investigation. The district court concluded that material disputes of fact precluded qualified immunity on both claims."

"We review de novo a district court's denial of summary judgment on a qualified immunity defense. *See Helphenstine v. Lewis County*, 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 *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). The official is entitled to summary judgment unless a 'genuine dispute as to any 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 qualified immunity, '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.' *Heeter*, 99 F.4th at 908 (quoting *Palma v. Johns*, 27 F.4th 419, 428 (6th Cir. 2022))."

"We evaluate both the *Brady* claim and the suggestive identification claim under this standard, to the extent our limited jurisdiction permits."

"To defeat qualified immunity on his *Brady* claim, Salter must first demonstrate that Detective Olsen violated his constitutional rights. The Fourteenth Amendment requires prosecutors, police officers, and forensic scientists to disclose favorable evidence to a criminal defendant that is material to their defense. *Brady*, 373 U.S. at 87; *Clark v. Louisville-Jefferson Cnty. Metro Gov.*, --- F.4th ---, 2025 WL 732838, at *8–9 (6th Cir. Mar. 7, 2025). Police officers must turn over evidence with 'apparent' exculpatory value to the prosecutor, who must then disclose that evidence to the defendant. *Moldowan v. City of Warren*, 578 F.3d 351, 381, 388 (6th Cir. 2009) (quoting *California v. Trombetta*, 467 U.S. 479, 489 (1984)). To sustain a *Brady* claim based on withheld evidence, Salter must show: (1) the government withheld evidence from Salter, 'either willfully or inadvertently'; (2) the evidence favored Salter, 'either because it is exculpatory, or because it is impeaching'; and (3) the evidence was material, such that its nondisclosure prejudiced Salter. *Jackson v. City of Cleveland*, 925 F.3d 793, 814 (6th Cir. 2019) (quoting *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999)). The district court concluded that Salter satisfied his burden at summary judgment on each of these elements. Detective Olsen disputes all three elements on appeal but raises arguments that we largely have no jurisdiction to review."

"On the first *Brady* element, Detective Olsen argues that he did not withhold evidence pointing to Collins as the shooter. The dissent agrees with him. *See* Dissenting Op. at 30 n.3. But this is precisely the type of factual dispute that we cannot review at this stage. *See Heeter*, 99 F.4th at 908. Indeed,

Detective Olsen abandons any factual argument in his reply brief, recognizing that we don't have jurisdiction to resolve such factual disputes in an interlocutory qualified immunity appeal. Detective Olsen's sole legal argument on this element (which we can review) is without merit. He contends that Salter must show that Detective Olsen withheld the evidence in 'bad faith.' Appellant Br. at 39. But we have rejected the proposition that an officer's *Brady* violation requires 'bad faith.' *Clark*, 2025 WL 732838, at *5 (citing *Moldowan*, 578 F.3d at 388)."

"Nor do we have jurisdiction over Detective Olsen's challenge to the district court's conclusion on the second and third *Brady* elements—that a reasonable jury could find that the withheld evidence favored Salter and was material to his defense. In Detective Olsen's view, and the dissent's, the withheld evidence was either duplicative of other disclosed evidence or available to Salter from other sources. *See* Dissenting Op. at 30–32. So it was neither favorable nor material to Salter's defense. But these arguments present 'mixed' questions of law and fact. *Clark*, 2025 WL 732838, at *6. And our court recently clarified that, in the *Brady* context, we lack jurisdiction to consider such mixed questions in an interlocutory qualified immunity appeal. *See id.* at *5–7. We therefore cannot reach the merits of Detective Olsen's arguments on the remaining *Brady* elements and dismiss them from his appeal."

"Even if he violated Salter's rights under *Brady*, Detective Olsen contends that he is still entitled to qualified immunity because, at the time, it was not clearly established that *Brady* applies to police officers. While we have jurisdiction to review this argument, *see id.* at *7, we will not consider it because Detective Olsen did not raise it in the district court, *see St. Marys Foundry, Inc. v. Emps. Ins. of Wausau*, 332 F.3d 989, 995–96 (6th Cir. 2003). Indeed, contrary to his argument now, Detective Olsen conceded below that he had an 'obligation to disclose' materially exculpatory evidence to the prosecutor based on *Moldowan v. City of Warren*, 578 F.3d 351 (6th Cir. 2009). MSJ, R. 29, PageID 380." …

"Salter next claims that Detective Olsen violated his due process rights by conducting an unduly suggestive identification by presenting Luster with a single-person show-up consisting only of Salter's black-and-white mug shot. But before arguing for qualified immunity, Detective Olsen contends that we cannot consider the merits of this claim because Salter is collaterally estopped from pursuing it. In Salter's criminal case, the state court held that the show-up was not impermissibly suggestive, which Detective Olsen argues precludes Salter from challenging the identification procedure in this lawsuit."

"To start, we have jurisdiction over this argument because its resolution is necessary to ensure 'meaningful review' of the district court's denial of qualified immunity. *Chaney-Snell*, 98 F.4th at 709, 712; *see also Peterson v. Heymes*, 931 F.3d 546, 553 (6th Cir. 2019); *Roberson v. Torres*, 770 F.3d 398, 403 (6th Cir. 2014). If Salter is precluded from raising a suggestive identification claim, then he cannot establish a constitutional violation on that basis under the first prong of the qualified immunity analysis. We therefore consider the merits of Detective Olsen's collateral estoppel argument. On that front, we find his argument unpersuasive."

"Federal courts must give a state court judgment the same preclusive effect it would receive in the courts of the rendering state. *See Bus. Dev. Corp. of S.C. v. Rutter & Russin, LLC*, 37 F.4th 1123, 1129 (6th Cir. 2022). We must therefore look to Michigan law to determine the preclusive effect of the suppression ruling in Salter's criminal case. *Id.* Michigan law allows criminal decisions to bind litigants in subsequent civil cases. *Peterson*, 931 F.3d at 554. But, under Michigan law, a vacated criminal conviction and the interlocutory rulings supporting it have no preclusive effect. *See id.* at 554–55 (suppression ruling underlying a vacated conviction lacks preclusive effect); *Tanner v. Walters*, 98 F.4th 726, 735 (6th Cir. 2024). That is true even if the conviction was vacated by stipulation. *See Sanford v. Russell*, 381 F. Supp. 3d 905, 924 (E.D. Mich. 2019), *aff'd*, 815 F. App'x 856 (6th Cir. 2020). Here, Salter's conviction was vacated, so he is not precluded from pursuing his suggestive identification claim against Detective Olsen."

"Turning to qualified immunity, we now consider whether Detective Olsen violated Salter's due process rights by using an unduly suggestive identification procedure. *See Haliym v. Mitchell*, 492 F.3d 680, 704

(6th Cir. 2007). We analyze suggestive identification claims in two steps. *First*, we assess whether the identification procedure was 'unnecessarily suggestive.' *Id.* If it was, we consider whether, despite the suggestive procedure, the identification was 'nevertheless reliable.' *Id.* We evaluate these prongs based on the totality of the circumstances. *Simmons v. United States*, 390 U.S. 377, 383 (1968)."

"The district court ruled that Detective Olsen abandoned any argument on the first prong of Salter's suggestive identification claim—whether the identification was unnecessarily suggestive. We agree. Detective Olsen has not disputed that the single-person show-up was unduly suggestive. In his motion for summary judgment, he argued only that Luster 'had an independent basis for identification of Mr. Salter apart from the photograph he was shown.' MSJ, R. 29, PageID 387. Put differently, Detective Olsen argued that the identification was reliable, not that it wasn't unnecessarily suggestive in the first place. And he pursues the same argument on appeal. Accordingly, we proceed to the second element of Salter's claim—whether the identification was reliable even if the procedure was unnecessarily suggestive."

"In assessing reliability, we look at the totality of the circumstances based on five factors: (1) the witness's opportunity to view the suspect, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the suspect, (4) the level of certainty demonstrated by the witness at the time he identified the suspect, and (5) the time between the crime and the identification. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). Together, these factors weigh in Salter's favor."

"*First*, Luster didn't have a good opportunity to view the shooters. Luster saw them from 35 to 40 feet away, 'at night, with limited lighting.' Prelim. Exam Tr., R. 36-9, PageID 814; Interview Mem., R. 36-18, PageID 930. He also didn't get a good look at the shooters' faces in the chaos of the moment."

"*Second*, Luster's attention was compromised. During the criminal proceedings, Luster said he wasn't drinking or smoking marijuana in the leadup to the shooting, but in this civil litigation, he admitted he had been 'smoking weed' and drinking Hennessy. Luster Dep., R. 36-7, PageID 778, 780. Luster also testified that his priority was to escape from the shooting, not to identify the people around him."

"*Third*, Luster's description of the shooters bore little resemblance to Salter. Our caselaw strongly indicates that an identification cannot be reliable if there were significant inconsistencies between the witness's description of the suspect and the person identified. *Gregory v. City of Louisville*, 444 F.3d 725, 756 (6th Cir. 2006) (citing *Webb v. Havener*, 549 F.2d 1081, 1086 (6th Cir. 1977))."

"*Fourth*, Luster told Detective Olsen that he was 'not sure' when he identified Salter as one of the shooters from Salter's black-and-white mug shot." …

"*Fifth*, timing is the only factor that works in Detective Olsen's favor. Luster's identification came only a matter of hours after the incident. That length of time between 'observation and identification' does not undermine the reliability of an identification. *See Howard v. Bouchard*, 405 F.3d 459, 473 (6th Cir. 2005). That said, timing is only one factor, and the other four factors all weigh against reliability here."

"Luster's seemingly limited familiarity with Salter does not outweigh the 'corrupting effect' of the single-person show-up. *Manson*, 432 U.S. at 116. We have held that a witness's familiarity with a suspect increases the reliability of an identification. *Haliym*, 492 F.3d at 706. But Luster said he knew 'Rob'—who later turned out to be Salter's cousin—not Salter. That means Detective Olsen did not show Luster a photo of the person Luster claimed to know. In any event, 'problems with identification testimony may exist even where the witness is familiar with the [suspect].' *Id.* Here, multiple problems remain even after we factor in Luster's alleged familiarity with Salter. Even if he knew Salter, Luster still had to 'sufficiently observe' the shooters to identify them as persons he knew. *Id.* As explained, he did not have the opportunity to do so. Luster was also uncertain about his identification of Salter. And there were glaring discrepancies between Salter's physical appearance and Luster's description of the shorter shooter—the one Luster identified as Salter in a signed statement during the show-up." …

"Detective Olsen also exacerbated the unreliability of the single-person show-up by telling Luster that police had already 'picked up' the taller shooter—the one Luster *later* claimed he had identified as Salter from the start. Luster Dep., R. 36-7, PageID 799. The risk of a misidentification increases when 'the police indicate to the witness that they have other evidence that . . . the person[] pictured committed the crime.' *Simmons*, 390 U.S. at 383. And Detective Olsen only increased that risk by showing Luster a single photo of Salter. *Gregory*, 444 F.3d at 755 ('By presenting only a single suspect to a witness, police convey an implicit message that 'this is the guy.'"). Under those circumstances, Luster could have felt pressure to make an identification regardless of his degree of confidence, undermining his identification's reliability."

"Detective Olsen further argues that the single-person show-up did not violate Salter's 'core right' to a fair trial, and thus cannot support a due process claim. Appellant Br. at 46. 'It is true that an unduly suggestive identification does not, in and of itself, violate constitutional rights.' *Gregory*, 444 F.3d at 747. But the admission at trial of such an identification, unless harmless, can violate a criminal defendant's core due process rights. *See Webb*, 549 F.2d at 1087. Luster signed a statement identifying Salter as a shooter based on the show-up, and that statement was admitted into evidence at Salter's trial. At trial, Detective Olsen and Luster also testified extensively about Luster's out-of-court identification. Detective Olsen stated that he showed Luster 'one single photograph that related to the shooting,' a 'photograph of Aaron Salter.' Trial Tr., R. 36-12, PageID 894. And Luster told the jury that he picked Salter's photo '[b]ecause he fit the description of the person that was shooting.' Trial Tr., R. 36-11, PageID 861. During the same testimony, Luster also twice identified Salter as his shooter in court. *Id.* at PageID 839, 883. Because the unreliable single-person show-up appeared in evidence at Salter's criminal trial, it can form the basis of Salter's suggestive identification claim. *See Gregory*, 444 F.3d at 735, 745–47."

"The district court further held that it was clearly established in 2003 that the single-person show-up of Salter was constitutionally impermissible. Detective Olsen disputes this. We agree with the district court."

"In 1967, the Supreme Court warned that 'showing suspects singly to persons for the purpose of identification has been widely condemned.' *Stovall v. Denno*, 388 U.S. 293, 302 (1967). It allowed a single-person show-up because it was the only possible identification procedure during an exigency and explained that courts must evaluate 'the totality of the circumstances' to determine whether a single-person identification procedure amounts to a violation. *Id.*"

"In 1977, our court applied *Stovall* and its progeny in *Webb v. Havener*. 549 F.2d at 1083–85. In *Webb*, two robbery witnesses described the robbers to the police 'in general terms.' *Id.* at 1082–83. The police told the witnesses to wait at the station while they went to get a suspect, and then they presented Webb to the witnesses without arranging for a lineup. *Id.* at 1086. The witnesses identified Webb as one of the robbers, and Webb was convicted of armed robbery with the witnesses' identification as the sole evidence connecting him to the crime. *Id.*"

"We held that the single-person show-up of Webb was unduly suggestive, and that a subsequent in-court identification was not harmless error because it lacked 'an independent basis.' *Id.* at 1086–87. We explained that police officers cannot focus a witness's attention on one suspect without an articulable need for employing such a procedure. *Id.*" …

"Detective Olsen's decision to present Luster with a single black-and-white mug shot of Salter was clearly unlawful for the same reasons. Detective Olsen admitted that nothing prevented him from presenting Salter's photo as part of an array. Adding to the suggestive nature of the identification, before showing Salter's photo to Luster, Detective Olsen told Luster that the police had apprehended one of the shooters. That statement could have further influenced Salter's identification by suggesting that Detective Olsen had an independent basis to suspect Salter (he did not). Luster's identification also had the same indicia of unreliability as the one in *Webb*: Luster saw the shooters briefly at night

while fleeing from gunfire; his description of the shooters' weight and height did not match Salter's; and his identification was inconsistent—he identified three people as the two shooters."

"… Based on binding precedent, a reasonable officer would have known that, under these circumstances, the single-person show-up would not produce a reliable identification. So its admission at trial violated Salter's due process rights."

"What's more, at the time, the Detroit Police Department's policy also prohibited the show-up, stating that '[w]itnesses should never be shown only a photograph of the suspect.' DPD Policy, R. 36-20, PageID 935. That policy is of course not dispositive of our qualified immunity inquiry, but it is further proof that Detective Olsen was on notice that his actions were unlawful. *See Martin v. City of Broadview Heights*, 712 F.3d 951, 962 (6th Cir. 2013). We therefore hold that Detective Olsen was not entitled to qualified immunity on Salter's suggestive identification claim."

2. Pretrial detainee death in jail - Qualified immunity granted - Plaintiff claimed a lack of medical care - Deceased consistently denied swallowing any drugs following his arrest - He had tried to swallow a bag of cocaine - Defendants did not act recklessly - Deceased showed no signs for the need of medical care - While the deceased was detained is mother contacted the jail to express her concern that her son may have ingested drugs, and she reported that his girlfriend called her and stated that he swallowed baggies of drugs - This phone call prompted the nurse to re-examine the decease and to question him for the second time about whether he had swallowed any drugs and he again confirmed that he had not - He explained that he had tried to swallow drugs upon his arrest, but was unsuccessful, and that the officers confiscated all of the drugs he had upon arrest - Defendants did not act recklessly by taking Molson to the jail instead of the hospital and are entitled to qualified immunity - The claim fails to prove an objective medical need, so the court did not need to address the subjective prong of the test - An injury or illness is obvious when even a lay person would easily recognize the necessity for a doctor's attention -If a medical need is *non-obvious*, it must generally have been diagnosed by a physician as mandating treatment - Deceased received not one but *two* medical examinations at the jail, and the officers could not reasonably have perceived a health risk that evaded detection by a registered nurse

KIM HODGES, personal representative for the estate of Michael Donte Molson v. JOSEPH ABRAM, STEPHEN DUMOND, Detective; BRAXTON CROWDER, Deputy, JASON KELLEY, Lieutenant, WARREN HANSEN, ALEX FOX, and JASON MERVAU, Detectives
SIXTH CIRCUIT COURT OF APPEALS Nos. 24-1292/1300 Decided and Filed: May 29, 2025

"Defendant law enforcement officers of Kent County, Michigan, appeal the district court's denial of their motions for summary judgment in connection with this 42 U.S.C. § 1983 action for the alleged wrongful death of Michael Molson. Plaintiff Kim Hodges, the administrator of Molson's estate, alleges that Defendants were deliberately indifferent to Molson's serious medical needs, resulting in his death. For these public officials to be granted qualified immunity from liability, they must not have violated the decedent's clearly established constitutional rights. Because this standard is satisfied, and for the reasons set forth below, we **REVERSE** the district court's denial of qualified immunity pursuant to Defendants' motions for summary judgment and **REMAND** for entry of judgment for Defendants."

"At approximately 5:00 p.m. on January 20, 2021, Defendant officers employed by Kent County, Michigan, drove to Michael Molson's residence in Grand Rapids, Michigan, 'to execute a search warrant for crack cocaine.' Order, R. 140, Page ID #3647. Outside Molson's house, Officer Dumond observed Molson sitting in the driver's seat of an SUV and attempting to drive away. To prevent Molson from fleeing, the officers repositioned their vehicles to block the SUV. Officer Mervau drove to the driver's side of the SUV to help box it in, accompanied by Officer Kelley, who was a passenger in Mervau's patrol vehicle. Kelley exited Mervau's car to approach Molson and noticed that '[Molson] placed

something in his mouth.' Kelley Dep., R. 116-3, Page ID #745. Although Kelley could not identify what the item was, he observed that Molson 'appeared as if he was trying to swallow something' that was 'too large' and 'suspected it was narcotics.' *Id.* at 748. Kelley promptly notified the other officers, who removed Molson from the SUV and commanded him to 'spit it out' several times. Deputy Crowder Body Cam., R. 116-13, at 17:17:13–24."

"Molson refused to spit out the object, so the officers placed him 'over the hood of a patrol vehicle and opened his mouth to stop him from swallowing drugs.' Order, R. 140, Page ID #3649. Then, Officer Dumond 'agitated Molson's Adam's Apple to initiate his gag reflex,' which caused Molson to expel a plastic bag containing crack cocaine. *Id.* Officer Fox told Molson, 'You're going to kill yourself eating that shit.' Deputy Crowder Body Cam., R. 116-13, at 17:17:41–43. When the officers asked Molson if he had more drugs in his mouth, Molson did not respond. Molson was then handcuffed, searched, and escorted to the back of Officer Crowder's police cruiser."

"During this time, the record shows that Molson did not exhibit any symptoms of drug use or intoxication, and none of the officers believed he had swallowed drugs. Officer Hansen said that Molson would have died if he had swallowed the bag of drugs but was under the impression that the officers had successfully gotten him to spit it out. Officer Crowder also did not think Molson had swallowed drugs. Similarly, Kelley and Mervau's observations of Molson did not yield any suspicion that he had swallowed drugs. Fox noted that there was a 'general consensus' among the officers that Molson 'could have killed himself' by swallowing the bag of drugs, but they were all 'glad' he had not. Fox Dep., R. 116-7, Page ID #844. Several officers then proceeded to search Molson's residence."

"At around 5:30 p.m., Dumond placed Molson in a different patrol vehicle, advised him of his rights, and interviewed him about his drug and criminal history. Dumond asked Molson if he swallowed any drugs, and Molson answered that he had not; but admitted that he had tried to swallow the bag of cocaine that officers retrieved from his mouth. Molson then proceeded to give 'very specific' and 'self-incriminating' statements about his involvement in the trade of narcotics. Dumond Dep., R. 116-10, Page ID #1006–07. Dumond asked Molson 'multiple times' whether he swallowed any narcotics and even 'relayed the dangerousness of the situation to him,' but Molson repeatedly denied swallowing drugs. *Id.* at 1006, 1008. Based on this interview, which lasted thirty-two minutes, Dumond decided that Molson was being truthful about not swallowing drugs. He reasoned that since Molson shared information consistent with the amount and description of drugs found on the scene, and made several self-incriminating statements that would 'help build a criminal case against him,' he would have no reason to lie about swallowing drugs, especially after being informed of the dangers in doing so. *See id.* at 1006–07. Throughout the interview, Dumond observed 'no red flags' in Molson's behavior. *Id.* at 1007. He then led Molson back to Crowder's police cruiser and asked him if he had anything else on him. Molson answered, 'no.' Order, R. 140, Page ID #3653. When Dumond asked him if he was 'good,' Molson said, 'yes.' *Id.*"

"Shortly thereafter, Crowder transported Molson to the jail and walked him inside, where Molson filled out the intake form and answered 'a series of standard pre-booking questions.' Order, R. 140, Page ID #3653. '[Molson] answered no to everything,' thus indicating that he had no medical or mental conditions. Crowder Dep., R. 116-8, Page ID #898. After taking inventory of Molson's possessions, Crowder escorted Molson to the check-in window, where intake personnel asked him 'whether he had swallowed cocaine or any other drugs prior to arriving [at the jail].' Order, R. 140, Page ID #3654. Molson shook his head to indicate that he had not. Crowder also 'didn't think [Molson] had swallowed any drugs.' Crowder Dep., R. 116-8, Page ID #899. At around 6:30 p.m., the jail finished processing Molson, and Crowder left the jail and did not return."

"At approximately 7:16 p.m., Molson was examined by Registered Nurse Zachary O'Connor for 'medical and mental health screenings.' O'Connor Decl., R. 116-21, Page ID #1103. O'Connor determined that 'Molson had a normal gait, normal breathing, normal skin appearance, and was not exhibiting signs of tremors, sweating, anxiety, lethargy, anger, aggressiveness, dilated pupils, confusion, or disorientation,' and that his vital signs 'were within normal ranges.' *Id.* at 1104. During this evaluation,

Molson 'denied using illegal drugs' or other medications not prescribed to him. *Id.* He also denied being drunk or high, experiencing drug withdrawal concerns, or having suicidal thoughts. *Id.* 'At no time did Mr. Molson verbally or non-verbally indicate that he had swallowed cocaine prior to arriving' at the jail. *Id.* When O'Connor asked Molson 'if there was anything else [he] need[ed] to know about [Molson's] medical history,' Molson said, 'no.' *Id.* at 1103."

"Shortly thereafter, Molson's mother contacted the jail to express her concern that Molson may have ingested drugs. Specifically, she reported that '[Molson's] girlfriend called her and stated that he swallowed baggies of drugs.' *Id.* at 1114. This phone call prompted Nurse O'Connor to re-examine Molson at around 7:31 p.m. O'Connor proceeded to question Molson, for the second time, about 'whether he had swallowed any drugs,' and Molson again confirmed that he had not. *Id.* at 1104–05. Rather, Molson explained that 'he had tried to swallow drugs upon his arrest, but was unsuccessful,' and that the officers 'confiscated all of the drugs he had upon arrest.' *Id.* at 1105. Molson also assured O'Connor that 'he felt 'fine' and was 'ok,' and affirmed that he did not swallow any drugs.' *Id.* Once again, O'Connor took Molson's vitals and found them to be 'normal.' *Id.* Jail staff also performed 'a full-body X-ray of Molson, which showed no foreign objects.' Order, R. 140, Page ID #3654. Finally, '[a]fter repeatedly denying having used or swallowed drugs and presenting normal vital signs,' Molson was judged to be in decent health, and he 'left the medical office to continue the intake and booking process at the jail.' *See* O'Connor Decl., R. 116-21, Page ID #1105."

"The next day, January 21, 2021, Molson attended his virtual arraignment from 1:00 p.m. until about 1:10 p.m., and then returned to his jail cell. At about 3:42 p.m., a deputy responded to an intercom call by Molson's cellmate and found Molson responsive, but incoherent. Two staff members at the jail promptly called for help. EMS then transferred Molson to the hospital, where he was pronounced dead at 6:37 p.m. The autopsy revealed that Molson died of '[a]cute cocaine toxicity,' with a '[f]oreign object (clear baggy with knot) found in [his] stomach.' Autopsy Report, R. 117-2, Page ID #1332. His postmortem blood test results showed 11,300 nanograms/milliliter of cocaine and 3,420 nanograms/milliliter of benzoylecgonine. 'In other words, Molson had successfully swallowed a bag of cocaine prior to the one forced from his throat by Defendant Dumond.' Order, R. 140, Page ID #3655."

"On June 14, 2021, Kim Hodges, personal representative for Michael Molson's estate, commenced a 42 U.S.C. § 1983 and wrongful death action in the district court against Sergeant Joseph Abram, Kent County, and all 'John Doe Deputies' who were either at the scene when Molson ingested the drugs, or 'who knew that [he] was dying of a drug overdose and [] let him die.' Compl., R. 1, Page ID #3. She later amended her complaint on November 18, 2021, naming Sergeant Joseph Abram, Deputy Braxton Crowder, Lieutenant Jason Kelley, Detective Warren Hansen, Detective Alex Fox, Detective Stephen Dumond, Detective Denny Pittman, and Detective Jason Mervau, as well as Kent County, as Defendants."

"On September 1, 2023, Defendants filed two separate motions for summary judgment based on qualified immunity. Defendants Abram, Crowder, Kelley, Hansen, Fox, Mervau, and Kent County filed a joint motion for summary judgment, while Defendant Dumond filed his motion for summary judgment separately. Defendants argued that they were unaware of a risk to Molson's health, and that '[i]t was Molson's successful attempt at swallowing and hiding drugs from law enforcement that caused his death.' Defs.' Mot. for Summ. J., R. 116, Page ID #666." …

"On March 26, 2024, the district court granted summary judgment as to claims against Sergeant Abram and Kent County, and dismissed Plaintiff's wrongful death claims against all Defendants, but otherwise denied Defendants' motions for summary judgment. The district court reasoned that there was

> at least a genuine issue of material fact as to whether, after witnessing Molson in the act of swallowing drugs and extracting a lethal-sized bag of cocaine from his mouth, there was a risk of the harm of drug overdose so obvious that even a lay person would easily recognize the necessity for a doctor's attention.

Order, R. 140, Page ID #3664 (citing *Brawner v. Scott County*, 14 F.4th 585, 607 (6th Cir. 2021)). The district court further concluded that there was a question of whether the officers behaved recklessly under the subjective component of *Brawner v. Scott County*'s deliberate indifference standard for pretrial detainees. Finally, the district court found that Molson's need for medical attention was clearly established at the time of his arrest, thus precluding summary judgment for Defendants on qualified immunity grounds."

"With respect to Defendants' motions for summary judgment on qualified immunity grounds, public officials performing discretionary functions are shielded 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). For the law to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.' *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)."

"Plaintiff argues that Molson had an 'obvious' medical need, and that Defendant officers were deliberately indifferent to it. *See* Appellee Br. No. 24-1300, ECF No. 32, 18. Specifically, she asserts that it is 'obvious to any reasonable person that an individual who [h]as swallowed a bag of narcotics is in need of medical care.' *Id.* at 17. She also argues that Molson's death in custody from 'acute cocaine toxicity,' one day after the events in question, is sufficient to prove his objective medical need at the time of arrest. *See id.* at 16–17 (citing *Burwell v. City of Lansing*, 7 F.4th 456, 463 (6th Cir. 2021)). Additionally, because the officers saw Molson attempting to conceal evidence by swallowing a bag of drugs, Plaintiff alleges that they 'knew' Molson was lying to them about not ingesting more drugs, and thus should have treated the situation as a medical emergency by taking him to the hospital. *See id.* at 18."

"Defendants respond that Molson's need for medical care was far from obvious, given that he 'had no symptoms and denied taking drugs,' despite being asked about swallowing drugs several times. *See* Appellant Br. No. 24-1300, ECF No. 22, 42–43. In particular, they reference Molson's medical assessment at the jail and argue that if a registered nurse did not perceive a serious medical need, then certainly the officers could not have recognized it. To underscore this point, Defendants state that 'no layperson recognized the necessity for a doctor's attention until Molson's cellmate called for help on January 21, 2024—about 22 hours after Deputy Crowder left the jail,' at which point Molson had no further interactions with Defendants. *Id.* at 32. In light of these facts, we agree that Defendants did not act recklessly by taking Molson to the jail instead of the hospital and are entitled to qualified immunity."

"Under the Fourteenth Amendment, pretrial detainees have an established right to medical care 'that is analogous to the right of prisoners under the Eighth Amendment.' *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009) (quoting *Est. of Carter v. City of Detroit*, 408 F.3d 305, 311 (6th Cir. 2005)). An officer violates that right if they show 'deliberate indifference to a pretrial detainee's serious medical needs.' *Hyman v. Lewis*, 27 F.4th 1233, 1237 (6th Cir. 2022) (cleaned up). Deliberate indifference consists of two prongs, one objective and the other subjective, and essentially requires that an officer 'knew of and disregarded a substantial risk of serious harm to [the pretrial detainee's] health and safety.' *Spears*, 589 F.3d at 254 (quoting *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001)). For the objective prong, Plaintiff must show that Molson's medical need was 'sufficiently serious.' *Brawner*, 14 F.4th at 591 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). For the subjective prong, as modified by *Brawner*, Plaintiff must prove that Defendant officers acted with 'more than negligence but less than subjective intent—something akin to reckless disregard.' *Id.* at 596 (quoting *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc)). Because her claim fails to prove an objective medical need, we need not address the subjective prong."

"Molson's medical need was not sufficiently serious within the meaning of the objective prong, where 'obviousness' is a key factor. *See Blackmore v. Kalamazoo County*, 390 F.3d 890, 897–99 (6th Cir. 2004). An injury or illness is 'obvious' when 'even a lay person would easily recognize the necessity for a doctor's attention.' *Id.* at 897 (quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 208 (1st

Cir. 1990)). Some life-threatening conditions may speak for themselves, such as a gunshot wound or other serious injury. *See Heeter v. Bowers*, 99 F.4th 900, 916 (6th Cir. 2024). Additionally, 'external signs of internal distress can indicate to a layperson that a detainee has a serious medical need,' *Grote v. Kenton County*, 85 F.4th 397, 406 (6th Cir. 2023), such as 'complain[ing] and vomiting,' or 'demonstrating the classic signs of an impending heart attack.' *Blackmore*, 390 F.3d at 900; *Est. of Carter*, 408 F.3d at 311. We have also held 'that drug or alcohol-related symptoms, like those associated with withdrawal or overdose, are sufficiently serious and obvious to laymen.' *Grote*, 85 F.4th at 406; *id.* at 408 (finding an obvious medical need when the detainee 'was shaking and twitching,' and 'lacked basic motor control'). However, if a medical need is *non-obvious*, it must generally have been 'diagnosed by a physician as mandating treatment,' *see Blackmore*, 390 F.3d at 897 (quoting *Gaudreault*, 923 F.2d at 208), and proven by 'verifying medical evidence.' *Id.* at 898 (citation omitted)."

"This Court has held that a medical need was not obvious, and hence not objectively serious, when it was not obvious to trained medical personnel. *See Spears*, 589 F.3d at 255." …

"… Molson's cocaine ingestion was not obvious to Defendant officers. When Molson put an object in his mouth, the officers immediately intervened and forced him to spit out a bag of cocaine. The officers did not observe Molson attempt to swallow anything else. When asked 'two or three different times' if he swallowed drugs, Molson did not respond in the affirmative. *See* Kelley Dep., R. 116-3, Page ID #763. This led to a 'general consensus' among the officers that Molson 'could have killed himself' by swallowing the bag of drugs, but that he thankfully had not. Fox Dep., R. 116-7, Page ID #844. Officer Dumond then proceeded to interview Molson for thirty-two minutes. During this interview, Dumond again questioned him on whether he swallowed drugs, 'multiple different ways[,] multiple different times,' but Molson denied doing so each time. Dumond Dep., R. 116-10, Page ID # 1008–09. Dumond tended to believe Molson when he denied swallowing the drugs, given his truthful answers to other police questions and apparent willingness to 'help build a criminal case against him[self].' *Id.* at 1007. Unlike the arrestee in *Spears*, who exhibited a variety of strange and concerning behaviors linked to drug use, Molson showed no symptoms whatsoever. *See* 589 F.3d at 252–53."

"Molson continued to deny swallowing drugs at the jail. In the presence of Officer Crowder, Molson answered 'no' to a series of pre-booking questions about his health, thus indicating 'no issues.' Crowder Dep., R. 116-8, Page ID #898. He also denied swallowing drugs to both intake and medical personnel. Approximately two hours after his arrest, Molson cleared his first medical exam. Nurse O'Connor determined that his vital signs were normal; his gait, breathing, and skin appeared normal; and he 'was not exhibiting signs of tremors, sweating, anxiety, lethargy, anger, aggressiveness, dilated pupils, confusion, or disorientation.' O'Connor Decl., R. 116-21, Page ID #1104. Molson then underwent a second medical evaluation, prompted by his mother's phone call communicating that he may have swallowed a bag of drugs, and was cleared once more. Despite his mother's concerns and O'Connor's efforts to assist him, Molson continued to deny swallowing drugs, showed no symptoms of drug use, intoxication, overdose, or any other medical condition, and appeared to be in normal health."

"It stands to reason that Molson's condition, which was not obvious to Nurse O'Connor after two medical evaluations, could not have been obvious to Defendant officers with minimal to no medical training. *See Spears*, 589 F.3d at 255 (rejecting the 'obvious existence of a sufficiently serious medical need' when that need was not obvious to trained medical personnel). This is magnified by the factual details in the case, such as Molson's multiple assurances that he did not swallow drugs, and his persistent lack of symptoms that seemed to corroborate his lie. *See Grote*, 85 F.4th at 409–10 (recognizing that when a medical need is non-obvious and the arrestee denies ingesting drugs, 'the defendants' knowledge of whether the person ingested drugs' may be 'necessary to appreciate' that need). Unlike the inmate in *Grote v. Kenton County*, who denied ingesting drugs but displayed symptoms that supported at least a jury question of deliberate indifference, *see id.* at 409–11, Molson denied ingesting drugs *and* showed no symptoms at all. In sum, these facts demonstrate that Molson's medical need was even less obvious to a layperson than the one in *Spears*. 589 F.3d at 252–53."

"Plaintiff suggests that because Molson tried to deceive law enforcement by swallowing and concealing drugs, the officers 'knew' not to believe his lies related to drugs, and thus should have registered that he was suffering from 'an objective medical emergency.' Appellee Br. 24-1300, ECF No. 32, 18. This approach places an unreasonable burden on the officers, who were not required to second-guess Molson's many denials of drug-ingestion in the absence of any symptoms or behaviors that could have revealed his true condition to a layperson. In fact, it is unclear what more the officers could have done under the circumstances. Plaintiff's bare assertion that they 'should have known' that Molson ingested drugs is not enough to 'establish a claim of deliberate indifference.' *Border v. Trumbull Cnty. Bd. of Comm'rs*, 414 F. App'x 831, 837 (6th Cir. 2011). This is especially true since the officers 'had no reason to doubt' that Molson would receive medical screening at the jail. *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) (recognizing no constitutional requirement to take a mentally unstable arrestee to the hospital instead of the jail). Indeed, Molson received not one but *two* medical examinations at the jail, and the officers could not reasonably have perceived a health risk that evaded detection by a registered nurse. *See Spears*, 589 F.3d at 255."

"Death alone does not suffice to prove the objective prong where the decedent, prior to their death, showed no symptoms of a serious medical need. *See Spears*, 589 F.3d at 253, 255. And Molson's death, one full day after his arrest, cannot establish 'the obvious existence of a sufficiently serious medical need' under the circumstances, since Molson exhibited *no symptoms* for the entirety of January 20, 2021, and denied swallowing drugs at every possible opportunity. *See id.* at 255; *Grote*, 85 F.4th at 409–10. Because Plaintiff has not established that Molson's condition was objectively serious when the officers arrested and transported him to jail on January 20, 2021, and the officers had no later interactions with him, his death alone cannot serve as a sufficient basis for their liability."

"Moreover, Plaintiff has not attempted to meet the objective prong under a non-obvious theory, and cannot do so, because she 'has not provided the required verified medical evidence.' Order, R. 140, Page ID #3662. To satisfy the objective prong under the non-obvious theory, the plaintiff must 'place verifying medical evidence in the record to establish the detrimental effect of the delay in medical treatment.' *Johnson v. Karnes*, 398 F.3d 868, 874 (6th Cir. 2005) (citations omitted). Before the district court, Plaintiff included a report by Dr. Werner U. Spitz, claiming that 'Molson would not have died' had he been taken to the hospital instead of jail. Spitz Report, R. 117-9, Page ID #1640. But Spitz's report does not explain the effect of this delay, other than concluding that 'the opportunity for treatment was delayed by a whole day.' *Id.* at 1639. Besides, Plaintiff did not respond to Defendants' objections to the admissibility of that report and has not otherwise attempted to show, through verifying medical evidence, that Molson's medical need was non-obvious. *See Brady*, 2011 WL 673949, at *3; *Foreword Mag., Inc. v. OverDrive, Inc.*, No. 1:10-cv-1144, 2011 WL 5169384, at *2 (W.D. Mich. Oct. 31, 2011) (noting that such an objection shifts the burden to the proponent to show that the evidence is admissible)."

"Accordingly, Plaintiff has not established an objectively serious medical need. This ends our inquiry on deliberate indifference, and we need not address the subjective prong. *See Dodson v. Wilkinson*, 304 F. App'x 434, 439 (6th Cir. 2008) (noting that a deliberate indifference claim 'requires proof of both the objective and subjective elements'). Because the officers committed no constitutional violation against Molson, they were not deliberately indifferent to his medical needs, and we need not address whether Molson had a clearly established right to medical care. *Spears*, 589 F.3d at 256. The officers are thus entitled to qualified immunity."

3. Excessive force claim – Motion to dismiss – Partial denial of qualified immunity upheld – Eleven year old child was seized by police and are allege to have used excessive force against the child – Because qualified immunity is a defense to suit rather than liability, the Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation, but this point is usually summary judgment and not dismissal under Rule 12 - It may be true, as the officers imply, that the video and police reports tell a more complete story of what happened on the night in question, but at this stage, but the court does not require a complete story; it require a *plausible* one -

The court may not consider materials outside the complaint except in narrow circumstances, and, none apply here - The officers will have an opportunity to present what they view to be the complete story at summary judgment or at trial - In the motion-to-dismiss context, the court has consistently held that it may only consider video footage over the pleadings when the videos are clear and blatantly contradict or utterly discredit the plaintiff's version of events - When the video does not blatantly contradict or utterly discredit the complaint, the court does not consider it on a Rule 12 motion - The video does not directly contradict the statement in the complaint, so the court will not consider it in a motion to dismiss - Plaintiffs are not, as the officers' arguments imply, required to allege every fact that a court might glean from available video evidence in order to survive a motion to dismiss, so long as their allegations are not blatantly contradicted or utterly undermined by video evidence, the plaintiff need only allege facts that give rise to the plausible inference that the defendants violated a clearly established right - Even if available video evidence would save time and effort or would easily resolve a case, we may not consider it at the motion-to-dismiss stage if it does not blatantly contradict or utterly undermine the complaint - At this stage, the factual allegations in the complaint are not in dispute—the legal sufficiency of the complaint is - Complaint shows no reasonable suspicion to detain the child - On a motion to dismiss, courts may consider public records for the truth of the statements contained within them only when the 'contents prove facts whose accuracy cannot reasonably be questioned - The complaint adequately pleads that officers had neither probable cause nor reasonable suspicion to arrest the child - The complaint also states facts giving rise to the plausible inference that the child was indeed arrested - The complaint alleges facts giving rise to the plausible inference that the manner in which the offciers detained the child - by handcuffing her and putting her in the police car, respectively—was so disproportionate to their reasons for detaining her that, for Fourth Amendment purposes, it transformed her detention into an arrest - In determining whether an officer used excessive force in violation of the Fourth Amendment, the bottom-line inquiry is whether the totality of the circumstances justifies a particular level of force - Three factors guide this inquiry: [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 he is actively resisting arrest or attempting to evade arrest by flight - Complaint alleges that police used excessive force and the facts alleged in the complaint, if true, would rise to the level of excessive force

WHITNEY HODGES, as personal representative of the estate of Honestie Hodges v. CITY OF GRAND RAPIDS et al., SPENCER SELLNER, ANTHONY BARBERINO, and JEFFREY DIONNE, Officers, in their individual and official capacities
SIXTH CIRCUIT COURT OF APPEALS No. 24-1615 Decided and Filed: May 30, 2025

"In this suit under 42 U.S.C. § 1983, defendant police officers appeal from the district court's partial denial of their motion to dismiss on qualified-immunity grounds. Because the complaint adequately states a claim for relief we **AFFIRM** the district court's order, and, to the extent the officers ask us to resolve disputed issues of fact, we **DISMISS** their appeal for lack of jurisdiction."

"In this suit under 42 U.S.C. § 1983, plaintiff-appellee Whitney Hodges ('Hodges' or 'Whitney') represents the estate of her late daughter, Honestie Hodges ('Honestie'). Hodges alleges that on December 6, 2017, she watched then eleven-year-old Honestie 'walk[] out of her back door with an adult family friend, Aisha Rose, to go to a neighborhood store' when Grand Rapids Police Department ('GRPD') officers 'abruptly and unexpectedly advanced on Honestie with guns drawn.' R. 1 (Compl. ¶¶ 47, 49, 50) (Page ID #7). '[T]here were at least three to four squad cars present with several officers surrounding the Hodges' home.' *Id.* ¶ 69 (Page ID #9). Defendant Spencer Sellner, with his gun drawn, 'yelled commands at Honestie to approach him by walking backward with her hands raised,' despite

Whitney's and Aisha's protestations. *Id.* ¶¶ 52, 54–56 (Page ID #7–8). Honestie complied, at which point defendant Anthony Barberino 'commanded Honestie to put her right hand behind her back,' which she did. *Id.* ¶¶ 57–59 (Page ID #8). 'Defendant Barbarino [sic] pulled out his handcuffs and handcuffed Honestie's hands behind her back' as she 'crie[d] and scream[ed]' in 'fear, panic, and distress.' *Id.* ¶¶ 60–62 (Page ID #8). Barberino walked Honestie toward defendant Jeffrey Dionne while officer Jake Bloom (who is not a party to this case) handcuffed Aisha, although Aisha 'informed the officers that [neither] she, nor anyone at the Hodges residence, had done anything wrong.' *Id.* ¶¶ 40, 63, 65 (Page ID #6, 8). Honestie, still handcuffed, was 'put in the custody' of defendant Dionne, who walked her to a nearby police car and searched her for weapons as she cried but continued to comply with Dionne's commands and answer his questions. *Id.* ¶¶ 70–72, 74 (Page ID #9). At the instruction of Sergeant Thomas Bush (also not a party), Dionne removed Honestie's handcuffs and left her sitting in the police car with the door closed as she continued to cry. *Id.* ¶¶ 39, 75–77 (Page ID #6, 9)."

"The complaint alleges that 'GRPD was looking for an adult Caucasian woman who had allegedly stabbed another individual at a different location,' and had been 'described as wearing her hair in a ponytail bun and wearing a black coat.' *Id.* ¶¶ 78–79 (Page ID #9). Honestie was 'African American and was an 11-year-old child at the time of the incident,' whose 'hair was not in a ponytail bun' and who 'did not match the description of GRPD's suspect.' *Id.* ¶¶ 80–82 (Page ID #9). 'Neither Honestie, [Aisha], nor Whitney Hodges made any movements to signal that they were fleeing the police, attempting to evade the officers on the scene, or were an immediate threat to anyone.' *Id.* ¶ 67 (Page ID #8). 'Honestie was not armed, believed to be armed, nor did she pose any immediate threat or danger to anyone,' and she 'did not make any movements that caused a threat to any of the GRPD officers on scene.' *Id.* ¶¶ 122–23 (Page ID #15). 'The officer[s] eventually cleared the house and the scene. The suspect they were looking for was not at that location.' *Id.* ¶ 84 (Page ID #10)."

"Hodges alleges that by 'seiz[ing] and detain[ing] Honestie at gunpoint . . . with the use of handcuffs, and by placing her in a police car, in the absence of probable cause or reasonable suspicion that she had committed any crime,' Sellner, Barberino, and Dionne 'violated Honestie's clearly established right to be free from unreasonable searches and seizures.' *Id.* ¶¶ 114–15 (Page ID #14). According to the complaint, when Sellner pointed his gun at Honestie and when Barberino handcuffed her, they used excessive force. *Id.* ¶¶ 132–46 (Page ID #16–17). The complaint also alleges that when, after Barberino handcuffed Honestie, Dionne put her in the police cruiser, Dionne and Barberino falsely imprisoned her, *id.* ¶¶ 118–26 (Page ID #15), all in violation of Honestie's Fourth Amendment rights, *id.*; *id.* ¶¶ 132–46 (Page ID #15–17)."

"We review de novo a district court's denial of a motion to dismiss on qualified-immunity grounds. *Marvaso v. Sanchez*, 971 F.3d 599, 605 (6th Cir. 2020). A district court should grant a motion to dismiss if the complaint 'fail[s] to state a claim upon which relief can be granted.' Fed. R. Civ. P. 12(b)(6); *Marvaso*, 971 F.3d at 605. A complaint states a claim when it alleges facts that, if true, make out a claim for relief that is plausible on its face, and that 'allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). 'Thus, when evaluating a complaint's sufficiency, we accept its factual allegations as true, draw all reasonable inferences in the plaintiff's favor, and only then determine whether those facts and inferences plausibly give rise to an entitlement to relief.' *Marvaso*, 971 F.3d at 605. This is so even where a defendant raises the defense of qualified immunity. *Id.*"

"Qualified immunity protects public officials from suit unless '(1) . . . the official violated a statutory or constitutional right, and (2) . . . the right was 'clearly established' at the time of the challenged conduct.' *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))." …

"Because qualified immunity is a defense to suit rather than liability, the Supreme Court has 'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.' *Guertin*, 912 F.3d at 917 (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). We have said, however, that

this 'point is usually summary judgment and not dismissal under Rule 12.' *Id.* (quoting *Wesley v. Campbell*, 779 F.3d 421, 433–34 (6th Cir. 2015))."

"The initial motion-to-dismiss question—whether a complaint pleads facts that, when presumed true, give rise to a plausible inference that the defendants violated a constitutional right—is fairly straightforward. And at summary judgment and trial the defendants will have an opportunity to demonstrate that the facts are not as the plaintiff pleaded them. But 'analyzing the *second* prong of qualified immunity—whether the alleged constitutional violation is clearly established—'is sometimes difficult' on the pleadings, since that 'inquiry may turn on case-specific details that must be fleshed out in discovery.'' *Myers v. City of Centerville*, 41 F.4th 746, 758 (6th Cir. 2022) (quoting *Crawford v. Tilley*, 15 F.4th 752, 765 (6th Cir. 2021))." …

"Indeed, 'the application of qualified immunity today can turn on minute factual distinctions,' *Crawford*, 15 F.4th at 765, particularly in light of Supreme Court precedent holding that, 'in performing Fourth Amendment qualified immunity analysis, we must confine ourselves to 'the situation [the officer] confronted,' [and] carefully consider[] the 'particular factual context[]' at issue.' *Hart v. Hillsdale County*, 973 F.3d 627, 642 (6th Cir. 2020) (first and fourth alterations in *Hart*) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018)). 'That is hard to accomplish at the motion to dismiss stage.' *Id.* 'Oftentimes, we need a fuller factual picture to define the contours of the right at issue to determine if it was clearly established.' *Diei v. Boyd*, 116 F.4th 637, 650 (6th Cir. 2024). Qualified immunity is, however, resolvable at the motion-to-dismiss stage 'when the *complaint* establishes the defense.' *Siefert v. Hamilton County*, 951 F.3d 753, 762 (6th Cir. 2020). It is therefore crucial that we define the proper scope of the record on which we review the district court's denial of the defendants' motion to dismiss—the breadth of that record also guides the clearly established analysis."

"As we will explain, the complaint here does not establish the defense of qualified immunity because Hodges has alleged facts making plausible the inference that the officers violated Honestie's clearly established Fourth Amendment rights to be free from unreasonable search and seizure, false imprisonment or arrest, and excessive force."

"The officers seek to avoid this conclusion by imploring us to consider substantial evidence outside the complaint, which they say tells a more complete story of the events of December 6, 2017 and demonstrates why they did not violate Honestie's clearly established rights. *See* Appellants Br. at 12–14, 27–32; Reply Br. at 3. Although at the pleading stage we are generally limited to the facts alleged in the complaint (which we must construe in favor the plaintiff), *Blackwell v. Nocerini*, 123 F.4th 479, 486 (6th Cir. 2024), the officers argue that we may (and indeed must) consider (1) video of the incident from officers' body-worn cameras because it contradicts the complaint's allegations (and omissions) and, (2) police reports summarizing the incident because they are public records that merely fill in the contours of the complaint. *See* Appellants Br. at 12–14. The district court ultimately declined to rely on the video and police reports for its qualified-immunity holding. *Hodges v. City of Grand Rapids*, No. 1:23-cv-1230, 2024 WL 3040882, at *3, *5 (W.D. Mich. Jun. 18, 2024)."

"It may be true, as the officers imply, that the video and police reports tell a more complete story of what happened on the night in question, but at this stage, we do not require a complete story; we require a *plausible* one. *Marvaso*, 971 F.3d at 605. We may not consider materials outside the complaint except in narrow circumstances, and, as we shall explain, none apply here. The officers will have an opportunity to present what they view to be the complete story at summary judgment or at trial."

"… On a motion to dismiss, our inquiry is premised on the purely legal question of whether the facts alleged, taken in the light most favorable to the plaintiff, state a claim for relief. *See Marvaso*, 971 F.3d at 605. We are thus precluded from answering questions of fact by the final-judgment rule *and* by our law regarding motions to dismiss. We agree with Hodges that the officers have surfaced several 'disputed [factual] issues that should be explored during discovery and not with this appeal,' Appellee

Br. at 20, but we retain jurisdiction over the question of whether Hodges has plausibly alleged a violation of Honestie's clearly established rights, *see Adams*, 946 F.3d at 948. As follows from our refusal discussed *infra* to consider the video and police reports, that is the only question we can or should answer at this stage. *Id.* We lack jurisdiction over the disputed factual issues of whether the officers in fact had reasonable suspicion or probable cause to detain or arrest Honestie, and whether the scene was in fact sufficiently dangerous to merit Honestie's detention and the force the officers used in executing it."

"In the motion-to-dismiss context, 'we have consistently held that we may only consider . . . video footage over the pleadings when 'the videos are clear and blatantly contradict[] or utterly discredit[] the plaintiff's version of events.'' *Saalim v. Walmart, Inc.*, 97 F.4th 995, 1002 (6th Cir. 2024) (alterations in *Saalim*) (quoting *Bell v. City of Southfield*, 37 F.4th 362, 364 (6th Cir. 2022)). 'This is because if a video clearly depicts a set of facts contrary to those alleged in the complaint, this makes a plaintiff's allegations implausible.' *Id.* 'But when the video does not blatantly contradict or utterly discredit the complaint, we do not consider it on [a] Rule 12 motion. Instead, as when assessing any motion made under Rule 12, we rely on the allegations in the pleadings alone.' *Id.*"

"The officers rely on our decision in *Bell v. City of Southfield* to contend that '[w]here a Plaintiff omits from her pleadings facts that are material to this Court's qualified-immunity analysis, and those facts are revealed by the video footage, the Court may treat the video as blatantly contradicting the complaint's omission.' Reply Br. at 6. In *Bell*, we posed 'a hypothetical where there are only two facts relevant to the outcome of an appeal from the denial of qualified immunity: first, whether the officer tased the plaintiff, and second, whether the plaintiff was holding a gun at the time.' 37 F.4th at 366. We posited that if '[t]he plaintiff's complaint only mentions the officer's tasing' and '[t]here's no mention of a gun anywhere in the complaint,' but 'the video footage clearly shows the plaintiff holding a gun,' then 'the gun's presence blatantly contradicts the complaint's omission.' *Id.* Meanwhile, where 'the video evidence is inconclusive as to what the plaintiff was holding,' it does not blatantly contradict or utterly undermine the complaint's allegations, and we must 'rely only on the facts in the complaint.' *Id.* In *Bell*, we took note of the plaintiff's affirmative allegation that officers had 'no need to' tase him, and held that the complaint's omission of the plaintiff's continued resistance was directly contradicted by video evidence 'that he continued resisting the officers as they attempted to restrain him.' *Id.* at 367."

"Even accepting *Bell*'s premise that we could permissibly use a conclusive video to fill holes in a complaint, the instant case is like the second of *Bell*'s hypotheses, where the video is inconclusive as to whether the hypothetical plaintiff was holding a gun. The officers insist that the video here contradicts the complaint because they assert that 'the video makes clear that the officers went to the Hodges's [sic] specific address because they had information that a suspect in a stabbing was at that house or might be coming to that house,' Reply Br. at 4, a fact they argue that the complaint omits, *id.* at 7–8; Appellants Br. at 13–14. But the video does not in fact show why police went to Honestie's house. The officers cite portions of the video where officers state to Whitney and Aisha that they have information that a suspect might be at the address, but the officers do not point to a portion of the video that would reveal *what* that information was. Appellants Br. at 28 (citing R. 14-4 (Bush Body Cam. at 9:49–10:15), R. 14-6 (Bloom Body Cam. at 12:20–12:25)); Reply Br. at 4 (same). An officer's mere statement that they have reason to believe a crime has occurred does not, without more, establish what 'particularized and objective basis' the officers *actually had* 'for suspecting that criminal activity might be 'afoot' and that it might involve' Honestie's home. Reply Br. at 13–14. Again, the complaint already acknowledges that police were looking for the stabbing suspect; it just does not say *why*. The video does not fill this gap."

"Even if the video showed what the officers say it does, it is not clear that the complaint's mere omission—of the information that police officers had received reports that the stabbing suspect might flee to Honestie's address or of a physical description of the scene—can meet the directly-contradicts-or-utterly-discredits threshold. The complaint's failure to explain what information led the police to Honestie's home must be read in concert with its allegations that the police lacked 'probable cause or

reasonable suspicion that Honestie was committing or had committed a crime.' R. 1 (Compl. ¶ 8) (Page ID #2). The complaint's key contention is that, whatever reason officers had to detain Honestie that day, it was not enough. … [H]ere, the video does not, at the motion-to-dismiss stage, resolve the context-specific question of whether officers had probable cause or reasonable suspicion the way a video might resolve whether a suspect had a gun in their hand or was resisting arrest."

"Even if it did, acceptance of the appellants' invitation to consider the video over the complaint would threaten our jurisdiction. *See Adams*, 946 F.3d at 948. That is because a dispute about whether officers had probable cause or reasonable suspicion under the circumstances is necessarily fact bound and would require us to answer factual questions about what circumstances actually existed. *See Hart*, 973 F.3d at 642."

"Similarly, details about the dark and confined nature of the scene may well be relevant to determining whether officers had cause to detain Honestie, but they are relevant to the *merits* of Hodges's claims." …

"In qualified-immunity cases, a plaintiff will often argue that the circumstances did not create probable cause, reasonable suspicion, or threat to an officer, and defendants will often disagree. Plaintiffs are not, as the officers' arguments imply, required to allege every fact that a court might glean from available video evidence in order to survive a motion to dismiss. So long as their allegations are not blatantly contradicted or utterly undermined by video evidence, *Saalim*, 97 F.4th at 1002, the plaintiff need only allege facts that give rise to the plausible inference that the defendants violated a clearly established right, *Courtright*, 839 F.3d at 518. The officers cannot escape this fundamental rule by arguing that the video shows a more complete picture of the events than the complaint; that is an argument for summary judgment or for trial. As discussed above, we see nothing in the video that blatantly contradicts or utterly undermines Hodges's allegation that the officers lacked probable cause or reasonable suspicion. And the officers will have an opportunity to contest that allegation on the merits using whatever admissible evidence they wish to present, just not at the motion-to-dismiss stage."

" … [E]ven if available video evidence would save 'time and effort' or would 'easily resolve a case,' we may not consider it at the motion-to-dismiss stage if it does not blatantly contradict or utterly undermine the complaint. " …

"The officers contend that the district court erred by refusing to consider two documents which they attached to their motion to dismiss. They argue on appeal that we should consider a Computer Automated Dispatch ('CAD') Event Report and an Incident Report (together, 'the reports'), which purport to summarize the events that led police to Honestie's house that day, as well as the events that came after. *See* R. 14-1 (CAD Rep.) (Page ID #115); R. 14-3 (Incident Rep.) (Page ID #121). The district court declined to take the reports into account on the grounds that it was 'not obligated to consider evidence that is 'subject to reasonable dispute' or that 'captures only part of the incident and would provide a distorted view of the events at issue[.]'' *Hodges*, 2024 WL 3040882, at *3 (alteration in *Hodges*) (quoting *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008))."

"'When a party moves to dismiss an action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, both sides proceed with the expectation that the court will decide the motion on the basis of the pleadings alone unless the court notifies them otherwise.' *Chun Ok Song v. City of Elyria*, 985 F.2d 840, 842 (6th Cir. 1993). … [C]ourts 'may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein' without converting to a summary-judgment motion. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)."

"An animating concern behind Rule 12(d) is that, where the court considers extraneous material (even public records) on a motion to dismiss, 'there is no way for an opposing party, prior to the issuance of

the court's decision, to register his or her disagreement with the facts in the document of which the court was taking notice.' *Passa v. City of Columbus*, 123 F. App'x 694, 697 (6th Cir. 2005). To put a finer point on it, there is no way for the opposing party to develop and present evidence to support their disagreement with the facts presented in the extra-complaint material. For this reason, and as the district court correctly noted, *Hodges*, 2024 WL 3040882, at *3, '[w]here the evidence 'captures only part of the incident and would provide a distorted view of the events at issue,' . . . we do not require a court to consider that evidence on a 12(b)(6) motion,' *Jones*, 521 F.3d at 562 (citation omitted)."

"The officers' proffered reports illustrate the problem. The Incident Report contains over a dozen officers' narrative accounts of the events of December 6. R. 14-3 (Incident Rep. at 5–11) (Page ID #124–30). If this case were before us at the summary-judgment stage, Hodges would have had the opportunity to depose these officers about the accuracy of their statements and could dispute the version of events presented in the Incident Report. Likewise, the CAD Report contains what appear to be logs of real-time communications between dispatchers and officers. R. 14-1 (CAD Rep. at 2–5) (Page ID #115–18). At the summary-judgment stage, Hodges would have had the opportunity to develop evidence about what was happening in the background of these in-the-moment communications and whether that information was accurately relayed to the officers on the scene. But at the motion-to-dismiss stage, Hodges has had no such opportunities, and for good reason; at this stage, the factual allegations in the complaint are not in dispute—the legal sufficiency of the complaint is. When the officers argue that the reports 'simply filled in the contours and details of Plaintiff's Complaint,' Appellants Br. at 51, they mean that the reports fill in the details of the complaint with *the officers'* version of the facts. *See Blackwell*, 123 F.4th at 487 (holding that it would 'flout[] basic pleading rules' to consider the defendant-officials' proffered extra-complaint police reports—purporting to document a threat the plaintiff reportedly made in the lead up to his allegedly illegal arrest, but which was not in the complaint—because the documents represented the officials' 'own conflicting story about the investigation'). At the motion-to-dismiss stage, this is impermissible. The reports are quintessential evidence, which the officers will have an opportunity to present before the district court should they choose to move for summary judgment."

"The officers nonetheless argue that the district court should have considered the reports because they are public records, *see id.*, but in doing so they rely on the definition of the term 'public records' for purposes of the hearsay exception contained in Federal Rule of Evidence 803(8). Appellants Br. at 48 & n.10 (acknowledging that 'this Court has not expressly defined what can be considered a 'public record' when it comes to documents offered in support of a Motion to Dismiss' (emphasis omitted)). The officers provide no basis for their resort to this rule and we see no reason why its definition should control. We think it likely that our case law's use of the term 'public records' is better understood to mean something closer to 'matters of public record,' like those of which we may take judicial notice. 5B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (4th ed. 2024); *Blackwell*, 123 F.4th at 487 ('We . . . allow district courts to take judicial notice of 'public records' without converting a motion to dismiss into a summary-judgment motion.' (quoting *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir. 1999))); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005) ('In addition to the allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or *are otherwise appropriate for the taking of judicial notice*.' (emphasis added))."

"The judicial-notice framing makes sense because it ameliorates the fairness concerns that animate Rule 12(d); ordinarily, we take judicial notice of adjudicative facts that 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b)(2); *accord In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 467 (6th Cir. 2014). On a motion to dismiss, '[c]ourts may consider public records for the truth of the statements contained within them only when the 'contents prove facts whose accuracy cannot reasonably be questioned.'' *Elec. Merch. Sys. LLC v. Gaal*, 58 F.4th 877, 883 (6th Cir. 2023) (quoting *Passa*, 123 F. App'x at 697). Otherwise, '[t]his exception . . . generally allows a court to conclude only that the record exists; the exception does not allow the court to treat all information in the record as true.' *Blackwell*, 123 F.4th at 487."

"In this context, a document is central to a complaint when the legal sufficiency of the complaint depends on the content of the document. *Id.* ('As the classic example, a plaintiff who asserts a breach-of-contract claim cannot prohibit a district court from considering the whole contract (including the contract terms that undermine the claimed breach) merely by omitting the contract from the complaint.'). Here, Hodges's 'claim[s'] . . . validity [does not] rise[] or fall[] with' the contents of the reports. *Id.* 'If anything, it is more accurate to say that the [reports] are central to the [officers'] *defense*.' *Id.*"

"Also doomed is the officers' argument that the reports were properly before the district court because they merely 'filled in the contours and details of Plaintiff's Complaint,' a proposition for which the officers cite unsupported dicta. Appellants Br. at 46, 51–52. In asking the court to consider the fact-laden reports, the officers 'ask us to disregard the normal 'presumption of truth' that we must give to a complaint's well-pleaded facts based on their own conflicting story about the investigation.' *Blackwell*, 123 F.4th at 487 (quoting *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 442 (6th Cir. 2012)). The officers will have an opportunity to tell their side of the story by filling in the contours of Hodges's allegations at summary judgment or at trial, but for now, she is the master of her complaint. *Cf. Rogers v. Webstaurant Store, Inc.*, 774 F. App'x 278, 282 (6th Cir. 2019) ('Most importantly, the plaintiff decides what factual allegations go into her complaint.')."

"Finally, the officers cite nonbinding out-of-circuit law for the proposition that the court should consider the reports because Hodges had 'actual notice of the documents and relied on them in framing her Complaint.' Appellants Br. at 47. Even assuming both of those assertions were true (which we do not decide), the officers' proposed exception to Rule 12(d) is unsupported."…

"The district court did not err by declining to consider the CAD and Incident Reports. The officers' exhortation that we should consider the video evidence and reports is a naked attempt to introduce improper substantive evidence at the motion-to-dismiss stage and in contravention of our proper appellate jurisdiction. The officers have not shown that any exception to Rule 12(d) applies so as to permit this end-run around the law governing motions to dismiss and final judgments."

"Having determined the proper scope of the record on appeal, we must now determine whether Hodges has plausibly alleged that the officers violated Honestie's clearly established rights. *Marvaso*, 971 F.3d at 605. For the reasons discussed above, we may do so based only on the complaint's allegations, and not the information presented in the video or the reports. Hodges alleges that the officers violated Honestie's Fourth Amendment rights by unreasonably seizing and searching her when they held her at gunpoint, handcuffed her, and put her in the police cruiser, R. 1 (Compl. ¶¶ 114–15) (Page ID #14), by falsely imprisoning Honestie when they handcuffed her and put her in the back of the police cruiser, *id.* ¶¶ 118–26 (Page ID #15), and by subjecting her to excessive force when they detained her at gunpoint and handcuffed her, *id.* ¶¶ 132–45 (Page ID #16–17)."

"No one disputes that the officers detained or seized Honestie without her consent. *See* Appellants Br. at 26. Hodges alleges that all three officers took part in the seizure: Sellner by detaining Honestie at gunpoint, R. 1 (Compl. ¶¶ 51–52, 56) (Page ID #7–8), Barberino by handcuffing her, *id.* ¶¶ 58–60, 63 (Page ID #8), and Dionne by putting her in the police cruiser, *id.* ¶¶ 71, 76 (Page ID #9). At the very least, officers must have reasonable suspicion for such an investigative (*Terry*) stop, and, if the stop evolves into an arrest, officers must have probable cause. *Bey v. Falk*, 946 F.3d 304, 312–13 (6th Cir. 2019). We begin with reasonable suspicion because if officers lack reasonable suspicion, they necessarily lack probable cause. *See id.* '[R]easonable suspicion exists when, based on the totality of the circumstances, a police officer has a particularized and objective basis for suspecting the particular person stopped of criminal activity.' *Id.* at 313 (alteration in *Bey*) (quoting *United States v. Gross*, 662 F.3d 393, 399 (6th Cir. 2011))."

"The complaint alleges that Honestie did not match the description of the suspect the officers were pursuing and that, at the time of the seizure, Honestie did not make 'any movements to signal that

[she] w[as] fleeing the police, attempting to evade the officers on the scene,' she 'was not armed, believed to be armed, . . . [did not] pose any immediate threat or danger to anyone,' and she 'did not make any movements that caused a threat to any of the GRPD officers on scene.' R. 1 (Compl. ¶¶ 67, 78–82, 122–23) (Page ID #8–9, 15). These factual allegations go beyond bare legal conclusions and make plausible the complaint's allegation that the officers lacked a 'particularized and objective basis for suspecting' Honestie of criminal activity. *Bey*, 946 F.3d at 313 (quotation omitted). If proven at trial, such facts support 'the reasonable inference that the defendant[s]' lacked reasonable suspicion and violated Honestie's Fourth-Amendment rights. *Iqbal*, 556 U.S. at 678."

"Our case law underscores that, absent reason to believe a detainee has committed a crime (for example, when the detainee matches a suspect's description), and absent a threat to others on the scene or an indication that a prospective detainee intends to flee or assault officers, there is no reasonable suspicion for even a temporary stop. *See United States v. Noble*, 762 F.3d 509, 523 (6th Cir. 2014) (holding no reasonable suspicion existed where there was no evidence that detainee 'gave [officers] any reason to suspect that he was inclined to assault the officers, . . . had anything in his hands[,] . . . indicated that he had a weapon, or . . . behaved in a threatening manner'); *United States v. Jackson*, 188 F. App'x 403, 409 (6th Cir. 2006) (holding that no reasonable suspicion for stop existed where officers 'stopped a car that was a different make and model from that being sought, traveling in the wrong direction, and that was driven by an individual who did not match the physical description of the suspect'). This case law demonstrates that the complaint here adequately alleges a plausible violation of Honestie's clearly established right to be free from detention absent at least reasonable suspicion."

"An officer commits false arrest or imprisonment in violation of the Fourth Amendment when they 'effect[] a warrantless arrest without probable cause.' *Akima v. Peca*, 85 F.4th 416, 422–23 (6th Cir. 2023). 'Probable cause exists if a person of 'reasonable caution,' considering 'the facts and circumstances within' the officer's knowledge, would 'believe that an offense had been, was being, or was about to be committed.'' *Id.* (quoting *Hartman v. Thompson*, 931 F.3d 471, 481 (6th Cir. 2019)). As discussed above, the complaint plausibly alleges that Barberino and Dionne had no reason to believe that Honestie was dangerous, would flee, or was involved in the commission of a crime, given that she did not match the stabbing suspect's description. The complaint thus adequately pleads that officers had neither probable cause nor reasonable suspicion to arrest Honestie. The complaint also states facts giving rise to the plausible inference that Honestie was indeed arrested."

"An investigative stop of the kind the officers concededly effected on Honestie 'may . . . ripen into an arrest through the passage of time or the use of force.' *Houston v. Clark Cnty. Sheriff Deputy John Does 1-5*, 174 F.3d 809, 814 (6th Cir. 1999). 'Although there is no bright line that distinguishes an investigative stop from a *de facto* arrest, . . . the length and manner of an investigative stop should be reasonably related to the basis for the initial intrusion.' *Id.* (citations omitted). Commentators have written that 'a seizure is an arrest rather than a *Terry* detention if 'a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.'' 3 Wayne R. LaFave, Search and Seizure § 5.1(a) (6th ed. 2024) (quoting *United States v. Corral-Franco*, 848 F.2d 536, 540 (5th Cir. 1988)). We have held that neither 'the use of handcuffs' nor 'detention in a police cruiser . . . automatically transform a[n] [investigative] stop into an arrest' 'so long as the circumstances warrant th[ose] precaution[s].' *Houston*, 174 F.3d at 815. The complaint must therefore plausibly allege that the detention of Honestie was 'qualitatively and quantitatively . . . so intrusive with respect to [Honestie]'s freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments.' *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 590 (6th Cir. 1994) (quoting *Hayes v. Florida*, 470 U.S. 811, 815–16 (1985))."

"Although it is a closer question than the existence of probable cause, we hold that the complaint alleges facts giving rise to the plausible inference that the manner in which Barberino and Dionne detained Honestie—by handcuffing her and putting her in the police car, respectively—was so disproportionate to their reasons for detaining her that, for Fourth Amendment purposes, it

transformed her detention into an arrest. This conclusion is necessarily informed by the fact that, accepting the complaint's allegations as true, officers had neither reasonable suspicion nor probable cause to detain Honestie. *Sutton v. Metro. Gov't of Nashville & Davidson Cnty.*, 700 F.3d 865, 876 (6th Cir. 2012) ('A broader factual base of suspicion permits a broader scope of detention because . . . '[t]he scope of activities permitted during an investigative stop is determined by the circumstances that initially justified the stop.'' (quoting *United States v. Obasa*, 15 F.3d 603, 607 (6th Cir. 1994))). A reasonable person in Honestie's position, as an eleven-year-old child detained at gunpoint, handcuffed, and put in the back of a police cruiser, could reasonably 'underst[and] the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.' LaFave, 3 Search and Seizure § 5.1(a) (quoting *Corral-Franco*, 848 F.2d at 540)."

"'It is beyond doubt that,' at the time of Honestie's alleged arrest, ''the law was clearly established that, absent probable cause to believe that an offense had been committed, was being committed, or was about to be committed, officers may not arrest an individual.'' *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310 (6th Cir. 2005) (quoting *Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999))." …

"In determining whether an officer used excessive force in violation of the Fourth Amendment, '[t]he bottom-line inquiry is 'whether the totality of the circumstances justifies a particular level of force.'' *Wright v. City of Euclid*, 962 F.3d 852, 865 (6th Cir. 2020) (quoting *Coffey v. Carroll*, 933 F.3d 577, 588 (6th Cir. 2019)). Three factors guide this inquiry: '[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 he is actively resisting arrest or attempting to evade arrest by flight.' *Id.* (quoting *Shreve v. Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681, 687 (6th Cir. 2006)). We ask 'whether the officers' actions [were] objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.' *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). 'When more than one officer is involved, the court must consider each officer's entitlement to qualified immunity separately.' *Smith v. City of Troy*, 874 F.3d 938, 944 (6th Cir. 2017) (per curiam)."

"With the Supreme Court's guidance in mind, we must consider whether Hodges has plausibly alleged that, under the totality of the circumstances—including all of the events preceding Honestie's detention—the officers used excessive force. *Hart*, 973 F.3d at 639–42. Hodges alleges that the defendants used excessive force on Honestie, Sellner by 'drawing and pointing . . . [a] [gun] directly towards an unarmed child,' R. 1 (Compl. ¶ 137, 146) (Page ID #16–17), and Barberino by handcuffing her, *id.* ¶ 138, 146 (Page ID #16–17). We are again limited to the facts asserted in the complaint in applying the above-recited factors to this allegation."

"Where the seriousness of the crime is concerned, the complaint's allegations state only that 'GRPD was looking for an adult Caucasian woman who had allegedly stabbed another individual at a different location.' *Id.* ¶ 78 (Page ID #9). This is far from an allegation that the stabbing actually happened, but we assume the crime at issue was a stabbing—a serious and violent crime. Although this first prong weighs in favor of the officers' use of force, the remaining two prongs do not. The complaint expressly avers that Honestie posed no threat to officers or anyone else and showed no signs of resisting or attempting to evade arrest. *Id.* ¶¶ 141, 143 (Page ID #17). Nonetheless, the complaint alleges, the officers used force on Honestie by holding her at gunpoint and handcuffing her. *Id.* ¶¶ 137–46 (Page ID #16–17). This allegation gives rise to the plausible inference that each defendant acted in a manner objectively unreasonable under the circumstances."

"It is clearly established that holding a detainee at gunpoint and in handcuffs constitutes the use of force. *Vanderhoef v. Dixon*, 938 F.3d 271, 277 (6th Cir. 2019)." …

"'[T]he fact that it is *sometimes* reasonable to use handcuffs and guns when detaining suspects does not support Defendants' argument that the amount of force used *in this case* was objectively reasonable. Whether an exercise of force is excessive will vary depending on the facts and circumstances of the specific case.' *Binay*, 601 F.3d at 649–50. Defendants will have an opportunity to explain to the district court or a jury why the facts and circumstances justified their use of force, but

Hodges has plausibly alleged that Sellner and Barberino each violated Honestie's clearly established right to be free from excessive force."

"The officers concede that 'the totality of the *all* the circumstances, including the information that the officers had before they interacted with Honestie, is critical to determining whether they should have known that their actions violated a clearly established right.' Reply Br. at 13. We agree, which is why this case should be resolved after the parties have exchanged discovery."

4. Malicious prosecution claim – Motion to dismiss – Statute of limitations – Plaintiff's malicious-prosecution claims arising out of the murder charge accrued when that charge was dismissed - Continuing violation doctrine does not apply - The last unlawful act plaintiff alleges is Downs's grand-jury testimony leading to the February 23, 2015 indictment— more than a year before he filed this lawsuit - Plaintiff fails to allege subsequent, continual unlawful acts, and plaintiff needs to show that the murder indictment was not a separate prosecution, which he has not done

PERCY DWAYNE BROWN v. LOUISVILLE-JEFFERSON COUNTY METRO GOVERNMENT, et al. JEFFREY G. JEWELL, in his individual capacity
SIXTH CIRCUIT COURT OF APPEALS No. 23-5673 Decided and Filed: April 30, 2025

"Plaintiff-Appellant Percy Brown appeals the dismissal of his malicious-prosecution claim against Defendant-Appellee Jeffrey Jewell as barred by the statute of limitations. We AFFIRM."

"Brown alleges that University of Louisville Police Officer Jewell and several Louisville Metro Police Department (LMPD) officers framed him for kidnapping, murder, rape, sodomy, and wanton endangerment after he refused to cooperate in a check-forging investigation. Over the course of more than ten years, the Commonwealth of Kentucky brought and dismissed numerous charges against Brown, resulting in Brown's spending more than seven years behind bars. After the final indictment was dismissed, Brown filed this action. The district court dismissed the malicious-prosecution claim arising from the murder charge as barred by the statute of limitations and granted Jewell's motion for judgment on the pleadings on Brown's fabrication-of-evidence claim. Brown now appeals the dismissal of the malicious-prosecution claim as time-barred."

"Jennifer French was murdered on September 16, 2004, in Louisville, Kentucky. Brown alleges that, '[w]ithin days of French being killed,' Jewell and LMPD Detectives Michael Smithers, Kristen Downs, Brian Kuriger, Gary Alcorn, and David Sanford learned through witness interviews that two people other than Brown—Loveil Burks and Cecil Gaines—killed French.R. 54, PID 632. Brown was out of town gambling at the time of the murder—an alibi he substantiates with a casino receipt."

"In December 2004, LMPD arrested Montoya Tyson for attempting to cash a forged check. Detectives Smithers and Alcorn questioned Tyson at the time of her arrest and learned that Tyson knew Brown, whom they suspected of being involved in a check-forgery scheme. One week later, Smithers and Jewell questioned Tyson again. During that interview, Tyson said that Brown had forced French to perform oral sex on him. Tyson also said that her child's father, Raymond Kennedy, told her that Shaquita Guthrie said Brown killed French. But Guthrie never told Kennedy or Tyson the basis for that accusation. Tyson made no allegation that Brown had sodomized her."

"After the interview, Smithers called the Milwaukee Police Department, allegedly prompting Brown's arrest in connection with a check-forging scheme. When Brown refused to cooperate with Defendants' investigation into the check-forging scheme, Detectives Sanford and Smithers threatened to frame him for French's murder."

"A grand jury indicted Brown on January 6, 2005, on two counts of sodomy involving Tyson. Brown alleges that the indictment was based on Tyson's December 2004 statement. A judge granted the

prosecution's motion to dismiss the January 2005 indictment without prejudice almost a year later, on December 4, 2006."

"In December 2008, Tyson gave a new statement to LMPD—one that Brown alleges Detectives Kuriger and Downs fabricated—alleging that Brown murdered French. That same day, Kuriger allegedly fabricated Michelle Connely's witness statement, which claimed that Brown threatened to kill her if she testified against him. Based on Tyson's and Connely's statements, a grand jury indicted Brown on December 16, 2008, on four counts: one count of murder involving French (Count 1), one count of sodomy involving Tyson (Count 2), and two counts of intimidating a participant in the legal process involving Tyson and Connely (Counts 3 and 4, respectively). The trial court dismissed the December 2008 indictment on March 17, 2009."

"A string of additional indictments and dismissals followed the December 2008 indictment." …

"The next developments came in May 2014. Brown alleges that, on May 16, 2014, Downs pressured Talesha Lynch into making a false witness statement. Based on that statement and Downs' testimony about it, a grand jury indicted Brown on May 29, 2014, on four counts: one count of rape (Count 1) and three counts of sodomy (Counts 2–4), all involving Lynch. Then, on January 20, 2015, the court granted the Commonwealth's motion to dismiss the February 2009 charges for kidnapping (Count 2), sodomy (Counts 3, 4, and 5), and wanton endangerment (Count 9), along with the entire January 2010 indictment. This left the four charges from the February 2009 indictment: one count of murder (Count 1) and three charges of intimidating a participant in the legal process (Counts 6–8)."

"The Commonwealth secured yet another grand-jury indictment against Brown on February 23, 2015. The February 2015 indictment included fourteen counts: eight counts of sodomy involving Tyson, Snow, Lynch, and Renfro (Counts 1–8); one count of kidnapping involving Renfro (Count 9); one count of rape involving Lynch (Count 10); one count of assault involving Snow (Count 11); two counts of wanton endangerment involving Snow and Renfro (Counts 12–13); and one count of intimidating a participant in the legal process involving Tyson (Count 14). The next day, on February 24, 2015, the court granted the prosecution's motion to dismiss the murder charge (Count 1) and the charges for intimidating a participant in the legal process (Counts 6, 7, and 8) from the February 2009 indictment without prejudice, thus completing the dismissal of all charges in the February 2009 indictment. Eight months later, on October 30, 2015, the court dismissed the May 2014 indictment. Finally, the court granted the Commonwealth's motion to dismiss the February 2015 indictment on April 5, 2016."

"Brown filed a 10-count Complaint against Alcorn, the City of Louisville, Downs, Jewell, Kessinger, Kuriger, the Louisville-Jefferson County Metro Government (LJCMG), Roberts, Sanford, Smithers, Stalvey, Weathers, Wilkerson, and the University of Louisville on July 15, 2016.**7** He brought six claims under 42 U.S.C. § 1983: malicious prosecution (Count 1), fabrication of false evidence (Count 2), supervisory liability (Count 3), failure to intervene (Count 4), conspiracy to deprive constitutional rights (Count 5), and a '*Monell* Claim' against the LJCMG (Count 6). R. 1, PID 17–22. He also brought four state-law claims: malicious prosecution (Count 7), negligent supervision (Count 8), intentional infliction of emotional distress (IIED) (Count 9), and 'Respondeat Superior' (Count 10). *Id.* at PID 23–25."

"The specific allegations against Jewell pertained only to the December 2004 interrogation of Tyson and Tyson's statement obtained that day regarding the French murder and an allegation of sodomy involving Tyson. Although the Complaint makes numerous allegations against the other Defendants specifically, and against Defendants generally, there are no specific allegations against Jewell regarding any other actions by him or his involvement in any of the other charges against Brown."

"Jewell and the University of Louisville jointly moved to dismiss the claims against them for failure to state a claim. As relevant here, they argued that the § 1983 claims stemming from the murder charge were time-barred because they accrued when the state court dismissed that charge on February 24, 2015. The LJCMG, the City of Louisville, Smithers, Downs, Stalvey, Kuriger, Roberts, Alcorn, Sanford, Kessinger, and Wilkerson also moved to dismiss the claims against them, arguing in relevant part that

the claims against them arising from the murder charge were time-barred for the same reason put forth by Jewell and the University of Louisville. In response, Brown argued that the claims were not time-barred because they did not accrue until the last criminal charges against him were dismissed on April 5, 2016."

"The district court granted both motions to dismiss." …

"Brown responded by seeking reconsideration of the dismissal of the § 1983 malicious-prosecution and fabrication-of-evidence claims and leave to amend the Complaint. The district court held that Brown's malicious-prosecution claim arising out of the murder charge was time-barred because 'Brown had separate claims of malicious prosecution that accrued on different dates' and the murder-based claim could not be salvaged under the continuing-violation doctrine. R. 53, PID 622–23. But it granted Brown leave to amend the Complaint except as to that claim, and except as to several erroneously included defendants and an erroneously included claim."

"Brown then filed the Amended Complaint. It names only Alcorn, Downs, Jewell, Kuriger, the LJCMG, Sanford, and Smithers. And it brings only five counts: a § 1983 claim for malicious prosecution (Count 1), a § 1983 claim for fabrication of evidence (Count 2), a § 1983 claim for failure to intervene (Count 3), a § 1983 claim for conspiracy to deprive constitutional rights (Count 4), and a '*Monell* Claim' against the LJCMG (Count 5). R. 54, PID 654–59."

"After the district court entered judgment on the pleadings in favor of Alcorn and Sanford, Jewell also moved for judgment on the pleadings. Jewell argued that the claims against him other than the claims arising from the murder charge, which the district court had already held were time-barred, were insufficiently pleaded. The district court granted Jewell's motion because 'Brown's claims against Jewell are contradicted by the document upon which they rely'—Tyson's statement, which the court could consider because it was integral to the Amended Complaint. R. 85, PID 831. The remaining Defendants entered into a settlement agreement with Brown that resolved all remaining claims, and this appeal followed."

"Brown's opening brief addresses only the statute-of-limitations issue. We therefore agree with Jewell that Brown has not preserved consideration of any other issues on appeal." …

"The parties dispute when Brown's malicious-prosecution claim against Jewell arising out of the murder charge accrued. Brown argues that the claim did not accrue until the last of the charges against him were dismissed on April 5, 2016. Jewell, on the other hand, contends that the claim accrued when the murder charge and the other remaining charges from the February 2009 indictment were dismissed on February 24, 2015."

"Section 1983, which 'allows plaintiffs to sue state actors who violate their constitutional rights,' does not contain 'time limits within which plaintiffs must seek redress for constitutional wrongs.' *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1008 (6th Cir. 2022). Rather, the relevant statute of limitations 'is the state statute of limitations applicable to personal injury actions under the law of the state in which the § 1983 claim arises.' *Eidson v. Tenn. Dep't of Child.'s Servs.*, 510 F.3d 631, 634 (6th Cir. 2007); *see also Wallace v. Kato*, 549 U.S. 384, 387 (2007) (noting that despite 'provid[ing] a federal cause of action,' § 1983's 'statute of limitations . . . is that which the [forum] State provides for personal-injury torts'). Because the § 1983 claims in this case arose in Kentucky, they are subject to Kentucky's one-year statute of limitations. *Harper v. Jackson*, 293 F. App'x 389, 391 n.1 (6th Cir. 2008); Ky. Rev. Stat. § 413.140."

"'The date on which the statute of limitations begins to run in a § 1983 action is a question of federal law.' *Eidson*, 510 F.3d at 635. For a malicious-prosecution claim, '[b]ecause an element that must be alleged and proved . . . is termination of the prior criminal proceeding in favor of the accused, the statute of limitations in such an action does not begin to run until the plaintiff knows or has reason to know of such favorable termination.' *King v. Harwood*, 852 F.3d 568, 578 (6th Cir. 2017) (internal

quotation marks and citation omitted). 'A plaintiff need only show that the criminal prosecution ended without a conviction.' *Thompson v. Clark*, 596 U.S. 36, 49 (2022)." …

"Brown has shown that the criminal proceedings ended in his favor. The question, then, is when that happened."

"Oddly, no case cited by the parties or identified by this court involves substantially similar facts. However, cases from the mixed-verdict context offer an analog to the question before the court here: whether the different charges against Brown are separable, such that the § 1983 malicious-prosecution claims arising out of the different charges accrued on different dates. In cases where there is a favorable termination on certain charges and a non-favorable termination, such as a conviction, on other charges, courts must determine whether plaintiffs have satisfied the favorable-termination element of a malicious-prosecution claim based on the favorably resolved charges. To answer that question, courts ruling on mixed-verdict cases consider whether the favorably and non-favorably terminated charges are intertwined, such that the entire proceeding did not terminate in the plaintiff's favor."

"… [T]he murder charge is separable from the other charges against Brown. The murder charge was based on a different 'course of conduct,' *Kossler*, 564 F.3d at 189, than the other charges because it was predicated on allegations involving a different victim and events occurring at a different time and place than the events underlying the other charges. It also involved different elements than the other charges, none of which were lesser-included offenses of murder (or vice versa). *Janetka*, 892 F.2d at 190; *Jones*, 2024 WL 3423707, at *2. Additionally, the murder charge and the other charges later dismissed in October 2015 and April 2016 involved unrelated factual circumstances and allegations, were brought in different indictments, and were dismissed on different dates. All those factors suggest separability. Notwithstanding Brown's argument to the contrary, that the murder charge and the other charges were brought by the same prosecutors in a series of indictments does not alter that conclusion."

"Even were we to treat all the charges, and all of Defendants' actions to bring those charges, as acts in furtherance of a single conspiracy to punish Brown for not cooperating with the check-forging investigation, rather than separate violations of Brown's rights—a theory Brown did not clearly plead below—Brown's claims would still be untimely. This circuit and other circuits have held that 'the existence of a conspiracy does not postpone accrual of appellant's separate claims.' *McCune v. City of Grand Rapids*, 842 F.2d 903, 906 (6th Cir. 1988); *accord Singleton v. City of New York*, 632 F.2d 185, 192 (2d Cir. 1980) ('Characterizing defendants' separate wrongful acts as having been committed in furtherance of a conspiracy or as 'a single series of interlocking events' does not postpone accrual of claims based on individual wrongful acts. . . . It is the wrongful act, not the conspiracy, which is actionable . . . .'); *Compton v. Ide*, 732 F.2d 1429, 1433 (9th Cir. 1984) ('The existence of a conspiracy does not generally postpone accrual of causes of action arising from the conspirators' separate wrongs.'), *abrogated on other grounds by Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987). Brown's claims are therefore untimely even under a theory that each of his claims is a component of a single, overarching conspiracy."

"In short, the charges against Brown constitute multiple separable, overlapping prosecutions resolved on different dates for statute-of-limitations accrual purposes. The other charges brought in the February 2009 indictment cannot delay accrual of Brown's claims arising out of the murder charge because the murder charge and the last of the other remaining charges from the February 2009 indictment were dismissed on the same date—February 24, 2015. And even if each violation of Brown's rights was an act in furtherance of a single overarching conspiracy to punish him for not cooperating with the check-forging investigation, Brown's malicious-prosecution claims arising out of the murder charge accrued when that charge was dismissed. Accordingly, Brown's malicious-prosecution claim against Jewell arising out of the murder charge is untimely under any of those theories of the case."

"The continuing-violation doctrine does not compel a different conclusion. A continuing violation can delay accrual of plaintiffs' causes of action. *Eidson*, 510 F.3d at 635. 'The continuing-violation doctrine has two categories.' *Howell v. Cox*, 758 F. App'x 480, 484 (6th Cir. 2018) (citing *Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009), and *Kuhnle Bros., Inc. v. Cnty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997))."

"The 'test for determining whether a continuing violation exists' under the first category has three components: 'wrongful conduct' that 'continue[d] after the precipitating event that began the pattern'; 'injury to the plaintiff' that 'continue[d] to accrue after that event'; and such 'further injury . . . hav[ing] been avoidable if the defendants had at any time ceased their wrongful conduct.' *Eidson*, 510 F.3d at 635 (internal quotation marks omitted). '[C]ontinual ill effects from an original violation' do not meet this standard. *Tolbert v. Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999) (quotation marks omitted). Rather, defendants must engage in 'continual unlawful acts.' *Id.* (quotation marks omitted). Similarly, '[p]assive inaction . . . does not support a continuing violation theory.' *Id.*"

"'The second category of continuing violations exists when the defendant has committed several distinct acts of wrongdoing, and the cumulative effect of these acts amounted to a constitutional violation. But if the defendant's separate acts of wrongdoing are individually actionable, the continuing-violation doctrine does not apply.' *Howell*, 758 F. App'x at 485 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 115–17 (2002); *Sharpe v. Cureton*, 319 F.3d 259, 266–67 (6th Cir. 2003); *Bowerman v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local No. 12*, 646 F.3d 360, 366–67 (6th Cir. 2011))."

"As the district court correctly noted, '[t]he last unlawful act Brown alleges is Downs's grand-jury testimony leading to the February 23, 2015[,] indictment—again, more than a year before he filed this lawsuit.' R. 53, PID 623. Brown therefore fails to allege subsequent, 'continual unlawful acts.' *Tolbert*, 172 F.3d at 940 (quotation marks omitted). And a malicious-prosecution claim is based on a discrete prosecution and is individually actionable, even if carried out by the same police officers and prosecutors. *Cf. Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 2–4 (1st Cir. 1995) (holding that, where both appellants in a consolidated case alleged that the same undercover police officer and confidential informant 'persuaded certain Commonwealth authorities to provide front money for undercover drug buys,' 'falsely identified appellants as the 'sellers' in two concocted undercover drug buys,' and charged each appellant with selling one ounce of cocaine to the undercover police officer, the 'appellants' [respective] section 1983 claims [against the same police officer and confidential informant] did not accrue until their respective criminal prosecutions ended in acquittals'). To rely on the second category of the continuing-violation doctrine, Brown therefore needs to show that the murder indictment was not a separate prosecution. And, as discussed above, he has not done so."

5. Qualified immunity denied - The government failed to disclose observations notes of one of its experts in a murder case - A *Brady* claim has three well-known elements (1) the State must suppress evidence by failing to disclose it to the defendant; (2) the undisclosed evidence must favor the defendant by helping to show the defendant's innocence or to impeach an unfavorable witness, and (3) the nondisclosure must prejudice the defendant - This prejudice exists if the undisclosed evidence is material—meaning that there is a reasonable probability that the trial outcome would have changed if the prosecution had turned over the evidence - Thurman correctly notes that *Brady* and the Supreme Court cases applying it have imposed the disclosure duty on prosecutors, not investigators like police officers or forensic scientists - Yet this court has held that pre-1990 cases clearly established that the police also have a *Brady*-derived duty to disclose material exculpatory evidence to the prosecution - Admittedly, this caselaw addressed claims against police officers rather than forensic scientists. But every reasonable scientist would have recognized that this extension of *Brady* covered them too

JEFFREY DEWAYNE CLARK, GARR KEITH HARDIN v. LOUISVILLE-JEFFERSON COUNTY METRO GOVERNMENT, ROBERT THURMAN, Kentucky State Police Crime Lab Forensic Serologist, in his individual capacity
SIXTH CIRCUIT COURT OF APPEALS No. 24-5061 Decided and Filed: March 7, 2025

"In 1995, a Kentucky jury convicted Garr Keith Hardin and Jeffrey Clark of murdering Rhonda Sue Warford. Robert Thurman, a forensic serologist, testified at their trial that a hair found at the crime scene was 'similar' to a sample of Hardin's hair. After Clark and Hardin spent over two decades in prison, DNA testing proved that this hair was not, in fact, Hardin's. A state court thus vacated Hardin's and Clark's convictions. Clark and Hardin then brought this suit under 42 U.S.C. § 1983 against (among others) Thurman. In discovery, they obtained the 'observation notes' that Thurman had written when examining the hairs. These notes suggested that the hair found at the scene might not have matched Hardin's hair sample in various ways. Hardin claimed that Thurman's failure to disclose the notes before trial violated his disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). The district court denied Thurman's qualified-immunity defense. On appeal, Thurman argues (1) that his notes were neither exculpatory nor material under *Brady*, and (2) that the law in the mid-1990s did not clearly establish that *Brady*'s duty of disclosure applied to scientists. Our precedent deprives us of jurisdiction over Thurman's first argument. And it also dooms his second argument that *Brady* did not clearly apply to him. We thus affirm in part and dismiss in part for lack of jurisdiction."

"On the evening of April 1, 1992, Rhonda Sue Warford visited a Kroger within walking distance of her home in Louisville, Kentucky. *See Hardin v. Commonwealth*, 396 S.W.3d 909, 910 (Ky. 2013). When she got back to her house, she told her mother that a strange man had harassed her in the parking lot. *See id.* Around midnight, she left home again and never returned. *See id.* On April 5, an elderly couple discovered Warford's body in a field to the southwest of Louisville in Meade County. *See id.* Warford's killer had repeatedly stabbed her. *Id.*"

"Warford had been dating Garr Keith Hardin at the time of her death. *See id.* Hardin claimed that he last saw Warford on March 28 and had last spoken to her over the phone on the afternoon of April 1. Warford's mother told the police that Warford, Hardin, and Jeffrey Clark, his close friend, had all been 'involved in Satanism.' *Id.* She, for example, suggested that Hardin had used 'a needle and thread' to sew a tattoo of an upside-down cross below Warford's left collarbone. Tr., R.292-12, PageID 4296. The police came to suspect that Hardin and Clark murdered Warford as part of a satanic ritual. *Hardin*, 396 S.W.3d at 911."

"Investigators recovered various hairs from Warford's body. *See id.* They sent these hairs (among other evidence) to the Kentucky State Police Crime Lab. Robert Thurman, a forensic serologist at the lab, analyzed the evidence. Thurman compared Hardin's, Clark's, and Warford's hairs with the hairs found on Warford. He issued his final report at the end of April 1992. His report opined that a 'Caucasian head hair found on [Warford's sweatpants] was similar in color and microscopic characteristics to [a sample of Hardin's hair] and may have common origin.' Rep., R.316-36, PageID 23748."

"At trial, the prosecution identified Hardin and Clark's shared desire to engage in a 'satanic' sacrifice as the 'motive' for Warford's murder. *Id.* It thus introduced evidence of their satanism, including the 'satanic bible and other occult-related objects found at' Hardin's home. *Hardin v. Commonwealth*, 2003 WL 21106138, at *3 (Ky. Ct. App. May 16, 2003) (citation omitted); *Clark v. O'Dea*, 257 F.3d 498, 500–01 (6th Cir. 2001). To support their theory that this satanism had led to Warford's murder, a detective with the Louisville Metro Police—Mark Handy—testified about a comment that Hardin had allegedly made to him. According to Handy, Hardin said that he had sacrificed animals in the past but that he 'got tired of looking at animals and began to want to do human sacrifices.' *Commonwealth v. Clark*, 528 S.W.3d 342, 346 (Ky. 2017). The State also presented testimony from an inmate named Clifford Capps who had shared a cell with Clark while Clark awaited trial. Capps testified that Clark had twice confessed to murdering Warford. *Hardin*, 396 S.W.3d at 911. The Kentucky Supreme Court described this statement as the 'most incriminating' testimony. *Id.*"

"The prosecution also introduced two primary pieces of physical evidence. First, the prosecution used the hairs found on Warford's pants to link Hardin to the crime scene. Thurman testified that '[o]ne of the hairs that [he] found on [Warford's] sweatpants was similar to the head hair standards from Garr Hardin.' Tr., R.316-48, PageID 23950. He conceded, though, that other hairs found on Warford's person did not match Hardin, Clark, or Warford. *Id.* On cross-examination, defense counsel asked Thurman about the allegedly matching hair: 'So, you don't know if it was actually [Hardin's] hair or not, but it may be?' Tr., R.316-49, PageID 23963. Thurman replied: 'Correct.' *Id.* Second, the prosecution introduced evidence that the police had discovered Warford's fingerprint in the backseat of Clark's car. *See Hardin*, 396 S.W.3d at 911."

"In response, Hardin and Clark presented an 'alibi defense,' claiming that they had been in Louisville (not Meade County) at the time of the murder. *Id.* at 911–12. Clark pointed out that Warford had been in his car many times before December 1991, which would explain why the police found her fingerprint there. *Id.* at 911, 915. Hardin denied making any statement to Detective Handy about human sacrifices. *Clark*, 528 S.W.3d at 346. He also denied ever engaging in either animal or human sacrifices."

"The jury found both men guilty. *See Hardin*, 2003 WL 21106138, at *1." …

"Eventually the Innocence Project agreed to represent Hardin and Clark. *See Hardin*, 396 S.W.3d at 912. This organization asked prosecutors to release various pieces of evidence for DNA testing. *See id.* In support, it noted that another man (James Whitley) had allegedly confessed to murdering Warford. *See id.* Prosecutors rejected its request. *See id.* at 913. The trial court also denied Hardin and Clark's joint motion to release the evidence for DNA testing. *See id.* But the Kentucky Supreme Court reversed the trial court's decision and held that Hardin and Clark were entitled to the testing. *Id.* at 915."

"The test results proved significant. They excluded Hardin and Clark as the source of the hair on Warford's sweatpants (although they also excluded Whitley). *See Clark*, 528 S.W.3d at 345. As a result, the trial court vacated Hardin's and Clark's convictions. *See id* at 348. The Kentucky Supreme Court affirmed. *Id.* The court reasoned that the 'hair evidence' was the 'only thing' that put Hardin and Clark at the murder scene. *Id.* at 345. It added that the 'match' of the hair on the sweatpants to Hardin had been an 'integral' part of the prosecution. *Id.*"

"New prosecutors chose not to retry Hardin and Clark after concluding that they now lacked sufficient evidence to convict the men. In 2018, the trial court granted their motion to dismiss the indictments. Authorities released Hardin and Clark after they had served some 22 years in prison."

"Once the state trial court vacated their convictions, Hardin and Clark filed this suit in federal court under 42 U.S.C. § 1983. They sued the Louisville-Jefferson County Metro Government, Meade County, and many officers who worked for the police in these jurisdictions. They also sued Thurman, the serologist who worked for the Kentucky State Police."

"Litigation in federal and state court revealed that some of these officials may well have committed misconduct. Of most note, Detective Handy (who testified about Hardin's alleged human-sacrifice remark) pleaded guilty to committing perjury in another murder case. *See Handy v. Louisville/Jefferson Cnty. Metro Gov't*, 2024 WL 1146541, at *1 (Ky. Mar. 14, 2024); *see also Clark*, 528 S.W.3d at 346–47. Louisville and its officials have since settled with Clark and Hardin for some $20 million. Claims remain pending against Meade County and its officials for *Brady* violations and for alleged falsification of evidence and against Thurman."

"This appeal involves only the claims against Thurman. We must assess his liability independent of the conduct of the other investigators. *See Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 934–35 (6th Cir. 2020). Clark's and Hardin's claims against Thurman turn on a potential mismatch between what he said in his final report and what he wrote down in observation notes while examining the hairs. The report disclosed that Hardin's hair sample and the hair on Warford's sweatpants were 'similar in color and microscopic characteristics[.]' Final Rep., R.316-36, PageID 23748. Under the

scientific standards at the time, this similarity finding meant that the hairs shared all the same 'characteristics,' such as color and density. Thurman Dep., R.316-5, PageID 21119, 21263."

"Thurman's observation notes, by contrast, suggested that the hairs did not match in various ways. The notes described the color of the hair on the sweatpants as 'Lt. Br. to Brown' (light brown to brown), but they described the color of Hardin's sample as just 'Brown.' Notes, R.316-8, PageID 21780, 21783. Likewise, the notes described the pigment density of the hair on the sweatpants as 'avg.; light' (average or light), but they described the pigment density of Hardin's sample as 'avg. to sl. heavy' (average to slightly heavy). *Id.* And the notes described the medulla width of the hair on the sweatpants as 'med to thick' (medium to thick), but they described the medulla width of Hardin's sample as 'medium.' *Id.* If these differences accurately described the hairs, Thurman's supervisor suggested that it would have been 'wholly improper and inconsistent with training and practice' to find the hairs similar. Thomas Dep., R.316-9, PageID 21980–81."

"Hardin and Clark thus brought several claims against Thurman arising out of this seeming disconnect between his notes and final report. Two claims matter now. The men alleged that Thurman had fabricated evidence by opining at trial that the hairs were similar when, in fact, they were dissimilar. And they alleged that he had violated his *Brady* duties by failing to turn over the notes before trial. Thurman moved for summary judgment."

"The district court granted summary judgment to Thurman on all claims but one. *See Clark v. Louisville-Jefferson Cnty. Metro Gov't*, 2024 WL 55862, at *7, *12 (W.D. Ky. Jan. 4, 2024). It rejected Clark's claims in their entirety because Thurman's report had excluded Clark as a source of the hair and so allegedly had not harmed him. *See id.* at *7, *12. It also rejected Hardin's fabricated-evidence claim. *Id.* at *8–9. Thurman had retained an expert who re-compared the hair on Warford's sweatpants with the sample of Hardin's hair (as Thurman had done in 1992). *See id.* at *3. This expert—the only one who compared the hairs—agreed with Thurman that they were similar. *Id.* at *3, *9. And the court held that Hardin could not show that Thurman gave a 'false' opinion unless Hardin produced 'expert testimony' to this effect. *Id.* at *9. The court found that Hardin had, at most, created a fact dispute over whether Thurman's notes conflicted with his report. *Id.* But it found that the notes alone would not allow a jury to find that the hairs were, in fact, dissimilar. *Id.* We currently lack jurisdiction to review these aspects of the court's decision."

"That said, the court reached a different result for Hardin's *Brady* claim. *Id.* at *10–12. All agree that Thurman did not disclose his observation notes because he followed his lab's official policy to provide only final reports. *See id.* at *11. But the court held that a reasonable jury could find that Thurman should have 'readily' recognized the 'exculpatory value' of these notes given their potential inconsistency with his report. *See id.* The court next suggested that the notes were material to Hardin's criminal case because Thurman's testimony evaluated the 'sole physical evidence' that could put Hardin at the murder scene. *Id.* at *12. And because the Supreme Court had clearly established Hardin's *Brady* rights before 1992, the district court found that Thurman could not invoke qualified immunity for this constitutional violation. *Id.* at *11–12."

"Thurman immediately appealed the denial of his qualified-immunity defense to Hardin's *Brady* claim. In *Brady*, the Supreme Court held that the 'prosecution' violates due process if it suppresses evidence that is both 'favorable' to a criminal defendant (or § 1983 plaintiff) and 'material' to whether the defendant committed the crime. 373 U.S. at 87. To rebut qualified immunity for this type of claim, § 1983 plaintiffs must show two things. They must show that a defendant did, in fact, violate *Brady*. *See Lawler ex rel. Lawler v. Hardeman County*, 93 F.4th 919, 925 (6th Cir. 2024). And they must show that the existing caselaw 'clearly established' this violation at the time the defendant failed to disclose the relevant evidence. *See id.*"

"Thurman first argues that he did not commit a *Brady* violation even under today's standards. A *Brady* claim has three well-known elements. *See Jackson v. City of Cleveland*, 925 F.3d 793, 814 (6th Cir. 2019). First, the 'State' must 'suppress[]' evidence by failing to disclose it to the defendant. *Strickler*

v. Greene, 527 U.S. 263, 281–82 (1999). Second, the undisclosed evidence must favor the defendant by helping to show the defendant's innocence or to impeach an unfavorable witness. *See id.* at 280 (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Third, the nondisclosure must 'prejudice' the defendant. *Id.* at 282. This prejudice exists if the undisclosed evidence is 'material'—meaning that there is a 'reasonable probability' that the trial outcome would have changed if the prosecution had turned over the evidence. *Turner v. United States*, 582 U.S. 313, 324 (2017) (citation omitted); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). According to Thurman, Hardin has not met any of these elements."

"… [P]rosecutors can violate *Brady* not only though malicious concealment but also through honest mistakes. *See United States v. Agurs*, 427 U.S. 97, 110 (1976). And under our circuit precedent, a *Brady*-derived obligation applies not just to prosecutors but also to police officers—so long as 'the exculpatory value' of the undisclosed evidence should have been 'apparent' to the officers. *Moldowan v. City of Warren*, 578 F.3d 351, 382–89 (6th Cir. 2009) (citation omitted). Contrary to Hardin's claim, this precedent does not require a § 1983 plaintiff to show that an officer acted in 'bad faith.' *Id.* at 388."

"Even if Thurman's observation notes were favorable to Hardin and material to his defense, Thurman next makes the standard qualified-immunity argument over which we have jurisdiction: he asserts that the caselaw at the time of Hardin's 1995 trial did not 'clearly establish[]' that *Brady*'s duty of disclosure could apply to forensic scientists. *Mitchell*, 472 U.S. at 528. On this question, too, our precedent compels us to reject Thurman's argument—this time on the merits."

"Typically, these fair-notice principles will compel plaintiffs to identify the legal rule on which they rely with a 'high 'degree of specificity.'' *Wesby*, 583 U.S. at 63 (citation omitted). Plaintiffs have identified a clearly established legal rule at 'too high a level of generality' if a court cannot 'immediately' say that the defendant's conduct violated the rule. *Beck v. Hamblen County*, 969 F.3d 592, 599 (6th Cir. 2020) (quoting *Wesby*, 583 U.S. at 64). When it is debatable how a general rule applies to a defendant's specific conduct, a court cannot conclude that a reasonable officer should have known that the conduct violated the law. *See Wesby*, 583 U.S. at 63–64."

"Thurman claims that Hardin cannot satisfy this qualified-immunity test. At the outset, he concedes that, by 1990, courts had clearly established the legal rule that forensic scientists cannot 'deliberately' fabricate incriminating evidence or conceal exculpatory evidence in bad faith. *Moldowan*, 578 F.3d at 397; *see Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988); *Spurlock v. Satterfield*, 167 F.3d 995, 1005–07 (6th Cir. 1999). But the district court rejected Hardin's fabricated-evidence claim. *Clark*, 2024 WL 55862, at *9. According to Thurman, this holding shows that he did not act in bad faith and thus that the clearly established rule does not apply."

"That brings us to the question at the crux of the parties' debate: do forensic scientists have a *Brady*-like duty of disclosure even absent bad faith? Thurman argues that *Brady*'s generic legal rule reads the right at 'too high a level of generality.' *Beck*, 969 F.3d at 600. Even if *prosecutors* had an absolute duty of disclosure in the 1990s, Thurman reasons, that rule does not establish that *everyone else* connected to the investigation (including forensic serologists) also had such an absolute duty. Hardin counters that our caselaw has already rejected this claim."

"Hardin is right. To be sure, Thurman correctly notes that *Brady* and the Supreme Court cases applying it have imposed the disclosure duty on 'prosecutors,' not investigators like police officers or forensic scientists. *Moldowan*, 578 F.3d at 377; *see Kyles*, 514 U.S. at 437–38; *Brady*, 373 U.S. at 87. Yet we have held that pre-1990 cases clearly established that the police also have a '*Brady*-derived' duty to disclose material exculpatory evidence to the prosecution. *Moldowan*, 578 F.3d at 381–82; *see Gillispie*, 18 F.4th at 918 n.2; *Jackson*, 925 F.3d at 823–24. In *Moldowan*, for example, a state court had wrongly convicted the § 1983 plaintiff of a violent sexual assault, and he brought a *Brady* claim against (among others) an officer involved in the investigation. 578 F.3d at 363–67, 376. The plaintiff alleged that this officer violated *Brady* because he did not disclose an eyewitness's 'exculpatory statements' suggesting that other men had committed the assault. *Id.* at 376, 382. We held that

'overwhelming' out-of-circuit precedent clearly established the extension of *Brady*'s no-fault regime to the police before 1990. *Id.* at 381–82."

"Admittedly, this caselaw addressed claims against police officers rather than forensic scientists. But 'every reasonable' scientist would have recognized that this extension of *Brady* covered them too. *Wesby*, 583 U.S. at 63. To be sure, one might have distinguished *prosecutors* from *others in the criminal investigation* for *Brady* purposes. After all, a state official must answer essentially legal questions suited for lawyers when deciding whether a piece of evidence is material or exculpatory. *See Moldowan*, 578 F.3d at 379–81; *id.* at 402 (Kethledge, J., concurring in the judgment in part and dissenting in part). But once we make the leap beyond prosecutors, we see no reasonable argument why this leap should apply only to police officers in the field and not those in the lab. *See Horn v. Stephenson*, 11 F.4th 163, 171–73 (2d Cir. 2021); *Brown v. Miller*, 519 F.3d 231, 237–38 (5th Cir. 2008); *Pierce v. Gilchrist*, 359 F.3d 1279, 1299 (10th Cir. 2004)."

"An analogy confirms this point. In *Spurlock*, we found that the existing caselaw in 1990 clearly established that a police officer would violate due process by intentionally fabricating evidence. *See* 167 F.3d at 1005–06. In *Gregory*, we then relied on *Spurlock* to find that the caselaw clearly established this principle for forensic scientists. *See* 444 F.3d at 740, 744. *Gregory* saw 'no reason to treat the intentional fabrication of a forensic report differently from the intentional fabrication of' a police report. *Id.* at 740; *see Moldowan*, 578 F.3d at 397. If we do not treat these two officials differently for purposes of a fabricated-evidence claim, why should we treat them differently for purposes of a *Brady* claim? In short, because we have held that it was clearly established in 1990 that *Brady*'s disclosure obligations covered police officers, we must now hold that it was clearly established that those obligations covered forensic examiners."

"In response, Thurman claims that no case has clearly established that a forensic scientist might have a *Brady* duty to turn over 'unfinished notes' that contain only initial 'thoughts and impressions.' Appellant's Br. 34. At this stage, however, our precedent requires us to assume what the district court held a reasonable jury could find about these notes: that their exculpatory nature was 'apparent' and that they were material to Hardin's innocence. *Clark*, 2024 WL 55862, at *11. And, as explained, it was clearly established in 1990 that a scientist could violate *Brady* by failing to disclose material exculpatory evidence. That rule suffices to rebut Thurman's qualified-immunity defense under our caselaw. *See Gillispie*, 18 F.4th at 918 n.2; *Jackson*, 925 F.3d at 823–24; *Moldowan*, 578 F.3d at 381–82. Contrary to Thurman's claim, these cases do not require plaintiffs to identify a decision that addressed exactly the same type of *Brady* evidence."

6. Injury to pretrial detainee slip and fell in the jail shower - Motion to dismiss was granted to the defendants - To allege a *Monell* claim against the county, Coleman must allege facts that plausibly suggest two things, (1) that her injuries arose from an unconstitutional act and (2) she must then connect that act to a county policy or custom - An ordinary risk that every member of the public faces everyday falls well below what is required to show an unconstitutional risk for inmates - Rule 15(c) of the Federal Rules of Civil Procedure provides that an amendment to a pleading relates back to the date of the original pleading in several circumstances - As relevant here, an amended complaint that changes the party or the naming of the party against whom a claim is asserted will relate back to the date of the original complaint if the amendment satisfies four criteria (1) the amended complaint must pursue a claim that arose out of the same conduct, transaction, or occurrence as the claim in the original complaint, (2) the party added by the amended complaint must have received such notice of the action that it will not be prejudiced in defending on the merits, (3) this party must have learned (or should have learned) that the action would have been brought against it, but for a mistake concerning the proper party's identity, and (4) the new party must have received the required notice and learned the required information within the period for serving the original complaint - Although plaintiffs need not plead a claim's timeliness, defendants can still move to

dismiss a complaint based on the statute of limitations if the complaint affirmatively alleges facts showing that the plaintiff did not sue in time, and here, plaintiff's alleged facts establish that she did not sue within the facially applicable limitations period

MISTY COLEMAN v. HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, CHARMAINE MCGUFFEY; BETHANIE DREW; COLINA YATES; MORGAN BOLEN; TIMOTHY SCHOLZ; FRITZ ELSASSER; NAPHCARE, INC.; MICHAEL J. PEGRAM, JR.; LAUREN A. SLACK; JENNA N. WARD; DONALD L. HAUN
SIXTH CIRCUIT COURT OF APPEALS No. 24-3453 Decided and Filed: March 25, 2025

"Misty Coleman alleges that she fell and broke her ankle after slipping on the wet shower floor of a county jail. This accident led Coleman to pursue constitutional claims under 42 U.S.C. § 1983 and negligence claims under Ohio law against the county and many corrections officers and medical personnel. The district court dismissed all claims against all parties. Coleman's appeal raises a mix of substantive and procedural questions. As for the substantive: Did Coleman adequately allege that the slippery shower violated the Due Process Clause? Did she adequately allege that a county policy or custom was behind her poor medical care? And may the county invoke state-law immunity from her negligence claim at the pleading stage? As for the procedural: When did Coleman's claims accrue and start the running of the statute of limitations? Did her amended complaint (which named actual corrections officers and medical personnel) 'relate back' to the date of her original complaint (which named 'John Doe' and 'Jane Doe' defendants) for statute-of-limitations purposes? And can Coleman rely on equitable tolling to delay the running of the limitations period? We agree with the district court on the answers to all six questions. We thus affirm its dismissal of Coleman's complaint."

"In June 2020, the authorities took Coleman into custody on unidentified charges and confined her at the Hamilton County Justice Center in Cincinnati, Ohio. 2d Am. Compl., R.28, PageID 225. The Hamilton County Sheriff's Office runs this jail. *Id.* On June 18, corrections officers escorted Coleman to the jail showers. *Id.* As Coleman exited, she slipped and fell on the wet floor. *Id.* Coleman fractured her left ankle. *Id.* The jail administrators had provided Coleman with what she describes as 'inappropriate' and 'unsafe' flip-flops to take a shower. *Id.*, PageID 225–26. Her complaint alleges that this footwear 'exacerbated' the 'dangerous condition' of the wet shower floor. *Id.* It adds that the 'slippery and dangerous condition' of that wet floor was 'hidden' from her. *Id.*, PageID 226. And it says that the Hamilton County Sheriff and the various corrections officers working on the day of her accident knew of this risky condition. *Id.* In fact, unknown officers told her that other inmates had also slipped and fallen. *Id.*"

"Coleman requested immediate medical aid after her fall. *Id.* NaphCare, a private company, had contracted with Hamilton County to provide medical care to inmates. *Id.*, PageID 222–23. The officers watching Coleman notified NaphCare employees of Coleman's injuries. *Id.*, PageID 226–27. These private employees moved her to the 'medical area in a wheelchair.' *Id.*, PageID 227. Coleman had an open cut and 'significant swelling and bruising' at this time. *Id.* She also complained of 'excruciating pain' to the NaphCare medical personnel. *Id.* But they only gave her 'an ice pack and ibuprofen.' *Id.* The employees otherwise kept her untreated in a 'holding cell' for about four hours. *Id.* When another corrections officer discovered a 'visibly distraught' Coleman in this cell, the officer ordered the NaphCare personnel to properly treat her. *Id.* Coleman's broken ankle eventually required surgery. *Id.*, PageID 229."

"In May 2022, almost two years after this accident, Coleman sued the following defendants in state court: the Hamilton County Board of Commissioners, the Hamilton County Sheriff's Office, the current sheriff, the former sheriff at the time of her injury, two 'John/Jane Doe' corrections officers, and two 'John/Jane Doe' nurses. Compl., R.2, PageID 20–22. After a defendant removed the suit to federal court, Coleman filed an amended complaint that alleged constitutional claims under 42 U.S.C. § 1983 and negligence claims under Ohio law. 1st Am. Compl., R.7, PageID 63–64. She asserted that the defendants had violated the Eighth and Fourteenth Amendments and had acted negligently both by allowing the slippery conditions in the jail showers and by failing to properly treat her injuries after her fall. *See id.*, PageID 59–64."

"The district court dismissed most of these claims. *Coleman v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 2023 WL 4466855, at *6 (S.D. Ohio July 11, 2023). It dismissed the claims against the sheriff's office because that office lacked the capacity to be sued. *See id.* at *2. It dismissed the claims against the former sheriff because Coleman had sued him only in his official capacity, but he no longer held the office. *See id.* at *3. It treated the § 1983 claims against the Board and the current sheriff as claims against Hamilton County because Coleman had also sued them in their official capacities. *Id.* And to state a claim against the county under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), Coleman had to allege that an unconstitutional county policy or practice caused her injuries. *See Coleman*, 2023 WL 4466855, at *3. She failed to do so. The court held that her claims challenging the slippery conditions did not allege a plausible constitutional violation. *Id.* at *4. It next held that she failed to allege that Hamilton County had a policy or practice of providing inadequate medical care. *Id.* Turning to the negligence claim, the court held that Ohio law would grant immunity to Hamilton County on the alleged facts. *See id.* at *4–5. That said, the court did not dismiss the case in its entirety. It allowed Coleman 'to conduct limited discovery' to identify the unnamed officers and nurses. *See id.* at *5–6."

"Coleman later filed a second amended complaint. During the litigation, she learned of Hamilton County's contract with NaphCare. She thus brought NaphCare and four of its medical staff into the suit. 2d Am. Compl., R.28, PageID 222–23. She also sued five Hamilton County corrections officers who had worked at the jail on the date of her accident. *Id.*, PageID 221–22."

"Hamilton County and the corrections officers moved to dismiss the complaint. NaphCare and its employees moved for judgment on the pleadings. The court granted both motions and dismissed the complaint for good. *Coleman v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 2024 WL 1897559, at *5 (S.D. Ohio Apr. 30, 2024). It held that the two-year statute of limitations barred the claims against these new defendants because Coleman filed the complaint adding them over two years after she suffered her accident in June 2020. *See id.* at *2–4."

"Coleman first challenges the dismissal of her constitutional and negligence claims against the current Hamilton County Sheriff and Board of County Commissioners. Because Coleman sued these parties in their official capacities, she effectively sued Hamilton County itself under § 1983 and Ohio law. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *Lambert v. Clancy*, 927 N.E.2d 585, 591 (Ohio 2010). But she has failed to plausibly plead either claim against the county."

"Section 1983 allows Coleman to sue any 'person' that 'subjects' her to the 'deprivation' of a constitutional right. 42 U.S.C. § 1983. Ever since *Monell*, the Supreme Court has held that the word 'person' includes municipalities like Hamilton County. 436 U.S. at 690–95. To allege a *Monell* claim against the county, Coleman must allege facts that 'plausibly suggest' two things. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009); *see Susselman v. Washtenaw Cnty. Sheriff's Off.*, 109 F.4th 864, 873–74 (6th Cir. 2024). She must first allege that her injuries arose from an unconstitutional act. *See Dibrell v. City of Knoxville*, 984 F.3d 1156, 1160 (6th Cir. 2021). She must then 'connect' that act to a county policy or custom. *Gambrel v. Knox County*, 25 F.4th 391, 408 (6th Cir. 2022); *see Connick v. Thompson*, 563 U.S. 51, 60–61 (2011)."

"Corrections officers must protect convicted prisoners from harm under the Eighth Amendment, and they must protect pretrial detainees from harm under the Due Process Clause. *See id.* at 926." …

"Turning to the other *Monell* requirement, Coleman must do more than show a due-process violation because § 1983 does not permit her to hold Hamilton County vicariously liable for its employees' conduct. *See Connick*, 563 U.S. at 60. She must instead prove that the violation arose from one of Hamilton County's policies or customs. An inmate can allege this type of policy or custom in different ways. Perhaps the county adopted 'official policies' that sanctioned the unconstitutional risk of harm. *Gambrel*, 25 F.4th at 408. Or perhaps the county's training policies failed to adequately teach corrections officers about how to avoid the unconstitutional failure to protect inmates. *See id.*; *see*

also Connick, 563 U.S. at 61. Or maybe the county had a custom of ratifying prior unconstitutional failures to protect and thereby encouraged officers to commit future violations. *See Pineda v. Hamilton County*, 977 F.3d 483, 494–95 (6th Cir. 2020)."

"Coleman's complaint attempts to meet these *Monell* standards by alleging two distinct constitutional violations. She first alleges that Hamilton County disregarded the risk of harm from the slippery shower. She next alleges that the medical personnel provided constitutionally inadequate medical care after she slipped and broke her ankle. But her first argument fails to allege a constitutional violation, and her second one fails to connect any alleged violation to the county."

"*Slippery Floor*. Coleman's complaint does not 'plausibly suggest' that the conditions of the jail shower violated the Due Process Clause. *Iqbal*, 556 U.S. at 680. We need not discuss the subjective element of this claim (the one relaxed by our recent precedent) because she cannot satisfy the objective element. That element requires Coleman to allege more than the unreasonable risk of harm that might establish a negligence claim. *See Lamb v. Howe*, 677 F. App'x 204, 208–09 (6th Cir. 2017); *see also Phillips*, 14 F.4th at 535. Rather, Coleman must allege facts showing that the risk of harm deprived her of 'the minimal civilized measure of life's necessities[.]' *Wilson*, 501 U.S. at 298 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). But she has not made that showing because the risk that shower floors will be slippery exists for all showers—whether located inside or outside a jail's walls. *See Lamb*, 677 F. App'x at 209; *see also Pyles v. Fahim*, 771 F.3d 403, 410 (7th Cir. 2014); *Coleman v. Sweetin*, 745 F.3d 756, 764–65 (5th Cir. 2014) (per curiam); *Reynolds v. Powell*, 370 F.3d 1028, 1031–32 (10th Cir. 2004); *LeMaire v. Maass*, 12 F.3d 1444, 1457 (9th Cir. 1993). An ordinary risk that every member of the public faces everyday falls well below what is required to show an unconstitutional risk for inmates."

"To be sure, we have suggested in dicta that slippery shower floors when combined with 'exacerbating factors' (such as the fact that a 'disabled' inmate 'had to use crutches') can establish an objectively intolerable risk of harm. *Lamb*, 677 F. App'x at 209. But Coleman's proposed exacerbating factors—that she had to wear 'inappropriate' and 'unsafe' flip flops and that other inmates had fallen in the past—do not resemble the types of factors that we have opined might suffice." …

"*Medical Care*. Coleman's complaint next fails to tie the purportedly inadequate medical care that she received after her fall to a Hamilton County policy or custom. *See Connick*, 563 U.S. at 60–61. Her complaint does not allege that Hamilton County had an official policy of mistreating injured inmates. And the complaint identified only her 'single instance' of neglect, which alone does not plausibly allege a continuous custom of tolerating inadequate care. *Franklin v. Franklin County*, 115 F.4th 461, 472 (6th Cir. 2024) (citation omitted). Indeed, Coleman's opening brief did not even identify this additional element of a *Monell* claim—let alone describe the theory on which she relied to hold the county liable. She thus forfeited any potentially applicable *Monell* theories. *See Blick v. Ann Arbor Pub. Sch. Dist.*, 105 F.4th 868, 881–82 (6th Cir. 2024)."

"Coleman's negligence claim against Hamilton County fares no better. Ohio grants its political subdivisions immunity from damages claims arising out of a 'governmental or proprietary function.' Ohio Rev. Code § 2744.02(A)(1); *see Rankin v. Cuyahoga Cnty. Dep't of Child. & Fam. Servs.*, 889 N.E.2d 521, 523–25 (Ohio 2008). But this state law contains exceptions. It does not grant immunity if a plaintiff's claim arises from negligent driving, the negligent maintenance of public roads, the negligent performance of a proprietary function, or a physical defect in a public building. *See* Ohio Rev. Code § 2744.02(B)(1)–(4). That said, the exception for physical defects in public buildings expressly excludes jails from its reach. *Id.* § 2744.02(B)(4). And the operation of a jail qualifies as a 'government' function, so it falls outside the exception for negligently performing a proprietary function. *Id.* § 2744.01(C)(2)(h). Coleman thus does not argue that her negligence claim could plausibly fall within any exception to immunity."

"Coleman next challenges the statute-of-limitations dismissal of her constitutional and negligence claims against NaphCare, the four NaphCare employees, and the five Hamilton County corrections officers. She added these defendants when she filed her second amended complaint in September

2023. But Ohio's two-year statute of limitations for personal-injury suits applies to her § 1983 and negligence claims against these parties. *See* Ohio Rev. Code § 2305.10(A); *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (en banc). Because Coleman's complaint alleges that her slip-and-fall accident occurred in June 2020, her own allegations suggest that she filed the claims outside this limitations period. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). Coleman nevertheless offers three reasons why she timely filed the claims. Her arguments require us to consider three questions: When did the claims accrue? Did the claims 'relate back' to her original complaint? And should we equitably toll the limitations period?"

The statute of limitations did not begin to run until Coleman's claims accrued. *See Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017)." …

"Although § 1983 incorporates the most analogous *state* statute of limitations, courts determine the accrual date of § 1983 claims using *federal* standards. *See Reguli v. Russ*, 109 F.4th 874, 879 (6th Cir. 2024) (per curiam). And although the Supreme Court has presumptively followed what has been called an 'occurrence' rule for § 1983 claims, our cases have presumptively followed a 'discovery' rule for those claims. *See id.* (citations omitted). The occurrence rule starts the limitations period on the first day that a plaintiff has a complete cause of action; the discovery rule delays this start date until the plaintiff discovers basic facts about the claim. *See id.* As we have done in past cases, we can assume that the more plaintiff-friendly discovery rule applies here because the difference does not matter to the outcome. *See id.* at 883."

"Even still, our § 1983 cases leave unclear what this discovery rule requires plaintiffs to have 'discovered' to trigger the limitations period. Many of those cases suggest that the limitations period starts when a 'plaintiff knows or has reason to know of the *injury* which is the basis of his action.' *Id.* at 882 (quoting *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir. 1984)). In another § 1983 case, though, we suggested that the limitations period does not start until a plaintiff knows or should know of 'both his *injury* and the *cause* of that injury.' *Id.* (quoting *Bishop v. Child.'s Ctr. for Developmental Enrichment*, 618 F.3d 533, 536 (6th Cir. 2010)). Which one of these discovery-rule tests adopts the right approach (assuming the discovery rule applies at all)? On this issue too, we need not reconcile our conflicting caselaw to decide this case. *See id.* at 883."

"Even if the discovery rule requires knowledge of both the injury and its cause, Coleman's complaint shows that her § 1983 claims accrued on the date of her accident. Start with her injuries. She knew of her physical harm immediately after she fell because she 'had plainly visible injuries including an open wound on her left ankle and significant swelling and bruising.' 2d Am. Compl., R.28, PageID 227. She also knew that she received little medical care 'for approximately four (4) hours' after this accident despite 'her complaints of excruciating pain and requests for medical help' from the four NaphCare employees. *Id.* Turn to the causes ofthese injuries. Immediately after she hurt her ankle, she knew that 'the slippery and dangerous condition of the shower caused' her fall. *Id.*, PageID 225. And she knew that the four NaphCare employees had failed to treat her during the four hours that she suffered through the pain. *Id.*, PageID 227."

"In response, Coleman counters with a single argument: that she could not have known of the 'cause' of her injuries to trigger the statute of limitations until she learned the identities of the medical personnel who failed to treat her and their affiliation with NaphCare rather than Hamilton County. She is mistaken. To start, our § 1983 caselaw has already rejected claims that plaintiffs must know the 'identity' of the defendants who harmed them to start the statute of limitations under the discovery rule. *Miller v. Cocke County*, 2022 WL 103143, at *2 (6th Cir. Jan. 11, 2022); *see Ruiz-Bueno v. Maxim Healthcare Servs., Inc.*, 659 F. App'x 830, 834 (6th Cir. 2016); *Dowdy v. Prison Health Servs.*, 21 F. App'x 433, 434–35 (6th Cir. 2001) (order). The injury itself should put plaintiffs on notice of the need to investigate the identities of the culprits to 'protect' their rights. *Miller*, 2022 WL 103143, at *2. And if those culprits attempt to hide, courts can fix that 'problem' on the backend through tolling doctrines like fraudulent concealment. *See id.* at *3."

"We end with a disclaimer: § 1983 plaintiffs cannot hold private companies like NaphCare vicariously liable for the acts of their employees. *See Savoie v. Martin*, 673 F.3d 488, 494 (6th Cir. 2012). Instead, plaintiffs must show that their injuries arose out of a private company's policy or custom (such as its failure to train its employees). *See id.* Perhaps Coleman could have argued that she did not know of this distinct failure-to-train 'cause' even if she immediately knew of the NaphCare employees' failure to treat her. *Cf. Snyder-Hill*, 48 F.4th at 703–04. But we need not resolve this issue now because Coleman did not make this argument or even allege any NaphCare custom or policy. She has thus forfeited the issue. *See Blick*, 105 F.4th at 881–82."

"A simpler analysis shows that Coleman's negligence claims accrued on the same date of her accident. State law (not federal law) determines the accrual date of state claims in federal court. *See Modern Holdings, LLC v. Corning, Inc.*, 2024 WL 4287900, at *3 (6th Cir. Sept. 25, 2024) (citing cases). And Ohio's legislature has presumptively set an occurrence rule for most personal-injury claims: 'a cause of action accrues [for those claims] when the injury or loss to person or property occurs.' Ohio Rev. Code § 2305.10(A). The legislature has also adopted a few exceptions to this presumptive rule that delay the accrual date for certain injuries that take time to manifest themselves. *See id.* § 2305.10(B)(1)(5). But Coleman does not try to invoke any of these statutory exceptions. So her negligence claim accrued on the day of her accident and injury under the plain text of Ohio Revised Code § 2305.10(A)."

"Because Coleman's claims accrued in June 2020, she timely filed her *original* complaint in May 2022. So Coleman next argues that her second amended complaint 'relates back' to this original one under Federal Rule of Civil Procedure 15. If so, she could use the initial complaint's filing date for her later pleading. And Coleman points out that the earlier date would render her claims timely even against the parties (NaphCare, its employees, and the five corrections officers) that she sued later. Yet this theory misapplies Rule 15's relation-back doctrine."

"Rule 15(c) provides that '[a]n amendment to a pleading relates back to the date of the original pleading' in several circumstances. Fed. R. Civ. P. 15(c)(1). As relevant here, an amended complaint that 'changes the party or the naming of the party against whom a claim is asserted' will relate back to the date of the original complaint if the amendment satisfies four criteria. Fed. R. Civ. P. 15(c)(1)(C); *see Schiavone v. Fortune*, 477 U.S. 21, 29 (1986). The amended complaint must pursue a claim that arose out of the same 'conduct, transaction, or occurrence' as the claim in the original complaint. Fed. R. Civ. P. 15(c)(1)(B), (C). The party added by the amended complaint must have 'received such notice of the action that it will not be prejudiced in defending on the merits[.]' Fed. R. Civ. P. 15(c)(1)(C)(i). And this party must have learned (or should have learned) 'that the action would have been brought against it, but for a mistake concerning the proper party's identity.' Fed. R. Civ. P. 15(c)(1)(C)(ii). Lastly, the new party must have received the required notice and learned the required information within the period for serving the original complaint. Fed. R. Civ. P. 15(c)(1)(C) (citing Fed. R. Civ. P. 4(m))."

"We can resolve this case under the third requirement: that a newly named party 'knew or should have known that the action would have been brought against it, but for a *mistake* concerning the proper party's identity.' Fed. R. Civ. P. 15(c)(1)(C)(ii) (emphasis added). Coleman asserts that her original complaint made a 'mistake' because it used 'John Doe' and 'Jane Doe' placeholders for the Hamilton County corrections officers and NaphCare employees that her amended complaint added. But what was her 'mistake'? The Supreme Court has read that word to convey what any ordinary person would understand it to mean: '[a]n error, misconception, or misunderstanding; an erroneous belief.' *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538, 548 (2010) (quoting *Black's Law Dictionary* 1092 (9th ed. 2009)). And, as we have held for decades, plaintiffs do not commit an 'error' or have a 'misconception' when they recognize that they do not know the name of a defendant and use a 'John Doe' placeholder instead. *Id.*; *see Zakora v. Chrisman*, 44 F.4th 452, 481–82 (6th Cir. 2022); *Smith v. City of Akron*, 476 F. App'x 67, 69 (6th Cir. 2012); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996). These types of 'known unknowns, in the happy phrase coined by Secretary of Defense Donald Rumsfeld,' do not qualify as mistakes because an 'absence of knowledge' is different from an error in knowledge. *Republic of Iraq v. Beaty*, 556 U.S. 848, 860 (2009); *Zakora*, 44 F.4th at 482. Coleman thus cannot rely

on the relation-back doctrine because she cannot show the required error for any of the newly added defendants."

"… Although plaintiffs need not plead a claim's timeliness, defendants can still move to dismiss a complaint based on the statute of limitations if the complaint affirmatively alleges 'facts showing that [the plaintiffs] did not sue in time.' *Reguli*, 109 F.4th at 879. And here, Coleman's alleged facts establish that she did not sue within the facially applicable limitations period. *See id.* When plaintiffs 'plead themselves out of court' in this way, *id.*, the burden switches to them to allege facts that plausibly 'establish an exception to the statute of limitations' (such as equitable tolling). *Lutz*, 717 F.3d at 464 (quoting *Campbell v. Grand Trunk W. R.R. Co.*, 238 F.3d 772, 775 (6th Cir. 2001)); *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 520 (6th Cir. 2008). But Coleman's equitable-tolling arguments on appeal did not contain a single citation to the document that matters: her complaint. *See Gordon v. England*, 354 F. App'x 975, 981 (6th Cir. 2009); *Bishop*, 520 F.3d at 520. She instead cited other materials (or just alleged facts in her appellate brief). If she sought to add more facts to bolster her equitable-tolling argument, she should have moved to amend her complaint. *See Bates*, 958 F.3d at 483–84. We must limit ourselves to that document."

7. Title VII Sex Discrimination - Verdict Form – Jury trial – General verdicts simply ask the jury to say who wins, and if it's the plaintiff, to say how much she gets - Special verdicts ask the jury for special written findings on each issue of fact submitted to it - If the court asks the jury for special verdicts, then it becomes the role of the court to decide whether there is liability, which it does by applying the law to the jury's factual findings - A general verdict with interrogatories combines a general verdict with factual questions that would, standing alone, be special verdicts - In sum, a court asks for a general verdict when it asks the jury to declare the ultimate result of a claim – The magistrate judge called for a general verdict on each of discrimination and retaliation - By awarding damages, the jury found in Debity's favor on its general verdict, but also found that the Board proved its affirmative defense - This is an irreconcilable inconsistency because, as a matter of law, the jury cannot find that the Board proved its affirmative defense but is liable nonetheless - The interrogatories for the discrimination claims are inconsistent with the general verdict, but not with each other – The court had no trouble concluding that an employer's desire to save money constitutes a legitimate business related reason - If a reasonable juror could believe that the Board was genuinely concerned about the budget, then their affirmative defense survives - Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA- Just because relying on supply and demand might lead to wage decisions based on factors unrelated to an individual's qualifications for a particular job, such policies are not necessarily gender biased - An employer may not use supply and demand as an excuse to discriminate generally by sex just because there are more people from a certain sex applying for a given job

MARINA DEBITY v. MONROE COUNTY BOARD OF EDUCATION
SIXTH CIRCUIT COURT OF APPEALS No. 24-5137 Decided and Filed: April 2, 2025

"Marina Debity brought claims against the Monroe County Board of Education for sex discrimination and retaliation in violation of the Equal Pay Act (EPA), Title VII of the Civil Rights Act of 1964 (Title VII), and the Tennessee Human Rights Act (THRA). Debity alleges that the Board offered her a lower salary than it had paid Matthew Ancel for the same job two years earlier. According to Debity, when she asked for the same salary as Ancel, the Board withdrew her job offer in retaliation."

"A jury found that the Board did offer Debity less money for equal work, but for legitimate reasons having nothing to do with her sex. It also found that the Board did not retaliate against Debity. Based on these findings, she had no claim to damages. Nevertheless, the jury awarded Debity slightly more

than $195,000, likely because of poor instructions on the verdict form. The magistrate judge, presiding with the parties' consent, noticed the inconsistency between the damage award and the jury's finding of no liability but nonetheless dismissed the jurors without allowing the parties to object."

"On appeal, we face two questions. The first is what type of verdicts the jury returned. The second is whether the Board's affirmative defense, that it offered Debity less money for a reason other than sex, survives a motion for judgment as a matter of law."

"We conclude that the magistrate judge presented the jury with a general verdict on the retaliation claims and a general verdict with interrogatories on the discrimination claims. We also conclude that the jury's answers to the interrogatories on the discrimination claims are consistent with each other but inconsistent with the general verdict. Though we reject the magistrate judge's classification of these verdicts as special verdicts, the Federal Rules of Civil Procedure still permit the magistrate judge's chosen course (entering judgment based on the interrogatories) under the correct classification, so we affirm it."

As for the Board's affirmative defense to the discrimination claims, we hold that two reasons in this case—(1) budget constraints and (2) market forces of supply and demand—each provide an independent basis to uphold the jury's verdict. Both are legitimate business explanations for offering one employee less salary than another for the same position. And both rationales have sufficient evidence in the record for a reasonable juror to find that those reasons, not Debity's sex, are why the Board offered her less money."

"We therefore affirm the judgment below."

"Marina Debity was a longtime, tenured education provider in the Monroe County school district. She worked as a special education teacher starting in 2008 and later transitioned into a case manager role. In 2018, she entered a postgraduate program to become a school psychologist while continuing to work full-time for Monroe County. In 2020, as part of her postgraduate program, Debity interned for the district, a typical career path for school psychologists there. Upon graduation, however, she learned from Trey Ferguson, Monroe County's Executive Director of Exceptional Education, that the district already had its four full-time psychologist roles filled. Nonetheless, Ferguson told Debity that he would try to find room in the budget to add a fifth position. He accomplished this, so on April 22, 2021, Debity applied for the new school psychologist position."

"The Board uses a step system for paying school psychologists. Those with more years of experience are paid at a higher step, which equates to a higher salary. But candidates can negotiate the step at which they start."

"That is what Matthew Ancel did. He was the only man that Ferguson could remember who had ever applied for a school psychologist position. Ferguson hired Ancel for the job in 2019, offering him a Step 5 salary, commensurate with his five years of experience working in a different capacity in the district. Like Debity, Ancel applied to join Monroe County after completing an internship there. And like Debity, he had no other experience as a school psychologist. Ferguson believed, but could not confirm, that Ancel received his Step 5 salary through negotiation after the district had offered a lower amount. On appeal, Debity presents nothing in the record that suggests otherwise."

"According to Ferguson, the hiring environment changed significantly from 2019 to 2021, when Debity applied. Ferguson testified that, in 2019, the Board was 'desperate' to hire a school psychologist. Trial Proceedings Vol I, R. 77, PageID 1110. The district needed four psychologists to meet students' needs. Of the four on staff in 2019, one had announced he would retire, and the other had dropped to part-time to pursue a doctorate degree. According to Ferguson, these developments put the Board in a position where it had to yield to Ancel's salary demands at a time when the district had the funding available to do so. By contrast, in 2021, the district already had four full-time psychologists on staff.

Ferguson testified it was all he could do to squeeze $60,000 out of the annual budget to create the fifth psychologist position for which Debity applied."

"On May 13, 2021, Ferguson offered her that new job, but they failed to agree on the salary. On May 24, Debity told Ferguson that she had received offers from Meigs County and Blount County of $66,000 and $64,000, respectively. On May 25, Debity asked Dr. Kristi Windsor, Ferguson's supervisor, for a Step 5 salary, noting that it was the pay level where Ancel had started with his five years of experience in a capacity outside psychology. Debity also noted that she had thirteen years of non-psychology experience, so she should be paid at least as much as Ancel. But her arguments did not persuade. On May 26, Dr. Windsor made Debity her final offer: a Step 3 salary of $61,077.56—higher than the $60,000 Ferguson had budgeted for, but less than what Debity would accept."

"Ferguson testified that not only did he struggle to find $60,000 in the budget to hire a fifth psychologist, but he also fought for the Board's approval of the Step 3 salary offer because he wanted very much to hire Debity. Ferguson budgeted for the fifth school psychologist position in part by replacing a retiring special education teacher at Coker Creek Elementary School with a lower-paid teaching assistant. He testified that sometime in the middle of the negotiations with Debity, Dr. Windsor informed him that the Board demanded he fill the Coker Creek position with a full-time teacher. This development meant he could no longer afford Debity's position."

"By May 28, two days after Dr. Windsor gave her ultimatum, Debity had accepted the $64,000 offer from Blount County, which credited all thirteen years of her prior experience. The job posting for a school psychologist was removed from Monroe County's website on June 4, and a position for a full-time teacher at Coker Creek was posted on July 9."

"The trial started on May 22. On the third day of the trial, the magistrate judge held a charge conference with counsel. They discussed the jury instructions at length, but not a word was spent on the verdict form. The jury instructions did not give the jurors detailed guidance for filling out the verdict form. The magistrate judge submitted the case to the jury that afternoon."

"Debity claims on appeal, and the Board does not rebut, that the magistrate judge submitted the verdict form to the jury without showing the final version, formulated by the magistrate judge, to counsel first. This matters because, on April 3, about seven weeks before trial, Debity had filed a stipulated verdict form. The magistrate judge's verdict form differs from the stipulated version in a salient way. The line of the magistrate judge's form that says, '[i]f you answer 'No' to Question 1(a) and Question (2), you do not need to answer Question 3' replaced a line in the stipulated verdict form that said, '[i]f your verdict is for the Defendant, you do not need to answer question [3].' R. 49, PageID 301. The magistrate judge's version of the form had the potential to confuse jurors—it did not tell them what to do about Question 3 if they answered 'yes' to both Questions 1(a) and 1(b). And the parties had no opportunity to object. Printed below is the text of the verdict form as used at trial and completed by the jurors.

> Discrimination in violation of the Equal Pay Act, Title VII of the Civil Rights Act, and the Tennessee Human Rights Act:
>
> Did the Plaintiff prove by a preponderance of the evidence that the Defendant used a lower wage scale for setting a wage than the wage of a male and the jobs at issue involved substantially equal skill, effort, and responsibility?"
>
> Did the Defendant prove by a preponderance of the evidence that any pay disparity was due to a factor other than sex that was specifically chosen for a legitimate purpose?
>
> ✓ Yes No
> If yes, go to section b. If no, skip section b and proceed to Question 2.

✓ Yes No

Retaliation in violation of the Equal Pay Act, Title VII of the Civil Rights Act, and the Tennessee Human Rights Act: Did the plaintiff prove by a preponderance of the evidence that she engaged in legally protected activity for which the Defendant took a materially adverse employment action against her?

Yes ✓ No

If you answer 'No' to Question 1(a) and Question (2), you do not need to answer Question 3.

1. If your verdict is for the plaintiff on either her discrimination or her retaliation claim, what is the amount of damages to allow for each of the following categories:

Compensatory damages: $ 5,875
Economic losses (back pay): $ 50,000
Future losses (front pay): $ 139,171.59"

"The jury returned this verdict the day after receiving the form. The foreperson handed the verdict form to the magistrate judge, who asked the clerk to read it aloud. But before the clerk could do so, the magistrate judge asked the clerk to stop and called for a five-minute, unexplained recess."

"About twenty minutes later, the magistrate judge called the court back into session. The magistrate judge then returned the verdict form to the clerk, who finally read it aloud. Without talking to counsel, the magistrate judge polled the jury. After every member of the jury had raised his or her hand, the magistrate judge thanked the jurors for their service and dismissed them. The jurors had checked 'yes' in boxes 1(a) and 1(b), 'no' in box 2(a), and awarded compensatory damages of $5,875; economic losses of $50,000; and future losses of $139,171.50. That totals to $195,046.50."

"It was at this point, *after* the jurors were dismissed, that the magistrate judge addressed the parties for the first time since exiting recess. 'So, the parties may now understand why I took a break to take a look at the verdict form,' the court said. Trial Proceedings Vol IV, R. 70, PageID 948. The court then explained the apparent inconsistency in the jury's verdict. When the court asked the parties to respond, Debity's counsel objected. This objection was timely under Rule 51(c)(2)(B) because Debity could not have known that the court gave the jury a verdict form that differed from the stipulated one."

"On June 13, Debity timely filed motions for judgment as a matter of law and for a new trial due to the inconsistent verdict. The magistrate judge denied these motions. Of particular importance, the court held that all the questions on the verdict form were special verdicts. *See Debity v. Monroe Cnty. Bd. of Educ.*, No. 3:22-CV-6-JEM, 2024 WL 2703758, at *2 (E.D. Tenn. Jan. 26, 2024). Pursuant to Rule 49(a), the court reconciled the verdicts by throwing out the award of damages and finding for the Board on all the claims. *See id.* at *3."

"On appeal, Debity asks for a new trial under Rule 49(b)(4), asserting that the verdict form is a general verdict with interrogatories where the interrogatories are inconsistent with each other and with the general verdict. Debity also moves for judgment as a matter of law on the Board's affirmative defense, which applies to the discrimination claims only."

"We review motions for judgment as a matter of law de novo. *See Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012). We view all evidence in a light most favorable to the nonmoving party, affording them all reasonable inferences. *See id.*"

"Here is the problem. The Federal Rules of Civil Procedure intuit three types of verdicts: general verdicts, special verdicts, and general verdicts with interrogatories. Each iteration gives the judge distinct responsibilities. The magistrate judge ruled that she presented only special verdicts to the jury. If so, then the court had discretion to reconcile inconsistent verdicts per Rule 49(a). Debity

argues the verdicts fall under Rule 49(b)(4)—general verdicts with interrogatories where the interrogatories conflict with each other and with the general verdict. If Debity is correct, the magistrate judge had no discretion to reconcile inconsistencies and should have ordered a new trial. Therefore, it matters how we classify the verdicts."

"General verdicts 'simply ask the jury' to say who wins, and if it's the plaintiff, to say how much she gets." …

"Special verdicts ask the jury for 'special written finding[s] on each issue of fact' submitted to it. Fed. R. Civ. P. 49(a); 3 William Blackstone, Commentaries *377 ('herein they state the naked facts, as they find them to be proven, and pray the advice of the court thereon'). If the court asks the jury for special verdicts, then it becomes the role of the court to decide whether there is liability, which it does by applying the law to the jury's factual findings. *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990)."

"Questions of ultimate fact differ from general verdicts because the court still must apply additional law to the jury's findings to determine liability. *See Portage II*, 899 F.2d at 1520 ('under the special verdict system, the jury makes formal findings on issues of ultimate fact and the court applies the law'). In contrast, when a court asks for a general verdict (with or without interrogatories), it leaves the question of liability to the jury. Rule 49 highlights this distinction: Rule 49(a) discusses the court rendering 'its judgment,' evincing its independent role after requesting a special verdict, while Rule 49(b) says the court 'must approve . . . an appropriate judgment on the verdict and answers,' evincing its lack of independence after requesting a general verdict. "

"To see this distinction in action, imagine a negligence suit where the parties have stipulated to every issue except proximate cause. The court would instruct the jury on the legal meaning of proximate cause and ask it to decide only that question based on the facts adduced at trial. This would be a special verdict because the jury was not asked to decide the negligence claim in whole. Indeed, the jury could not decide liability in whole because it would not know that negligence also requires a duty and a breach of that duty. The court would have to make that decision for itself based on the stipulated facts. What matters is whether the jury decided liability in whole—a single discrete issue cannot form the basis for a general verdict, even if that issue is dispositive to the liability analysis."

"A general verdict with interrogatories combines a general verdict with factual questions that would, standing alone, be special verdicts. Indeed, we can see Rule 49(b) interrogatories are equivalent to special verdicts because the text of the Rules limits both to 'issues of fact.' *Compare* Fed. R. Civ. P. 49(a)(1), *with* Fed. R. Civ. P. 49(b)(1). The only difference is how we name them. If a court asks for a general verdict, then any factual question is an interrogatory. If it does not, then any factual question is a special verdict. Adding interrogatories to a general verdict helps a jury 'give close attention to certain factual matters,' *Bills*, 52 F.3d at 605, and 'serve[s] to check the propriety of the general verdict' through the safeguards Rule 49(b) provides, *Portage II,* 899 F.2d at 1520."

"In sum, a court asks for a general verdict when it asks the jury to declare the ultimate result of a claim. Examples include 'Title VII violation: for plaintiff/defendant' and 'Did the defendant violate Title VII? Yes/No'. A court asks a jury to find a special verdict or interrogatory in scenarios short of that, like when the court poses questions of evidentiary or ultimate fact. And when a judge asks for a general verdict and answers to questions, we call these questions interrogatories. When the judge only asks for answers to questions, we call them special verdicts."

"We now address whether the magistrate judge called for a general verdict on each of discrimination and retaliation. We hold that she did for both."

"The jury instructions provide the best evidence. We 'evaluate the verdict form in the context of the instructions as a whole' because the jury instructions are the 'user manual' for the verdict form. *Moody v. United States*, 958 F.3d 485, 491 (6th Cir. 2020). 'In other words, we must determine

whether the instructions and the verdict sheet required the jury to make a finding on the ultimate question of liability.' *Knoedler*, 805 F. App'x at 153."

"The jury instructions here were written to be paired with general verdicts. In multiple places they ask the jury to find for the plaintiff or defendant, evincing that the court wanted the jury to make the final call on liability, not reserve that decision for itself. *Cf. Turyna*, 83 F.3d at 181. For example, the instructions tell the jury '[y]ou must decide for yourselves if plaintiff has proven her claims,' Trial Proceedings Vol III, R. 79 at PageID 1634, and that 'your second duty is to take the law that I give you, apply it to the facts, and decide if plaintiff has proven her claims,' *id.* at PageID 1609. The instructions also tell the jury that it must consider the question of damages 'if you return a verdict in the plaintiff's favor.' *Id.* at PageID 1626."

"The verdict form itself also has indicia of general verdicts. Question 3 asks the jury to award damages, '[i]f your verdict is for the Plaintiff on either her discrimination or her retaliation claim.' That sentence is exactly what one would expect to see on a general verdict form. Indeed, the Third Circuit has held that a damages question phrased this way suffices to show a general verdict because it shows that an award of damages depends on a finding of ultimate liability. *Stanton by Brooks v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 574 (3d Cir. 1983) (holding the following standalone question to be a general verdict: 'If you determine that any of the defendants are liable in damages to plaintiff, what compensatory damages do you award?')." …

"We respectfully part ways with the concurrence's conclusion that the jury rendered special verdicts. Contrary to what the concurrence implies, a verdict form need not explicitly state that it is a general verdict to be properly characterized as such. *See Jarvis v. Ford Motor Co.*, 283 F.3d 33, 56 (2d Cir. 2002) ('where a jury is instructed to apply legal principles and assign liability, the answers to the questions submitted to the jury are not special verdicts, despite the use of those words in the title appended to the form' (quotation omitted)). The relevant question is what type of verdict the jury returned. Both the jury instructions and the verdict form can help answer that question. … We believe the jury instructions illustrate what the verdict form struggles to say clearly: the magistrate judge asked the jury to return general verdicts."

"Because we hold that the district court asked the jury for general verdicts on both the discrimination and retaliation claims, we now analyze whether the court asked for general verdicts only or general verdicts with interrogatories per Rule 49(b) for each of discrimination and retaliation."

"We take the discrimination questions first. Questions 1(a) and 1(b) are questions of ultimate fact because each question on its own is insufficient to 'fully resolve[]' Debity's discrimination claim. *Team Contractors*, 976 F.3d at 520. Question 1(a) cannot stand alone because finding that Debity met her burden could not create liability without knowing whether the Board failed to prove its affirmative defense. And while, as here, a finding that the Board succeeded on its affirmative defense would be dispositive, that would not be true if the jury found the other way, so Question 1(b) does not stand alone either. Therefore, these questions can only be special verdicts or interrogatories. And because there is a general verdict, these questions must be interrogatories per Rule 49(b)."

"We now turn to the apparent inconsistency in the interrogatories. It is obvious that the general verdict conflicts with the interrogatories. By awarding damages, the jury found in Debity's favor on its general verdict. *Cf. Stanton by Brooks*, 718 F.2d at 574. Yet, it also found that the Board proved its affirmative defense. This is an irreconcilable inconsistency because, as a matter of law, the jury cannot find that the Board proved its affirmative defense but is liable nonetheless. Our duty is to reconcile the jury's findings when possible, not to choose between them. *See Am. Cas. Co. of Reading, Pa. v. B. Cianciolo, Inc.*, 987 F.2d 1302, 1305 (7th Cir. 1993) ('there is no priority among inconsistent verdicts—the judge may not assume that the first answer is the 'authentic' one with which later answers must be reconciled')."

"Debity argues that the jury's responses to the discrimination questions fall under Rule 49(b)(4) because the interrogatories conflict with each other and with the general verdict. But the interrogatories are not inconsistent with each other. It is plainly consistent for the jury to find that Debity proved a pay disparity, but that the Board proved there was a legitimate purpose. None of the caselaw Debity cites suggests otherwise. We therefore hold that the interrogatories for the discrimination claims are inconsistent with the general verdict, but not with each other."

"As a result, the discrimination claims fall under Rule 49(b)(3). According to this subsection, a court may either (1) enter judgment based on the answers to the questions notwithstanding the general verdict, (2) direct the jury to continue deliberating, or (3) order a new trial. The second option is unavailable at this point. The Rules do not make clear whether it would be proper for us to remand the choice between the remaining two options to the magistrate judge or whether we can make the decision ourselves."

"Fortunately, we need not answer the question. When the magistrate judge erroneously classified these verdicts as special verdicts, she entered judgment based on the answers to Questions 1(a) and 1(b), in effect ignoring the jury's answer to Question 3. Based on how we have classified the questions on the verdict form, this is exactly what the magistrate judge would do if she were entering judgment based on the answers in accordance with Rule 49(b)(3)(A). We have no trouble holding that remand is unnecessary because it is clear that the magistrate judge would enter judgment based on the answers to Questions 1(a) and 1(b) notwithstanding the general verdict as reflected in Question 3. Therefore, despite classifying these verdicts differently than the magistrate judge did, we can nevertheless affirm the judgment on the discrimination claims."

"We now address whether Question 2(a) is an interrogatory or part of a general verdict together with Question 3. We hold that it is part of the general verdict because, taking its text and relevant jury instructions together, the question asks the jury to declare the winner of the claim in whole."

"Considered on its own, the verdict form gives conflicting signals. On the one hand, Question 2(a) appears to collect many facts that the jury needs to consider into one question of ultimate fact. *See* Dudnik, *supra*, at 502–3. Nor is there any explicit question on the verdict form asking the jury to rule for either party on this claim. On the other hand, the preface to Question 2(a) says the question is about violating the statutes through retaliation. Further, it makes sense for the only question under the retaliation subheading to be a general verdict on that claim. And, as discussed previously, the court premises an answer to Question 3 on a finding of liability."

"Once one considers the jury instructions, it becomes clear again that the court asked for a general verdict. The magistrate judge instructed the jury to determine 'whether plaintiff has established her retaliation claim.' Trial Proceedings Vol. III, R. 79, PageID 1611." …

"Having found that Question 3 and Question 2(a) form a general verdict, we hold that the verdict is a consistent one in favor of the Board."

"We conclude also that when the jury awarded damages in Question 3, it did so only for the discrimination claims. One might ask whether we should interpret the jury's award of damages to be at least partially for retaliation. That would create an irreconcilable contradiction where the jury finds no liability but awards damages. *See Turyna*, 83 F.3d at 181 ('It would do just as much violence to the jury's factual findings to give primacy to its answer on the liability issue, ignoring its response on damages, as it would to do the reverse.'). We reject such a reading because it is our duty, where possible, to interpret the jury's responses as harmonious. *Cf. Gallick v. Baltimore & Ohio Ry. Co.*, 372 U.S. 108, 119 (1963) (In the context of interrogatories, 'it is the duty of the courts to attempt to harmonize the answers, if it is possible under a fair reading of them[.]'); *see also B. Cianciolo*, 987 F.2d at 1306 ('[W]e should do what we can to save the verdict against the specter of inconsistency.'). Because the jury did not state its basis for damages, we may infer one that is harmonious with the other answers on the verdict form."

"Debity also moves for judgment as a matter of law on the question of whether the Board made a successful affirmative defense to the discrimination claims. In this posture, we are 'not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences.' *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35 (1944). If 'a reasonable juror could reach the challenged verdict,' we will not disturb it. *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 821 (6th Cir. 2000). We affirm the magistrate judge's denial of the motion because a reasonable juror could find that the Board offered Debity a lower salary than Ancel's for a reason other than sex."

"The EPA prohibits paying employees of one sex lower wages than are paid to the opposite sex for equal work. *See* 29 U.S.C. § 206(d)(1). There is a catch-all exception: when the pay differential is due to a factor 'other than sex.' *Id.* This 'does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.' *E.E.O.C. v. J.C. Penney Co., Inc.*, 843 F.2d 249, 253 (6th Cir. 1988). In this respect, Title VII and the THRA work the same as the EPA. *See Briggs v. Univ. of Cincinnati*, 11 F.4th 498, 508 (6th Cir. 2021) (Title VII); *Kirkland v. City of Maryville*, 54 F.4th 901, 910 (6th Cir. 2022) (THRA)."

"In his testimony, Ferguson pointed to two reasons for offering Debity less than Ancel: budget constraints and a different supply and demand for the times in which Debity and Ancel applied for their jobs. Either of these is a legitimate business reason to offer Debity less than Ancel. Therefore, either is sufficient to uphold the jury's verdict."

"We do not read the EPA to 'preclude cost-savings as a legitimate business justification for the [] government' 'as long as it is not based upon the lesser cost of employing one sex versus the other.' *Lissak v. United States*, 49 F. Cl. 281, 287 (2001). Consequently, we have 'no trouble concluding that an employer's desire to save money constitutes a legitimate business related reason.' *Id.* If a reasonable juror could believe that the Board was 'genuinely concerned about the budget,' then their affirmative defense survives. *Lauderdale v. Ill. Dep't of Hum. Servs.*, 876 F.3d 904, 909 (7th Cir. 2017)."

"'Unequal wages that reflect market conditions of supply and demand are not prohibited by the EPA.' *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994). Just because relying on supply and demand 'might lead to wage decisions based on factors unrelated to an individual's qualifications for a particular job, such policies are not necessarily gender biased.' *Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003)."

"Take this case. Ferguson testified that when the school district hired Ancel, the Board was desperate because one of their four psychologists announced his retirement, and another moved to part-time. This 'would have left [the Board] in a real bind.' Trial Proceedings Vol I, R. 77, PageID 1110. According to Ferguson, 'it was a hard-to-staff position. We had no applicants for the position. We were in desperate need of a school psychologist at that time, and so we hired Mr. Ancel based on whatever was negotiated.' *Id.* at PageID 1110–11."

"In other words, Monroe County had a high demand for a psychologist in 2019 and a supply of one person, Ancel, to fill it. A reasonable juror could believe that this put the Board in a position where it needed to offer Ancel a higher salary than it would when there was a less urgent need to hire a psychologist, like in 2021 when Debity applied."

"Now, to be clear, an employer may not use supply and demand as an excuse to discriminate generally by sex just because there are more people from a certain sex applying for a given job. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974) (rejecting an affirmative defense when the 'differential arose simply because men would not work at the low rates paid women . . . and it reflected a job market in which Corning could pay women less than men'). But by Ferguson's account, this sort of generalized discrimination is not what happened here. He would have treated a woman

applying in 2019 as he treated Ancel and a man applying in 2021 as he treated Debity. Whether to believe Ferguson is a matter for the jury, not this court."

8. Attorney fees in a section 1983 action – Case explains steps district court should take to determine the appropriate attorney fee to award – District court needed to be more specific as to why it reduced the requested attorney fee by 35 percent – The court also held that, in § 1983 suits, losing state intervenors under § 2403(b) can be made liable for fees even if the state's litigation position was not frivolous, unreasonable, or without foundation - Although district courts must consider a partially prevailing plaintiff's degree of success in calculating a reasonable attorneys' fee, they are not mandated to reduce the award in such circumstances

DONALD FREED v. MICHELLE THOMAS, GRATIOT COUNTY, MICHIGAN, AND MICHIGAN DEPARTMENT OF ATTORNEY GENERAL
SIXTH CIRCUIT COURT OF APPEALS Nos. 24-1170/1197/1251 Decided and Filed: May 12, 2025

"Donald Freed, Gratiot County, and the state of Michigan appeal the district court's order awarding Freed attorneys' fees. We affirm the court's determination that Gratiot County and Michigan are liable for attorneys' fees. But for the following reasons, we vacate the court's fee calculation and remand for further proceedings."

"This case is almost seven years old, and Freed's current appeal is his third before this court."

"In 2017, Gratiot County foreclosed on Donald Freed's home because he did not pay his taxes. Freed's property was worth $98,800. At the time of foreclosure, Michigan's General Property Tax Act (GPTA) did not require that 'foreclosing governmental unit[s]' return the surplus proceeds from a foreclosure sale to the property owner. *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434, 446 (Mich. 2020). So even though Freed owed just under $1,110, the county sold his property for $42,000 and kept everything."

"Freed sued Gratiot County and its treasurer Michelle Thomas under 42 U.S.C. § 1983. He alleged that the county took his property without just compensation in violation of the Fifth and Fourteenth Amendments."

"Because Freed's claim implicated the GTPA's constitutionality, Michigan intervened under 28 U.S.C. § 2403(b). That federal law entitles states to join 'any action . . . wherein the constitutionality of any statute of that State affecting the public interest is drawn in question.' 28 U.S.C. § 2403(b). It also makes intervening states 'subject to all liabilities of a party as to court costs.' *Id.*"

"On remand, the county defendants and the Michigan Attorney General conceded that, post-*Rafaeli*, Michigan law required the government to return surplus proceeds from a foreclosure sale to the property's former owner. Thus, the parties agreed that Freed experienced a taking."

"But the parties disagreed about the value of Freed's taken property. The state and county argued that Freed could only recover the proceeds from the foreclosure sale that exceeded the amount to which the proceeds exceeded his debt. Freed, on the other hand, claimed that Gratiot County took his 'equity' and owed him the entire fair market value of his home (minus liens) at the time of the foreclosure sale—almost $98,000. The county defendants also argued that neither Thomas nor the county could be held liable under various immunity doctrines."

"The district court granted partial summary judgment to Freed on his takings claim. *Freed v. Thomas*, No. 17-cv-13519, 2021 WL 942077, at *2-4 (E.D. Mich. Feb. 26, 2021). We affirmed. *Freed v. Thomas* (*Freed II*), 81 F.4th 655, 657 (6th Cir. 2023). Citing *Rafaeli*, we concluded that the Fifth and Fourteenth Amendments required Gratiot County to pay Freed the difference between the foreclosure sale and his debt. *Id.* at 658-59. But we rejected Freed's equity theory. *Id.* We also determined that the county was

not immune from judgment but dismissed the claims against Thomas as barred by qualified immunity. *Id.* at 660, 661."

"Back in district court, Freed moved for attorneys' fees. Freed claimed that his attorney worked 366 hours on the case. For 274.5 of those hours, the attorney charged a rate of $525 per hour. The attorney's hourly rate was $595 for the remaining 91.5 hours, which were spent working on the *Freed II* appeal. To support his requested fee, Freed submitted a log of his attorney's work and Michigan Bar documents showing the average rates charged by attorneys in various areas within the state[.]"

"The county opposed Freed's motion. So did the state of Michigan, which argued that it could not be made liable for attorneys' fees."

"The district court awarded fees to Freed, though it reduced by 35% both Freed's claimed hours and rates." …

"The district court then ordered Gratiot County to pay 95% of Freed's fees and the state of Michigan to pay the remaining 5%. The court based that apportionment on its assessment that Michigan's intervention did not inordinately increase Freed's attorney's workload. All three parties appealed."

"In § 1983 suits, the 'prevailing party' is entitled to 'a reasonable attorney's fee.' 42 U.S.C. § 1988(b). The 'threshold determination' for district courts is whether the party seeking fees prevailed. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). If so, the court 'determine[s] what fee is reasonable.' *Id.* (internal quotation marks omitted)."

"We review the district court's prevailing-party-status determination de novo. *Miller v. Caudill*, 936 F.3d 442, 447-48 (6th Cir. 2019), *abrogated in part on other grounds by Lackey v. Stinnie*, 145 S. Ct. 659, 667-68 (2025). A party prevails when 'a court conclusively resolves his claim by granting enduring relief on the merits that alters the legal relationship between the parties.' *Lackey*, 145 S. Ct. at 671."

"On the other hand, since the district court has a 'superior understanding of the litigation,' we review its fee award calculation for abuse of discretion. *Ne. Ohio. Coal. for the Homeless v. Husted*, 831 F.3d 686, 702-03 (6th Cir. 2016) (quoting *Hensley*, 461 U.S. at 437). A court abuses its discretion when it relies on clearly erroneous factual findings, incorrectly applies the law, or uses the wrong legal standard. *Id.* at 702. To properly calculate an attorneys' fee award, the district court must start by multiplying the 'hours reasonably expended' by 'a reasonable hourly rate.' *Hensley*, 461 U.S. at 433. We presume that this 'lodestar' figure represents a reasonable fee. *Murphy v. Smith*, 583 U.S. 220, 227 (2018). Still, the district court can adjust the initial fee award based on several factors, the 'most critical' of which is 'the degree of success obtained.' *Hensley*, 461 U.S. at 434-36; *see also Reed*, 179 F.3d at 471. On appeal, we look for 'a concise but clear explanation of [the court's] reasons for the fee award.' *Husted*, 831 F.3d at 703 (quoting *Hensley*, 461 U.S. at 437)."

"Before evaluating the district court's fee award calculation, we ask whether Freed could recover attorneys' fees in the first place. He could. Freed prevailed against both Gratiot County and Michigan, and the statute under which Michigan intervened explicitly makes the state subject to attorneys' fee liability."

"The district court correctly determined that Gratiot County owed Freed attorneys' fees. Indeed, the county concedes as much. And the record supports the conclusion that Freed partially prevailed against the county. The district court determined that the county had unconstitutionally taken Freed's property by foreclosing on his home, selling it, and then refusing to return the surplus proceeds from the sale to Freed. We affirmed that ruling. *Freed II*, 81 F.4th at 657. Although he did not prevail on every claim he brought against the county, Freed's partial success is enough to entitle him to at least some fee award. *Hensley*, 461 U.S. at 433."

"Freed can also recover fees from Michigan. He prevailed against the state, and neither sovereign immunity nor § 2403(b) prohibits a fee award."

"Michigan intervened under § 2403(b). That statute provides that intervening states, 'shall, *subject to the applicable provisions of law*, . . . be subject to *all liabilities of a party* as to court costs.' 28 U.S.C. § 2403(b) (emphasis added). But § 2403(b) does not tell courts how to assess an intervenor's court-cost liability; it only instructs that intervenors are liable like a party in the lawsuit. So, to determine Michigan's liability, we look to the 'applicable provisions of law,' that is, the substantive legal provisions governing what costs a party to the suit must pay. *Id.* In this case, because Freed brought a § 1983 action, Section 1988(b) controls the parties' liability for court costs. Thus, as an initial matter, the district court was correct to conduct the usual § 1988(b) analysis to decide Michigan's fee liability."

"And we agree with the district court that Freed also prevailed against Michigan. As we noted in *Freed II*, 'Michigan joined this case solely for the purpose of defending the constitutionality of the [GPTA].' *Freed II*, 81 F.4th at 661 n.4." …

"Michigan objects to the district court's imposition of attorneys' fees liability. First, it claims sovereign immunity. And second, the state argues it can only be made liable for attorneys' fees if its intervention was frivolous, unreasonable, or without foundation. These arguments are unavailing."

"According to Michigan, because the state is not a 'person' within the meaning of § 1983, it is also immune from fee liability under § 1988(b). True, the district court correctly declined to enter judgment against Michigan because of the state's sovereign immunity. *Freed II*, 81 F.4th at 661 n.4; *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (generally, states are not suable 'persons' under § 1983); *Tennessee v. Garner*, 471 U.S. 1, 22 (1985) (state made 'party only by virtue of 28 U.S.C. § 2403(b)' was 'not subject to liability'). But such immunity does not extend to attorneys' fees."

"And in § 1983 suits, court costs include attorneys' fees. 42 U.S.C. § 1988(b); *see Sullivan Cnty. v. Home Indem. Co.*, 925 F.2d 152, 153 (6th Cir. 1991). Indeed, in enacting § 1988(b), 'Congress had a perfectly intelligible reason for treating attorney fees as costs: to ensure that attorney fees could be awarded against a state notwithstanding [sovereign immunity].' *Home Indem. Co.*, 925 F.2d at 153 (internal quotation marks omitted). As a result, to the extent that Michigan must pay court costs despite its sovereign immunity, the state is also responsible for reasonable attorneys' fees."

"Even if it can be subjected to fee liability, Michigan contends it must pay attorneys' fees only if its litigation position was frivolous, unreasonable, or without foundation. For this point, the state relies on *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989)."

"We hold that, in § 1983 suits, losing state intervenors under § 2403(b) can be made liable for fees even if the state's litigation position was not frivolous, unreasonable, or without foundation. Two considerations guide this conclusion: § 2403(b)'s text and *Zipes*'s focus on 'blameless intervenors.' *Zipes*, 491 U.S. at 461."

"The plain language of § 2403(b) applies no bar to the recovery of fees. The statute simply directs that losing intervenor states can be made liable for attorneys' fees like any other party. Applying that rule, Michigan is most analogous to a § 1983 defendant, because it intervened solely to counter Freed's claims. And any traditional defendant would be liable for attorneys' fees in these circumstances."

"Next, we look to the district court's fee award calculation. Although the district court is owed deference, it 'must apply the correct standard,' *Fox v. Vice*, 563 U.S. 826, 838 (2011), and offer 'a reasonably specific explanation for all aspects of a fee determination,' *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 558 (2010). In this case, the district court insufficiently explained its decision to reduce Freed's hours and rate by 35% each."

"In awarding attorneys' fees, the district court's first job is to determine the lodestar award: the reasonable number of hours expended multiplied by a reasonable hourly rate. *Binta B.*, 710 F.3d at 627. This is a fact-intensive task, and thus the court must identify the facts upon which it relies."

"The district court should 'exclude from [its] initial fee calculation hours that were not 'reasonably expended.'' *Hensley*, 461 U.S. at 434 (quoting S. Rep. No. 94-1011, at 6 (1976)). To do so, the court may 'identify specific hours that should be eliminated,' *id.* at 436, or it may rely on its 'overall sense of a suit' and 'use estimates' to calculate an attorney's time, *Fox*, 563 U.S. at 838. Either way, it must explain '*why* the rejected hours were not reasonable.' *Minor v. Comm'r of Soc. Sec.*, 826 F.3d 878, 884 (6th Cir. 2016) (emphasis added)."

"The court needed to be more specific in justifying the 35% reduction. It could have examined whether the case was overstaffed, or if the hours claimed were duplicative or wasteful. *Hensley*, 461 U.S. at 434; *Husted*, 831 F.3d at 704. It also could have looked to whether Freed's attorney billed for time that was not directly related to the instant litigation. *See Webb v. Bd. of Educ.*, 471 U.S. 234, 242 (1985). Instead, the district court merely identified relevant factors that might weigh in favor of a fee reduction without applying those factors to Freed's case. It is insufficient to say that Freed's attorney billed too many hours; the court must explain why those hours were unnecessary to adjudicating Freed's claim."

"The same is true for the court's decision to reduce Freed's hourly rate. Although district courts 'ha[ve] broad discretion in determining a reasonable hourly rate for an attorney,' *Husted*, 831 F.3d at 715, their discretion is not unlimited. Here, the court simply said that reducing Freed's attorney's rate by 35% was appropriate because the attorney's hourly rate should have been between $350 and $375. But that does not explain why a rate between $350 and $375 per hour was reasonable to begin with."

"Moreover, the court did not make a finding as to the prevailing market rate, which we have identified as a useful guideline for determining a reasonable hourly rate. *Id.*"

"After conducting the lodestar calculation, the district court can adjust the award based on litigation-specific considerations. *Binta B.*, 710 F.3d at 628. The most important factor at this stage is the extent to which the party seeking fees prevailed. *Id.* (quoting *Hensley*, 461 U.S. at 436). Here, Freed only partially prevailed in two senses. First, he won only on his takings argument, and even there, his equity theory failed. Second, Freed's success was supported in part by intervening precedent."

"The district court did not discuss Freed's unsuccessful arguments as a basis for the 35% reduction. But it did mention 'the benefit that [Freed] received in this matter as a result of other cases.' *See* RE 138, Tr. of Att'y Fee Hr'g, PageID 2154. Presumably, the court was referring to *Rafaeli* and *Knick*—the county and the state both cited these cases to argue that Freed achieved only limited success. Although district courts must consider a partially prevailing plaintiff's degree of success in calculating a reasonable attorneys' fee, they are not 'mandated' to reduce the award in such circumstances. *Planned Parenthood Sw. Ohio Region v. Dewine*, 931 F.3d 530, 543 (6th Cir. 2019), *abrogated in part on other grounds by Lackey*, 145 S. Ct. at 667-68."

"The district court also mentioned, but did not apply, the *Johnson* factors. We suggested in *Reed* that district courts should turn to those factors only after determining the lodestar fee award. *See Reed*, 179 F.3d at 471-72; *see also Binta B.*, 710 F.3d at 628. *But see Adcock-Ladd v. Sec'y of Treasury*, 227 F.3d 343, 349 (6th Cir. 2000) (noting that the trial court can consider the *Johnson* factors 'either in determining the basic lodestar fee and/or adjustments thereto'). In Freed's case, the fee hearing transcript indicates that the district court's decision to reduce Freed's fee award was based largely on its assessment that Freed's attorney claimed too many hours at too high a rate. So the court may not have needed to apply *Johnson*. On remand, whatever fee award the court provides, it should clarify the extent to which that award is based on factors beyond the initial lodestar calculation."

"Finally, the county argues that Freed's fee award should not be greater than the amount he won on the merits. This argument is foreclosed by *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (plurality opinion), where the Court held that fee awards in § 1983 cases do not need to be proportional to money damages. *Id.* at 574; *id.* at 585 (Powell, J., concurring in the judgment) (also rejecting a proportionality requirement); *accord Bldg. Serv. Loc. 47 Cleaning Contractors Pension Plan v. Grandview Raceway*, 46 F.3d 1392, 1401 (6th Cir. 1995) ('In the civil rights area, there is no requirement that the amount of an award of attorneys' fees be proportional to the amount of the underlying award of damages.')."

9. Pretrial detainee died in jail – Qualified immunity denied as officer did not accept plaintiff's version of the facts on summary judgment – This court has consistently declined to exercise jurisdiction over appeals where the officer's dispute of facts is crucial to the appeal - When the record contains genuine factual disputes, a defendant may nonetheless invoke the court's jurisdiction by conceding the plaintiff's version of the facts for the purposes of appeal

STEVEN GILLMAN, as personal representative of the estate of Megan Miller, Deceased v. CITY OF TROY, MICHIGAN, JULIE GREEN-HERNANDEZ
SIXTH CIRCUIT COURT OF APPEALS No. 23-1702 Decided and Filed: January 22, 2025

"When Megan Miller was arrested and booked into the City of Troy's pretrial detention facility, she informed facility staff that she had been heavily using heroin and expected to go into withdrawal within about a day. Over the next two and a half days, Miller vomited continually. On the third day of her detention, Miller was found unconscious and unresponsive in her cell. She was pronounced dead soon after."

"Despite Miller's continual vomiting, no jail official sought medical care for her—not even Julie Green-Hernandez, one of the employees responsible for monitoring the City's pretrial detainees on the day of Miller's death. So Miller's husband sued Green-Hernandez, arguing that she violated Miller's constitutional right to adequate pretrial medical care under the Fourteenth Amendment and violated Michigan state law by acting with gross negligence."

"In this appeal, Green-Hernandez asks us to reverse the district court's conclusion that she is not entitled to qualified immunity on the Fourteenth Amendment claim or state law immunity on the negligence claim. Because Green-Hernandez's arguments regarding qualified immunity are premised on disagreements with the district court's factual findings, we lack jurisdiction over the qualified immunity question and dismiss that part of Green-Hernandez's appeal. Our jurisdiction is proper, however, over the district court's denial of Green-Hernandez's claim to governmental immunity under Michigan state law, and on that question we reverse."

"In July 2020, Megan Miller was arrested on a parole absconder warrant and transported to the City of Troy's pretrial detention facility. During the booking process, Miller stated that she was experiencing abdominal pain and had taken heroin about an hour before being arrested. Facility staff noted Miller's condition on her booking forms. During an interview with a police detective shortly thereafter, Miller stated that she had been using heroin 'a lot' and that she expected to begin experiencing symptoms of heroin withdrawal within about a day. Op., R. 95, PageID 3723. Miller was then detained in a holding cell in the lockup facility."

"Miller remained in the holding cell until she died two and a half days later. That morning, at approximately 7:00 a.m., Julie Green-Hernandez signed in for a shift as a Police Service Aid (PSA) for the City of Troy Police Department. PSAs like Green-Hernandez are tasked with monitoring pretrial detainees, performing routine cell checks, and reporting anything unusual to the on-duty police officer supervising them. PSAs must record each time they check a prisoner using a time stamp log in the facility's control room. PSAs are required to physically observe each prisoner at least every thirty minutes, either by walking by a prisoner's cell or by observing a prisoner remotely using the facility's

cameras—but only if the camera's view allows them to confirm the prisoner's wellbeing. And where a prisoner presents a medical, security, or psychological risk, PSAs are required to conduct a physical observation of the prisoner as often as possible and at least every fifteen minutes. The City of Troy Police Department's policies explain that prisoners who are intoxicated may present serious medical problems and that vomiting is an indication of severe intoxication."

"At the start of her shift, Green-Hernandez reviewed the booking materials for the facility's current detainees and noticed that Miller's materials stated that she was going through heroin withdrawal. Green-Hernandez then spoke with two PSAs with whom her shift overlapped; they both informed her that Miller had been vomiting."

"The facility's cameras do not show either Green-Hernandez or the other PSA on duty walk by Miller's cell at any point between 1:00 and 3:20 p.m. The cell-check log likewise does not reflect that Green-Hernandez checked on Miller at any time between 1:00 p.m. and 3:20 p.m. Green-Hernandez, however, testified that she remotely checked on Miller at least once between 1:30 and 2:00 p.m., but 'forgot' to log this cell check. *Id.* at PageID 3726. She claimed that during this cell check, she saw Miller's foot move while Miller was laying down, which she took to mean that Miller was 'okay.' *Id.* The facility's cell-check log shows that the other PSA on duty checked on Miller twice, presumably remotely, at 2:20 p.m. and at 3:04 p.m."

"At 3:20 p.m., Green-Hernandez returned to Miller's cell and found Miller unresponsive. Attempts to revive Miller were unsuccessful. EMS transported Miller to the hospital. Miller's hospital records state that an officer at the jail informed EMS that the last time anyone saw Miller conscious was 12:30 p.m. Miller was pronounced dead shortly after arriving at the hospital."

"Green-Hernandez begins by contesting the district court's order denying her motion for summary judgment on her qualified immunity defense. We review the district court's denial of qualified immunity de novo. *See Helphenstine v. Lewis County*, 60 F.4th 305, 314 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 692 (2024). '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.'' *Heeter v. Bowers*, 99 F.4th 900, 908 (6th Cir. 2024) (alteration in original) (quoting *Jackson v. City of Cleveland*, 64 F.4th 736, 745 (6th Cir. 2023)). Before we can address the merits of Green-Hernandez's qualified immunity arguments, however, we must confirm that we have jurisdiction over this appeal. We don't, so our qualified immunity analysis starts and ends with that threshold issue."

"Our jurisdiction to hear an interlocutory appeal concerning qualified immunity turns on whether the defendant's appeal raises questions of fact or of law. *Berryman v. Rieger*, 150 F.3d 561, 562–63 (6th Cir. 1998). We can review a denial of qualified immunity 'only to the extent' that the appeal 'turns on an issue of law.' *Adams v. Blount County*, 946 F.3d 940, 948 (6th Cir. 2020) (citation omitted). By contrast, we have no jurisdiction to review an appeal that is based on the defendant's 'quarrel with the plaintiff's record-supported facts, which the district court must adopt at summary judgment.' *Heeter*, 99 F.4th at 908. Accordingly, we 'have consistently declined to exercise jurisdiction over appeals where the officer's dispute of facts is 'crucial to' the appeal.' *Id.* at 909 (quoting *Adams*, 946 F.3d at 951). The 'onus is on the defendant to comply with this jurisdictional limit.' *Gillispie v. Miami Township*, 18 F.4th 909, 915 (6th Cir. 2021)."

"When the record contains genuine factual disputes, a defendant may nonetheless 'invoke our jurisdiction by conceding the plaintiff's version of the facts' for the purposes of appeal. *Anderson-Santos v. Kent County*, 94 F.4th 550, 554 (6th Cir. 2024)." …

"Here, Green-Hernandez's arguments on appeal fail to construe the record in the light most favorable to Gillman, and she has failed to adequately concede the material facts, as she must to invoke our jurisdiction. As in *Anderson-Santos*, Green-Hernandez has offered us a 'concession in name only,' despite repeated opportunities before this court to offer a genuine concession. *Id.*"

"*First*, in Green-Hernandez's opening brief on appeal, she repeatedly relied on her 'version of the facts' to support her arguments. *Adams*, 946 F.3d at 951. She emphasized, for example, that Miller did not show any signs of physical distress and that she had offered Miller medical attention—even though the district court noted that those facts were supported only by Green-Hernandez's testimony (which a reasonable jury could choose to disbelieve)."

"*Second*, after the parties completed their merits briefing, we ordered them to submit supplemental briefing on appellate jurisdiction. In her supplemental brief, Green-Hernandez attempted to invoke our jurisdiction with a concession to Gillman's version of the facts: she stated that she 'accept[s] the District Court's adopted facts, at least to the extent they are not contradicted by video evidence.' Appellant's Suppl. Br. at 2. But the rest of her supplemental brief demonstrated that she was only superficially accepting Gillman's version of the facts—she followed her so-called concession with a recitation of the facts that was not construed in the light most favorable to Gillman."

"*Finally*, any doubt regarding whether Green-Hernandez was willing to genuinely concede Gillman's version of the facts for the purposes of our jurisdiction was resolved at oral argument. There, Green-Hernandez's counsel explained that although Green-Hernandez was willing to concede the district court's 'adopted facts,' her position was that she needed to concede only the 'record-supported facts'—that is, the district court's factual findings that Green-Hernandez believed had adequate support in the record. Oral Arg. Rec. at 1:20–1:44. In response to the court's questions, Green-Hernandez's counsel stated that Green-Hernandez was unwilling to concede for the purpose of appeal that she knew that Miller had been continually vomiting in the days prior to her shift. Green-Hernandez also would not concede that a jury could disbelieve her testimony that she saw Miller's foot move on camera prior to Miller's death during a cell check between 1:30 and 2:00 p.m.—even though that cell check is not shown on the video of Miller's cell and Green-Hernandez did not record it in the facility's time stamp log. Throughout oral argument, Green-Hernandez's counsel repeatedly relied on Green-Hernandez's version of the facts; she again contended that Miller never showed signs of distress and that there was 'nothing' to put Green-Hernandez on notice that Miller was experiencing a serious medical need. *Id.* at 12:20–12:42."

"Thus, her nominal concession notwithstanding, Green-Hernandez has contested the record-supported facts at virtually every juncture. And those disputed facts are 'crucial to' the qualified immunity question. *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). The extent to which Green-Hernandez was aware of Miller's condition, and what Green-Hernandez did in response to that condition, 'go[es] to the heart of the legal issue'—whether Green-Hernandez's conduct 'rises to' a violation of Miller's clearly established Fourteenth Amendment right to adequate medical care. *Adams*, 946 F.3d at 949. Because Green-Hernandez's arguments rely on these critical factual disputes, we lack jurisdiction to conduct the interlocutory review she seeks. *See McKenna v. City of Royal Oak*, 469 F.3d 559, 561 (6th Cir. 2006). We accordingly dismiss this part of Green-Hernandez's appeal."

10. Excessive force claim - In the context of excessive-force claims, the qualified immunity inquiry is (1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident - The sole constitutional standard for evaluating excessive force claims is the Fourth Amendment's criterion of reasonableness - The court applies an objective reasonableness' standard to excessive force claims - Intent is irrelevant: an officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional - The fact that a situation unfolds quickly is not sufficient to justify the application of deadly force, when it is not accompanied by a credible threat to the safety of an officer or the public - In the moments before Officer Reinink deployed deadly force, plaintiff did not present such a threat - The tumultuous scene is the only other factor weighing in Officer Reinink's favor,

so a reasonable jury could find that Officer Reinink used excessive force when he fired Spede-Heat at the plaintiff at point-blank range – The court's precedent makes clear that officers have fair warning that they may not use deadly force where the suspect poses no immediate threat to the officer and no threat to others in the area – Municipal liability - Our precedent provides at least four methods to prove a municipality's illegal policy or custom—the plaintiff may prove (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 - To establish *Monell* liability for ratification based on a failure to investigate, a plaintiff needs to show not only an inadequate investigation in this instance, but also a clear and persistent pattern of violations in earlier instances

SEAN HART; TIFFANY GUZMAN v. CITY OF GRAND RAPIDS, MICHIGAN; PHILLIP REININK, BRAD BUSH, and BENJAMIN JOHNSON, Officers, in their individual and official capacities
SIXTH CIRCUIT COURT OF APPEALS No. 23-1382 Decided and Filed: May 15, 2025

"Sean Hart and Tiffany Guzman appeal the district court's dismissal of their excessive force claims under 42 U.S.C. § 1983 against the City of Grand Rapids, Sergeant Brad Bush, and Officers Benjamin Johnson and Phillip Reinink. Hart and Guzman claim that the officers employed excessive force during a 2020 Black Lives Matter demonstration in Grand Rapids and that the City ratified this unlawful conduct. The officers moved for summary judgment based on qualified immunity, and the City moved for summary judgment based on the failure of Hart and Guzman to establish municipal liability. The district court granted the motions, dismissing the federal claims and declining to exercise jurisdiction over Hart and Guzman's state law claims. For the reasons that follow, we **AFFIRM** the grant of summary judgment based on qualified immunity as to Officer Johnson and Sergeant Bush and **AFFIRM** the grant of summary judgment in favor of the City, but we **REVERSE** the grant of summary judgment based on qualified immunity as to Officer Reinink, and **REMAND** for further proceedings on that claim."

"The facts of this case are largely undisputed. Around 8:30 p.m., on May 30, 2020, after fishing near Grand Rapids, Michigan, Sean Hart and Tiffany Guzman heard sirens and began driving downtown. There, a crowd had gathered for a racial justice demonstration. Based on reports of violence at similar demonstrations across the country, members of the Grand Rapids Police Department (GRPD)'s Special Response Team (SRT) were stationed around the crowd."

"SRT had prepared 'crowd control' packs containing specialty munitions, which included Muzzle Blast, munitions, which contain cannisters of a chemical 'commonly known as tear gas[,] . . . w[ere] designed to be launched into a target area and not directly at a subject.'"

"Around 7:45 p.m., some demonstrators began to surround officers and throw items, including rocks, bricks and bottles containing unknown substances at them; that behavior continued to escalate, and included property damage and increasing crowd volatility and violence. Officers issued orders using the public announcement system, notifying listeners that failure to disperse could result in arrest or other officer intervention, such as the use of chemical agents or less-than-lethal munitions that could nonetheless result in serious injury. The district court found that '[t]he hours of video footage provided by the parties confirm that downtown, initially the site of a peaceful protest, had become complete mayhem.'"

"When Hart and Guzman arrived downtown, they observed 'people going crazy,' 'breaking windows' and '[t]hrowing things.' Around 11:40 p.m., Hart and Guzman arrived at an intersection by a police line, where they lingered, playing the N.W.A. song 'F**k tha Police.' Officers had cleared the intersection earlier. About two minutes after Hart and Guzman's arrival a group of three officers, concerned that the car would drive into the police line, approached the vehicle. Officer Benjamin Johnson approached the vehicle with his launcher loaded with Muzzle Blast, poised in the 'high ready'

position, and pointed toward the passenger side of the vehicle where Guzman sat. Officer Johnson commanded Hart and Guzman to leave the area, which they eventually did."

"But less than two minutes later, Hart and Guzman returned. Hart parked and exited the car, leaving his door open, and approached the officer line, placing his left hand in his pocket. Sergeant Brad Bush and Officer Phillip Reinink, both standing in the officer line, were unsure of Hart's intentions and feared that Hart might assault the officers. As Hart approached, officers yelled at him to get back."

"Hart stopped several feet from the officer line, withdrew his left hand from his pocket and pointed at the police line; he was unarmed. Sergeant Bush then stepped forward to meet Hart and fired pepper spray at Hart's head for two to three seconds. On impact, Hart turned and took a few steps away from the officer line, lifted his head, took a drag from the cigarette he held in his right hand, and began to turn back to face the officers again. Bystander video recordings show Officer Reinink left the police line to confort Hart afgger Sergeant Bush began pepper spraying him and Hart had started to retreat. As Hart was turning back toward the police line, Officer Reinink launched a Spede-Heat cannister at Hart, who was then 'a few feet away.' Reinink testified that he believed the canister—which he loaded without a witness, contrary to GRPD policy—contained Muzzle Blast; however, it was Spede-Heat. The cannister hit Hart's left shoulder area. Hart remained on his feet, turned around, flicked his cigarette on the head, took a drag from the cigaretteground, and 'flipped off' the officers before walking back to his car."

"Once back in the car, Hart drove slowly toward the officers, stopped, and revved his engine while the crowd cheered. Hart stuck his left hand out of the car window and raised his middle finger at the police before driving over the median. 'F**k tha Police' continued playing from the car window; a man got on top of the car, and officers called out additional dispersal orders, warning that those who remained would be in violation of state law. Less than a minute later, Hart drove away."

"Hart received treatment at the emergency room for left shoulder pain from the Spede-Heat cannister and eye irritation from the pepper spray. Photos corroborate Hart's testimony that the impact from the canister left an abrasion and bruising on his left shoulder. Guzman had no physical injuries. Officer Reinink was investigated for excessive force and GRPD sustained that charge. The GRPD's investigation also concluded that Officer Reinink violated department's procedures by loading his launcher with a specialty munition, Spede-Heat, without a witness and by turning off and not reactivating his body camera earlier that day. GRPD Chief Eric Payne disciplined Officer Reinink with two days of unpaid leave."

"Plaintiffs filed this lawsuit on September 16, 2020; their operative complaint contains three counts: (1) excessive force in violation of the Fourth and Fourteenth Amendments against Officers Reinink, Bush, and Johnson; (2) failure to train, inadequate policies and procedures, and illegal custom and practices against the City of Grand Rapids (City); and (3) state law claims against Officers Reinink, Bush, and Johnson. At the close of discovery, the City, Sergeant Bush, and Officer Johnson filed a joint motion for summary judgment; Officer Reinink filed a separate motion for summary judgment. On March 31, 2023, the district court granted the defendants' motions as to the federal claims, dismissing them with prejudice, and declined jurisdiction as to the state claims, dismissing them without prejudice. Plaintiffs timely appealed."

"To prevail on a § 1983 claim, a plaintiff must demonstrate '(1) the deprivation of a right secured by the Constitution or laws of the United States; (2) caused by a person acting under the color of state law.' *Baynes v. Cleland*, 799 F.3d 600, 607 (6th Cir. 2015). 'Government officials,' however, 'are entitled to qualified immunity from civil suits for damages arising out of the performance of their official duties as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.' *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994). In the context of excessive-force claims, the qualified immunity inquiry is '(1) whether the officer violated the plaintiff's constitutional rights under the Fourth Amendment; and (2) whether that constitutional right was clearly established at the time of the incident.' *Est. of Hill v. Miracle*, 853 F.3d 306, 312 (6th Cir.

2017) (quoting *Kent v. Oakland County*, 810 F.3d 384, 390 (6th Cir. 2016)). A reviewing court may address these prongs in either order, determining 'in light of the circumstances in the particular case at hand' which step in its 'sound discretion' it makes sense to address first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)."

"Under this standard, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). '[G]eneral statements of the law are not inherently incapable of giving fair and clear warning.' *United States v. Lanier*, 520 U.S. 259, 271 (1997). In some cases, 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'' *Id.* (quoting *Anderson*, 483 U.S. at 640). The touchstone of this analysis is whether the official received 'fair warning' that his conduct was unlawful, such that 'existing precedent . . . placed the statutory or constitutional question beyond debate'; 'the specific conduct,' however, 'need not have been found unconstitutional.' *Baynes*, 799 F.3d at 613 (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). Whether the officer violated clearly established law and whether the plaintiff offered 'evidence sufficient to create a genuine issue as to whether the defendant in fact committed' the unlawful act are both 'questions of law for the court to decide.' *Adams*, 31 F.3d at 386. Beyond that, 'weighing the evidence and determining whether an officer should be liable are tasks exclusively for the jury.' *Baynes*, 799 F.3d at 615."

"'The sole constitutional standard for evaluating excessive force claims is the Fourth Amendment's criterion of reasonableness.' *Gaddis ex rel. Gaddis v. Redford Township*, 364 F.3d 763, 772 (6th Cir. 2004). We apply 'an 'objective reasonableness' standard' to excessive force claims. *Baynes*, 799 F.3d at 607 (quoting *Morrison v. Bd. Of Trs. Of Green Twp.*, 583 F.3d 394, 401 (6th Cir. 2009)). Intent is irrelevant: '[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.' *Graham v. Connor*, 490 U.S. 386, 397 (1989)."

"In reviewing an excessive force claim, a court must 'balance the government's interests in protecting others (including the police) and curbing crime against a suspect's in protecting others (including the police) and curbing crime against a suspect's right [] not to be injured.' *Puskas v. Delaware County*, 56 F.4th 1088, 1093 (6th Cir. 2024). This is a fact-intensive inquiry, requiring particular attention to 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' *Graham*, 490 U.S. at 396. Taking into consideration 'that police officers are often forced to make split-second judgments'under 'tense, uncertain, and rapidly evolving' conditions, the 'particular use of force must be judged from the perspective of a reasonable officer on the scene,' not 'with the 20/20 vision of hindsight.' *Id.* at 396–97."

"When reviewing a case involving allegations of multiple instances of excessive force, we must 'analyze the claims separately.' *Gaddis*, 364 F.3d at 772 (ellipses omitted) (quoting *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996)). Under this analysis, we 'carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage.' *Dickerson*, 101 F.3d at 1161 (quoting *Plakas v. Drinski*, 119 F.3d 1143, 1150 (7th Cir. 1994))." …

"Guzman claims that Officer Johnson engaged in excessive force when he pointed the launcher, which she believed was a gun, at her, an exchange that was captured on video. We begin with the second qualified immunity prong: whether the constitutional 'right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct.' *Pearson*, 555 U.S. at 232 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001))."

"Here, Hart and Guzman stopped at an intersection located near the police line, playing the song, 'F**k tha Police,' loudly with the car windows down. This occurred after GRPD's initial dispersal orders, which Guzman and Hart stated they did not hear. Three officers, including Officer Johnson, then

approached the passenger's side of the vehicle. Officer Johnson held alauncher containing Muzzle Blast, which Guzman testified she believed was a gun, and pointed it at the passenger-side window."

"The district court determined that the plaintiffs failed to produce 'any existing precedent on this issue,' and granted qualified immunity because the plaintiffs 'ha[d] not shown that Officer Johnson violated a clearly established right.' Guzman argues on appeal that Officer Johnson employed excessive force by pointing the launcher, which she believed was a firearm, at her, which caused Guzman to fear for her life. She relies on the holding in *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010), that detaining a suspect at gunpoint can constitute excessive force under the Fourth Amendment. Guzman also points to a Ninth Circuit decision, *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir. 2002) (en banc), cited with approval in *Binay*, 601 F.3d at 650, for the proposition that pointing a gun at an unarmed suspect who poses no danger constitutes excessive force."

"We begin with the applicability of *Binay*'s principles to Guzman's situation. *Binay* concerned an officer holding the plaintiffs—who 'had no criminal record, cooperated throughout the ordeal, posed no immediate threat to the officers, and did not resist arrest or attempt to flee'—at gunpoint while executing a search warrant for the plaintiffs' apartment. *Binay*, 601 F.3d at 644–45, 650. The search took about an hour. *Id.* at 644. Here, Officer Johnson approached Hart and Guzman in the context of an ongoing, disorderly demonstration in the public streets, not in a private home. Hart and Guzman aver that they had notheard the dispersal orders, but from Officer Johnson's perspective, the pair appeared to ignore or resist that command by driving toward the police line. The encounter took place over a couple of minutes, not an hour. And, as emphasized by the district court, the officers in *Binay* pointed an actual gun capable of inflicting lethal force, whereas here, Officer Johnson carried a launcher loaded with non-lethal chemical spray. The context of Officer Johnson's interaction with Hart and Guzman, then, is distinct on several key bases from *Binay*."

"*Robinson* is also distinguishable. Although the court concluded that 'pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment,' 278 F.3d at 1015, *Robinson* involved officers pointing a gun at plaintiff's head as he exited his home, *id.* at 1010. Here, Officer Johnson approached Hart and Guzman in their car, a context where 'the risk of a violent encounter,' *Arizona v. Johnson*, 555 U.S. 323, 331 (2009), arises 'from the fact that evidence of a more serious crime might be uncovered during the stop,' *id.* (quoting *Maryland v. Wilson*, 519 U.S. 408, 414 (1997)). The tense scene surrounding the car added to the risk that a reasonable officer would perceive. On the facts of this case, we cannot say that a clearly established constitutional right was violated by the actions of Officer Johnson. We therefore affirm the district court's grant of summary judgment to Officer Johnson based on qualified immunity."

"Turning to Sergeant Bush's deployment of pepper spray, an interaction that was also documented on video, we again begin the analysis with the second qualified immunity prong: whether the constitutional 'right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct.' *Pearson*, 555 U.S. at 232 (quoting *Saucier*, 533 U.S. at 201)."

"After Hart's and Guzman's initial encounter with GRPD officers, Hart drove away from the officer line. Shortly thereafter, Hart and Guzman drove back to the intersection, where Hart parked his vehicle around 50 feet from the line of police officers, left the driver's side door open, and approached the line of police. Sergeant Bush then sprayed Hart with pepper spray from eight to ten feet away."

"On appeal, Hart relies on three cases to show that Sergeant Bush violated clearly established law when deploying pepper spray: *Wright v. City of Euclid*, 962 F.3d 852 (6th Cir. 2020); *Grawey v. Drury*, 567 F.3d 302 (6th Cir. 2009); and *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006). *Wright* concerned plain-clothes officers' deployment of a taser and pepper spray on an unarmed man in a parked vehicle. 962 F.3d at 860. We concluded 'that the right to be free from being pepper sprayed when a suspect is not actively resisting arrest was . . . clearly established' at the time of that incident. *Id.* at 871. Unlike in *Wright*, however, here the record shows that Hart actively disobeyed officers' orders in advancing toward the police line. *Wright* thus does not provide clearly established precedent applicable here."

"In *Grawey*, as the district court emphasized, the plaintiff was passively awaiting police arrival, not advancing toward officers, when officers assaulted him with pepper spray. *Grawey*, No. 23-1382 *Hart, et al. v. City of Grand Rapids, Mich., et al.* 567 F.3d at 307, 311. And unlike *Grawey*, where officers' use of pepper spray occurred at such a 'close range,' that the force subjected the plaintiff to 'an intense burning' that caused him to 'collaps[e] to the sidewalk, unconscious,' *id.* at 307, Sergeant Bush did not 'spray Hart with enough pepper spray to cause Hart to lose even the ability to walk or drive away,' which he did. Given the factual distinctions between the use of pepper spray in *Grawey* and Sergeant Bush's pepper spraying of Hart, Hart cannot rely on *Grawey* to establish that Sergeant Bush's conduct violated clearly established law."

"*Ciminillo* presents a more similar context; the plaintiff's claims there also stemmed from police attempting to disperse a crowd during a riot. There, officers had ordered a crowd to disperse after it 'had become rowdy' and some of its members 'set fires in the street' and 'were throwing bottles at police officers and civilians.' *Ciminillo*, 434 F.3d at 463. Unlike Hart, the plaintiff in *Ciminillo* was slowly walking toward an officer with his hands above his head when the officer shot him 'allegedly without provocation and at point blank range' with 'a beanbag propellant.' *Id.* We held that '[t]he use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable.' *Id.* at 468. Here, Hart was not attempting to leave, but had driven back to the scene, exited his car, and was approaching the police line to confront the officers when Sergeant Bush pepper sprayed him. Hart's provocative advance toward the officer line sufficiently distinguishes his conduct from that in *Ciminillo*."

"In sum, none of the cases that Hart cites establish that it was 'beyond debate' at the time of this incident that Sergeant Bush's pepper spraying of Hart was unlawful. *See District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). We therefore affirm the district court's grant of summary judgment to Sergeant Bush."

"Hart alleges that Officer Reinink used lethal force against him. When Sergeant Bush pepper sprayed Hart, Hart turned away and retreated from the police line. As Hart began to turn around again, Officer Reinink fired a Spede-Heat canister, which is intended for long-range deployment, directly at Hart, who was located several feet away from the officers, striking his left shoulder area."

"We begin with whether Officer Reinink's use of a Spede-Heat munition constituted deadly force. Officer Reinink argues that the district court appropriately analyzed his mistaken discharge of Spede-Heat as the use of 'the wrong non-lethal munition' in tumultuous circumstances. At his deposition, however, Officer Reinink admitted that he was trained that some uses of Spede-Heat could result in serious injury and even death, and thus, Spede-Heat could 'be considered a deadly weapon.' Deposition testimony by others corroborates this understanding." …

"It is true that the record contains some support for the inference that Officer Reinink had intended to deploy Muzzle Blast and mistakenly fired the Spede-Heat canister. But, under governing law, officer intent is irrelevant. *Graham*, 490 U.S. at 397; *see also Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (ignoring the officer's intent when he alleged that he mistakenly fired his gun instead of his Taser at a fleeing suspect). Viewing the record evidence in the light most favorable to Hart, as we must, Officer Reinink did deploy Spede-Heat at close range, such that it could have exerted lethal force." …

"'Qualified immunity in cases involving claims of deadly force is difficult to determine on summary judgment because liability turns upon the Fourth Amendment's reasonableness test.' *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 902 (6th Cir. 1998)." …

"We begin with the context of Officer Reinink's actions. First, in anticipation of the potential need for emergency intervention at the demonstration, GRPD officers had received an email on April 3, 2020, 'which directed personnel to ensure their body cameras are appropriately charged.' Yet Officer Reinink

admits that, in violation of GRPD policy, his body camera was not on during the incident. Though he asserts that his body camera was off because 'the battery died,' likely 'early in the night,' GRPD's investigation concluded that Reinink turned it off 'due to a privileged conversation that he engaged in, which is permitted[,]' but failed to reactivate it. Officer Reinink also admits that he knew, based on his training, that he needed a witness to observe him loading the munition, but nevertheless failed to enlist one prior to loading and firing the Spede-Heat. Sergeant Bush, moreover, testified that he had never heard of an officer, not at GRPD nor anywhere else in the nation, mistaking a Spede-Heat canister for a Muzzle Blast. Though these violations of departmental policy do not, on their own, deprive an officer of qualified immunity, they are 'relevant to the first prong of the qualified immunity analysis.' *Latits v. Phillips*, 878 F.3d 541, 553 (6th Cir. 2017). On this record, a jury could find that Officer Reinink's failure to follow police department required protocol and his deployment of potentially deadly force evidences 'plainly incompetent' behavior that falls outside the ambit of qualified immunity's protection, *see Stanton v. Sims*, 571 U.S. 3, 6 (2013) (quoting *al-Kidd*, 563 U.S. at 744), rather than the type of reasonable 'split-second judgment[]' under 'tense, uncertain, and rapidly evolving' conditions that supports qualified immunity, *see Graham*, 490 U.S. at 396."

"With this context in mind, we assess the reasonableness of the use of deadly force, guided by the *Palma* factors. First, Officer Reinink 'was called to the scene,' *Palma*, 27 F.4th at 432, to deal with tumultuous crowd conditions, which included individuals throwing objects at officers. These facts support a finding that Officer Reinink faced an imminent risk of serious physical harm."

"Second, the video shows that Hart possessed a cigarette, not any weapons, an observation corroborated by testimony of both parties. *Palma* noted that 'even if the person's hands are not visible—and even if he appears to be suspiciously reaching for something in his clothing—these facts would not lead a reasonable officer to believe that the person posed an immediate threat of serious harm.' 27 F.4th at 434; *see also id.* (collecting authorities). Video footage shows Hart placing his left hand in his pocket as he approached the officers, but, before Officer Reinink fired the Spede-Heat cannister at him, Hart had withdrawn his hand from the pocket, and no weapons could be seen. We cannot say that the evidence supports Officer Reinink's contention that he 'reasonably believed' that Hart 'posed an imminent threat of serious bodily harm.' *See id.* at 432."

"The third factor is 'whether [Hart] verbally or physically threatened the officer or disobeyed the officer.' *Id.* 'When a person does not act 'aggressively' towards an officer, that fact undermines the officer's claim that the person presented an immediate threat of bodily harm.' *Id.* at 434. Hart initially approached the police line at a walking pace and stopped several feet away before Sergeant Bush stepped out of the line to pepper spray him. When he was pepper sprayed, Hart turned away from Sergeant Bush, retreated a number of steps, and then began turning back. At that point, he was unarmed, had not verbally or physically threatened the officers, and had stopped advancing toward the police line. Construing the evidence in Hart's favor and focusing on the moment that Officer Reinink shot Hart with a Spede-Heat cannister, we cannot say that Hart presented an immediate threat of serious bodily harm to the officers."

"The fourth factor is 'how far the officer was from the person.' *Palma*, 27 F.4th at 432. Although a few feet of distance may be meaningless when a firearm is involved, the distance is highly relevant when an officer fears a hand-to-hand confrontation. *Id.* at 435. Hart's unarmed status—affirmed by Hart's holding of a cigarette in his right hand and removal of his left hand, unarmed, from his pocket—might indicate a reasonable fear of 'a hand-to-hand confrontation.' *Id.* at 435. But critically, Officer Reinink approached Hart only after Hart had turned his back to the police line and stepped away from pepper spray. Sergeant Bush had also backed away from Hart. The facts that Hart was approximately eight to ten feet away when Officer Reinink shot him with Spede-Heat, that the officers on the scene did not observe Hart with any weapons, and that Hart's progress toward the officers had already been halted by the deployment of pepper spray weigh in favor of finding that Hart 'did not pose an imminent threat of harm.' *Id.* at 435-36."

"Turning to the fifth consideration—the duration of the encounter, *Palma*, 27 F.4th at 432—Hart began turning around only seconds after being pepper sprayed. This 'very brief moment' between Hart's turn and Officer Reinink's split-second decision to deploy Spede-Heat weighs in favor of Officer Reinink. *See Untalan v. City of Lorain*, 430 F.3d 312, 317 (6th Cir. 2005); *Graham*, 490 U.S. at 397."

"Because the sixth *Palma* factor, 'whether the officer knew of any ongoing mental or physical health conditions that may have affected the person's response to the officer,' *Palma*, 27 F.4th at 432, is not at issue, we need not address it."

"As to the final factor, 'whether the officer could have diffused the situation with less forceful tactics,' *Palma*, 27 F.4th at 432, Officer Reinink's testified that he intended to deploy Muzzle Blast, 'a powder dispersion round' suitable for 'crowd control management' at 'intermediate and close deployment,' not Spede-Heat. This indicates that less forceful tactics were available and, accordingly, that Officer Reinink did not face an imminent threat of harm."

"All the facts, viewed at this stage in the light most favorable to Hart, demonstrate that Officer Reinink faced a split-second decision during a potentially dangerous demonstration-turned-riot. But '[t]he fact that a situation 'unfolds quickly' is not . . . sufficient to justify the application of deadly force,' *Palma*, 27 F.4th at 432, when it is not accompanied by a credible threat to the safety of an officer or the public. *Id.* In the moments before Officer Reinink deployed deadly force, Hart did not present such a threat. And the tumultuous scene is the only other factor weighing in Officer Reinink's favor. As a result, 'a reasonable jury could find that [Officer Reinink] used excessive force' when he fired Spede-Heat at Hart at point-blank range. *See Palma*, 27 F.4th at 432."

"Turning to the 'clearly established' prong, we consider 'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' *Baynes*, 799 F.3d at 610 (quoting *Saucier*, 533 U.S. at 202). 'It has been well settled law for a generation that, under the Fourth Amendment, '[w]here a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.' *Walker*, 649 F.3d at 503 (quoting *Garner*, 471 U.S. at 11). The question in this case is whether Officer Reinink could reasonably conclude that Hart posed a serious danger to those on the scene."

"Hart's conduct resembles that in *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005). There, we determined that the officer's use of deadly force 'was constitutionally impermissible' where the suspect's 'movement was . . . limited and he could not quickly charge the officers,' '[h]e was not verbally threatening,' and '[h]is hands were visible and empty.' *Id.* at 697. Similarly, here, the video footage reflects that Hart's movement was impaired due to Officer Bush's deployment of pepper spray. Officer Johnson provided deposition testimony that Hart 'turned his body away from us after being hit with the chemical spray, and then he turned back towards us,' but 'did not make an advance' on the officer line. Hart did not make verbal threats or approach the officers aggressively after Sergeant Bush sprayed him. And, as reflected in the video, Hart was visibly unarmed. On this record, no reasonable officer could have thought he had probable cause to use deadly force against Hart."

"Our precedent makes clear that officers have fair warning that they may not use deadly force '[w]here the suspect poses no immediate threat to the officer and no threat to others [in the area],' *Smith v. Cupp*, 430 F.3d 766, 775–76 (6th Cir. 2005) (quoting *Garner*, 471 U.S. at 11), and we have affirmed the denial of qualified immunity where video footage 'd[id] not conclusively show whether that was the case.' *Lewis v. Charters Twp. of Flint*, 660 F. App'x 339, 347 (6th Cir. 2016). Given that a suspect resisting arrest and fleeing the crime scene does not justify deadly force, Hart's lesser disobedience—turning back around to face the officer line—could not warrant deadly force."

"As Plaintiffs point out, our precedent also makes clear that '[t]he use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable.' *Ciminillo*, 434 F.3d at 468. … Viewing the facts in the light most favorable to Hart and drawing all reasonable inferences in his favor, as we must, *Scott*, 550 U.S. at 378 (quoting *Diebold, Inc.*, 369 U.S. at 655), Hart no longer

presented the aggressive behavior that he had demonstrated moments earlier when he was advancing toward the police line."

… That an officer may not use deadly force against a person displaying no aggression, even during a riot, was and remains squarely 'beyond debate.' Rivas-Villegas v. Cortesluna, 595 U.S. 1, 5 (2021) (quoting White v. Pauly, 580 U.S. 73, 79 (2017))."

"Recognizing that 'there can be no doubt that § 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights,' the Supreme Court has long held that a municipality can be sued under § 1983 for constitutional violations for which 'the government as an entity is responsible.' *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 700–01 (1978). The preliminary question in a *Monell* analysis is 'whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.' *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). 'Municipal liability for the actions of employees may not be based on a theory of respondeat superior.' *Berry v. City of Detroit*, 25 F.3d 1342, 1345 (6th Cir. 1994) (emphasis omitted)."

"Our precedent provides at least 'four methods' to prove a municipality's illegal policy or custom—the plaintiff may prove '(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.' *Wright*, 962 F.3d at 880 (quoting *Jackson v. City of Cleveland*, 925 F.3d 793, 838 (6th Cir. 2019)). '[T]he dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor, correspondingly, that a municipality . . . may not be liable for that deprivation.' *Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir. 1992)."

"Both before the district court and on appeal, Hart and Guzman connect their record evidence to the theory that the City ratified the officers' unconstitutional conduct by insufficiently investigating and punishing that conduct. *See Pineda v. Hamilton County*, 977 F.3d 483, 494–95 (6th Cir. 2020). To establish *Monell* liability for ratification based on a failure to investigate, a plaintiff needs to show ''not only an inadequate investigation in this instance,' but also 'a clear and persistent pattern of violations' in earlier instances.' *Pineda*, 977 F.3d at 495 (quoting *David v. City of Bellevue*, 706 F. App'x 847, 853 (6th Cir. 2017)). This requires the plaintiff to present evidence of 'multiple earlier inadequate investigations . . . concern[ing] comparable claims.' *Id.* (quoting *Stewart v. City of Memphis*, 788 F. App'x 341, 344 (6th Cir. 2019)). '[A]n allegation of a single failure to investigate a single plaintiff's claim' fails to satisfy this standard. *Id.* (emphasis omitted). In contrast, the testimony of several witnesses to persistent patterns of failure to correct excessive force and/or details of past instances of excessive force can sustain *Monell* claims based on a ratification theory. *See Berry*, 25 F.3d at 1355 (discussing cases)."

"Hart and Guzman present a spreadsheet listing every reported excessive force claim against GRPD officers between 2015 and 2020, which they submit demonstrates that 'every single officer in nearly 90 complaints for excessive force over a five-year span was exonerated or cleared by the department.' Only two claims were sustained. This, coupled with the GRPD imposing only two days of unpaid leave on Officer Reinink for the sustained charge of unreasonable force, Hart and Guzman argue, evidences the City's deliberate indifference to officers' deployment of unconstitutionally excessive force. The City responds that, absent additional context, 'the raw number of excessive force complaints' renders Hart's and Guzman's arguments purely speculative, and thus, insufficient to proceed to trial."

"The spreadsheet contains seven columns of information, and all but two columns identify the complaint and the subject officer. Those two columns, labeled 'Allegation' and 'Finding,' offer little in the way of substance. Every row of the 'Allegation' column reads, 'Unreasonable Force.' The 'Finding' column contains the result of GRPD's investigation—indicating only that the claim was sustained, not sustained, withdrawn, or unfounded, or that the subject officer was exonerated. Accordingly, the

spreadsheet lacks any substantive description of the events giving rise to the complaint or of any specifics of GRPD's investigation or its results."

"Without some qualitative specifics, the district court lacked a basis under our precedent to conclude that genuine disputes of material fact regarding Hart's and Guzman's single ratification claim remain. Some information or evidence indicating that GRPD failed to properly investigate the unreasonable force complaints it received or that dismissed complaints were well-founded could have provided the requisite foothold. *Pineda*, 977 F.3d at 495–96; s*ee also Wright*, 962 F.3d at 882 (reserving the grant of summary judgment based on testimony that the sergeant 'had *never* heard of a use of force incident by a[n] . . . officer that seemed inappropriate to him'). But Hart and Guzman did not adduce information or evidence indicating a pattern supporting their claim of ratification based on a failure to investigate past unreasonable force complaints. Thus, the district court's grant of the City's motion for summary judgment on Hart's and Guzman's municipal liability claims is supported by governing law."

11. - Excessive force claim - Qualified immunity granted in an officer shooting an armed plaintiff - When evaluating a motion for summary judgment, the trial court must accept the nonmoving party's evidence as true and view the evidence and all reasonable inferences that can be drawn therefrom in favor of the nonmoving party - However, when video evidence exists that irrefutably contradicts the nonmovant's version of the facts, the trial court may accept the facts as shown on the video and grant summary judgment in the movant's favor if no other genuine issue of material fact remains - The relevant question here is what facts were known to the officers at the time of the incident, not what facts were known to Mr. Holland - Although the proper application of the objective reasonableness standard requires careful attention to the facts and circumstances of each particular case, a court can only consider the circumstances immediately prior to the officer's use of force - All three *Graham* factors weigh in favor of a finding that the Officers' use of deadly force on Mr. Holland was objectively reasonable - Given the totality of the circumstances, including the rapidity with which the events transpired, the exposed position of the Officers and a civilian when confronted with an armed and unknown person, the knowledge the Officers possessed regarding the reason they had been called to the scene, and the Officers' employment of their lights and sirens to make known their presence upon arrival at the scene, we conclude that it was reasonable for the Officers to have acted quickly without first issuing verbal commands to Mr. Holland to drop his weapon

CHARLES F. HOLLAND ET AL. v. CHEATHAM COUNTY ET AL.
COURT OF APPEALS No. M2024-00631-COA-R3-CV Filed January 28, 2025

"In this action filed pursuant to 42 United States Code § 1983, the plaintiffs alleged that the defendant law enforcement officers had violated one plaintiff's constitutional rights by using excessive force when the officers shot and injured him at the scene of a 'road rage' incident that did not involve the injured plaintiff. The defendants subsequently moved for summary judgment, arguing that the officers' use of deadly force was objectively reasonable under the totality of the circumstances because the injured plaintiff had appeared at the scene of the road rage investigation suddenly and without warning, had approached the officers rapidly, and had been armed with a rifle. Following a hearing, the trial court granted summary judgment in favor of the defendants and dismissed the action with prejudice, determining, *inter alia*, that the officers' use of deadly force had been objectively reasonable. The plaintiffs timely appealed. Discerning no reversible error, we affirm."

"This matter arises from an officer-involved shooting that occurred shortly after 8:00 p.m. on January 30, 2017, during which Charles Holland, the injured plaintiff in this action, was shot and wounded outside of his residence in an incident involving three county law enforcement officers: Thomas Royal, Paul Ivey, and Walter Bamman ('the Officers'). The Officers had been dispatched to the area in

response to a 'road rage' incident categorized as a 'rolling domestic assault.' The Officers arrived on the scene in separate, marked patrol cars to find a woman, whom they believed to have been involved in the road rage incident, beside a Jeep vehicle, which was parked in the driveway of a home. According to two of the Officers, shortly after they arrived on the scene, they each observed Mr. Holland moving toward them across the home's yard, holding what they described as an 'AR-15' assault rifle in a 'low-ready' position."

"On January 29, 2018, Mr. Holland, along with his wife and their three children (collectively, 'the Hollands'), filed a complaint pursuant to 42 United States Code § 1983 in the Cheatham County Circuit Court ('trial court') against Cheatham County ('the County') and the Officers in their official and individual capacities (collectively, 'Defendants'). In the complaint, the Hollands alleged, *inter alia*, that the Officers had violated Mr. Holland's rights under the Fourth and Fourteenth Amendments to the United States Constitution when they shot him on his own property after he had exited his residence while lawfully armed and not posing any threat to the Officers. The Hollands further alleged negligence on behalf of the Officers and averred that the Officers had caused Mr. Holland's family emotional distress because the family had witnessed the shooting and its aftermath. Against the County, the Hollands propounded that the County should have instituted policies governing the proper use of deadly force by the Officers such that the shooting might have been avoided."

"In the complaint, the Hollands asserted that earlier in the day on January 30, 2017, another incident had occurred on their real property when a vehicle pursued by law enforcement had crashed into the creek behind the Hollands' home.1 The Hollands averred that the suspects had left the vehicle and fled on foot. Because one of those suspects had not been captured, Mr. Holland had purportedly conversed with the officers on the scene of that incident and asked if they would recommend that he arm himself in order to protect his family. The Hollands stated in the complaint that the officers had advised Mr. Holland 'that being armed under the prevailing circumstances was an appropriate precaution.'"

"The Hollands asserted that when the domestic assault situation occurred later that evening, Mr. Holland heard what he thought was a collision and went outside to investigate, encountering a woman who stated that someone was trying to kill her. After Mr. Holland assisted the woman into his residence, he averred that a vehicle pulled into his driveway with 'blinding headlights.' Mr. Holland then 'went out his back door armed with a rifle and rounded the back of his house to investigate the ongoing disturbance on his property' when '[i]n seconds, and without warning, multiple gunshots were fired' at him, striking him and his home and causing him injury. The Hollands alleged that the Officers never identified themselves as law enforcement before firing. The Hollands sought compensatory and punitive damages."

"Defendants filed an answer to the complaint on February 27, 2018. In the answer, Defendants denied all liability and asserted, *inter alia*, the affirmative defenses of expiration of the statute of limitations and immunity under the Governmental Tort Liability Act."

"On September 25, 2023, after participating in discovery, Defendants filed a motion seeking a grant of summary judgment in their favor, along with an accompanying memorandum of law and statement of undisputed material facts. Defendants argued, *inter alia*, that there was no genuine dispute of material fact and that the complaint should be dismissed with prejudice because the Officers' use of force was objectively reasonable under the totality of the circumstances." …

"Following a hearing conducted on January 3, 2024, the trial court entered an order on April 25, 2024, granting summary judgment in favor of Defendants. In its order, the court elucidated that it had reviewed the parties' submissions, including the dashcam footage, noting that '[w]here there is such a video record, this Court should 'take the facts as they appear in the video, which may not necessarily be in the light most favorable to the non-moving party,'' citing *Nelson v. City of Battle Creek, Michigan*, 802 F. App'x 983, 985 (6th Cir. 2020)."

"The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must 'make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied.' *Rye*, 477 S.W.3d at 250." …

"The Hollands contend that there are several disputed facts that, when viewed in the light most favorable to them as the nonmovants, create a genuine dispute of material fact as to the reasonableness of the Officers' use of deadly force on Mr. Holland. Specifically, the Hollands posit that a jury could reasonably conclude that (1) Mr. Holland was not a suspect and was not subject to being arrested on the day he was shot, (2) Mr. Holland was lawfully armed and within the curtilage of his residential property, (3) Mr. Holland was unaware that law enforcement officers were present before he was shot, (4) Mr. Holland did not move toward the Officers, (5) Mr. Holland moved diagonally across the front yard to get out of the way of the blinding white light, (6) Mr. Holland was not facing the Officers when he was shot, (7) Mr. Holland neither pointed his gun at the Officers nor threatened them in any way as he crossed his yard, (8) Mr. Holland received neither a verbal identification nor a verbal warning from the Officers before the Officers used deadly force, (9) Mr. Holland's rifle was pointed at the ground at all material times, and (10) Mr. Holland did not disobey any orders because the Officers gave him no verbal orders. The Hollands argue that based on these and other disputed facts, a jury could reasonably conclude that Mr. Holland did not pose an immediate threat to the Officers or others because there were no additional indicia of immediate danger beyond Mr. Holland's possession of a firearm such that the Officers' use of deadly force was not objectively reasonable."

"The Officers argue that the trial court correctly granted summary judgment in their favor because no genuine dispute of material fact exists. The Officers urge that under the totality of the circumstances, their use of deadly force on Mr. Holland was objectively reasonable and that no constitutional violation occurred. According to the Officers, they were therefore entitled to qualified immunity. Upon thorough review of the record and applicable authorities, we determine that the trial court did not err in granting summary judgment in favor of Defendants."

"The Officers herein have claimed qualified immunity." …

"The United States Supreme Court has held that '*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.' *Graham v. Connor*, 490 U.S. 386, 395 (1989)."…

"We reiterate that when evaluating a motion for summary judgment, the trial courtmust accept the nonmoving party's evidence as true and view the evidence and all reasonable inferences that can be drawn therefrom in favor of the nonmoving party. *See Shipley v. Williams*, 350 S.W.3d 527, 551 (Tenn. 2011). However, when video evidence exists that irrefutably contradicts the nonmovant's version of the facts, the trial court may accept the facts as shown on the video and grant summary judgment in the movant's favor if no other genuine issue of material fact remains. *See Jones v. Publix Supermarket, Inc.*, No. M2018-01672-COA-R3-CV, 2019 WL 2404975, at *4-5 (Tenn. Ct. App. June 7, 2019) (upholding a trial court's grant of summary judgment when video evidence conclusively contradicted the nonmovant's version of facts); *Keirsey v. K-VA-T Food Stores Inc.*, No. E2018-01213-COA-R3-CV, 2019 WL 1301758, at *6 (Tenn. Ct. App. Mar. 20, 2019) (same); *Hall v. Owens*, No. W2014-02214-COA-R3-CV, 2015 WL 7354384, at *4 (Tenn. Ct. App. Nov. 20, 2015) (same)."

"… [T]he relevant question here is what facts were known to the Officers at the time of the incident, not what facts were known to Mr. Holland."

"The Hollands postulate that the trial court should have considered the earlier car chase ending on their property when judging the reasonableness of the Officers' decision to use deadly force because

this circumstance justified why Mr. Holland was in his yard holding his gun in the first place. We disagree. Although the proper application of the objective reasonableness standard 'requires careful attention to the facts and circumstances of each particular case,' *see Graham*, 490 U.S. at 396, a court can only consider the circumstances immediately prior to the officer's use of force. *Livermore v. Lubelan*, 476 F.3d 397, 407 (6th Cir. 2007) (explaining that courts should only 'focus on the 'split-second judgments' made immediately before the officer used allegedly excessive force')."

"Events leading up to a shooting incident should not be considered when determining whether law enforcement officials had probable cause to use deadly force at the time of the shooting." …

"In their brief, the Hollands aver that earlier during the day of the shooting, Mr. Holland had been advised to remain armed by law enforcement after two fleeing suspects drove onto the Holland property, crashed their vehicle, and one potentially armed suspect eluded capture. The Hollands further proffer that when Mr. Holland later heard a vehicle collision close to his home and investigated, he discovered a woman in a car yelling for help and stating that someone was trying to kill her. The driver of another car, whom he assumed to be the woman's alleged assailant, almost hit him with that car before leaving the scene, and Mr. Holland ushered the woman into his home for protection. The Hollands claim that Mr. Holland subsequently went outside to find the person threatening the woman and was blinded by white lights, such that he moved diagonally away from the light and across his yard to avoid the lights' harshness. We agree with the trial court's determination that 'while Mr. Holland may have felt that his actions that night were justified by the events which occurred earlier in the day . . . the Court cannot consider those facts in reaching the determination of the objective reasonableness of the officers' use of force.' We, like the trial court, are constrained when evaluating the objective reasonableness of the Officers' actions to only consider the circumstances both knowable to the Officers and occurring immediately prior to the Officers' use of force. *See Livermore*, 476 F.3d at 407. Therefore, the reason that Mr. Holland was in his yard with a gun in the first instance is irrelevant to the inquiry."

"The Hollands argue that the three *Graham* factors weigh against a finding of objective reasonableness. We disagree. We determine that the first *Graham* factor, the severity of the crime, *see Graham*, 490 U.S. at 397, supports the Officers' use of force because it is undisputed that at the time of the incident, the Officers had been responding to a report of a dangerous situation involving road rage and domestic violence. We likewise discern that the third *Graham* factor, whether the suspect is attempting to resist or evade arrest, *see id.*, weighs in favor of the Officers as well because it would be reasonable for an officer responding to a domestic violence call to believe that a man holding a weapon and quickly moving across the yard, as Mr. Holland was shown to do in the dashcam footage, could be attempting to resist arrest or escape the scene of a crime."

"The controversy in this case centers on the second *Graham* factor, whether the suspect posed an immediate threat to the safety of the Officers or others. *See id.* Regarding this factor, the Hollands argue that the trial court should have considered that at the time of the incident, Mr. Holland was moving diagonally across his yard rather than toward the Officers, his gun was pointed at the ground rather than at the Officers, and he neither received nor disobeyed any verbal orders or warnings. We recognize that the Sixth Circuit has clearly stated that 'we do not hold that an officer may shoot a suspect merely because he has a gun in his hand.' *Thomas v. City of Columbus*, 854 F.3d 361, 366 (6th Cir. 2017). A suspect having a weapon 'constitutes just one consideration in assessing the totality ofthe circumstances.' *Id.* Accordingly, a suspect's possession of a firearm absent a threat of danger to the officer or others is insufficient to justify an officer's use of deadly force. *See Bouggess*, 482 F.3d at 896. The 'threat factor is 'a *minimum* requirement for the use of deadly force,' meaning deadly force 'may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.'' *Mullins*, 805 F.3d at 766 (citing *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir. 2005)). *See Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 487 (6th Cir. 2007) ('[A]n officer may use deadly force whenever he or she, in the face of a rapidly evolving situation, has probable cause to believe that a suspect poses a serious physical threat either to the police or members of the public.')."

"However, 'when a police officer both knows a defendant has a weapon *and* has a reasonable belief that the weapon will be used against him or others, the officer is justified in using deadly force.' *Bouggess*, 482 F.3d at 896. 'In sum, probable cause exists when officers 'could reasonably conclude that a suspect might fire a gun at them or use another dangerous weapon against them (even if they turned out to be wrong).'' *Cooper v. City of Columbus*, No. 22-3251, 2023 WL 1434055, at *6 (6th Cir. Feb. 1, 2023) (citing *Gambrel v. Knox Cnty.*, 25 F.4th 391, 405-06 (6th Cir. 2022))."

"Moreover, 'aiming a weapon is not a minimum requirement[.]' *Cooper*, 2023 WL 1434055, at *6 *(*citing *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019) ('[A]n officerneed not face the business end of a gun to use deadly force.')). 'The Sixth Circuit has been clear that deadly force can be reasonable even if the suspect does not point a firearm at the officers.' *Ball v. Cocke Cnty.*, No. 3:19-CV-445, 2021 WL 601169, at *4 (E.D. Tenn. Feb. 16, 2021) (citing *Thornton v. City of Columbus*, 727 F. App'x 829, 838 (6th Cir. 2018)). 'A suspect does not even have to raise the firearm.' *Ball*, 2021 WL 601169, at *4."

"Here, it is undisputed that: (1) the Officers arrived at Mr. Holland's residence in response to an incident that had been characterized as 'road rage' and a 'rolling domestic assault,' (2) the Officers were called to respond to the incident at a location close to the Holland residence, and (3) the Officers stopped behind the Jeep right outside the Holland residence because they believed the woman in the Jeep was involved in the potential domestic violence situation. It is also undisputed and shown in the video evidence from Officer Royal's dashcam that when Officer Royal approached the woman, she exited the Jeep, was visibly distraught, and pointed toward the road and the Holland residence. At this point, Officer Royal began to follow her toward the house, which appears to coincide with the moment when Mr. Holland admittedly walked 'with haste' into the yard while holding his rifle. Meanwhile, the dashcam video evidence also demonstrates the obvious, visible presence of law enforcement at the scene. Upon review, we agree with the trial court's conclusion that the videos clearly showed 'that Royal's unit had its overhead lights flashing and Bamman's unit had its blue lights flashing. In either event, it was clear to any observer that a law enforcement action was taking place.' Although Mr. Holland claimed that he saw no blue lights flashing, his testimony was fully discredited by contradictory video evidence."

"Despite the Officers' use of sirens and lights on approach and the continued use of strobing blue lights by the Officers upon arriving at the scene and parking their marked patrol cars,5 Mr. Holland admittedly moved diagonally across the front yard to the left of the Officers and the civilian while holding a rifle. Although he claimed to be unaware of the presence of law enforcement officers at the time, Mr. Holland acknowledged that he exited his home while carrying a rifle in his hands in a 'low ready position' with the muzzle pointed toward the ground. The video demonstrates that at the time the Officers used deadly force, Mr. Holland was moving into a position to the left of the Officers such that the Officers and the woman behind the Jeep would soon be exposed to Mr. Holland and within his visual and firing range."

"… [H]ere, the Officers were (1) responding to a potentially violent crime, (2) used sirens and strobing blue lights to announce their presence on the scene, and (3) immediately interacted with a person at the scene who was visibly distraught and gestured toward the road and Mr. Holland's house. Mr. Holland then advanced from the home and was observed to be armed and approaching the Officers' position. Mr. Holland did not raise his weapon or point it at the Officers and did not react to the Officers' shouts before the Officers began shooting. Consistent with *Thornton*, we determine that the Officers could reasonably have believed that Mr. Holland was the same man who was involved in the domestic violence situation. We similarly determine that the situation presented here could have 'easily and quickly transformed into a deadly action in a split-second' such that the Officers were reasonable in believing that Mr. Holland posed an immediate threat to their safety or to the safety of others. *See id*. Therefore, all three *Graham* factors weigh in favor of a finding that the Officers' use of deadly force on Mr. Holland was objectively reasonable. *See Graham*, 490 U.S. at 397."

"As is undisputed by the parties and shown in the video evidence from Officer Royal's dashcam, the Officers and the woman quickly moved behind the Jeep concurrent with Mr. Holland's admittedly

'hast[y]' diagonal movement across the yard while holding his gun in his hands. The Hollands argue that 'from this point of relative safety,' the Officers had the opportunity to shout to Mr. Holland and issue a verbal warning. The Hollands also contend that the Officers' failure to issue a verbal warning to Mr. Holland when such a warning was feasible made the Officers' exercise of deadly force unreasonable. The Hollands rely on United States Supreme Court precedent stating:

> If the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11-12 (emphasis added). The United States Supreme Court has cautioned against a rigid application of *Garner*, however, explaining:

> *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation.

Scott v. Harris, 550 U.S. 372, 382 (2007) (internal citation omitted)."

"In *Garner*, an officer had shot and killed a minor who was fleeing the scene of a crime; who was neither armed nor otherwise apparently dangerous; and who had not, to the knowledge of the pursuing officers, been involved in a crime involving serious harm or violence to others. *Garner*, 471 U.S. at 3-4. The idea that the preconditions from *Garner* have 'scant applicability' to a case with 'vastly different facts,' *see Scott*, 550 U.S. at 383, is further bolstered by *Garner* itself wherein the Court found that the officer 'could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, [the officer] never attempted to justify his actions on any basis other than the need to prevent an escape.' *Garner*, 471 U.S. at 21. The *Garner* Court found that the officer's decision to use deadly force rested solely 'on the fact that Garner had broken into a house at night,' and the Court held that 'the fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force.' *Id.*"

"We find the Hollands' reliance on *Garner* to be unavailing. Whereas *Garner* involved the use of deadly force upon an unarmed, fleeing suspect, this case involved the use of deadly force on someone who was armed and who was not running away—instead, he was advancing on the officers' position." …

"Moreover, we find the plain language of *Garner* to necessitate only that 'some warning' be given if feasible. *Garner*, 471 U.S. at 11 (emphasis added). Our review of the dashcam footage in this matter demonstrates that the entire incident from the time of the Officers' arrival at the scene to the time of the shooting lasted mere seconds. Based on the circumstances presented, we agree with the trial court's finding that the Officers' 'failure to give a clear command to show hands or to drop the weapon also does not create a material disputed issue in the Court's mind.'"

"In its order granting summary judgment, the trial court relied on *Thurman v. Hawkins*, a district court case from the Eastern District of Kentucky for its determination that '[o]fficers don't have to wait until an armed suspect points a gun at them before it is 'objectively reasonable' to use deadly force.' *See Thurman*, No. 13-50-GFVT, 2014 WL 384387, at * 6-7 (E.D. Ky. Sept. 3, 2014)." …

"In *Thurman*, the district court upheld the officers' decision to use deadly force whenthree officers, responding to a report of domestic violence, entered the residence of a man who had outstanding arrest warrants for assault and burglary. *Id.* at *4. The officers found the man, drunk and holding a gun to his own head. *Id.* at *6. The officers proceeded to use deadly force after a four-minute standoff and a verbal warning wherein the officers asked the man to drop his gun and he refused. *Id.* at *4. The officers had also unsuccessfully tried to subdue the man with a taser before resorting to deadly force.

Id. at *1-2. Although *Thurman* mentions unheeded verbal orders from an officer as an example of a circumstance contributing to the reasonableness of an officer's decision to use deadly force, we note that neither *Thurman* nor any of the cases cited therein specifically requirea verbal warning from an officer before the use of deadly force can be found objectively reasonable, even when a weapon is not directly pointed at an officer or bystander." …

"In the case at bar, we find the alleged lack of a verbal warning to be but one factor in our analysis of the totality of the circumstances concerning reasonableness. Given the totality of the circumstances, including the rapidity with which the events transpired, the exposed position of the Officers and a civilian when confronted with an armed and unknown person, the knowledge the Officers possessed regarding the reason they had been called to the scene, and the Officers' employment of their lights and sirens to make known their presence upon arrival at the scene, we conclude that it was reasonable for the Officers to have acted quickly without first issuing verbal commands to Mr. Holland to drop his weapon."

"The Hollands further argue that the Officers' use of deadly force was unreasonable because the Officers could have feasibly attempted non-lethal means to de-escalate the situation. For example, the Hollands contend that the Officers could have ordered Mr. Holland to drop the gun, and they urge that if the need for deadly force could have been eliminated by a command from the Officers to Mr. Holland to drop his weapon, the use of deadly force was unreasonable. We disagree. 'The Fourth Amendment reasonableness standard does not turn on the availability of less intrusive alternatives.' *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989)." …

"We discern no dispute of fact as to the swiftness with which the incident in question took place. Despite the parties' arguments concerning certain timestamps for events shown in the dashcam footage, our review of the footage demonstrates that the entire interaction between the Officers and Mr. Holland lasted mere seconds. *See Nelson*, 802 F. App'x at 985-86 ('When there is a video record of the incident, we take the facts as they appear in the video, which may not necessarily be in the light most favorable to the nonmoving party.'). The video also establishes that Mr. Holland, who was clearly armed and whose intent was unknown to the Officers, rapidly moved across the yard to the left of the Officers such that their position and that of an unarmed civilian was exposed within a matter of seconds. … Giving the proper deference to the Officers' 'on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case,' *see Burchett*, 310 F.3d at 944, we likewise conclude that the Officers' actions were objectively reasonable. We therefore affirm the trial court's grant of summary judgment in their favor, determining that the Officers' use of force did not violate Mr. Holland's constitutional rights."

12. **Motion to dismiss granted by the trial court was upheld - Although it is clear that the complaint alleges tragically irresponsible conduct by the defendants, that conduct is not a clearly established constitutional violation - The *Monell* claim fails on both the lack of a clearly established constitutional violation and a failure to state facts supporting the claim - The validity of a qualified immunity defense, like most affirmative defenses, may be apparent from the face of the complaint, in which case dismissal is proper - A county official is entitled to qualified immunity from a § 1983 suit if either (1) his conduct did not violate a constitutional right or (2) that right was not clearly established at the time of the conduct - Because any constitutional violation alleged by the Martinez Family was not clearly established, the court affirmed the district court's dismissal - A right is clearly established if the contours of the right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right, and to ensure that, courts cannot define established law at too high a level of generality - No case in this circuit establishes a next of kin's right to recover when a failure to timely notify them of a death leads to the severe, but natural, decomposition of the decedent's body - To hold the government liable the plaintiff must show that an employee's unconstitutional conduct stems from a municipal policy or custom - A policy or custom is broadly defined**

to include more than written rules, it can also include a policy of inaction - To set forth a claim on this theory, the complaint must show (1) the existence of a clear and persistent pattern of unconstitutional conduct; (2) notice or constructive notice on the part of the municipality; (3) the municipality's tacit approval of the unconstitutional conduct, such that its deliberate indifference in [its] failure to act can be said to amount to an official policy of inaction; and (4) that the municipality's custom was the moving force or direct causal link in the constitutional deprivation - There can be no liability under *Monell* without an underlying constitutional violation - A municipality cannot deliberately shirk a constitutional duty unless that duty is clear - The lack of a clearly established constitutional violation alone spells the end of the Martinez Family's *Monell* claim

LUIS ANTONIO MARTINEZ, SR; ANA MARTINEZ DE JESUS; YARITZA MARTINEZ DE JESUS; DEBORA MARTINEZ DE JESUS; ENITH MARTINEZ DE JESUS v. WAYNE COUNTY, MICHIGAN, et al.
SIXTH CIRCUIT COURT OF APPEALS No. 24-1474 Decided and Filed June 23, 2025

"Luis Martinez Jr. died in February 2021 and the Wayne County Medical Examiner's Office (WCMEO) took control of his body. The WCMEO found his next of kin but inexplicably did not contact them. Meanwhile, the family hired a social worker to find out what happened to Luis Jr. In April 2021, the investigator found him. But by then, his body was in an advanced state of decomposition and had to be cremated."

"The family sued Wayne County and various state officials under § 1983 alleging a Fourteenth Amendment procedural due process claim, a *Monell* liability claim, and various state-law claims. The defendants moved to dismiss, and the district court granted the motion. The family appealed. Although it's clear that the complaint alleges tragically irresponsible conduct by the defendants, that conduct is not a clearly established constitutional violation. And the *Monell* claim fails on both the lack of a clearly established constitutional violation and a failure to state facts supporting the claim. So we affirm."

"Because this case is on a motion to dismiss, we take the facts as plaintiffs alleged them in the complaint. *England v. DENSO Int'l Am. Inc.*, 136 F.4th 632, 634 (6th Cir. 2025). On February 3, 2021, Luis Antonio Martinez Jr. was found unconscious and transported to a hospital. He was pronounced dead that evening. The next day, his body was transferred to the WCMEO where Dr. Michael Caplan performed an autopsy. Defendants William Kasper, Dale Collins, Dr. Leigh Hlavaty, Dr. Carl Schmidt, and two investigators (Davis and Doe) (collectively, the 'individual defendants') conducted and supervised an investigation into Luis Jr.'s next of kin. They identified Luis Jr.'s body, his date of birth, two last known addresses, and eight family members who are next of kin. Despite finding them, no one from the WCMEO contacted the family about Luis Jr.'s death."

"After realizing he was missing, Luis Jr.'s family hired a social worker to find him. On April 8, 2021, the social worker told Ana Martinez De Jesus, Luis Jr.'s sister, that he was dead, and his body was in the WCMEO's possession. Ana went to the WCMEO and demanded to see him and take possession of his body. An investigator spoke with Ana but only showed her photos of Luis Jr.'s body because 'by then the body was in an advanced state of decomposition.' R.13, Second Am. Compl., p.7, PageID 68. Ana and various individual defendants argued for forty-five minutes, during which Ana was told that no one notified her of Luis Jr.'s death because they 'were backed up and didn't get to it until now.' *Id.*"

"Ana was not allowed to see Luis Jr.'s body before the body was transferred to a funeral home and cremated. The family could not identify his remains or confirm that the cremated body was in fact Luis Jr.'s body. They were also denied sacred funeral and burial rites because the body had to be cremated."

"Luis Jr.'s next of kin are his father, Luis Antonio Martinez Sr., and his four sisters, Ana, Yaritza, Debora, and Enith Martinez De Jesus (collectively, 'Martinez Family'). They sued the individual

defendants and Wayne County alleging a federal constitutional violation under 42 U.S.C. § 1983 against the individual defendants, a *Monell* liability claim against Wayne County, and Michigan state-law claims of gross negligence and intentional or reckless infliction of emotional distress."

"For the § 1983 claims, the family alleged that they had a property interest as Luis Jr.'s next of kin that is recognized under state law and protected by the Fourteenth Amendment. They alleged that the defendants violated that interest by not telling them about Luis Jr.'s death until the body was severely decomposed. And that the lack of a a pre- or post-deprivation hearing violated their procedural due process rights. They also alleged that Wayne County was liable under a *Monell* theory for either not training WCMEO staff on their responsibility to notify and deliver a decedent's body to the next of kin or not acting to ensure WCMEO staff fulfilled this responsibility."

"… [T]o state a plausible claim, the plaintiff must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Id.* (quoting *Iqbal*, 556 U.S. at 678). And the validity of a qualified immunity defense, like most affirmative defenses, 'may be apparent from the face of the complaint,' in which case dismissal is proper. *Id.* at 763. A county official is entitled to qualified immunity from a § 1983 suit if either (1) his conduct did not violate a constitutional right or (2) that right was not clearly established at the time of the conduct. *Crawford*, 15 F.4th at 760. This court can address these prongs 'in either order.' *Id.* And if one is lacking, the court need not address the other and can dismiss the plaintiff's claim based on the defendant's immunity. *Id.*"

"Because any constitutional violation alleged by the Martinez Family is not clearly established, we affirm. And so we do not address whether the defendants' conduct violated the Martinez Family's constitutional rights. Still, some background on the alleged violation is necessary to understand why it is not clearly established."

"The Martinez Family alleges that they had 'fundamental property interests in Luis, Jr.'s body.' R.13, Second Am. Compl., p.9, PageID 70. So first we will look to state law (here, Michigan law) to decide whether that property interest exists. Then we will apply federal law to decide whether the Constitution protects it."

"We have held that 'Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative.' *Whaley*, 58 F.3d at 1116. But the interest is not necessarily in the body itself. Rather, three Michigan Supreme Court cases have explained the contours of the interest."

"… Michigan provides some right to next of kin related to the possession of the decedent's body and the body's condition. *See also Waeschle*, 576 F.3d at 546 (noting the right 'of the next of kin 'to possess the body for burial and prevent its mutilation'' 'was inferred from several Michigan Supreme Court cases recognizing a cause of action for the unlawful mutilation of a corpse.' (quoting *Whaley*, 58 F.3d at 1114)). And in *Whaley* we considered how the Constitution protects that right."

"There, a pathologist's assistant removed the corneas from corpses without the next of kin's permission. *Whaley*, 58 F.3d at 1113. The assistant ran an eye bank and had a business agreement with two counties where he would pay all the counties' autopsy expenses whenever he took the corneas from a corpse and half the expenses when he did not. *Id.* The decedent's next of kin sued under § 1983 alleging Fourteenth Amendment procedural due process violations. *Id.* The district court dismissed the suit finding that 'Michigan law did not create an interest in a dead body sufficient to qualify as a 'property interest'' under the Constitution. *Id.* And on appeal, we had to decide 'whether the next of kin have a property interest in the body, including the eyes, of a deceased relative.' *Id.* We reviewed *Keyes*, *Doxtator*, and *Deeg* to conclude that Michigan provides the next of kin 'a right to possess the body for burial and prevent mutilation.' *Id.* at 1115 (citing *Doxtator*, 79 N.W. 922; *Keyes*, 78 N.W. 649; and *Deeg*, 76 N.W.2d 16). So we reversed the motion to dismiss."

"… While based in common law rather than statutory law, Michigan still provided next of kin 'the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation.' *Id.* at 1116. So like in *Brotherton*, the next of kin possessed 'a constitutionally protected property interest in the dead body of a relative.' *Id.*"

"But just because the next of kin have some constitutionally protected property rights does not mean that right extends to the circumstances here or that it is clearly established that the conduct here violated that right. We turn now to that latter question, which resolves this case."

"A right is clearly established if 'the contours of [the] right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.' *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation marks and alterations omitted). Plaintiffs need not find a case directly on point, but existing precedent at the time the conduct occurred must place the 'constitutional question beyond debate.' *Id.* And to ensure that, courts cannot 'define established law at too high a level of generality.' *City of Tahlequah v. Bond*, 595 U.S. 9, 12 (2021) (per curiam). 'It is not enough that a rule be *suggested* by then-existing precedent'; the specifics of existing law must make the contours of the rule clear. *Id.* (emphasis added) (internal quotation marks omitted).

"The family zeroes in on our statement in *Whaley* (relying on *Doxtator*, *Keyes*, and *Deeg*) that the Michigan courts have held that the 'next of kin have a right to possess the body for burial and prevent its mutilation.' 58 F.3d at 1115. But this statement defines the right at too high a level of generality to put WCMEO officials on notice that their conduct here violated the family's constitutional rights. The heart of the Martinez Family's claim is that the failure to timely notify them of Luis Jr.'s death deprived them of their right to possess the body for burial, specifically because the body was severely decomposed and required cremation. So two things undergird the alleged constitutional violation: (1) delayed notification of the decedent's death and (2) severe, natural decomposition of the corpse. Put differently, this case involves a body's natural decomposition due to (at most) reckless conduct by state officials. But none of the cases cited deal with these issues."

"Those cases involve volitional acts, which is consistent with the standard definition of mutilation. The family says that allowing a body to badly decompose is essentially the same thing as mutilation. And they're right that to a grieving family, the result looks no different. But that's not enough. Neither *Whaley* nor *Brotherton* nor any other case in our circuit establishes a next of kin's right to recover when a failure to timely notify them of a death leads to the severe, but natural, decomposition of the decedent's body. And that's especially important in the context of § 1983, which otherwise requires intent."

"Next, we turn back to state law. But to the extent that the Martinez family relies on Michigan law alone to clearly establish the law here, it is of no help." …

"… *Dampier* doesn't help the plaintiffs here. To begin with, '[f]or a right to be clearly established, 'existing *precedent* must have placed the . . . constitutional question beyond debate.'' *Bell v. City of Southfield*, 37 F.4th 362, 368 (6th Cir. 2022) (quoting *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (per curiam)). So we have rejected a plaintiff's attempt to use an unpublished case to clearly establish a right. *Id.* at 367–68. Though this court has not always been consistent with that requirement, we have said that, at minimum, a 'robust consensus of cases of persuasive authority' is necessary absent controlling authority. *Stewart v. City of Euclid*, 90 F.3d 667, 674 (6th Cir. 2020). *Dampier* is neither binding precedent on this court nor does the single case show a 'robust consensus' among persuasive authority."

"Finally, the Martinez Family points to a Michigan statute to claim that it helps establish the right. They point to § 52.205(4), which says that 'the county medical examiner shall ascertain the identity of the decedent and immediately and as compassionately as possible notify the next of kin of the decedent's death and the location of the body.' Mich. Comp. Laws § 52.205(4). While this statute might make the defendants aware that they violated state law, it does nothing to put them on notice

that they violated a *federal constitutional* rule. For that, the family looks to *Whaley* to say that the state statutes 'contemplate and imply the next of kin's right to possession of the body, to which the protection of federal law attached.' Appellant Br. at 28."

"Because the Martinez Family did not have a clearly established constitutional right to timely notice of Luis Jr.'s death to prevent decomposition of his body, the defendants are entitled to qualified immunity."

"The Martinez Family also appeals the district court's dismissal of their *Monell* liability claim against Wayne County. The district court found the complaint did not state a viable claim for relief. The court also noted that its holding that the family did not allege a clearly established constitutional violation 'may be fatal' to the municipal liability claim but did not definitively answer that question. *Martinez*, 2024 WL 1806423, at *13 n.6."

"We review a dismissal for failure to state a claim de novo. *Kenjoh Outdoor, LLC v. Marchbanks*, 23 F.4th 686, 692 (6th Cir. 2022). A claim survives only if it 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' *Id.* (internal quotation marks omitted). And to be facially plausible, the claim must allow the court 'to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Id.* (internal quotation marks omitted)."

"While this court must accept the plaintiff's factual allegations as true, it is 'not required to accept legal conclusions or unwarranted factual inferences as true.' *Crosby*, 863 F.3d. at 552 (internal quotation marks omitted). And similarly, a ''legal conclusion couched as a factual allegation' is not entitled to a presumption of truth.' *Crawford*, 15 F.4th at 762 (quoting *Iqbal*, 556 U.S. at 678)."

"A municipality is not subject to § 1983 liability 'for an injury inflicted solely by its employees or agents.' *Kovalchuk v. City of Decherd*, 95 F.4th 1035, 1038 (6th Cir. 2024) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). Instead, the municipality can only be held liable 'for [its] *own* illegal acts.' *Id.* (alteration in original) (quoting *Connick v. Thompson*, 563 U.S. 51, 60 (2011)). So the plaintiff must show that an employee's unconstitutional conduct stems from a municipal 'policy or custom.' *Coleman v. Hamilton Cnty. Bd. of Cnty. Comm'rs*, 130 F.4th 593, 599 (6th Cir. 2025)."

"A policy or custom is broadly defined to include more than written rules. *Id.* It can also include a policy of inaction. *Franklin v. Franklin County*, 115 F.4th 461, 472 (6th Cir. 2024) (alterations omitted). To set forth a claim on this theory, the complaint must show

> (1) the existence of a clear and persistent pattern of unconstitutional conduct; (2) notice or constructive notice on the part of the municipality; (3) the municipality's tacit approval of the unconstitutional conduct, such that [its] deliberate indifference in [its] failure to act can be said to amount to an official policy of inaction; and (4) that the [municipality's] custom was the moving force or direct causal link in the constitutional deprivation.

Id. (alterations in original) (internal quotation marks omitted). The plaintiff cannot rely on a single instance to show a pattern of unconstitutional conduct. *Id.*"

"Regardless of the asserted theory, our precedent shows that '[t]here can be no liability under *Monell* without an underlying constitutional violation.' *Chambers v. Sanders*, 63 F.4th 1092, 1101–02 (6th Cir. 2023) (alteration in original) (quoting *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014)). And if 'no underlying rights violation [is] plausibly established in the[] complaint, we [will] affirm the district court's dismissal of [a] *Monell* claim.' *Id.* at 1102. Similarly, when the complaint alleges municipal liability based on a policy of inaction or a failure to train, '[t]he absence of a *clearly established* right spells the end of th[e] *Monell* claim.' *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017) (emphasis added). That's because a policy of inaction relies on the municipality's deliberate indifference. *See Franklin*, 115 F.4th at 471. And 'a municipality cannot *deliberately* shirk a

constitutional duty unless that duty is clear.' *Arrington-Bey*, 858 F.3d at 995. Likewise, a failure to train theory requires it be obvious (i.e., clearly established) that the conduct violates a constitutional right. *J.H.*, 951 F.3d at 721. So both theories rely on a clearly established constitutional violation."

"The lack of a clearly established constitutional violation alone 'spells the end of [the Martinez Family's] *Monell* claim.' *See Arrington-Bey*, 858 F.3d at 995." …

CLASS ACTION

1. CLASS ACTION - A district court has broad discretion to decide whether to certify a class - This Court will only reverse the district court's certification of the Water Lien Class if the City makes a strong showing that the district court's decision amounted to a clear abuse of discretion - An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment - To obtain class certification, Plaintiffs must first satisfy the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequate representation - For numerosity, there is no strict numerical test, but substantial numbers will qualify, and Plaintiffs have identified at least 943 residents who would belong to the proposed Water Lien Class - Commonality is also satisfied, because Plaintiffs have demonstrated a common question that will yield a common answer for the class and that that common answer relates to the actual theory of liability in the case - Typicality exists because Plaintiffs' claims fairly encompass the claims of all unnamed class members - Finally, Plaintiffs have established the adequacy of class representation because the named representatives share common interests with the unnamed interests of the Water Lien Class and appear able to vigorously assert those interests for all - Under Rule 23(b)(2), the party opposing the class must have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole - Under Rule 23(b)(3), the district court must find that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof - This does not mean that all elements of a claim must be subject to class-wide proof - Rather, a class may be certified based on a predominant common issue even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members

ALBERT PICKETT, JR.; KEYONNA JOHNSON; JAROME MONTGOMERY; ODESSA PARKS, deceased; TINIYA SHEPHERD, on behalf of themselves and all others similarly situated v. CITY OF CLEVELAND, OHIO
SIXTH CIRCUIT COURT OF APPEALS No. 24-3395 Decided and Filed: June 9, 2025

"Defendant City of Cleveland appeals the district court's class certification order of the 'Water Lien Class' pursuant to Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure. The Class consists of at least 943 individuals in Cuyahoga County, Ohio, all African American, who were assessed a water lien by the City. For the reasons set forth below, we **AFFIRM**."

"Cleveland Water, a department of the City of Cleveland, provides water services to approximately 1.5 million customers within its service area in Ohio. This includes over seventy communities across Greater Cleveland, as well as municipalities in Cuyahoga, Portage, Medina, Summit, and Geauga Counties. Though not mandated by law, Cleveland Water charges payment for water services pursuant to Ohio Rev. Code § 743.04(A) through various 'user charges,' including utility rates and fees. Mastracchio Report, R. 64-16, Page ID #1136. These water charges constitute Cleveland Water's 'sole

revenue source,' and are used to support its operations, maintenance, and capital projects. Appellant Br., ECF No. 24, 4."

"To collect unpaid fees, Cleveland Water places 'water liens' on delinquent customer accounts. Appellant Br., ECF No. 24, 4–5. To trigger the placement of a water lien, a customer must: (1) fall behind on a water bill for at least 180 days, and (2) owe an account balance of $300 or more. 'Between 2012 and 2020, Cleveland Water attached over 17,172 water liens to properties for unpaid water bills.' Parnell Expert Report, R. 65-15, Page ID #1732. These water liens accumulate penalties, interest, and other fees which can place customer properties at increased risk of foreclosure and possible eviction. *Id.* To avoid this result, customers may enter a payment plan with Cleveland Water to recall the water lien, although the lien is re-certified if the customer breaks the payment plan. Cleveland Water uses these lien revenues to help pay for its other expenses."

"In Cuyahoga County, more water liens are assessed to properties in majority Black neighborhoods than those in majority White neighborhoods. *See* Parnell Expert Report, R. 65-15, Page ID #1732 ('[T]he larger the percentage of African Americans living in a particular neighborhood, the larger the number and proportion of all water liens.'). Statistics show that White residents make up approximately 59% of the population of Cuyahoga County, while Black residents make up 29%. Still, roughly 18% of water liens are placed in majority White neighborhoods, while 68% of water liens are placed in majority Black neighborhoods. Cleveland Water does not have knowledge of a particular homeowner's race at the time of assessing a water lien. Plaintiffs Albert Pickett, Jr., Keyonna Johnson, Jarome Montgomery, Odessa Parks, and Tiniya Shepherd were residents of Cuyahoga County, Ohio, during all times relevant to this action. Plaintiffs are African American, and each of them had a water lien placed on their property by Cleveland Water that resulted in additional fees, and in some cases, water shutoffs or even foreclosure."

"On December 28, 2019, Pickett, Johnson, Montgomery, and Shepherd ('Plaintiffs' or 'Named Plaintiffs') filed a class action lawsuit against Defendant City of Cleveland and Cleveland Water ('the City' or 'Cleveland') under 42 U.S.C. § 3604 of the Fair Housing Act (FHA), § 4112.02(H) of the Ohio Civil Rights Act (OCRA), and the United States and Ohio Constitutions. They alleged that Cleveland's water policy disproportionately harms Black homeowners in violation of §§ 3604(a) and 3604(b) of the FHA as well as § 4112.02(H) of the OCRA. In this regard, § 3604 makes it unlawful '[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.' 42 U.S.C. § 3604(a) (emphasis added)."

"On September 15, 2022, Plaintiffs filed a motion for class certification requesting that the district court certify four classes of individuals. This included a group known as 'the Water Lien Classes,' characterized by Plaintiffs as 'two classes of Black residents and homeowners in Cuyahoga County who ha[d] been obligated to pay a debt against their property pursuant to a water lien placed by Cleveland.' Appellees' Br., ECF No. 48, 8. Plaintiffs sought certification under Rule 23(b)(2) for injunctive relief, as well as Rule 23(b)(3) for damages. Plaintiffs also outlined the methodology proposed by their expert, Dr. Justin Steil, to calculate an estimate of class-wide damages. In this model, Dr. Steil analyzed two data sets, including the water lien liabilities of the five named Plaintiffs as well as that for all residents in Cuyahoga County who owned properties with water liens from Cleveland Water. He ultimately determined that while individual damages may vary, the cost increase attributable to water liens was similar in both groups."

"The City filed a motion for summary judgment, which the district court denied on September 29, 2023." …

"On September 30, 2023, the district court granted Plaintiffs' motion for class certification and certified the Water Lien Classes under Rules 23(b)(2) and 23(b)(3)." …

"'A district court has broad discretion to decide whether to certify a class.' *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013). This Court will only reverse the district court's certification of the Water Lien Class if the City makes 'a strong showing' that the district court's decision 'amounted to a clear abuse of discretion.' *Id.* 'An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.' *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012). Importantly, we will not find an abuse of discretion in the absence of a 'definite and firm conviction' that such an error occurred. *Id.* (quoting *Mia. Univ. Wrestling Club v. Mia. Univ.*, 302 F.3d 608, 613 (6th Cir. 2002))."

"… [T]he City attempts to argue that all class members must have a common economic harm and may not 'simply point[] to a common statutory violation,' such as Plaintiffs' FHA claim under 42 U.S.C. § 3604, to satisfy the predominance requirement of Rule 23(b)(3). *See* Appellant Br., ECF No. 24, 22. The City also argues that FHA violations of 42 U.S.C. § 3604(a) do not constitute a legally cognizable harm on the merits."

"Plaintiffs argue that common issues predominate their disparate-impact claim, specifically 'whether Cleveland's water lien policy violates the FHA and OCRA and whether the water lien policy has a disparate impact on Black homeowners and residents in Cuyahoga County.' *See* Appellees' Br., ECF No. 48, 36. Plaintiffs reason that these questions predominate over individualized concerns relating to causation and damages, which may be resolved later in the litigation and do not defeat class certification at this stage. They also defend the merits of their FHA claim against Cleveland's water policy, which derives from § 3604(a) and makes it unlawful '[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.' 42 U.S.C. § 3604(a) (emphasis added). Because of the disproportionate number of water liens placed on Black properties in Cuyahoga County, and the potential for fees and foreclosure, Plaintiffs argue that Cleveland's policy makes housing 'unavailable' within the meaning of § 3604. We hold that the district court did not abuse its discretion by certifying the Water Lien Class under Rules 23(b)(2) and 23(b)(3)."

"To obtain class certification, Plaintiffs must first satisfy the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequate representation. *See Whirlpool*, 722 F.3d at 850. The district court addressed these requirements in depth. For numerosity, there is 'no strict numerical test,' but 'substantial' numbers will qualify, and Plaintiffs have identified 'at least 943 residents who would belong to the proposed Water Lien Class.' *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552 (6th Cir. 2006); Order, R. 93, Page ID #4829. We thus determine that numerosity is satisfied. *See Helwig v. Concentrix Corp.*, 345 F.R.D. 608, 619 (N.D. Ohio 2024) (noting that 'a class of 40 or more members raises a presumption' of numerosity) (quoting *1 Newberg and Rubenstein on Class Actions* § 3:12 (6th ed.))."

"Commonality is also satisfied, because Plaintiffs have demonstrated 'a common question that will yield a common answer for the class . . . and that that common answer relates to the actual theory of liability in the case.' *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015). Specifically, Plaintiffs suffer according to a common theory of injury under the FHA whose answer will resolve the suit 'in one stroke' for all members of the Class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)."

"Typicality exists because Plaintiffs' claims fairly encompass the claims of all unnamed class members. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). Since Cleveland's water lien policy applies to the entire Water Lien Class, and all class members suffered the placement of a water lien on their personal property, all claims are 'interrelated.' *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that '[t]he commonality and typicality requirements of Rule 23(a) tend to merge')."

"Finally, Plaintiffs have established the adequacy of class representation because the named representatives share common interests with the unnamed interests of the Water Lien Class and appear able to 'vigorously' assert those interests for all. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976). Rule 23(a)(4) further seeks to 'uncover conflicts of interest between named parties and the class they seek to represent,' but we find no indication of conflicting interests or other arguments against the adequacy of representation in this matter. Plaintiffs have thus satisfied the prerequisites of Rule 23(a). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)."

"After clearing the requirements of Rule 23(a), the proposed class must also fall within one of the three types of class actions under Rule 23(b). *Amchem Prods.*, 521 U.S. at 614. Under Rule 23(b)(2), 'the party opposing the class [must have] acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.' *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir. 2002) (quoting Fed. R. Civ. P. 23(b)(2))." …

"In the present matter, Plaintiffs seek an injunction and declaratory judgment as to the City's water lien policy that would provide relief to each member of the Water Lien Class and is 'separate from any request for monetary damages' under Rule 23(b)(3). Order, R. 93, Page ID #4841. By definition, the Class consists of 'all Black homeowners or residents in Cuyahoga County' who suffered the placement of a water lien within the past two years. *Id.* at Page ID #4823. This means that the City's alleged conduct, i.e., the placement of water liens disproportionately affecting Black residents in violation of the FHA, 'can be enjoined or declared unlawful . . . as to all of the class members or as to none of them.' *Wal-Mart*, 564 U.S. at 360. Because such a remedy would be 'indivisible' in nature, *id.*, we hold that the district court did not abuse its discretion by certifying the Water Lien Class under Rule 23(b)(2)."

"Under Rule 23(b)(3), the district court must find that 'issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.' *Young*, 693 F.3d at 544 (internal quotation marks omitted). This does not mean that all elements of a claim must be subject to class-wide proof. *See In re Whirlpool Corp.*, 722 F.3d at 858. Rather, '[a] class may be certified based on a predominant common issue even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.' *Hicks v. State Farm Fire & Cas. Co.*, 965 F.3d 452, 460 (6th Cir 2020) (citation omitted))." …

"Plaintiffs have likewise presented a common question asking whether the City's 'disproportionate placement of water liens on Black homeowners and residents of Cuyahoga County violates the FHA.' Order, R. 93, Page ID #4842." …

"The fact that some members of the Water Lien Class may not be eligible for damages, or may receive damages in varying amounts, does not invalidate the district court's certification of the Class based on a common question. *See Hicks*, 965 F.3d at 460; *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016). For predominance, the important inquiry is whether common questions can be proven through evidence common to the Class, *see In re Whirlpool*, 722 F.3d at 858, and Plaintiffs have alleged a significant statistical disparity in the City's placement of water liens in majority Black versus White neighborhoods." …

"To decertify based on the existence of some questions on individual damages would undermine the very purpose of Rule 23(b)(3), which endeavors 'to allow integration of numerous small individual claims into a single powerful unit.' *Young*, 693 F.3d at 540 (quoting *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 722 (9th Cir. 2010)). Rather than investigating the merit of these separate claims, 'the predominance inquiry must focus on common questions that *can be proved* through evidence common to the class.' *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 521 (6th Cir. 2015) (quoting *In re Whirlpool*, 722 F.3d at 858 (emphasis added)). 'In other words, named plaintiffs must show that they

will be able to prove injury through common evidence, not that they have in fact proved that common injury.' *Rikos*, 799 F.3d at 521"

Moreover, Plaintiffs have set forth a plan for future damages calculations through Dr. Steil's report, which 'applies to the whole class and can be calculated for each class member using a common methodology.'" …

"Regardless of economic damages, Cleveland contends that standing is improper because 'up to 20% of the Water Lien Class' suffered no *economic injury* traceable to a water lien. Appellant Br., ECF No. 24, 26. No matter the truth of this statement, it falsely assumes that Plaintiffs' alleged injury under § 3604 is economic in nature. Instead, Plaintiffs have Article III standing by virtue of their FHA claim, which constitutes an injury in fact and is plainly cognizable given its close relationship to traditional harms. *Merck v. Walmart, Inc.*, 114 F.4th 762, 779–80 (6th Cir. 2024)."

"For standing to exist, a plaintiff must be injured in a recognized way. 'Under constitutional standing doctrine, an 'injury in fact' is an 'invasion of a legally protected interest [*sic*] which is (a) concrete and particularized and (b) 'actual or imminent, not conjectural or hypothetical.'' *Id.* at 773 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up))." …

"Turning to Plaintiffs' alleged injury under the FHA, the appropriate analogue comes from Congress and the precedent of this Court. *See id.* at 773, 779–80. In *Merck v. Walmart*, we recognized that '[p]laintiffs under the Fair Housing Act have standing under Article III' because Congress analogized the harm of private discrimination in the housing market to the constitutional harm of racial discrimination by the government. *Id.* at 779–80. In so doing, we explicitly distinguished monetary harms that create automatic standing from those harms that Congress has elevated due to their 'strong resemblances to constitutional claims.' *Id.* at 780." …

"… Because Plaintiffs' disparate-impact claim falls squarely within the FHA's scope and is thus comparable to traditional harms found in the Constitution, they have satisfied Article III standing. *See Merck*, 114 F.4th at 779–80."

"Furthermore, the litigation of Plaintiffs' claim that Cleveland's water policy makes housing 'unavailable' will resolve a common question 'at the heart of the litigation' for the whole of the Water Lien Class, which consists of almost 1,000 members, all African American, who have suffered the placement of a water lien. *See Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007). For all the foregoing reasons, the district court properly certified the Water Lien Class pursuant to the predominance requirement of Rule 23(b)(3)."

"The City asks this Court to address the merits of Plaintiffs' claim that 'the act of placing a lien to secure unpaid debt owed to a public utility makes 'unavailable' or denies housing.' Appellant Br., ECF No. 24, 1. But appeals brought under Rule 23(f) are limited to evaluating the district court's decision to certify a class, not whether the cause of action is meritorious. *Olden v. LaFarge Corp.*, 383 F.3d 495, 507 (6th Cir. 2004); *In re Delta Air Lines*, 310 F.3d 953, 961 (6th Cir. 2022) ('A Rule 23(f) appeal should avoid mixing the merits of the case with the class certification issues.' (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107 (D.C. Cir. 2002))). At the certification stage, '[t]he question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (citation omitted)."

CONSTITUTIONAL LAW (U.S.)

1. Contracts Clause, Procedural Due Process and Equal Protection claims - Amendment - For purposes of a procedural due process claim, an individual has no protected property interest in the procedure itself - This is because a mere failure to comply with state or local procedural requirements does not, alone, constitute a denial of

due process - Instead, the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause - The Supreme Court has held that procedural due process does not govern the enactment of generally applicable legislative acts and the adoption of a generally applicable zoning ordinance is a legislative act – Equal protection class of one claim - Under a class-of-one theory, Lathfield must show that (i) the City intentionally treated it differently from others similarly situated in all relevant respects, and (ii) that there is no rational basis for the difference in treatment - To prevail on this theory, Lathfield must show that it was treated differently than those similarly situated in all relevant respects - In addition, Lathfield must show that the City's actions were so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational - Lathfield has not satisfied the first element of its class-of-one equal protection claim because it does not offer evidence demonstrating that the City treated it differently from similarly situated property owners - Bare allegations of differential treatment are insufficient to establish an equal protection violation - Contract clause claim -The Constitution provides that no State shall pass any Law impairing the Obligation of Contracts - The Supreme Court has outlined a three-part test for determining whether a law violates the Contract Clause - To prevail on a Contracts Clause claim, a plaintiff must show that (i) the legislation operates as a substantial impairment of a contractual relationship, (ii) the state lacks a significant and legitimate public purpose behind the regulation, and (iii) the adjustment of the rights and responsibilities of contracting parties is not based on reasonable conditions and is not of a character appropriate to the public purposes justifying the legislation - An alleged Contracts Clause violation cannot give rise to a cause of action under § 1983 - The challenged provision of the City Code, was enacted on December 20, 1999, long before Lathfield bought the property and because Lathfield's contracts with its tenants did not exist at the time the code section was enacted, the City could not have violated the Contracts Clauses of the United States and Michigan Constitution

LATHFIELD INVESTMENTS, LLC; LATHFIELD HOLDINGS, LLC; LATHFIELD PARTNERS, LLC v CITY OF LATHRUP VILLAGE; LATHRUP VILLAGE DOWNTOWN DEVELOPMENT AUTHORITY
SIXTH CIRCUIT COURT OF APPEALS No. 24-1318 Decided and Filed: April 28, 2025

"Plaintiff-Appellants Lathfield Investments, LLC; Lathfield Holdings, LLC; and Lathfield Partners, LLC (collectively, 'Lathfield') own three commercial buildings (the 'Property'), located in the City of Lathrup Village, Michigan, that are rented to various commercial tenants. Defendant-Appellees'—City of Lathrup Village (the 'Village') and the Village's Downtown Development Authority (the 'DDA') (collectively, the 'City')—Code of Ordinances (the 'City Code') requires that all landlords apply for a landlord rental license before renting any units to commercial tenants. The City Code also requires all landlords renting to commercial tenants to list each tenant's name and principal business."

"In July 2020, Lathfield sought to comply with the City Code and applied for a landlord rental license. In its application, Lathfield did not list the names and the principal businesses of its tenants, as required under Chapter 18, Article II, § 18-33(a) of the City Code. For this reason, the City denied Lathfield's application for a landlord rental license. Because Lathfield did not have a landlord rental license, the City also denied the Lathfield tenants' general business license applications."

"Lathfield sued, among other parties, the Village and the DDA, a local governmental body that assists in the Village's commercial development. Broadly, Lathfield argued that the City engaged in a concerted effort to unlawfully compel it to apply for unnecessary licenses and to make unnecessary improvements to the Property. Lathfield brought eleven claims, nine of which are against the City, seeking monetary damages and various forms of relief that would allow it to continue leasing space at

the Property despite its failure to obtain a landlord rental license. We affirm the district court's grant of summary judgment to the City with respect to all nine claims whose dismissal Lathfield now appeals."

"In October 2019, Lathfield bought the Property from Dhal Real Estate, LLC ('Dhal'). Because Dhal rented Property space to commercial tenants, under the City Code, Dhal was required to obtain both a general business license, Lathrup, Mich. City Code, ch. 18, art. II, § 18-30(a) (hereinafter 'City Code'), and a landlord rental license, *id.*, art. IV, § 18-184(a). To obtain both general business and landlord rental licenses, under the City Code, Dhal was also required to have the City inspect the Property for compliance with both the Michigan Building Code, *id.*, ch. 18, art. IV, § 18-184(b)(1); *id.*, ch. 14, art. II, § 14-26 ('The City of Lathrup Village shall apply and enforce the Michigan Building Code 2006 update, and all amendments thereto.'), and the City's Zoning Ordinance ('City Zoning Ordinance'), *id.*, ch. 18, art. IV, § 18-184(b)(2)."

"Accordingly, Dhal arranged for the City to inspect the Property in or around December 2017. After the City inspected the Property, the City sent Dhal a notice letter describing numerous Michigan Building Code violations. Among other violations, including that Dhal had made multiple renovations without proper permits, the City found that Dhal had rented Property space to retail stores. Because the Property was not approved for retail store use, the City required Dhal to submit a new site plan, along with accompanying applications, to ensure the Property's compliance with the 2015 Michigan Building Code and the City Code."

"After sending its December 2017 notice letter, the City continued to inform Dhal of various code violations on the Property. Dhal did not attempt to correct these code violations. Instead, Dhal brought suit against the City, which it subsequently agreed to dismiss after settlement discussions with the City. In the settlement, Dhal agreed to cure the Property's various code violations. But before curing the violations under the settlement, in November 2019, Dhal closed on a sale of the Property to Michigan Asset Holdings, LLC, which subsequently assigned its rights under the agreement to Lathfield."

"A week before the anticipated closing date, Dhal informed Lathfield about the Property's code violations and presented Lathfield with a January 6, 2020 letter from the City stating that several outstanding code violations required the immediate submission of a new site plan, which was to be due on February 2, 2020. Undeterred by the Property's code violations and the need to submit a new site plan, Lathfield proceeded with the purchase and closed on January 28, 2020—a month earlier than the date contemplated in Lathfield's purchase agreement."

"Lathfield allowed the City to conduct an inspection, and, in July 2020, the City issued a 174-page inspection report that detailed several Michigan Building Code violations and findings that the Property had undergone extensive renovations without proper permits, in violation of the City Code. After the July 2020 Inspection Report was issued, Lathfield, through its legal counsel, sent the City a letter to 'assure the City . . . that they are taking all reasonable and appropriate steps to bring the Propert[y] into compliance,' and that Lathfield would 'coordinate [further] inspections' with the City. DE 40-10, August 2020 Letter, Page ID 1270. Lathfield also submitted (i) applications for both general business and landlord rental licenses, and (ii) a site plan with its proposed solutions to cure the violations found in the July 2020 Inspection Report. In September 2020, in response to Lathfield's submitted site plan, the City's Planning Commission issued a Site Plan Review that detailed additional City Zoning Ordinance violations on the Property, including violations related to the Property's parking lot and dumpster. But later that month, on the condition that Lathfield would either cure the City Zoning Ordinance violations detailed in the September 2020 Site Plan Review or seek variances, the Planning Commissioners approved Lathfield's proposed site plan."

"A couple of days after the Planning Commissioners approved its site plan, on September 17, 2020, Lathfield submitted applications to the City's Zoning Board of Appeals to challenge the July 2020 Inspection Report's findings on several grounds. In its appeal applications, Lathfield argued, among

other things, that (i) the building inspector misapplied the City Code, effectively compelling Lathfield to make unnecessary improvements, (ii) the City violated its due process rights because the City failed to properly adopt subsequent updates to the Michigan Building Code, and (iii) the City violated Lathfield's due process rights by providing adequate notice of Lathfield's specific violations and its right to appeal, along with a reasonable amount of time to remediate. In response, in November 2020, the City stated that the City had not issued an order or notice of violation, so there was nothing from which Lathfield could appeal."

"The next month, the City denied Lathfield's applications for general business and landlord rental licenses because Lathfield did not comply with the City Code's requirement under § 18-33(a), which required Lathfield to list names and the principal businesses of its tenants. Lathfield did not subsequently resubmit its application to comply with this disclosure requirement. Because Lathfield did not have a landlord tenant license, the City also denied its tenants' general business license applications."

"In January 2021, each of the three Lathfield entities sued the City; the DDA; the City's inspection contractor, McKenna & Associates, Inc. ('McKenna'); and Jim Wright, McKenna's building inspector, in Michigan state court. *Lathfield Holdings LLC v. Dahl Real Est. LLC*, No. 363502, 2023 WL 6168972 (Mich. Ct. App. Sept. 21, 2023). In its complaint, Lathfield brought eleven claims, nine of which were against the City. In those claims, it sought declarations that (i) the Property is not subject to site plan approval, (ii) Lathfield is not obligated to obtain a general business license, (iii) the City improperly prejudiced the rights of Lathfield's third party tenants by denying their applications for business licenses based on Lathfield's failure to obtain a landlord rental license, and that (iv) the Property, as presently constructed, is permitted as a preexisting, nonconforming use. In addition, Lathfield also alleged that (v) the City violated its due process rights, (vi) the City violated its equal protection rights, (vii) the City Code's requirement that an applicant disclose the names and businesses of its tenants violates the Contracts Clauses of the United States and Michigan Constitutions, (viii) the City violated the Fifth Amendment's Takings Clause through inverse condemnation of the Property, and that (ix) the City engaged in an unlawful civil conspiracy to compel Lathfield to undertake actions to comply with alleged code violations not required by law. Lathfield brought its constitutional claims against the City under 42 U.S.C. § 1983. The City removed all three suits to the United States District Court for the Eastern District of Michigan, where they were consolidated."

"The City, McKenna, and Wright each moved for summary judgment. The district court granted in part McKenna and Wright's motion and granted the City's motion summary judgment in its entirety. After the district court denied McKenna and Wright's motion for reconsideration, it dismissed all claims against those two defendants by stipulated order. The district court granted summary judgment for the City on all nine claims."

"Lathfield argues that the district court erred in dismissing its request for a declaration that it was not subject to the City's site plan approval process as moot." …

"… Because the City already approved Lathfield's proposed site plan, Lathfield lacks a 'legally cognizable interest' in the relief it seeks. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (citation omitted)."

"Lathfield also argues that the district court should have issued a declaration, even if it would not address a 'live' controversy, because a declaration would have guided the City's future conduct with respect to other parties. But we do not have the authority to 'give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [us].' *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citation omitted). The Supreme Court has explained that '[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit,' a claim is moot 'if the dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.' *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (internal quotation marks and citation omitted). It follows

that, even if we accept Lathfield's premise that the City improperly required Lathfield to undergo a site plan review, there is no 'substantial controversy' of 'immediacy and reality' because Lathfield is no longer undergoing the City's site review process. *Preiser*, 422 U.S. at 402 (citation and emphasis omitted)."

"We conclude that the district court did not err in dismissing this request for declaratory relief as moot because Lathfield's claim was no longer 'live' at the time of the district court's decision."

"Lathfield next argues that the district court erred in denying its request for declaratory relief that, under the City Code, it has no obligation to obtain a general business license. The City Code requires every person 'conducting business' in the City to apply for and obtain a general business license. City Code, ch. 18, art. II, § 18-30(a). This general business license requirement applies even to those that 'are already conducting business within th[e] [C]ity and do not hold a license.' *Id.* The question is whether Lathfield is 'conducting business' within the City, as defined by the City Code."

"Lathfield's argument relies on its assertion that leasing Property space to commercial tenants falls outside the City Code's definition of 'conducting business.' According to Lathfield, it does not conduct business because it does not supply commodities, nor does it sell any goods or merchandise. But the City Code defines 'conducting business' broadly. The broad heading of 'conducting business' includes (i) '[p]ursuing a business,' which includes 'any form of activity that has for its end the production or supplying of commodities,' *id.*, § 18-26(1); (ii) '[a]cting as a merchant,' which includes 'selling goods, wares and merchandise,' *id.*, § 18-26(2); and (iii) '[p]erforming a trade,' which includes 'all other kinds of vocations, occupations, enterprises, establishments and kinds of activity not included in the definition of the term 'merchant' or 'business,'' *id.*, § 18-26(3)."

"Lathfield's business falls within this broad third category of 'performing a trade.' Given that § 18-26(3) states that 'conducting business' includes 'all other kinds of vocations, occupations, enterprises, establishments and kinds of activity not included in the definition of the term 'merchant' or 'business,'' it operates as a catch-all provision for other businesses that do not involve the sale of goods or merchandise. 'Trade' is defined as '[t]he business of buying and selling or bartering goods or *services*.' *Black's Law Dictionary* (12th ed. 2024) (emphasis added). Although Lathfield does not sell goods or merchandise, it nonetheless operates as a business and provides commercial leasing services by offering rental units for mixed use office, retail, and services."

"… Before purchasing the Property, Lathfield engaged in lengthy due diligence efforts to evaluate the Property's profitability, including by reviewing rent rolls. After buying the Property, Lathfield contracted with a property management company for help with maintaining rent rolls, negotiating lease contracts, coordinating tenant rental payments, and maintaining the physical space. In other words, it is clear Lathfield was engaged in the business of leasing commercial space 'with continuity and regularity' for profit. *Id.*"

"We conclude that Lathfield is engaged in 'conducting business' in the City, as defined by Chapter 18, Article II, § 18-26(3) of the City Code. Therefore, under City Code § 18-30(a), Lathfield must obtain a general business license. The district court did not err in concluding that Lathfield is required to obtain a general business license."

"Lathfield argues that the district court erred in denying its request for a declaration that the City improperly prejudiced the rights of Lathfield's third party tenants because Lathfield does not have a landlord rental license." …

"As a threshold issue, we agree with the district court that Lathfield lacks Article III standing to vindicate the rights of its tenants rather than its own. Nevertheless, we address the merits of Lathfield's arguments, based on its own injuries stemming from its inability to obtain business and landlord rental licenses."

"Contrary to Lathfield's assertion, the City Code makes clear that whether a tenant can be approved for a business license depends on whether the building owner has a landlord rental license. The City Code unambiguously states that '*[e]ach rental unit* . . . shall be registered with the city clerk . . . on an annual basis prior to any premises or part thereof being offered for occupancy, and *shall not be occupied without acquiring a landlord license*[.]' City Code, ch. 18, art. IV, § 18-183(a) (emphases added)." …

"With regard to business license approval in particular, under the City Code, the City may only approve a general business license application if it 'determines that such person's business, *as and where conducted or proposed to be conducted*, will not be in violation of . . . city ordinances.' *Id.*, § 18-30(d) (emphasis added). Thus, if the City Code prohibits a tenant from occupying a rental unit because a landlord violates § 18-33(a)'s tenant registration requirement, a tenant's business application to occupy the same rental unit cannot be approved. The district court did not err in concluding that the City Code conditions the approval of a tenant's business license application on a building owner's ability to obtain, and satisfy the requirements for, a landlord rental license."

"Under Michigan law, 'when a statute specifically defines a given term, that definition alone controls.' *Tryc v. Mich. Veterans' Facility*, 545 N.W.2d 642, 646 (Mich. 1996). The City Code specifically defines 'leasing' or 'renting' as 'providing property to a person or entity *for any period of time* in exchange for monetary remuneration or other benefit.' City Code, ch. 18, art. IV, § 18-181 (emphasis added). Considering Lathfield's sample 'license agreement' in the record, Lathfield provided one of its licensees the right to use and occupy 700 square feet of the Property 'between 10:00 A.M. and 12:00 A.M. on Monday through Thursday, and twenty-four (24) hours per day on Friday through Sunday,' in return for $800 per month. DE 40-15, License Agreement, Page ID 1629–30. Although the agreement states that 'Licensee is not a tenant and has no possessory interest in the License Area,' *id.*, Page ID 1629, under § 18-181's definition, Lathfield was 'leasing' the Property space because it provided the Licensee property for a period of time in return for monetary remuneration."

"Because Lathfield was 'leasing' Property space as a landlord, it is subject to the City Code's landlord rental requirements, including § 18-33(a)'s tenant registration requirement. The district court did not err in holding that Lathfield was not entitled to declaratory relief that it was exempt from landlord rental licensing requirements."

"… [W]e also conclude that Lathfield's laches claim fails because the City did not show a lack of diligence in enforcing its ordinances, given that it has been consistently pursuing enforcement of its ordinances since at least 2016. The district court did nor err in rejecting Lathfield's claims that the City should be barred from enforcing its ordinances based on the equitable doctrines of estoppel and laches."

"Lathfield argues that the City violated the Due Process Clause of the Fourteenth Amendment in two ways. First, according to Lathfield, the City failed to provide adequate notice that its inspectors would be applying more recent versions of the Michigan Building Code when the City's adopting ordinance only purports to adopt the 2006 version of the Michigan Building Code. Second, according to Lathfield, the City refused to honor its right of appeal to challenge the findings of the July 2020 Inspection Report."

"Although Lathfield presents its due process challenge as a substantive due process claim, its arguments relate to procedural notice and the opportunity to be heard. Therefore, we understand Lathfield to be presenting first and foremost a procedural due process claim. *See United States v. Louisville & Nashville R.R. Co.*, 221 F.2d 698, 701 (6th Cir. 1955) ('[T]he label which a plaintiff applies to his pleading does not determine the nature of the cause of action.')."

"The Fourteenth Amendment of the United States Constitution protects individuals against the deprivation of 'life, liberty, or property, without due process of law.' U.S. Const. amend. XIV, § 1. The clause has both a substantive and a procedural components. The substantive component protects

individual liberties against 'certain government actions regardless of the fairness of the procedures used to implement them.' *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted). The procedural component, on the other hand, guarantees a 'fair procedure' when the government seeks to deprive an individual of life, liberty, or property. *Id.* To prevail on claims under either component, a plaintiff has the burden of establishing that he has a protected liberty or property interest. *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 573 (6th Cir. 2008) (substantive due process); *Richardson v. Twp. of Brady*, 218 F.3d 508, 516–17 (6th Cir. 2000) (procedural due process)."

"The Supreme Court has explained that the Constitution itself does not create property interests; 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.' *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)." …

"Although Lathfield argues that the City failed to properly adopt subsequent updates to the 2006 version of the Michigan Building Code under the state adoption procedures set out in Mich. Comp. Laws § 117.3(k), Lathfield has not identified either a liberty or property interest of which it has been deprived. To the extent that Lathfield argues that it has a property interest in the adoption procedures themselves, its argument lacks merit. Our court has previously held that, for purposes of a procedural due process claim, an individual has 'no protected property interest in the procedure itself.' *Richardson*, 218 F.3d at 518. This is because a mere failure to comply with state or local procedural requirements does not, alone, constitute a denial of due process. *Stanley v. Vining*, 602 F.3d 767, 769 (6th Cir. 2010); *Onyx Properties LLC v. Bd. of Cnty. Comm'rs of Elbert Cnty.*, 838 F.3d 1039, 1044 (10th Cir. 2016) ('Violation of state procedural requirements . . . does not in itself deny federal constitutional due process.'), *cert. denied*, 137 S. Ct. 1815 (2017). Instead, the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause. *See Bates v. Sponberg*, 547 F.2d 325, 329–30 (6th Cir. 1976). But, here, Lathfield's argument is limited to its claim that the City's adoption of § 14-26 of the City Code violated the state procedures set out in Mich. Comp. Laws § 117.3(k). For this reason, Lathfield's due process claim fails."

"Both the Supreme Court and this court have long ago held that legislative acts equally affecting many people, such as the City's adoption of § 14-26 of the City Code, do not implicate procedural due process concerns. *See Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); *Smith*, 641 F.3d at 216–17; *Pickney Bros. v. Robinson*, 194 F.3d 1313, 1999 WL 801514, at *4 (6th Cir. 1999) (unpublished table decision) (holding that because municipal board's actions were legislative in nature, plaintiffs were 'not entitled to actual notice and, therefore, was not deprived of procedural due process'); *see also Chicago Area Council, Inc. v. Blue Lake Twp.*, No. 285691, 2010 WL 986500, at *10 (Mich. Ct. App. Mar. 18, 2010) (per curiam) (holding that plaintiff could not allege a property interest because the adoption of a municipal ordinance is part of the legislative process). In *Bi-Metallic*, the Colorado Tax Commission and the State Board of Equalization ordered a forty percent increase in the valuation of all taxable property in Denver. *Bi-Metallic*, 239 U.S. at 443. A property owner subsequently sued to enjoin the enforcement of the order, alleging that he was not allowed to be heard and that his property was being taken in violation of his procedural due process rights. *Id.* at 444. The Supreme Court rejected the property owner's procedural due process claim, holding that procedural due process does not govern the enactment of generally applicable legislative acts. *See id.* at 445–46."

"*Bi-Metallic* controls because the adoption of a generally applicable zoning ordinance is a legislative act. *See Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989) (holding that the defendants 'clearly were acting in their legislative capacities in passing the 1978 zoning ordinance')"[.] …

"Lathfield also argues that the City violated its procedural due process rights by denying it an appellate process to challenge the findings of the July 2020 Inspection Report. But, as discussed, Lathfield has not identified either a liberty or property interest of which it has been deprived to support a procedural due process claim on this ground. Moreover, even if we understand Lathfield to be implicitly

alleging a property interest in the Property's prior zoning classification, Lathfield's procedural due process claim still fails."

"Under Michigan law, reliance on a prior zoning classification may be sufficient to create a property interest. *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897 (6th Cir. 1991). This property interest arises if the property is either lawful under the doctrine of nonconforming use, *Heath Twp.*, 502 N.W.2d at 629–30, or if the plaintiff 'actively pursued and completed a course of action of an inarguably substantial character' in reliance on the prior zoning classification, *Nasierowski Bros. Inv. Co.*, 949 F.2d at 897. Lathfield does not have a property interest in the Property's prior zoning classification because (i) the doctrine of nonconforming use does not apply given that Lathfield has not shown that the current use of the Property was ever operated for a 'lawful use,' *see supra* Section III(D)(1), and (ii) Lathfield does not claim to have either applied for a building permit or otherwise expended substantial resources in reliance on representations that their use of the Property was a lawful nonconforming use. Therefore, the requirements of procedural due process do not apply. *Bd. of Regents of State Colls.*, 408 U.S. at 569 ('The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.'). The district court did not err in granting summary judgment for the City on Lathfield's due process claims."

"Lathfield argues that the City violated the Equal Protection Clause of the Fourteenth Amendment by selectively enforcing its ordinances against it and treating it differently from other similarly situated owners of commercial real property. Lathfield pursues its equal protection claim based on a 'class-of-one' theory."

"The Equal Protection Clause provides that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.' U.S. Const. amend. XIV, § 1. This clause is a 'direction that all persons similarly situated should be treated alike.' *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Under a 'class-of-one' theory, Lathfield must show that (i) the City 'intentionally treated' it 'differently from others similarly situated' in all relevant respects, and (ii) 'that there is no rational basis for the difference in treatment.' *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). To prevail on this theory, Lathfield must show that it was treated differently than those similarly situated in all relevant respects. *See Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 682 (6th Cir. 2011). In addition, Lathfield must show that the City's actions were 'so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational.' *Id.* (citation omitted). In sum, Lathfield must overcome a 'heavy burden' to prevail on its 'class-of-one' theory. *Loesel v. City of Frankenmuth*, 692 F.3d 452, 462 (6th Cir. 2012) (citation omitted)."

"Lathfield has not satisfied the first element of its 'class-of-one' equal protection claim because it does not offer evidence demonstrating that the City treated it differently from similarly situated property owners. Lathfield states, without support, that it 'has been treated differently from other owners of commercial real Property in the City.' CA6 R. 24, Appellant's Br., at 35. Lathfield provides no examples of similarly situated commercial property owners against whom the City has declined to enforce its ordinances. Bare allegations of differential treatment are insufficient to establish an equal protection violation. *Braun*, 519 F.3d at 575 ('[T]he failure to make any concrete allegations with respect to similarly situated persons mandates a grant of summary judgment in the defendant's favor.'); *see also Tri-Corp Mgmt. Co. v. Praznik*, 33 F. App'x 742, 746–47 (6th Cir. 2002) (rejecting plaintiff's equal protection claim based on absence of specific allegations about similarly situated individuals). Here, too, we conclude that Lathfield's bare allegations of differential treatment cannot establish a cognizable 'class-of-one' equal protection claim."

"Lathfield argues that the City Code's requirement that an applicant disclose the names and businesses of its tenants violates the Contracts Clauses of the United States and Michigan Constitutions. Lathfield points to a non-disclosure provision in its tenant lease agreements which states:

> Licensor and Licensee mutually agree to take all reasonable steps to ensure that the confidential information each party obtains from or about the other in connection with this agreement will remain confidential and will not be disclosed by the receiving party to any other individual or entity. For purposes of this provision, *'confidential information' shall include but not be limited to the names of the licensees*, their agents, managers, employees and/or shareholders; the names of the licensor, its agents, managers, employees, and/or shareholders; *the licensee[']s business identity or business operations in the licensed space*; and/or the rate of pay by the licensee for use of space from licensor.

DE 40-15, Sample License Agreement, Page ID 1641 (emphases added). According to Lathfield, § 18-33(a) of the City Code requiring Lathfield to list the names of its tenants and their principal businesses constitutes a substantial impairment of its contractual relationship with its tenants."

"The Constitution provides that '[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.' U.S. Const. art. I, § 10. The Supreme Court has outlined a three-part test for determining whether a law violates the Contract Clause. To prevail on a Contracts Clause claim, a plaintiff must show that (i) the legislation 'operate[s] as a substantial impairment of a contractual relationship,' (ii) the state lacks 'a significant and legitimate public purpose behind the regulation,' and (iii) 'the adjustment of 'the rights and responsibilities of contracting parties'' is not based on 'reasonable conditions' and is not 'of a character appropriate to the public purposes justifying' the legislation. *Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983) (citations omitted). The Michigan Constitution includes a similar prohibition, Mich. Const. art. I, § 10, which courts interpret 'no[] . . . more expansively than its federal counterpart,' *Att'y Gen. v. Mich. Pub. Serv. Comm'n*, 642 N.W.2d 691, 698 (Mich. Ct. App. 2002); *see also Blue Cross & Blue Shield of Mich. v. Milliken*, 367 N.W.2d 1, 14 (Mich. 1985) ('The federal balancing approach has been adopted by our Court for purposes of adjudicating state Contract Clause claims as well as federal Contract Clause claims.')."

"Lathfield asserted its Contracts Clause claims against the City under 42 U.S.C. § 1983. There is a threshold question of whether Lathfield can bring a Contracts Claim under § 1983. In *Kaminski v. Coulter*, we addressed whether the Contracts Clause amounts to a 'right, privilege, or immunity' secured by the Constitution that is enforceable under § 1983. 865 F.3d 339, 345 (6th Cir. 2017). We noted that 'the Supreme Court has never definitively held that an alleged Contracts Clause violation is cognizable as a § 1983 claim, ' *id.* at 346, and that in *Carter v. Greenhow*, which concerned an alleged Contracts Clause violation brought under § 1983's predecessor statute, Revised Statute 1979, the Court held that the Contracts Clause, 'so far as it can be said to confer upon or secure to any person any individual rights, does so *only indirectly and incidentally*,' 114 U.S. 317, 322 (1885). Extending *Carter*'s logic to the language contained in § 1983, we concluded that 'an alleged Contracts Clause violation cannot give rise to a cause of action under § 1983.' *Kaminski*, 865 F.3d at 347."

"... Here, the challenged provision, Chapter 18, Article II, § 18-33(a) of the City Code, was enacted on December 20, 1999, long before Lathfield bought the Property. Thus, because Lathfield's contracts with its tenants did not exist at the time § 18-33(a) was enacted, the City could not have violated the Contracts Clauses of the United States and Michigan Constitutions."

"For the forgoing reasons, we conclude that the district court did not err in granting summary judgment in favor of the City on both Contracts Clause claims."

"Lathfield argues that the City violated the Fifth Amendment's Takings Clause through inverse condemnation by requiring that Lathfield comply with the Michigan Building Code and the City Zoning Ordinance. According to Lathfield, the City, by withholding business licenses, enforcing its ordinances, and acknowledging that the Property could be affected by a future widening of an adjacent road, has intentionally caused a decline in the Property's value and has thus effected a taking."

"To prevail on an inverse condemnation claim, a plaintiff must establish '(1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property.' *Krieger*, 17 N.W.3d at 725 (citation omitted). An owner must demonstrate 'a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated.' *Spiek v. Michigan Dep't of Transp.*, 572 N.W.2d 201, 209 (Mich. 1998)."

"Because Lathfield has not shown that it bears any 'unique' or 'special' injury beyond having to comply with the City's ordinances, we conclude that Lathfield's inverse condemnation claim under the Fifth Amendment's Takings Clause fails. The district court did not err in concluding that Lathfield met neither elements of an inverse condemnation claim."

"Finally, Lathfield argues that the City and its building inspector Jim Wright engaged in an unlawful civil conspiracy to compel Lathfield to undertake actions to comply with code violations allegedly not required by law. According to Lathfield, their actions caused it to lose several prospective tenants and, ultimately, diminished the Property's value."

"'A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.' *Admiral Ins. v. Columbia Cas. Ins.*, 486 N.W.2d 351, 358 (Mich. Ct. App. 1992). '[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.' *Advoc. Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 670 N.W.2d 569, 580 (Mich. Ct. App. 2003) (per curiam), *aff'd*, 693 N.W.2d 358 (Mich. 2005) (citation omitted). Lathfield's civil conspiracy claim fails for two reasons."

"… Lathfield has not established that the City engaged in a separate, actionable tort. Even if Lathfield prevailed on its inverse condemnation claim, '[a]n inverse condemnation action is not a tort action.' *Allen v. City of Laingsburg*, No. 286031, 2010 WL 539823, at *1 (Mich. Ct. App. Feb. 16, 2010) (per curiam). In its complaint, Lathfield did not allege any tortious conduct on the part of the City, as necessary to support its civil conspiracy claim. *Admiral Ins.*, 486 N.W.2d at 359."

2. First Amendment - Charter provision prohibiting board members from directing the appointment or removal of a city employee was not vague or overbroad - Plaintiff was a City Council member in the City of Albion, Michigan, and she was prosecuted for violating a provision in the City Charter prohibiting City Council members from directing the appointment or removal of any administrative officer or employee of the city - She alleges that her political opponents on the City Council engaged in retaliatory prosecution and arrest, malicious prosecution, and conspiracy to violate her civil rights, and she alleges that the relevant provision of the City Charter is unconstitutional - To state a claim for First Amendment retaliation, the complaint must allege that (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff 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 the plaintiff's protected conduct - Where the alleged adverse action consists of a criminal prosecution, the plaintiff must plead the absence of probable cause - Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity - Where the adverse action consists of an arrest, the plaintiff generally must plead the absence of probable cause, but as discussed below, there are exceptions to this requirement - To state a claim for malicious prosecution, the complaint must allege that (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty as a consequence of the legal proceeding; and

(4) the criminal proceeding was eventually resolved in the plaintiff's favor - To state a claim for conspiracy to violate civil rights, the plaintiff must plead that (1) a plan existed; (2) the conspirators in the plan shared an objective to deprive the plaintiff of his or her constitutional rights; and (3) an overt act was committed in furtherance of the conspiracy that caused the plaintiff's injury

KENETTE BROWN v. CITY OF ALBION, MICHIGAN; ALBERT SMITH, GLENIANE REID, and SHANE WILLIAMSON, individually and in their official capacities as City Council Members for the City of Albion; DAVID ATCHISON, individually and in his official capacity as the Mayor of the City of Albion; SCOTT KIPP, individually and in his official capacity as Chief of Public Safety for the City of Albion; JASON KERN, individually and in his official capacity as the Deputy Chief of Public Safety for the City of Albion; CULLEN CHRISTOPHER HARKNESS, individually and in his official capacity as City Attorney for the City of Albion; NICOLE WYGANT, individually and in her official capacity as Detective/Sergeant for the City of Albion Department of Public Safety
SIXTH CIRCUIT COURT OF APPEALS No. 24-1522 Decided and Filed: April 29, 2025

"Sonya Kenette Brown was a City Council member in the City of Albion, Michigan. She was prosecuted for violating a provision in the City Charter prohibiting City Council members from directing the appointment or removal of any administrative officer or employee of the city. She alleges that her political opponents on the City Council engaged in retaliatory prosecution and arrest, malicious prosecution, and conspiracy to violate her civil rights, and she alleges that the relevant provision of the City Charter is unconstitutional. The district court dismissed her claims alleging retaliatory prosecution and arrest, malicious prosecution, and conspiracy to violate civil rights and granted summary judgment to the Defendants on her claim that the City Charter provision was unconstitutional. She now appeals those decisions. For the reasons set forth below, we **AFFIRM** the district court's judgment."

"This case stems from a deeply acrimonious relationship between Brown and several other members of Albion City government. The facts alleged in Brown's Complaint and related documents are as follows. In November 2016, Brown was elected to serve a four-year term as a City Council member for the City of Albion. Defendants David Atchison, Gleniane Reid, Albert Smith, and Shane Williamson were also City Council members at various times throughout Brown's political career. Defendants Scott Kipp (Chief), Jason Kern (Deputy Chief), and Nicole Wygant (Detective) were officers in the City's Department of Public Safety. Defendant Cullen Harkness was the City Attorney. This was a turbulent time in local politics, and Brown had political disputes with multiple City Council members, including Atchison and Williamson. Initially, these included policy disputes over equitable economic development. In 2018, however, the Mayor, Garrett Brown (no relation to the plaintiff), was involved in a public dispute with his City Manager, Sheryl Mitchell, that culminated in Mitchell's resignation. Mitchell spoke negatively online about members of Albion City government on several occasions after her termination, and Atchison began campaigning against Mayor Brown in a recall election. After Mitchell resigned, Defendant Kipp became interim City Manager, until he was replaced in October 2018 by Latonya Rufus."

"In October 2018, Brown, Mayor Brown, and Rufus started a Facebook Messenger group chat, which they used for both text messaging and audio calls. In the text messages, they routinely discussed the political happenings in the City. For example, they complained about Sheryl Mitchell's online commentary against Mayor Brown and Rufus. In November 2018, they shared messages expressing displeasure with Defendant Scott Kipp, who Brown and Rufus believed to be politically aligned with Mitchell."

"On November 9, 2018, Rufus complained that Kipp was still sending emails with 'Interim City Manager' in his signature line, although he had already been replaced by Rufus. The following conversation ensued:

> Rufus: Y would he send that[?]
> Brown: We got u[,] Ms. Rufus! [emoji]

Brown: Crazy and wishful thinking…
Mayor Brown: The [emojis] were directed at Scott[.]
Brown: Get rid of him! He's untrustworthy[.]

R. 2, Ex. 1, PageID 103–04. Brown then sent two screenshots of emails in which Kipp justified his continued use of the 'Interim City Manager' title. The conversation continued:

Rufus: BS[.]
Brown: [emoji]
Brown: Isn't the personal phone bill enough to terminate Scott?
Brown: And Corisha?
Brown: Has the labor atty responded to your inquiry?
Rufus: Not yet[.]
Rufus: I'm just upset at the mess[.]
Brown: Scott needs to go, Ms. Rufus. One less worry!
Brown: He knew he wasn't paying his bill!! And he should've known about Carisha! That's bs[.]
Brown: Sheryl is gone and there's a new Sheriff in town! [emoji]

R. 2, PageID 104–05. By Brown's own acknowledgment, this was a 'reminder that City Manager LaTonya Rufus was the person that had administrative authority over personnel, including terminating employees that are insubordinate and/or in debt to the City of Albion.' R. 1, Compl., PageID 41. Similarly, on November 30, 2018, Brown once again raised the possibility of action against Kipp, writing 'Ms. Rufus, please call Cullen. He's a snake but he is not going to risk losing his license for Kipp, Sheryl, or anybody else. He will give you your legal options on dealing with Kipp.' R. 2, Ex. 1, PageID 112."

"In January 2019, the City Council placed Rufus on administrative leave and began investigating allegations that she embezzled the City's funds. Rufus eventually pled guilty to misdemeanor embezzlement. As part of that investigation, Harkness, the City Attorney, directed Kipp, in his capacity as the Chief of Public Safety, to confiscate Rufus's city-issued cell phone and laptop and to attempt to recover any deleted messages. Kipp recovered the messages between Rufus, Brown, and Mayor Brown described above. Upon seeing the messages, Defendant Smith filed a recall petition against Brown, alleging that Brown had violated the City Charter, which prohibits City Council members from directing the termination of any city employee. He later withdrew the petition, but the messages got leaked to a local news website. As a result of the publicized messages, a local resident filed a second recall petition against Brown for violation of the City Charter using identical language to that used by Smith. This time, the recall was successful, and, on November 8, 2019, Brown was voted out of office."

"After Brown was voted off the council, the City Council hired outside counsel to investigate Brown's behavior. Counsel advised that, while Brown had not harassed Kipp, she had violated the City Charter by sending the text messages regarding Kipp. Defendants Smith, Reid, Williamson, and Atchison then voted to hire a special prosecutor to criminally prosecute Brown. Once they had done so, Harkness, acting on the direction of the special prosecutor, asked Wygant, in her role as Detective Sergeant, to generate a police report incident number about the alleged violation. In June 2020, the special counsel signed a misdemeanor complaint against Brown. Wygant generated an arrest warrant and swore out a warrant affidavit, a magistrate judge authorized the warrant, and Brown was charged with violation of the City Charter. Ultimately, a jury found Brown not guilty of the charges against her."

"Two portions of the City Charter are relevant to this appeal. First, § 5.8(a) of the City Charter provides, 'The council members shall not individually direct the appointment or removal of any administrative officer or employee of the City and shall deal with the administrative service of the City only through the City Manager, as to officers and employees made responsible to him.' Albion, Mich., Charter § 5.8. This is the section of the City Charter that Brown was alleged to have violated in her texts with Rufus."

"Second, § 2.5 of the charter sets forth criminal penalties for violations of the charter. It reads as follows:

> Any person found guilty of an act constituting a violation of this charter may be punished by a fine which, in addition to court costs charged to him, shall not exceed five hundred dollars ($500.00) or imprisonment for not more than ninety (90) days, or by both such fine and imprisonment, in the discretion of the court. This section shall not operate to limit or prejudice the power to remove officers or discharge employees as provided in this charter.

Id. § 2.5."

"… Brown's claims relevant to this appeal are:

> (A) Claims for retaliatory arrest alleging that her arrest was retaliation for First Amendment protected speech in her Facebook messages and for her public complaints about the search of LaTonya Rufus's phone;
> (B) Claims for retaliatory prosecution alleging that her prosecution was retaliation for the same conduct;
> (C) A claim of malicious prosecution;
> (D) A claim of conspiracy against the many Defendants alleged to have deprived Brown of her civil rights via retaliatory and malicious prosecution; and
> (E) A claim of municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), against the City for enforcing § 5.8 of the City Charter—which Brown alleges is unconstitutionally vague and overbroad—against her."

"The district court dismissed the retaliatory arrest, retaliatory prosecution, malicious prosecution, and conspiracy claims because all of those claims require that the plaintiff allege an absence of probable cause. The district court found that, even based solely on the pleadings, it was apparent that there was probable cause, because the Facebook messages—screenshots of which Brown attached to the Complaint—created probable cause for the city officials to believe that she had violated the City Charter." …

"To state a claim for First Amendment retaliation, the complaint must allege that '(1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff 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 the plaintiff's protected conduct.' *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999). Where the alleged adverse action consists of a criminal prosecution, the plaintiff must plead the absence of probable cause. *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006). Where the adverse action consists of an arrest, the plaintiff generally must plead the absence of probable cause, but as discussed below, there are exceptions to this requirement. *Nieves v. Bartlett*, 587 U.S. 391, 401–02 (2019)."

"To state a claim for malicious prosecution, the complaint must allege that (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty as a consequence of the legal proceeding; and (4) the criminal proceeding was eventually resolved in the plaintiff's favor. *Sykes v. Anderson*, 625 F.3d 294, 308–09 (6th Cir. 2010)."

"To state a claim for conspiracy to violate civil rights, the plaintiff must plead that (1) a plan existed; (2) the conspirators in the plan shared an objective to deprive the plaintiff of his or her constitutional rights; and (3) an overt act was committed in furtherance of the conspiracy that caused the plaintiff's injury. *Jackson v. City of Cleveland*, 925 F.3d 793, 817 (6th Cir. 2019). Here, because the only

violations of her constitutional rights that Brown alleges as part of the conspiracy are retaliatory and malicious prosecution, the conspiracy claim will rise and fall with those claims."

"Brown raises two potential exceptions to the requirement that a plaintiff plead the absence of probable cause in a retaliatory arrest case. First, in the 'unique class of retaliatory arrest claims' premised on 'objective evidence' of a premeditated municipal policy to retaliate or intimidate the plaintiff by arresting her for conduct unrelated to her protected activity, the plaintiff is not required to plead the absence of probable cause. *Lozman v. City of Riviera Beach*, 585 U.S. 87, 99–101 (2018). Second, the requirement to plead the absence of probable cause for retaliatory arrest claims does not apply when 'a plaintiff presents objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.' *Nieves*, 587 U.S. at 407."

"In *Lozman*, the plaintiff was an outspoken critic of city policy and often spoke at city council meetings. 585 U.S. at 91. He filed a lawsuit alleging that those same council meetings violated Florida's open meeting laws. *Id.* In a closed-door meeting about that lawsuit, city council officials allegedly reached a consensus to use city resources to intimidate Lozman. *Id.*" …

"The Court held that Lozman was not required to plead an absence of probable cause on that record, but, instead, could plead that his speech was a but-for cause of his arrest. *Id.* at 96, 101 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–87 (1977)). The Court did so for several reasons. First and foremost, Lozman had pled 'more governmental action than simply an arrest.' *Id.* at 99. He had pled that there was 'an 'official municipal policy' of intimidation' carried out by the City through its legislators with a premeditated plan to retaliate for his prior speech. *Id.* at 99–100 (citing *Monell*, 436 U.S. at 691)." …

"The *Lozman* Court explained that 'Lozman's claim is far afield from the typical retaliatory arrest claim,' and it tied its holding to cases that fell in the 'unique class of retaliatory arrest claims' factually similar to *Lozman*. *Id.* at 99–101 ('On facts like these, *Mt. Healthy* provides the correct standard for assessing a retaliatory arrest claim.'). The Court explicitly declined to extend its holding to address the elements required to plead a retaliatory arrest claim where facts like the ones described above were not present. *Id.* at 101."

"This record does not present either of the key circumstances relied upon by the Court in *Lozman* or circumstances sufficiently analogous to permit an appropriate extension of *Lozman*. Brown does not directly allege, or allege any facts to suggest, that there was an official policy of retaliation. Brown points to the City Council's vote to hire a special prosecutor and argues that the vote was tantamount to a policy of retaliation. Yet Brown did not allege that City Council members suggested intimidating Brown or engaging in political retribution. She does not suggest that the decision to prosecute was made as part of a general discussion about the political or personal implications of her speech. Instead, that decision was undisputedly made at a meeting set to discuss the allegedly criminal nature of Brown's conduct after the violation of the City Charter had been brought to the City's attention by an outside attorney. Indeed, even at that meeting, the City Council did not directly order Brown's arrest or prosecution; instead, they voted to hire a special prosecutor who made the arrest decisions on his own. Brown has not, therefore, alleged an official policy of retaliation by the legislators. Nor has she presented objective evidence to that end as Lozman did."

"In *Nieves v. Bartlett*, the Supreme Court created another exception to the general requirement that the plaintiff plead a lack of probable cause. 587 U.S. at 406–07. 'Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so.' *Id.* at 406. To plead retaliatory arrest in that context, a plaintiff must present 'objective evidence that [s]he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.' *Id.* at 407."

"The Supreme Court recently revisited the *Nieves* exception in *Gonzalez v. Trevino*. 602 U.S. 653, 658 (2024) (per curiam). The Court acknowledged that the *Nieves* exception is 'narrow' but held that it does not require 'virtually identical and identifiable comparators[.]' *Id.* at 655, 658. A plaintiff may demonstrate that comparable crimes were not prosecuted, but may also present other types of evidence to demonstrate that officers typically do not arrest someone for the conduct engaged in by the plaintiff. *Id.*" …

"We begin by identifying the set of evidence Brown can rely on to demonstrate that comparable crimes are typically not prosecuted. In Brown's Complaint, she does not allege any evidence comparable to the narrow classes of evidence suggested in either *Nieves* or *Gonzalez*. She does not allege that any other similarly situated individuals were not charged, and she does not provide statistics, or other information about how violations of the City Charter are generally charged. Instead, Brown alleges that '[t]o Plaintiff's knowledge, Section 5.8 has never been used to criminally prosecute anyone in the entire history of the ordinance, which was enacted in 1998, upon information and belief.' R. 1, PageID 77. This is the only reference to prior charging patterns under the City Charter in Brown's Complaint."

"Outside the Complaint, Brown points to an exhibit she attached for the first time to her motion for reconsideration of the district court's order dismissing her Complaint. The attached exhibit is a memorandum Brown allegedly submitted to the City Council in advance of the meeting to discuss the appointment of the special prosecutor after she was voted off the council. R. 59-2, Ex. 2, PageID 614. In the memorandum, she alleges that Williamson and Atchison should also be prosecuted for violation of the City Charter. *Id.* Brown now argues that because no action was taken on this memorandum, Williamson and Atchison are similarly situated comparators who were never arrested."

"Regardless of whether this memorandum would be sufficient 'objective evidence' under *Gonzalez*, we cannot consider it. On a motion to dismiss, the court is limited to the allegations in the plaintiff's complaint, the exhibits attached to the complaint, public records, and documents in the record to which the complaint refers. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)." …

"Brown argues, relying on *Gonzalez*, that the lack of criminal prosecutions for certain conduct under a longstanding statute is always evidence that officers have declined to prosecute other individuals for similar conduct. This argument relies on an overly broad reading of *Gonzalez*. *Gonzalez* makes the commonsense point that, if a particular type of behavior is common but never charged, officers must be declining to charge it. 602 U.S. at 658. Take the jaywalking example from *Nieves*. In a town that never prosecutes jaywalking, one can assume a prosecution for jaywalking is retaliatory because jaywalking happens all the time. If something happens all the time, and is never charged, officers must be declining to charge it. If, by contrast, a particular crime is never committed, the fact that it is never charged does not demonstrate that officials are *declining* to charge it." …

"The problem for Brown on this record is that it seems likely Brown's conduct was novel. Section 5.8 of the City Charter is a highly specific prohibition that restricts the conduct of a narrow group of people. By its own terms, it only applies to City Council members, Albion, Mich., Charter § 5.8, and at any given time only six people will hold that role, *id.* § 5.1. It proscribes a specific act rather than a broad range of conduct. *Id.* § 5.8. As a result of the narrow applicability of the statute, there is a significant likelihood that Brown's conduct truly was novel. The fact that no one has been prosecuted for a violation of § 5.8, therefore, does little, if anything, to suggest that others have violated this same provision and not been charged." …

"… [A]ll of Brown's claims for retaliatory prosecution and arrest, malicious prosecution, and conspiracy to violate civil rights through retaliatory and malicious prosecution require her to allege an absence of probable cause. This means that we must determine whether Brown 'pleaded allegations plausibly suggesting the 'absence of probable cause' for the charges brought against [her].' *See Blackwell v. Nocerini*, 123 F.4th 479, 489 (6th Cir. 2024) (quoting *Hartman*, 547 U.S. at 265–66). Probable cause requires only 'a probability or substantial chance of criminal activity, not an actual showing of such

activity.' *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (quoting *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983)). It 'is not a high bar.' *Id.* (quoting *Kaley v. United States*, 571 U.S. 320, 338 (2014)). Brown needed, therefore, to plead allegations plausibly suggesting that the Defendants did not have sufficient evidence, based on her Facebook messages, to raise a substantial chance of criminal activity."

"The City Charter makes it a crime to 'direct the . . . removal of any administrative officer or employee of the city[.]' Albion, Mich., Charter § 5.8. It is undisputed that Scott Kipp, the subject of Brown's text messages, was an officer or employee of the City. R. 1, PageID 30 ('At all times relevant, Kipp was an agent or employee of City of Albion and acted or failed to act within the scope, course, and authority of his employment.'). LaTonya Rufus was the person with the authority to remove Kipp from his position. Brown told Rufus that Kipp 'need[ed] to go' and that Rufus should 'get rid of him.' R. 2, Ex. 1, PageID 103-05."

"Even based solely on Brown's pleadings, there was evidence available to the Defendants that this was not merely 'blowing off steam' or 'express[ing] [her] political opinion' as Brown claims. Appellant's Br. 52–53. Brown explicitly followed up on these messages with questions about whether Rufus had consulted an attorney and garnered sufficient evidence to justify a termination. R. 2, PageID 105, 112. It is, of course, possible that Brown's Facebook messages constituted only informal advice on how Rufus should do her job rather than a directive; but, based on the messages, there was a substantial chance that the repeated instructions to terminate Kipp and the follow up on the logistics of doing so were a directive. *See United States v. Martin*, 289 F.3d 392, 400 (6th Cir. 2002) ('Although innocent explanations for some or all of these facts may exist, this possibility does not render the . . . determination of probable cause invalid.'). Therefore, the government officials reading those messages had probable cause to believe Brown had committed a violation of the City Charter. *See Wesby*, 583 U.S. at 57. Based on the Facebook messages attached to the Complaint, it is not plausible to conclude that there was a lack of probable cause, so Brown has not pled facts that plausibly suggest a lack of probable cause. She has failed to meet the required pleading standard. *See Blackwell*, 123 F.4th at 489."

"Brown argues that probable cause is an issue of fact for the jury to resolve. It is correct that, where the defendants' theory of probable cause involves material factual disputes, the issue should be sent to a jury. *St. John v. Hickey*, 411 F.3d 762, 769 (6th Cir. 2005), *abrogated on other grounds by Marvin v. City of Taylor*, 509 F.3d 234 (6th Cir. 2007). But where the plaintiff's allegations fail to plausibly suggest the absence of probable cause, dismissal is appropriate. Here, Brown's allegations fail to plausibly suggest that the Defendants lacked probable cause. No jury issue is presented."

"Finally, Brown argues that protected speech cannot serve as a basis for a probable cause determination and that, since the sole basis for her arrest and prosecution was her speech in the text messages, there must have been a lack of probable cause. Brown rests on two cases to make this argument: *Sandul v. Larion* and *Leonard v. Robinson*. Appellant's Br. 51 (citing *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997); *Leonard v. Robinson*, 477 F.3d 347, 358 (6th Cir. 2007)). Neither case supports Brown's argument that no political speech may be the basis of probable cause. Both cases concern instances in which the plaintiff engaged in profane or vulgar speech and was arrested for it. *Sandul*, 119 F.3d at 1252; *Leonard*, 477 F.3d at 351–52. In both cases, we concluded that the plaintiff's speech could not be criminal because any law criminalizing such speech would be unconstitutional. *Sandul*, 119 F.3d at 1254–55; *Leonard*, 477 F.3d at 358–61. Therefore, because there was no valid crime the speech could raise a suspicion of, the speech could not form the basis of a probable cause determination. *Sandul*, 119 F.3d at 1256; *Leonard*, 477 F.3d at 361."

"Where, however, a law *permissibly* regulates conduct that may involve speech, 'acts are not shielded from regulation' merely because of their expressive content. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). Where a particular type of conduct is criminalized, and constitutionally so, observation of that conduct, even if through speech, may form the basis of probable cause. *Reichle*, 566 U.S. at 668 (noting that probable cause can be based on 'wholly legitimate consideration of speech'). As discussed

below, § 5.8 of the Albion City Charter was constitutionally valid. It was, therefore, permissible to rely on Brown's speech as evidence of a violation of the Charter in order to establish probable cause. On this record, taking Brown's Facebook messages into account, there was enough evidence to constitute probable cause. Therefore, Brown's retaliatory prosecution and arrest, malicious prosecution, and conspiracy to violate civil rights through retaliatory and malicious prosecution claims all fail."

"Brown appeals the district court's grant of summary judgment on her municipal liability claim against the City of Albion, in which she contends that the City had an unconstitutional policy embodied in § 5.8 of the City Charter and that the City enforced that policy against her." …

"A plaintiff can succeed in a § 1983 suit against a municipal entity by showing that the City 'implement[ed] or execut[ed] a policy statement, ordinance, regulation, or decision' that caused the violation of her constitutional rights. *Monell*, 436 U.S. at 690. There can be no liability for the City without an underlying constitutional violation. *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014). Here, the alleged constitutional violation is the enforcement of Albion City Charter § 5.8, which Brown alleges is unconstitutionally vague and overbroad."

"To succeed on a vagueness claim, a plaintiff must show that the relevant statute '(1) 'fail[s] to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorize[s] or even encourage[s] arbitrary and discriminatory enforcement.'' *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 894 F.3d 235, 246 (6th Cir. 2018) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). When determining whether a law provides a reasonable opportunity to understand its prohibitions, courts begin with the plain text of the statute. *Id.* Courts should not require 'mathematical certainty' regarding the precise extent of the statute. *Id.* (quoting *Grayned*, 408 U.S. at 110). And when the common meaning of a term makes clear what conduct is prohibited, failure to further define the term will not render the statute void for vagueness. *Id.* at 247. When the challenged language ''is commonly used in both legal and common parlance,' it often will be 'sufficiently clear so that a reasonable person can understand its meaning.'' *Id.* (quoting *Deja Vu of Cincinnati, L.L.C. v. Union Twp. Bd. of Trs.*, 411 F.3d 777, 798 (6th Cir. 2005)). When determining whether a law invites arbitrary enforcement, the primary question is whether it 'provides explicit standards guiding [its] enforcement.' *Id.* at 252 (brackets omitted) (quoting *United Food & Com. Workers Union*, 163 F.3d at 359)."

"The only relevant portion of the code is the first clause of Albion City Charter § 5.8, which provides, 'The council members shall not individually direct the appointment or removal of any administrative officer or employee of the city[.]' First, § 5.8 states that it applies to 'council members.' Council members are defined in § 5.1, which explains, 'The council shall consist of the mayor and the six (6) councilmen. . . . One councilman shall be elected from each of the six (6) council districts of the city.' Second, § 5.8 states that the act those council members must not take is 'direct[ing] the appointment or removal[.]' All of these words have ordinary meanings. Appointment and removal are common terms used throughout any number of statutes without definition. *See, e.g.*, 5 U.S.C. §§ 2302(a)(2)(A)(i), 2303 (describing prohibited 'personnel actions' for government employees and defining the term 'personnel action' to include 'appointment[s]'); 44 U.S.C. § 3902 (discussing appointment and removal of inspectors general). To 'direct' means 'to request or enjoin . . . with authority[.]' *Direct*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/direct (last visited Feb 22, 2025)."

"… § 5.8 instructs that none of the six elected councilmen from the six districts may individually request with authority that any person appoint or remove one of the officers listed in § 4.1 or any other individual whom the City employs. Brown can point to no term in this clause that has an ambiguous meaning. Nor does she suggest some meaning other than the one proposed above. Nor does she indicate that any of those terms leave substantial discretion to the enforcing officers as to who or what might fall into one of the defined categories. The ordinance is not unconstitutionally vague."

"A statute is unconstitutionally overbroad under the First Amendment if 'it prohibits a substantial amount of protected speech.' *United States v. Williams*, 553 U.S. 285, 292 (2008). The court measures

substantiality 'relative to the statute's plainly legitimate sweep.' *Id.* at 292–93. The first step in the overbreadth analysis is to construe the challenged statute to determine its reach. *Id.* at 293. The second is to determine whether the statute 'criminalizes a substantial amount of protected expressive activity.' *Id.* at 297."

"As the Supreme Court has long made clear, 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Thus, while agreements, conspiracies, and directives are all generally carried out verbally (sometimes entirely so), the First Amendment permits government actors to restrict agreements in restraint of trade, *id.*, to regulate the information communicated in corporate disclosure statements, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978), to curtail employer retaliation for labor activities, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), and to prohibit certain types of solicitation, *Ohralik*, 436 U.S. at 457. All of the preceding examples involve speech that is regulated not because of its content, but because of its role in an illegal course of conduct."

"The conduct prohibited by § 5.8 of the Albion City Charter is of the same nature as the examples described above. Section 5.8 prohibits a City Council member from engaging in what amounts to an employment action—terminating or directing the termination of an employee. While that conduct is accomplished through speech, it is not protected by the First Amendment. *See Gissel Packing Co.*, 395 U.S. at 618. Brown presents no argument that § 5.8 prohibits anything other than this type of employment action, nor is any other prohibition readily apparent on the face of the statute. As a result, § 5.8 of the Albion City Charter is not unconstitutionally overbroad."

3. **Fourth Amendment – Search of teacher's purse at school yielded a gun on school property during the school day – Employees that searched the teacher's purse did not conduct the search pursuant to to any state authority, and consequently, Lawson cannot satisfy the acting-under-color-of-state-law element for her § 1983 claim – Plaintiff was seized under the Fourth Amendment when she was taken to the office of the school resource officer - Once seized in Kelly's office, plantiff was entitled to the protections afforded to an investigative stop, and such a stop is proper where there is a reasonable, articulable suspicion that a person *has been*, is, or is about to be engaged in criminal activity - The stop also must be sufficiently limited in time, and the investigative means must be the least intrusive means reasonably available - An unreasonable duration or unreasonable means may convert an investigatory stop into an arrest requiring the more onerous showing of probable cause Superintendent seized plaintiff as an investigative stop and under the circumstance it did not violate the Fourth Amendment – Plaintiff searched her own purse during the investigative stop and *herself* revealed the presence of the firearm in her bag without being directed to do so there was no illegal search**

HOLLY LAWSON v. KAYLA CREELY, individually; LORI FRANKE, individually, MARK KOPP, in his individual and official capacities; FRANKLIN COUNTY, KY BOARD OF EDUCATION
SIXTH CIRCUIT COURT OF APPEALS No. 24-5649 Decided and Filed: March 26, 2025

"Plaintiff-Appellant Holly Lawson appeals the grant of summary judgment to Defendants-Appellees in this 42 U.S.C. § 1983 action asserting that Lawson's public-school coworkers, Defendants-Appellees Kayla Creely and Lori Franke, together with Defendants-Appellees School Superintendent Mark Kopp and the Franklin County, Kentucky Board of Education (the Board), violated her Fourth Amendment rights. We **AFFIRM**."

"Lawson began working as a guidance counselor at Franklin County High School in 2016. Franke and Creely also worked at the school as a registrar and freshman guidance counselor, respectively. Kopp was the superintendent of this school and others. Over the May 1, 2021, weekend, Lawson attended a

party for the Kentucky Derby, to which she brought her handgun. On the way back from the event on Sunday, May 2, she placed her handgun in a large purse or tote bag. She did not unpack that bag Sunday night and took it with her from Monday, May 3, through Wednesday, May 5, including to the school."

"Lawson was prescribed, and took, various medications for anxiety and back-and-knee issues. On Monday, May 3, Creely observed Lawson taking medication and acting 'in somewhat of a manic state.' R. 38, PageID 714. Creely 'was concerned for her behavior,' which Creely viewed as 'out of the ordinary.' *Id.* at 715. Specifically, Creely was 'concerned for students' and doubted whether Lawson could provide 'whatever resources a student that needed to see her was in need of.' *Id.* Franke testified that Lawson 'seemed . . . overly excited' but that Franke 'had seen it before in Ms. Lawson's actions.' R. 39, PageID 855. Lawson's behavior nonetheless led Franke to 'wonder[] if she was feeling okay.' *Id.* The next day, May 4, Creely believed that Lawson was now 'sluggish' and 'intoxicated' because she could not communicate complete thoughts and was 'babbl[ing]' in conversation. R. 38, PageID 717–18. Creely testified that Lawson did not 'smell of alcohol,' however, Creely confirmed that Lawson was 'slurring her words.' *Id.* at 718. At lunch on May 4, Creely again observed Lawson taking medication. *Id.* at 720. Similarly, Franke observed Lawson speaking 'thick tongued'—*i.e.*, '[h]er words smeared [together].' R. 39, PageID 857."

"After lunch, around 1:30 p.m., Lawson left the guidance counselors' suite of offices. Franke asked Creely if Lawson had told Creely where she was going, to which Creely said, 'No.' R. 38, PageID 726. Creely attempted to see if Lawson's car was still in the portion of the parking lot visible from Creely's office window. Creely and Franke then went to look at the lot from the vantage of Lawson's office window. According to Lawson, she had closed and locked her office door, presumably requiring Creely and Franke to use their keys—which worked on every door in the guidance counselors' suite of offices—to access Lawson's office. Lawson also testified that her bag was not visible from the far side of her desk, suggesting that Creely and Franke must have walked into her office and around her desk. Upon seeing Lawson's bag, Creely told Franke that she 'wanted to know what [Lawson] was taking,' referring to Lawson's medications. *Id.* at 728. Creely then unlatched the bag, saw a few amber-colored prescription bottles on top, and read the bottles' labels out loud. When Creely placed the last bottle back in the purse, she noticed what appeared to be the handle of a handgun. After she told Franke, Franke leaned over the desk and also saw 'like the end of the handle or the butt of a handgun.' R. 39, PageID 865. Creely did not touch the firearm, and the two left Lawson's office. They did not immediately report their discovery and returned to work."

"Later that day, Creely met with Ashley Reid, a social worker, about an unrelated issue and reported her concerns about Lawson's behavior earlier that day. Reid invited Franke to join them in Creely's office, and Franke confirmed Creely's account. Creely then added that had found a firearm in Lawson's purse. At that point, the group saw Lawson return to her office before leaving again a few minutes later. Reid said that she would have to report the firearm to the authorities and did so that same day. She contacted her immediate supervisor as well as the law-enforcement officer designated as the School Resource Officer, Marvin Kelly, who in turn informed Jeff Abrams, an officer designated as the Safety Coordinator for the county's schools. As the May 4 school day came to an end, Reid's supervisor and Abrams informed Superintendent Kopp of the situation. By that time, Lawson had left for the day, and Kopp preferred to discuss the situation with her in person."

"The next day, May 5, Lawson returned to the school with her bag (still containing the firearm) and was met at the entrance by Kopp. Kopp asked Lawson if he could 'talk to [her] for a second,' and after she agreed, he walked her to Kelly's office, where Kelly and Abrams waited. R. 40, PageID 1019; R. 36, PageID 459; R. 36-40, PageID 613. Kelly and Abrams carried their firearms and wore shirts with a sheriff's crest. Kopp stood in front of the office door, advised Lawson that he had received a report that she possessed a weapon on school grounds, and asked her if that was true. In Lawson's recollection of events, she stated that she was unsure; she asked Kopp if she 'need[ed] to look,' to which Kopp said, 'Yes'; and she checked her bag and found the firearm still in it. R. 40, PageID 1104. Kelly's body-camera footage tells a materially different story, however. The camera began recording

halfway through a statement by Kopp: '—so, I need to ask you if this is true,' to which Lawson replies, 'I'm trying to think. I had one with me this weekend.' Kopp–Board Br. 10; R. 37, Ex. 40, PageID 681 (body-camera footage); *accord* R. 36, PageID 459 (Kopp's witness statement). The footage then shows Lawson looking through her purse without being directed to do so and stating, 'It is in there in the bottom.' R. 37, Ex. 40, PageID 681."

"Following this interaction, Kopp handed Lawson a letter stating that she was suspended with pay pending an investigation. Kelly and Abrams photographed the firearm in the bag and took custody of the bag and its contents. The meeting lasted approximately four minutes. Abrams then transported Lawson to the sheriff's office. Authorities charged Lawson with unlawful possession of a weapon on school property. A Kentucky prosecutor eventually offered to discontinue the prosecution if Lawson resigned, and she accepted."

"On May 1, 2022, Lawson filed a single-count complaint under 42 U.S.C. § 1983 alleging violations of her Fourth Amendment rights. She asserts that Defendants-Appellees conducted two warrantless searches of her bag: First, when Creely and Franke entered her office in her absence and searched her bag; and second, when Kopp allegedly directed her to look through her bag in the presence of Kelly and Abrams. Lawson also claims that Kopp and the officers unlawfully detained her during that May 5 interaction. Finally, she seeks to hold the Board responsible pursuant to *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), based on Kopp's policymaking role, the Board policies that allegedly authorized Creely and Franke to search Lawson's bag, and Creely's and Franke's lack of training."

"Lawson sued the individual defendants in their official and personal capacities. The parties agreed to dismiss the official-capacity portion of this claim as to Creely and Franke, and the district court approved the dismissal. After discovery, the parties filed cross-motions for summary judgment. The district court granted judgment in favor of Defendants-Appellees, and this appeal followed."

"The Fourth Amendment protects individuals from 'unreasonable searches and seizures.' U.S. Const. amend. IV. A plaintiff invoking § 1983 must establish that the defendant was acting 'under the color of state law' and deprived the plaintiff of 'rights secured by federal law.' *League of Women Voters v. Brunner*, 548 F.3d 463, 475 (6th Cir. 2008) (internal citations omitted)." …

"The district court determined that Creely's and Franke's conduct was 'fairly attributable to the State' because their status as school employees granted them access to Lawson's office and bag, regardless of whether Lawson locked her office door or whether her purse was visible to passersby; put differently, the court 'doubt[ed] whether Creely and Franke could have acted as they did 'without the authority of [their] office.'' *Lawson v. Creely*, 737 F. Supp. 3d 483, 495–96 (E.D. Ky. 2024) (second alteration in original) (first quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); and then quoting *Waters v. City of Morristown*, 242 F.3d 353, 359 (6th Cir. 2001)). The district court ultimately entered summary judgment in their favor, however, on the basis that they were entitled to qualified immunity. *Id.* at 502–03. We affirm the district court on different grounds: Creely and Franke lacked state authority for their conduct and did not act under color of state law, as required for a claim under § 1983."

"The Supreme Court recently addressed state action by public employees in a case arising from this circuit, *Lindke v. Freed*, 601 U.S. 187 (2024). There, a municipal official maintained a Facebook page on which he posted both personal updates and information relating to his government job. *Id.* at 191–93. After a constituent posted negative comments, the official deleted the negative comments and blocked the constituent from commenting on the official's Facebook page. *Id.* at 190–91, 193. The constituent sued, alleging a violation of his First Amendment rights. *Id.* at 193. *Lindke* provides some guidance here. First, a claimant under § 1983 cannot 'hang his hat on [the defendant's] status as a state employee. The distinction between private conduct and state action turns on substance, not labels: Private parties can act with the authority of the State, and state officials have private lives and their own constitutional rights.' *Id.* at 197. Second, there is a 'bedrock requirement that 'the conduct

allegedly causing the deprivation of a federal right be *fairly attributable to the State*,'' which is only the case if the act 'is traceable to the State's power or authority.' *Id.* at 198 (quoting *Lugar*, 457 U.S. at 937) (gathering cases)." …

"Lawson focuses on a statement in the employee handbook, asserting that it granted Creely and Franke the authority required to attribute their actions to the state: 'All employees are expected to use sound judgment in the performance of their duties and take reasonable and commonly accepted measures to protect the health, safety, and well-being of others, as well as District property.' R. 36-17, PageID 582 (employee handbook); R. 36-14, PageID 576 (classified-personnel duties); R. 36-15, PageID 577 (certified-personnel duties)."

"Considering the first *Mackey* situation—a state regulation tasking an employee with engaging in the specific conduct at issue—the identified school policy falls short of tasking Creely and Franke with searching Lawson's purse. And the rule in *Stengel* that informed the first *Mackey* situation specifically required an officer 'to take action 'in any type of police or criminal activity 24 hours a day.'' *Stengel*, 522 F.2d at 441. Here, the cited policy is not nearly as specific: It does not suggest that employees like Creely and Franke must *proactively investigate* potential threats to the health, safety, and well-being of students and others. In fact, in the employee handbook, the cited policy is immediately followed by a requirement that employees like Creely and Franke cooperate with 'investigations *conducted by the District*,' R. 36-17, PageID 582 (emphasis added), belying the notion that Creely and Franke were tasked with conducting their own. Further, even if Creely and Franke could initiate their own investigation, the cited policy is tempered by language requiring employees to use 'sound judgment' and employ methods that are 'reasonable and commonly accepted.' *Id.* Lawson has not explained how surreptitiously rifling through a coworker's bag is a reasonable and commonly accepted measure."

"*Lindke* cautioned courts to give 'careful attention to the relevant . . . ordinance [or] regulation' and not to 'rely on 'excessively broad job descriptions'' in determining the scope of an official's authority. 601 U.S. at 200–01 (quoting *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 529 (2022)). Construing Creely's and Franke's conduct as falling within a policy to 'take reasonable and commonly accepted measures to protect the health, safety, and well-being of others' would constitute the excessively broad construction of their job description foreclosed by *Lindke*. Accordingly, the first *Mackey* situation does not support state authority here."

"The second *Mackey* situation—whether 'an official . . . possess[es] the required state authority even if the State did not permit the conduct'—presents a closer call but ultimately favors a finding of no state authority. *See* 106 F.4th at 560. In this situation, the fact that Creely's and Franke's conduct 'exceed[ed] the scope' of the school policy does not preclude that conduct from being state action if 'the State has delegated the *general* 'type of authority' that [Creely and Franke] exercised.' *Id.* (quoting *Lindke*, 601 U.S. at 200). But nothing in the policy suggests that the state had delegated to Creely and Franke the general authority to conduct investigations or seek out potential dangers beyond what was immediately ascertainable to them. Instead, a holistic review of the school's policies suggests that employees should report concerns and suspicions to supervisors or law enforcement, who are better equipped to develop a plan of action." …

"For the foregoing reasons, Creely and Franke did not search Lawson's bag pursuant to any state authority, and consequently, Lawson cannot satisfy the acting-under-color-of-state-law element for her § 1983 claim. *Waters*, 242 F.3d at 359."

"Lawson argues that Kopp unlawfully seized her on May 5, 2021, when he met her in the school lobby and led her to Kelly's office. She also claims that Kopp unlawfully searched her bag in Kelly's office. The district court concluded that Kopp seized Lawson for Fourth Amendment purposes but properly conducted an investigative stop under the framework of *Terry v. Ohio*, 392 U.S. 1 (1968), resulting in no constitutional violation. *Lawson*, 737 F. Supp. 3d at 505–06. Additionally, the district court found that Lawson consented to the search of her bag because she initiated the search and conducted it herself. *Id.* at 507. We affirm as to both conclusions."

"A Fourth Amendment seizure occurs 'when, 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'' *United States v. Knox*, 839 F.2d 285, 289 (6th Cir. 1988) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)); *see also Florida v. Bostick*, 501 U.S. 429, 434, 437 (1991) (reframing the inquiry as whether 'a reasonable person would feel free 'to disregard the police and go about his business'' or 'ignore the police presence' (first quoting *California v. Hodari D.*, 499 U.S. 621, 628 (1991); and then quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988))). A reasonable person would not believe herself free to leave if she were approached by authorities (who identified themselves as such) and, rather than being briefly questioned, were asked to follow them to an office. *Knox*, 839 F.2d at 288–89 (citing *United States v. Jefferson*, 650 F.2d 854, 856 (6th Cir. 1981)). *But cf. United States v. Collis*, 766 F.2d 219, 221 (6th Cir. 1985) (no seizure where the defendant agreed to accompany an agent to baggage claim, and there was no indication of 'coercive or intimidating behavior' that would suggest that compliance was compelled)."

"Kopp did not seize Lawson when he met her in the school lobby: Although he led her to an office for further questioning, he did not suggest that her compliance was compelled; instead, he asked if 'she could answer a few questions,' and she agreed. R. 36, PageID 459. Lawson was seized, however, when she found herself in Kelly's office with the door closed, Kopp blocking that door, and two law-enforcement officers equipped with firearms. *See id.* at 460; R. 40, PageID 1020 (Lawson's testimony that given Kopp's position, she felt that '[t]here was no way that [she] could go out'); *Mendenhall*, 446 U.S. at 554 ('circumstances that might indicate a seizure . . . would be the threatening presence of several officers [or] the display of a weapon by an officer,' *inter alia*). And although Kopp and the Board argue that Lawson was questioned at work in an office similar to her own—*i.e.*, a location not 'inherently intimidating,' like a station-house, *Salvo*, 133 F.3d at 951 (discussing this factor in a custodial-interrogation context)—this argument is undercut by the facts. Lawson was not questioned in a random coworker's office but rather in the office of the law-enforcement officer assigned to the school. And Kelly's body-camera footage reveals that the room was relatively small and, with the blinds drawn and paper covering the window on the door, was concealed from anyone outside. *Cf. id.* (the defendant was not 'in a confined space in which he might have felt constrained or intimidated,' because the room 'was large with windows facing various public areas'). In these circumstances, a reasonable person would not have felt free to disregard the police and go about her business."

"Once seized in Kelly's office, Lawson was entitled to the protections afforded to an investigative stop. Such a stop is proper where there is a 'reasonable, articulable suspicion that [a] person *has been*, is, or is about to be engaged in criminal activity.' *United States v. Smith*, 594 F.3d 530, 536 (6th Cir. 2010) (alteration in original) (quoting *United States v. Atchley*, 474 F.3d 840, 847 (6th Cir. 2007)). The stop also must be 'sufficiently limited in time,' and the investigative means must be 'the least intrusive means reasonably available.' *United States v. Davis*, 430 F.3d 345, 354 (6th Cir. 2005) (quoting *Bennett v. City of Eastpointe*, 410 F.3d 810, 825–26 (6th Cir. 2005)). An unreasonable duration or unreasonable means may convert an investigatory stop into an arrest requiring the more onerous showing of probable cause. *United States v. Avery*, 137 F.3d 343, 349 (6th Cir. 1997) (citing *United States v. Place*, 462 U.S. 696, 709 (1983); *United States v. Sharpe*, 470 U.S. 675, 685–86 (1985))."

"Kopp had a reasonable, articulable suspicion that Lawson possessed a firearm on school grounds based on the reports he received from Reid's supervisor and Abrams. Establishing a reasonable, articulable suspicion is difficult in cases of anonymous informants providing vague descriptions of individuals or their alleged criminal acts. But these reports were from Kopp's coworkers, based on personal observations of Lawson's allegedly illegal conduct. *Cf., e.g., United States v. Johnson*, 620 F.3d 685, 693 (6th Cir. 2010) (discussing factors such as the reliability of the tip, whether the informant identified the suspects with particularity, and whether the information alleged criminal activity). Kopp was therefore justified in making an investigative stop based on the reports."

"The investigative stop was also sufficiently limited in time, and Kopp employed the least intrusive means reasonably available. The meeting lasted approximately four minutes, and as the body-camera

footage indicates, Kopp resolved the question whether Lawson had a firearm in her bag within the first minute of the meeting; he and the officers then spent the remaining time explaining to Lawson what would happen next and photographing the bag. It would be difficult to imagine a more expeditious investigation. The means were similarly appropriate: Kopp made the reasonable judgment not to immediately accuse Lawson in the school lobby, and instead he led her to a secure office and promptly informed her of the allegation. *Salvo*, 133 F.3d at 951 (noting that law enforcement chose a private interview location 'to save [the defendant] from a more public exposure of his criminal activity, not out of a desire to coerce or intimidate him'). In sum, Kopp 'diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly.' *Sharpe*, 470 U.S. at 686."

"Here, Lawson voluntarily followed Kopp to Kelly's office, Kelly and Abrams did not brandish their weapons, and Lawson was not subjected to physical restraints such as handcuffs. The *Lopez-Arias* court also noted that employing some of the above measures would not escalate an investigative detention into an arrest if they were proportional to safety concerns. *Id.* (citing *Houston v. Clark Cnty. Sheriff Deputy John Does 1-5*, 174 F.3d 809, 814–15 (6th Cir. 1999)). Here, even if Kopp's decision to bring Lawson to a private, secure office could be faulted as possibly escalating the interaction into an arrest, it was justified by the potential dangers of confronting a likely armed person in the school lobby. This undermines Lawson's reliance on *Florida v. Royer*, where the Supreme Court found that the limits of *Terry* had been exceeded when authorities moved the defendant from an airport concourse to a police interrogation room because '[t]he record d[id] not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing [the defendant] to the police room.' 460 U.S. 491, 505 (1983)."

"For these reasons, the district court correctly concluded that Kopp did not seize Lawson in a manner that violated the Fourth Amendment."

"A person may waive her Fourth Amendment rights by consenting to a search, which can be shown 'in the form of words, gesture, or conduct.' *United States v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004) (quoting *United States v. Griffin*, 530 F.2d 739, 742 (7th Cir. 1976)). Consent must be 'freely and voluntarily given' and is not established by 'showing no more than acquiescence to a claim of lawful authority.' *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). To determine whether there was consent, courts examine the totality of the circumstances, including the individual's 'age, his or her education and intelligence, the existence of advice concerning the nature of the constitutional right that is implicated, the length of detention prior to the request for consent, the nature of any prior questioning, and whether any physical punishment was involved.' *Morphis v. United States*, 110 F. App'x 527, 530 (6th Cir. 2004) (first citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); and then citing *United States v. Guimond*, 116 F.3d 166, 170 (6th Cir. 1997)). 'The absence of an overt act or threat of force, promises made to a defendant, or indications of more subtle forms of coercion that might flaw a defendant's judgment indicate that a defendant's consent was freely given.' *Id.* (citing *United States v. Watson*, 423 U.S. 411, 424 (1976))."

"Lawson contends that Kopp, flanked by two law-enforcement officers, directed Lawson to search her bag. But Kelly's body-camera footage tells a different story and shows that no search by state actors occurred at all: Kopp informed Lawson of the allegation and stated that he 'need[ed] to ask [her] if this [wa]s true.' R. 37, Ex. 40, PageID 681. Then Lawson, while answering verbally, initiated a search of her bag on her own. 'Where video evidence depicts the events, we view the facts 'in the light depicted by the videotape' and do not adopt a version of the facts that is 'blatantly contradicted by the record.'' *Jackson-Gibson v. Beasley*, 118 F.4th 848, 853–54 (6th Cir. 2024) (quoting *Scott v. Harris*, 550 U.S. 372, 380–81 (2007)). More than consenting to a search by authorities, then, Lawson *herself* revealed the presence of the firearm in her bag without being directed to do so. *United States v. Strouth*, 311 F. Supp. 1088, 1093 (E.D. Tenn. 1970) ('[M]ere acceptance by officers of that which a defendant turns over to them voluntarily is not 'a search' within the purview of the Fourth Amendment.'). Accordingly, no constitutionally impermissible search of Lawson's bag occurred on May 5."

"To establish the Board's municipal liability under *Monell*, Lawson must show both 'the deprivation of a constitutional right' and that the Board 'is responsible for that violation.' *Doe v. Claiborne Cnty. ex rel. Claiborne Cnty. Bd. of Educ.*, 103 F.3d 495, 505–06 (6th Cir. 1996) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992)). Because Creely and Franke lacked state authority for their conduct, and because Kopp did not violate Lawson's Fourth Amendment rights, Lawson cannot maintain a *Monell* claim against the Board. *Pollard v. City of Columbus*, 780 F.3d 395, 404 (6th Cir. 2015) ('Because the officers did not commit a violation of [the decedent's] constitutional rights, [the plaintiff's] claim of municipal liability must fail . . . .'). We therefore affirm the district court's entry of summary judgment in favor of the Board."

4. Eighth Amendment – Inmate in prison was injured by correction officers excessive force – Qualify immunity denied – Officer did not deliberately disregard prisoner's medical needs, since the officer did not know of the injuries - Prisoner did not have the types of injuries (such as a knife or a gunshot wound) that would have made it obvious to any onlooker that he needed immediate medical attention - Indeed, after officer left the holding cell, prisoner immediately jumped to his feet and paced around, and showed no visible signs of injury at that time - So officer's use of force, by itself, could not allow a reasonable jury to find that he subjectively knew of prisoner's need for medical aid

RANDY ERICKSON v. GOGEBIC COUNTY, MICHIGAN, et al., SCOTT VOIT
SIXTH CIRCUIT COURT OF APPEALS No. 24-1311 Decided and Filed April 7, 2025

"This appeal asks whether a corrections officer violated the Eighth Amendment both by using excessive force and by failing to obtain medical care afterward. The officer threw an inmate to the ground and kneed him in the back for failing to comply with an order. The district court denied the officer's qualified-immunity defense at the summary-judgment stage. We agree with the district court that a reasonable jury could find that the officer maliciously used force to retaliate against the inmate for his disrespectful language. And this version of the facts would show that the officer violated clearly established law. On the other hand, we disagree with the district court that a reasonable jury could find that the officer deliberately disregarded the inmate's medical needs. No evidence suggests that the officer even knew of the inmate's injuries. All told, then, we affirm in part and reverse in part."

"Randy Erickson pleaded guilty to operating a vehicle while intoxicated. In February 2020, he was serving his sentence for that crime at the Gogebic County Jail in Michigan's Upper Peninsula. The Gogebic County Sheriff's Office operates this facility."

"On February 18, Erickson looked forward to seeing his family because 'it was visiting day.' Erickson Dep., R.114-5, PageID 2168. He spent most of that day playing cards with fellow inmates in a shared cell. Deputy Sheriff Scott Voit came by the cell around 7:10 p.m. before Erickson's family had arrived. Voit spotted an 'orange peel in the hallway' and asked the inmates to identify who had thrown this trash on the ground. *Id.* Erickson antagonistically told Voit: 'If you were doing your job, you would know who threw the orange peel in the hallway.' *Id.*, PageID 2169. Voit responded to Erickson's rude comment by telling him that his 'visits' were now 'gone.' *Id.* The deputy then walked away."

"Voit's punishment upset Erickson. To take out his anger, Erickson repeatedly hit and kicked the door to the cell. He also aggressively pulled the inmate phone off its base as if trying to break the cord. And he picked up the large 'boat' (a 'mattress container for an extra person in the cell') and threw it at the door. Voit Dep., R.114-6, PageID 2222. Yet Erickson soon recognized the 'childish' nature of these acts, so he put the phone and boat back in their proper locations. Erickson Dep., R.114-5, PageID 2169."

"Voit watched Erickson's erratic behavior through the jail's video system. He visited the cell again. Voit opened the cell door and asked Erickson if he needed a 'time out.' *Id.* Erickson responded: 'No, I need my f**king visits. I didn't do anything wrong.' *Id.* Voit ordered Erickson out of the cell and

commanded him to put his hands on the wall of a long hallway. *Id.* Voit proceeded to handcuff Erickson's hands behind his back and walk him to a holding cell. Erickson complied with Voit's instructions without resistance."

"Once the men entered the holding cell, a video (without audio) recorded the events that took place over the next minute. Voit walked Erickson to a mattress raised about a foot above the floor next to the cell's back wall. To remove the handcuffs, Voit asked Erickson to kneel on the mattress while facing the wall. Erickson placed his left knee on the mattress with his left foot raised, and he pressed his right knee against the side of the mattress with his right foot touching the ground. Voit again asked Erickson to kneel. Erickson lowered his head so that his body was now at a 90-degree angle at his waist. His right foot remained touching the floor."

"At this point, Voit suddenly threw the still-handcuffed Erickson to the ground by grabbing his right arm and swinging him around in a circular motion. Erickson hit the ground on his knees. Voit immediately dropped on top of (the much smaller) Erickson and started pulling him by the neck and wrist to get him to lie flat. Voit quickly got Erickson on his side, but Erickson was still not on his stomach. So Voit began to pull him by the handcuffed arms, which caused Erickson's body to rub back and forth against the floor for another ten seconds. Once Voit got Erickson on his stomach, Voit placed his knee on Erickson's back right below his neck. Voit kept his knee in this place during the forty or so seconds that it took him to uncuff Erickson's hands. Voit then took his knee off Erickson's back and walked out of the cell. An upset Erickson jumped up and shouted out the cell window."

"The next day, another deputy came by Erickson's cell to discuss this incident. The deputy let Erickson know that he could file a complaint against Voit. And Erickson told this deputy that he needed medical attention."

"Two days after the incident, however, Erickson still had not received any medical care. He thus completed a medical-request form asserting that Voit had 'assaulted' him and that he continued to suffer neck, back, and wrist pain. Form, R.114-10, PageID 2270. This request led jail personnel to take him to a hospital. A doctor diagnosed Erickson with back contusions and a fractured upper rib near where Voit had placed his knee on Erickson's back. The doctor believed that these injuries would heal on their own and told Erickson to rest, take ibuprofen, and ice the affected areas. Erickson also claims that Voit's use of force damaged several teeth and required dental treatment. And he claims that the force left him with chronic shoulder and wrist pain."

"The Michigan Attorney General's Office investigated Voit's conduct and charged him with assault and battery. The Gogebic County Sheriff also suspended him over this encounter. A jury later found Voit not guilty of the charged crime. So the Sheriff reinstated him to his deputy position. Even so, the Sheriff believed that Voit had not used the proper 'communication' and 'de-escalation techniques' during his confrontation with Erickson. Letter, R.114-16, PageID 2645. The Sheriff thus opined that Voit had brought 'discredit' to the office. *Id.* He ordered Voit to take additional training. Voit chose to retire instead."

"Soon after Voit's criminal trial, Erickson brought this civil suit under 42 U.S.C. § 1983 against several defendants. He eventually dismissed everyone but Voit. Erickson alleged that Voit had violated the Eighth Amendment both by using excessive force during the encounter and by acting with deliberate indifference to his medical needs after it." …

"The Eighth Amendment has been incorporated against the States by the Fourteenth Amendment. *See id.* at 615. Together, these amendments bar States from 'inflict[ing]' 'cruel and unusual punishments' on individuals convicted of crimes. U.S. Const. amend. VIII. And according to the Supreme Court, the word 'punishments' covers more than the formal penalty that a court imposes. *Sootsman*, 79 F.4th at 615. It also covers informal harms that prison staff cause. *See id.* To show that these types of informal harms violate the Eighth Amendment, prisoners must establish both objective and subjective elements. *See id.* The harm must rise to a sufficient level of objective seriousness so that one can describe it as

'cruel and unusual.' *See id.* And a corrections officer must have acted with a sufficient level of subjective volition so that one can describe the officer's conduct as the 'inflict[ion]' of 'punishment[].' *See id.* Ultimately, though, the scope of these objective and subjective elements turns on the type of Eighth Amendment claim that a prisoner asserts. *See Hudson v. McMillian*, 503 U.S. 1, 8 (1992)."

"Erickson pursues two Eighth Amendment claims here. He argues that Voit used malicious force by throwing him to the ground and jumping on top of him. *See Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). And he argues that Voit acted with deliberate indifference to his health by failing to seek medical care after using this force. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To overcome Voit's qualified-immunity defense to these claims, Erickson must show two things. *See District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018). He must show that Voit's actions satisfied the objective and subjective components of his claims. *See id.* And he must show that any reasonable officer would have recognized that Voit's conduct violated the law. *See id.* at 63. Erickson has met this test for his use-of-force claim but not for his medical-needs claim."

"Erickson deserves a trial on his use-of-force claim because a reasonable jury could find that Voit gratuitously assaulted him. And once we accept this fact about Voit's state of mind, any reasonable officer would have known that his conduct was illegal."

"Under the first part of the qualified-immunity test, Erickson must show a constitutional violation. *See id.* at 62–63. When a prisoner asserts that a corrections officer has used force that violates the Eighth Amendment, the Supreme Court has adopted a 'more demanding' subjective element but a 'more relaxed' objective one. *Sootsman*, 79 F.4th at 615–16; *see also Wilkins v. Gaddy*, 559 U.S. 34, 37–38 (2010) (per curiam)."

"*Subjective Element*. Corrections officers must regularly make quick decisions in dangerous situations to restore order or prevent a disruption. *See Whitley*, 475 U.S. at 320. The Supreme Court has thus refused to hold them liable when they honestly (if unreasonably) miscalculated the amount of force that a given situation required. *See id.* at 319. The Court has instead held that the use of force in prisons qualifies as the infliction of cruel and unusual punishment only if an officer uses the force 'maliciously and sadistically to cause harm' to an inmate. *Hudson*, 503 U.S. at 7. It has also told us to consider several questions to decide whether a reasonable jury could find that an officer harbored this malicious mindset when using force on a particular occasion. *See id.*; *Sootsman*, 79 F.4th at 618. Our answers to these questions here show that a jury could find that Voit threw Erickson down and held him to the ground for no reason other than his malicious intent to harm Erickson because of his disrespectful behavior."

"… Erickson had not ignored Voit's requests to kneel in the holding cell. Rather, he had placed both knees on the mattress (albeit one more firmly than the other), and he had lowered his head and back to make it easier for Voit to uncuff him. And Erickson remained handcuffed with his arms behind his back when Voit chose to use the force. A reasonable jury thus could find that Erickson did not pose much (if any) of a 'threat' when situated in this precarious position. *Sootsman*, 79 F.4th at 619."

"Next consider 'the relationship between' the need for the force 'and the amount of force used[.]' *Hudson*, 503 U.S. at 7. To gain control of an aggressive inmate, we have held that an officer may use modest force like a 'leg-sweep' or a take-down maneuver. *Griffin*, 604 F.3d at 954–55; *Sootsman*, 79 F.4th at 620. Here, by contrast, Erickson was handcuffed and nonresistant. And even if Erickson had not followed Voit's command to kneel down with lawyerly precision, Voit's response to this alleged noncompliance looks extreme by comparison. Recall that Voit threw Erickson down, got on top of him, and pulled his body back and forth for ten seconds. Voit then drove his knee into Erickson's back for another forty or so seconds while Erickson passively lay on his stomach. A reasonable jury could find it hard to 'reconcile' this significant force with the minor threat that Erickson posed. *Cordell*, 759 F.3d at 583."

"Voit responds that he took Erickson to the ground for safety reasons because Erickson failed to put both knees completely on the holding-cell mattress. And Voit adds that he tugged on Erickson's body and kneed him in the back because Erickson 'wouldn't lay out flat' and was 'resisting.' Voit Dep., R.114-6, PageID 2225. Perhaps a civil jury will believe him (as a criminal jury did). Yet a reasonable jury could also accept Erickson's claim that Voit did not subjectively believe he needed to use this force. So Voit must save these arguments for trial."

"*Objective Element*. If a reasonable jury could find that an officer used force in the required malicious way, a prisoner need not establish that the force caused any 'significant injury' as an objective matter. *Wilkins*, 559 U.S. at 37; *see Hudson*, 503 U.S. at 8. The Supreme Court has reasoned that this type of malicious force 'always' violates society's 'contemporary standards of decency' and that a contrary rule would permit 'diabolic or inhuman' treatment as long as it did not have lasting effects. *Hudson*, 503 U.S. at 9. At the same time, the Court has added that '*de minimis* uses of physical force'—such as a malevolent 'shove'—rarely violate these societal standards. *Id.* at 9–10; *see Wilkins*, 559 U.S. at 37–38."

"The caselaw clarifies this dividing line between actionable force and *de minimis* force. *See Sootsman*, 79 F.4th at 616–17. On the one hand, the Supreme Court has held that officers used actionable force when they kicked and punched an inmate, causing him to suffer 'bruises, swelling, loosened teeth, and a cracked dental plate[.]' *Hudson*, 503 U.S. at 10. And we have held that an officer used actionable force when he rammed an inmate's head into a concrete wall, putting a large gash above his eye that required a hospital visit. *Cordell*, 759 F.3d at 577–79, 586. On the other hand, we have held that a guard used *de minimis* force by landing a 'karate chop' on an inmate's neck that did not cause pain or leave a mark. *Leary v. Livingston County*, 528 F.3d 438, 443 (6th Cir. 2008). And we have held that officers used *de minimis* force when they handcuffed inmates too tightly. *See Sootsman*, 79 F.4th at 617 (collecting cases)."

"When measured against this caselaw, Voit's conduct falls on the actionable side of the line. His use of force looks a lot more like the beating in *Hudson* than the karate chop in *Leary*. The force continued for about a minute—not for a second or two. It also caused Erickson pain that he complained about soon after the encounter. And the force resulted in a fractured rib, bruises on his back, damaged teeth, and chronic shoulder and wrist pain. *Cf. Hudson*, 503 U.S. at 10."

"Under the second part of the qualified-immunity test, Erickson must show that Voit's conduct violated 'clearly established' law. *Wesby*, 583 U.S. at 63 (citation omitted)."

"Erickson has satisfied these standards. To start, the legal rule that prohibits officers from using force 'maliciously and sadistically to cause harm' may well be specific enough in this Eighth Amendment context. *Hudson*, 503 U.S. at 7. After all, what reasonable officers would believe that they could use force solely to inflict pain on prisoners for no penological purpose? At least when the force rises above the *de minimis*, any reasonable official should know that such malicious and sadistic conduct has violated the Eighth Amendment since *Hudson* in 1992. And keep in mind that we have concluded that a reasonable jury could find that Voit maliciously used force for no reason other than to injure Erickson. If so, 'the unlawfulness' of his conduct would 'follow immediately from the conclusion' that *Hudson* clearly established a ban on malicious and sadistic force. *Wesby*, 583 U.S. at 64 (citation omitted)."

"Besides, Erickson has also identified an analogous case: *Cordell*. 759 F.3d 573; *see Rivas-Villegas*, 595 U.S. at 6. There, an inmate spoke to an officer in a disrespectful manner after the officer refused to sign him up for a haircut. *See Cordell*, 759 F.3d at 576–77. The officer decided to take the inmate to a holding cell in response. *Id.* at 577. He handcuffed the inmate and led him toward the cell in an escort position. *Id.* En route, the inmate allegedly 'tensed up' and turned toward the officer in an apparent act of disobedience. *Id.* at 578, 581–82. According to the inmate, the officer retaliated by running him into a wall and putting a gash in his forehead. *Id.* at 577–78. When accepting the facts in the light most favorable to the inmate, we held that a jury could find that the officer harmed the inmate with 'a

malicious and sadistic' intent rather than for any safety reason. *Id.* at 584. And we found the force more than *de minimis*. *See id.* at 585–87."

"Our holding in *Cordell* clearly established an Eighth Amendment violation here." …

"We reach a different conclusion for Erickson's argument that Voit violated the Eighth Amendment by ignoring his medical needs. As compared to the use-of-force claim, this medical-needs claim has a more demanding objective element and a less demanding subjective one. Objectively, inmates must establish that they had 'serious medical needs.' *Phillips v. Tangilag*, 14 F.4th 524, 534 (6th Cir. 2021) (quoting *Estelle*, 429 U.S. at 106). This standard requires them to show either that a doctor has diagnosed them with a condition requiring treatment or that they suffer from a condition that any layperson would recognize requires treatment. *See Mattox v. Edelman*, 851 F.3d 583, 598 (6th Cir. 2017); *Blackmore v. Kalamazoo County*, 390 F.3d 890, 897–900 (6th Cir. 2004). Subjectively, inmates must establish that an officer acted with 'deliberate indifference' to their serious medical needs. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citation omitted); *see Blackmore*, 390 F.3d at 895–96. This standard requires them to show that an officer subjectively knew of (and consciously disregarded) the serious medical needs. *See Farmer*, 511 U.S. at 837–39."

"We need not decide whether Erickson's injuries rose to the objectively required level because he has not shown that Voit knew of and consciously disregarded his need for medical treatment. For starters, Erickson cites no evidence to suggest that he ever asked Voit for medical care on the day of the incident. And Voit had the next two days off work. Voit thus did not return to the prison until after Erickson received care at the hospital."

"Erickson instead argues that Voit's use of force alone should have put him on notice that Erickson required medical care. Yet Erickson did not have the types of injuries (such as a knife or a gunshot wound) that would have made it obvious to any onlooker that he needed immediate medical attention. *Cf. Heeters v. Bowers*, 99 F.4th 900, 916–17 (6th Cir. 2024); *Mattox*, 851 F.3d at 598. Indeed, after Voit left the holding cell, Erickson immediately jumped to his feet and paced around. He showed no visible signs of injury at that time. So Voit's use of force, by itself, could not allow a reasonable jury to find that he subjectively knew of Erickson's need for medical aid. Voit thus did not deliberately disregard that need."

6. Eighth and Fourteenth Amendments – Qualified immunity denied – Jail death of an inmate – Failure-to-protect claim arising from conduct occurring before 2021 so the standard applicable at that time applies – The first element is satisfied if the plaintiff proves that the inmate had an objectively serious medical need – Defendants did not that the Estate satisfied this element – Next the plaintiff must prove that the officer knew of the facts creating the substantial risk of serious harm, that the officer believed that this substantial risk existed, and that the officer responded to the risk in an unreasonable way – The district court properly concluded that Watson was aware of a substantial risk to deceased if he did not timely receive his essential medications, but Watson did nothing to ensure that deceased received his blood-pressure medications—or any medication other than for his diabetes—in a timely manner, and this was unreasonable – Based on the evidence, a jury could find that Snow was aware of the substantial risk that the deceased faced, and that she unreasonably failed to ensure that the deceased timely received all his essential medications

DENNIS WIERTELLA, as father and administrator of the estate of Randy Wiertella, deceased v. LAKE COUNTY, OHIO, DIANA SNOW, RN and CHRISTINA WATSON, RN, in their individual and official capacities
SIXTH CIRCUIT COURT OF APPEALS No. 24-3311 Decided and Filed June 24, 2025

"Randy Wiertella died in the Lake County Adult Detention Facility (the Jail) on the morning of December 10, 2018. Dennis Wiertella, as the Administrator of the Estate of Randy Wiertella (the Estate), filed suit on behalf of the Estate. The Estate brought several claims, including a 42 U.S.C. § 1983 claim that Wiertella's constitutional rights under the Eighth and Fourteenth Amendments were violated by Jail staff Diane Snow, RN, and Christina Watson, LPN."

"Snow and Watson filed a motion for summary judgment, seeking dismissal on the basis of qualified immunity. The district court denied their motion. For the reasons set forth below, we **AFFIRM** the decision of the district court and **REMAND** the case for further proceedings on the Estate's § 1983 claim."

"Wiertella was charged in Willoughby Municipal Court with the illegal possession of drugs and the improper transport of a firearm. He was sentenced to 27 days in the Jail. Wiertella was booked at the Jail on December 2, 2018 and underwent a medical screening as part of the booking process. He entered the Jail without any of his medications, but a corrections officer recorded that Wiertella was taking medications for heart disease, diabetes, high blood pressure, and a psychiatric disorder. These were 'essential medications' under the Jail's policies and procedures. The medical-screening form states that Wiertella's medications needed to be continuously administered. Snow was the medical coordinator responsible for making sure that all inmate medical screens were reviewed."

"Watson reviewed and signed Wiertella's medical-screening form on December 2, 2018. She was aware that Wiertella was booked without any medications and that Wiertella had been taking 'essential medications' that needed to be continuously administered. She initially testified that she was 'sure' that she would have ordered diabetes medication and a diabetic diet immediately after reviewing the medical-screening form. But she did not in fact order any medications on that date."

"On December 3, Wiertella sent in an inmate-request form that asked for 'diabetic, and other meds.' Watson received this request. She wrote down that 'Inmate states he is diabetic and takes Metformin 1000 mg BID.' Watson testified that she had likely asked a booking officer to ask Wiertella how many milligrams of Metformin he took and how often. She said that Wiertella 'had to have probably stated that he was on a thousand milligrams twice a day in order for me to order it such as that.' The Jail doctor then signed off on Watson's order for diabetes medication and a diabetic diet."

"Watson testified that she did not recall receiving any inmate-request forms from Wiertella. No one contacted the VA pharmacy or ordered any blood-pressure medication. Watson also testified that she prioritized Wiertella's 'most important' medical condition, which was 'him being a diabetic,' and did not treat his other medical conditions. She said that this is what she was trained to do by Snow. But Watson conceded that there was nothing that prevented her from addressing Wiertella's other medical conditions. She testified that the Jail, however, preferred for inmates to get a friend or family member to bring in their medications because medications could be expensive for the Jail to order through the pharmacy."

"Wiertella was eventually scheduled to have a sick call on December 10, 2018." …

"There is no explanation in the record for why Wiertella was not scheduled for a sick call until December 10. Nurse sick call was available every day of the week, including weekends, and doctor sick call was available on Mondays through Fridays." …

"Watson testified that if an inmate said he was on blood-pressure medication, she could decide that she did not need to verify the prescription with his pharmacy and could order the medication herself. She chose to do this with Wiertella's diabetes medication, but not with any of his other medications."

"If an inmate was unable to provide his own medications, nurses could also put that inmate on the sick-call log to be evaluated by the doctor. Wiertella was never scheduled for a physical exam or for a review of his medical history. Nor was he ever seen by anyone who could prescribe medications."

"Wiertella was found in his cell nonresponsive and pronounced dead at 3:12 a.m. on December 10, 2018. The Estate's expert, Dr. Jonathan Arden, concluded that Wiertella's cause of death was hypertensive cardiovascular disease. Dr. Arden testified that 'the discontinuance and failure to provide medications contributed to [Wiertella's] blood pressure spiking and his risk of sudden death.' He concluded in his report that '[b]ut for the failure to provide those medications and a CPAP machine, in my opinion, Mr. Wiertella would not have died how and when he did.'"

"To overcome Snow's and Watson's qualified-immunity defense, the Estate must establish (1) that Snow and Watson violated Wiertella's constitutional rights, and (2) that the governing caselaw 'clearly established' the violation. *See Lawler ex rel. Lawler v. Hardeman County*, 93 F.4th 919, 925 (6th Cir. 2024)."

"In *Lawler*, this court recognized that an Eighth Amendment failure-to-protect claim arising from conduct occurring before 2021 is governed by *Farmer v. Brennan*, 511 U.S. 825 (1994). *Id.* at 927–28. *Farmer*'s first element is satisfied if the plaintiff proves that the inmate had an objectively 'serious medical need[].' *Id.* at 928 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Snow and Watson do not dispute that the Estate satisfied this element. Wiertella had several conditions that had been 'diagnosed by a physician as mandating treatment.' *See Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008) (quoting *Blackmore v. Kalamazoo County*, 390 F.3d 890, 897 (6th Cir. 2004)). The first requirement of *Farmer* has therefore been met."

"*Farmer* next requires the plaintiff to prove that '[the] officer knew of the facts creating the substantial risk of serious harm,' that 'the officer believed that this substantial risk existed,' and that 'the officer 'responded' to the risk in an unreasonable way.' *See Lawler*, 93 F.4th at 929 (quoting *Farmer*, 511 U.S. at 844)."

"Watson testified that she was aware that Wiertella had been booked without his medications, that he was on medications that needed to be continuously administered, and that these medications were classified as 'essential' under the Jail's policies. She stated that heart disease, high blood pressure, diabetes, severe sleep apnea, and depression are all serious medical conditions. Watson also considered medications for diabetes, heart disease, high blood pressure, and psychiatric disorders to all be essential medications. She further acknowledged the importance of taking medications for serious medical conditions because the failure to take those medications could lead to serious harm or even death."

"Finally, Watson recognized the general principle that the medical staff should intervene sooner rather than later. She expressly said that she had sometimes been concerned that inmates at the Jail were not getting their blood-pressure medicine in a timely manner"

"In light of the above testimony, the district court properly concluded that Watson was aware of a substantial risk to Wiertella if he did not timely receive his essential medications. Yet Watson did nothing to ensure that Wiertella received his blood-pressure medications—or any medication other than for his diabetes—in a timely manner. This was unreasonable."

"With regard to Snow, she was responsible as the medical coordinator for making sure that every inmate's medical-screening form was reviewed. She was also responsible for making sure that all the sick calls were set up correctly. Snow was not merely an administrator; she also performed the same duties as the other nurses, such as addressing the daily medical needs of inmates. Further, Watson testified that she believed that Snow had seen Wiertella. Snow disputed this fact, but we must view the evidence in the light most favorable to the Estate."

"A jury could thus find that Snow was aware that Wiertella had been booked without 'essential medications' that needed to be continuously administered. Snow testified that untreated high blood pressure can cause a substantial risk of harm to patients and that, if an inmate identified a need for

high-blood-pressure medication, 'it would be something that would need to be addressed as soon as possible.' Based on the above evidence, a jury could find that Snow was aware of the substantial risk that Wiertella faced, and that she unreasonably failed to ensure that Wiertella timely received all his essential medications."

"To prove that Wiertella faced a 'substantial risk of serious harm,' the Estate does not have to establish that Wiertella faced a substantial risk of dying within one week." …

"Moreover, a plaintiff can suffer serious harm without dying. For example, if the medical staff refuses to clean a prisoner's wound, this can constitute serious harm even if the wound later heals. *See Boretti v. Wiscomb*, 930 F.2d 1150, 1154 (6th Cir. 1991). If an inmate experiences symptoms of depression because he is not timely receiving his psychiatric medication, this can constitute serious harm. *See Richmond v. Huq*, 885 F.3d 928, 942–43 (6th Cir. 2018). An inmate who 'suffers pain needlessly' has suffered serious harm. *Boretti*, 930 F.2d at 1154–55. And the 'interruption of a prescribed plan of treatment could constitute a constitutional violation.' *Id.* at 1154. Wiertella suffered the symptoms of untreated high blood pressure, heart disease, sleep apnea, and depression because his prescribed plan of treatment for all these conditions was unnecessarily interrupted."

"In establishing its § 1983 claim, the Estate concedes that it is required to 'identify a case with a similar fact pattern that would have given 'fair and clear warning to officers' about what the law requires.' *See Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 993 (6th Cir. 2017) (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)). The Estate cited, and the district court extensively analyzed, similarities between this case and *Richmond*. Richmond's medical records indicated that she had been taking psychiatric medications before she arrived at the Wayne County Jail. *Richmond*, 858 F.3d at 935–36. This court held that her treating doctor at the jail had an obligation to take reasonable steps to ensure that Richmond timely received her medications. *Id.* at 942. These steps could have included the doctor prescribing the medications herself or requesting that a nurse verify Richmond's prior prescriptions. *Id.* Waiting for Richmond to have her psychiatric conditions addressed at an upcoming psychiatrist appointment scheduled 14 days later was not deemed sufficient to address her serious medical needs. *See id.* at 935, 941–43."

"This case is distinguishable from cases like *Jones v. Martin*, 9 F. App'x 360 (6th Cir. 2001) (order), relied on by the dissent. Dissenting Op. at 18. Jones suffered blackouts after running out of his blood-pressure medication, but he was unable to establish that the prison doctor intentionally denied him the medication or unreasonably delayed treatment. *Id.* at 362. Snow and Watson, in contrast, were aware that Wiertella had been taking several essential medications for serious medical conditions, and they knew that he did not have access to these medications in the Jail. Yet they intentionally chose not to provide those medications in a timely manner."

"This court in *Richmond*, moreover, held that prior caselaw had clearly established that 'neglecting to provide a prisoner with needed medication' could 'constitute a constitutional violation.' *Id.* at 948. *Richmond* thus presents a 'similar fact pattern' that gave Snow and Watson a 'fair and clear warning' that failing to ensure that Wiertella timely received his essential medications was a violation of his constitutional rights under the Eighth and Fourteenth Amendments. *See Arrington-Bey*, 858 F.3d at 993. The district court therefore did not err in concluding that Snow and Watson were not entitled to qualified immunity as a matter of law."

7. Fourteenth Amendment - Qualified immunity denied to local officers - Motion to dismiss - Water contaminated with lead - A defendant asserting qualified immunity at the motion-to-dismiss stage may argue both that the facts set out in the complaint do not plausibly allege a violation of the plaintiff's statutory or constitutional right—that the complaint fails to state a claim—and that, even if so, the right was not clearly established at the time of the challenged conduct - When a document attached to the complaint contradicts the allegations, the document trumps the allegations - The Fourteenth Amendment prohibits the state from depriving any person of life, liberty, or property,

without due process of law - This due-process right has substantive and procedural components - The substantive component bars the state from depriving people of certain protected rights regardless of the fairness of the procedures used to implement them, including right to bodily integrity, an indispensable right recognized at common law as the right to be free from unjustified intrusions on personal security and encompassing freedom from bodily restraint and punishment - Individuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest - Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value—often under false pretenses and with deceptive practices hiding the nature of the interference—is a classic example of invading the core of the bodily integrity protection - To establish a constitutional violation, a plaintiff must demonstrate not only that her bodily integrity was infringed, but also that it was infringed by government officials' discretionary, constitutionally repugnant actions - Actions are constitutionally repugnant in the context of a bodily integrity violation when they shock the conscience - The complaint does not allege a constitutional violation by the State officials - To find deliberate indifference, the court must make some assessment that the officer did not act in furtherance of a countervailing governmental purpose that justified taking that risk - It is in the very nature of deliberative bodies to choose between and among competing policy options, and yet a substantive-due-process violation does not arise whenever the government's choice prompts a known risk to come to pass - Poor choices made in furtherance of a legitimate government interest are not deliberately indifferent - As for city officials There is rarely a justification for misleading the public about the extent of a lead-water crisis; Defendants have offered no legitimate government purpose for providing information that downplayed the extent of the danger - City is also liable under *Monell* - A municipality is liable under § 1983 only if the challenged conduct occurs pursuant to a municipality's official policy, such that the municipality's promulgation or adoption of the policy can be said to have caused one of its employees to violate the plaintiff's constitutional rights - Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law - Where action is directed by those who establish governmental policy, the municipality is equally responsible

IESHA MITCHELL, guardian and next friend of A.M., et al. v. CITY OF BENTON HARBOR, MICHIGAN; MARCUS MUHAMMAD; MICHAEL O'MALLEY; DARWIN WATSON; LIESL CLARK; ERIC OSWALD; ERNEST SARKIPATO; BRANDON ONAN; ELHORN ENGINEERING COMPANY
SIXTH CIRCUIT COURT OF APPEALS No. 23-1970 Decided and Filed: May 6, 2025

"This case concerns the claims of several hundred children in Benton Harbor, Michigan, who drank lead-contaminated water from the City's public water system for three years and now suffer from the consequences of elevated lead levels in their blood. Plaintiffs filed suit in the U.S. District Court for the Western District of Michigan against several state officials and city officials, as well as two engineering firms, whom they blame for failing to mitigate and even worsening the lead-water crisis and misleading them about the dangers of the drinking water. They brought substantive-due-process and state-created-danger claims under 42 U.S.C. § 1983 and state-law negligence claims. The district court dismissed the complaint. We **AFFIRM IN PART** and **REVERSE IN PART**. Because Plaintiffs plausibly pleaded a violation of the right to bodily integrity against the city officials, we reverse and remand as to those officials and as to the municipality but affirm as to the state officials. We also reverse the district court's declination of supplemental jurisdiction over the state-law claims and remand for reconsideration."

"This factual background is drawn from the allegations in Plaintiffs' complaint and the exhibits attached thereto. Because this case comes to us on an appeal of a motion to dismiss, we accept the complaints' allegations as true. In October 2018, routine water testing revealed that Benton Harbor's municipal water supply was contaminated with dangerous quantities of lead. R. 1 (Compl. ¶ 1) (Page ID #21). Plaintiffs, hundreds of children suing by and through their guardians or next friends, allege that the City of Benton Harbor ('City'); certain officials employed by the City of Benton Harbor, Marcus Muhammad, Darwin Watson, and Michael O'Malley ('City officials'); certain officials employed by the Michigan Department of Environment, Great Lakes, and Energy ('EGLE'), Liesl Clark, Eric Oswald, Brandon Onan, and Ernest Sarkipato ('State officials'); and certain private engineering firms, Elhorn Engineering Co. and F&V Operations & Resource Management, Inc., bungled the lead-water discovery, failed to remediate and worsened the problem through their actions, and encouraged Plaintiffs to drink unsafe water."

"As is well known, lead is a toxic metal that is particularly hazardous to children's health. *Id.* ¶¶ 336, 343 (Page ID #82–83). Even low-level lead exposure in children can cause lifelong consequences. *Id.* ¶¶ 343–44 (Page ID #83–84). Those consequences include impairment to the nervous system, anemia, hypertension, and harm to organ systems. *Id.* 'The neurological and behavioral effects of lead are believed to be irreversible.' *Id.* ¶ 344 (Page ID #84) (citation omitted)."

"Lead contamination of public drinking-water systems, like that in Benton Harbor, is caused by older lead pipes leading from water sources to homes and businesses. *Id.* ¶ 108 (Page ID #43). While the water source itself is not contaminated with lead, the traveling water, combined with sanitary treatment chemicals, can corrode the pipe walls and cause lead to leach into the drinking water. *See id.* ¶¶ 107–09 (Page ID #43). Water must be properly treated to prevent corrosion of lead pipes. *Id.*"

"Benton Harbor has long struggled to maintain its water system. … Most of Benton Harbor's population is Black and Latino, and more than half live below the federal poverty line. *Id.* ¶ 91 (Page ID #41). Benton Harbor has maintained a public water-distribution system for more than one hundred years. *Id.* ¶ 95 (Page ID #42). Benton Harbor pulls its water from the surface of Lake Michigan and then filters and treats the water at the Benton Harbor Water Treatment Plant, before piping the water to homes and businesses. *Id.* ¶¶ 105–06 (Page ID #43)."

"A recent partial inventory of the service lines indicated that 51 percent still contained (or likely contained) lead, and only 2 percent were lead-free. *Id.* ¶¶ 101–03 (Page ID #42–43). Shortly before the lead contamination was discovered, defendant Ernest Sarkipato, a surface water treatment specialist and engineer at EGLE, mailed Benton Harbor a notice of 'significant deficiencies' in numerous areas, 'with the potential to allow or introduce contamination to the public water supply.' R. 4 (Oct. 3, 2018 Letter at 2) (Page ID #282). The letter also noted a 'lack[] [of] financial and managerial capacity to meet all the requirements' of the Michigan Safe Drinking Water Act. *Id.* at 1 (Page ID #281)."

"In October 2018, following mandatory triennial testing, officials in Benton Harbor discovered lead concentrations exceeding the federal action level in the public drinking water. R. 1 (Compl. ¶ 162) (Page ID #53). Ten percent of sites sampled returned lead levels of 22 ppb, more than the 15-ppb threshold. *Id.* Plaintiffs claim that the City and State Defendants, as well as certain engineering firms, badly mishandled this discovery."

"Plaintiffs allege that, from the beginning, City and State officials failed adequately to convey the danger posed by the lead-contaminated water. On October 24, 2018, EGLE issued an advisory that told residents that '[t]he most important thing [they] can do is run water to flush out potential lead contaminants.' R. 92-4 (Notice) (Page ID #845); *see* R. 1 (Compl. ¶¶ 163–66) (Page ID #53). Although the notice did not discourage residents from drinking the water, it advised them to use 'cold water tap for drinking or cooking' and to use 'bottled water to prepare baby formula.' R. 92-4 (Notice) (Page ID #845)."

"To the extent that the EGLE advisory served to warn Plaintiffs about the contaminated water, the City undermined it at a press conference the next day, Plaintiffs allege. R. 1 (Compl. ¶ 173) (Page ID #55). During the press conference, defendant Marcus Muhammad, mayor of Benton Harbor, stated that the notice was 'not being . . . delivered as a high alert, emergency 911, panic frenzy. This is FYI, and you can work with our city staff to find out ways to get tested.' *Id.* ¶ 174 (Page ID #55). Then defendant Darwin Watson, the former city manager, falsely told the public that the City had no lead water lines, and the county medical director, Dr. Rick Johansen, 'misleadingly emphasized that this was not a system-wide crisis but isolated to individual plumbing.' *Id.* ¶ 175–76 (Page ID #55). These communications left Plaintiffs with a misleading impression that the problem was 'present in isolated, individual plumbing systems' and not the result of the City's failure to implement 'proper corrosion controls' to prevent lead leaching from municipal and residential plumbing. *Id.* ¶¶ 169–72 (Page ID #54)."

"The City's misleading communications continued: In early January 2019, a Benton Harbor resident notified EGLE that she received a letter from the City indicating the water was 'safe to drink after a 'first flush,'' and that, when she called defendant Michael O'Malley, then the City's drinking water superintendent, he informed her that the City was 'delivering 'clean water right to the tap and [she] should have no problem drinking it.'' *Id.* ¶¶ 198–200 (Page ID #59–60). Around the same time, a nonprofit organization Fresh Water Future informed EGLE officials that O'Malley said the City was 'not prov[id]ing filters or bottles [of water] for anyone,' including homes testing above the action level, because the City was 'provid[ing] clean water 'right to their spout.'' R. 1-4 (Jan. 2019 Email) (Page ID #162); *see* R. 1 (Compl. ¶¶ 202–06) (Page ID #60)."

"Meanwhile, City and State officials failed to effectively address the City's aging lead-pipe infrastructure. While the lead issues were not featured in the October 2018 warning letter from EGLE that preceded the lead exceedance, the State and City officials were on notice that the system at least contained lead. R. 1 (Compl. ¶ 149) (Page ID #50). As evidence, Plaintiffs point to a $284,000 grant from EGLE to the City to begin replacing lead and galvanized steel lines in May 2018, five months before the testing results came in. *Id.* ¶ 148 (Page ID #50). Despite the known presence of lead pipes, the City 'was not using any form of corrosion control' until, 'at the earliest, four months after the exceedance/violations.' *Id.* ¶¶ 185–86 (Page ID #57)."

"In January 2019, the City began working with EGLE's recommended consultant, as well as with officials at EGLE, to develop a corrosion-control plan. *Id.* ¶¶ 188, 207 (Page ID #57, 61). O'Malley sent EGLE a proposal, recommended by Elhorn, to dose the water supply with Carus 8600, a 'generic blend' of orthophosphate and polyphosphate used to control corrosion of lead pipes. *Id.* ¶¶ 138, 208–10 (Page ID #49, 61). The plan was debated by EGLE officials, who raised concerns about the appropriate amount of chemical to use and how the optimal dosage would be determined. *Id.* ¶¶ 211–12 (Page ID #61–62). But the officials ultimately reached a consensus. R. 1-7 (Feb. 7–21, 2019 Emails) (Page ID #194–95); R. 1-8 (Feb. 22–25 2019, Emails) (Page ID #199). EGLE approved the plan by the end of February 2019, and the City implemented it 'under the approval, direction, and guidance of EGLE and Defendant Elhorn' on March 27, 2019. R. 1 (Compl. ¶¶ 213, 221) (Page ID #62–63). Plaintiffs contend this was inappropriate given EPA guidance on the use of polyphosphates, the lack of a preceding corrosion-control study, the failure to consider alternative treatments, and the failure to take special precautions in using the blended phosphate. *Id.* ¶¶ 213, 220, 222–26 (Page ID #62–64)."

"The treatment had no immediate effect. By June 2019, lead levels had risen to 27 ppb in the worst ten percent of samples, with the highest sample reaching 59 ppb. *Id.* ¶ 233 (Page ID #65). And although EGLE issued an administrative consent order requiring the City to submit either a corrosion control treatment proposal or a corrosion-control study by the end of April 2019, the City submitted only a one-page plan for a future study of the Carus 8600 treatment by that date. *Id.* ¶¶ 214–19 (Page ID #62–63). Nonetheless, O'Malley stated publicly that the corrosion plan was working ahead of schedule, even though few lead samples had been taken by that point. *Id.* ¶¶ 247–48 (Page ID #68). Later test results proved his statement false, as lead levels continued to rise. *Id.* ¶ 249 (Page ID #68)."

"In early 2020, defendant Brandon Onan, Supervisor of the Lead and Copper Unit at EGLE, wrote the City a letter indicating that the Carus 8600 blend was not working fast enough and ordered the City to change the treatment rate. *Id.* ¶¶ 253, 259 (Page ID #69–70). The letter was sent despite EGLE's initial internal concerns that the letter could bias the City's corrosion-control study, and that the City should instead investigate other options. *Id.* ¶¶ 254–58 (Page ID #69–70). EGLE ordered the City to hire a third-party consultant to implement the changes and conduct a corrosion-control study by September 30, 2020. *Id.* ¶¶ 261–264 (Page ID #70–71). The City once again submitted a one-page proposal for a corrosion-control study that EGLE described as insufficient because it was 'not detailed' and because the City lacked the capacity to implement the proposal due to staffing shortages at the water treatment plant. *Id.* ¶¶ 269–74 (Page ID #72). Meanwhile, the Carus 8600 dosage remained unchanged, and by the end of June 2020 the worst ten percent of homes continued testing with 23 ppb of lead, with the highest sample testing at 440 ppb. *Id.* ¶¶ 275–77 (Page ID #73)."

"In July 2020, the City finally issued an advisory encouraging residents to drink bottled water or to use water filters. *Id.* ¶¶ 279–80 (Page ID #73). But to the extent residents could not access either, the City recommended flushing the pipes for a few minutes before drinking the tap water. *Id.* ¶ 281 (Page ID #74). At this point, the City still had not completed a corrosion-control study and instead submitted another proposal, which was approved by EGLE, despite the City's lack of capacity to carry it out. *Id.* ¶¶ 283–88 (Page ID #74–75)."

"In November 2020, EGLE revoked O'Malley's license, and the City placed him on administrative leave and terminated his employment. *Id.* ¶ 289 (Page ID #75). Subsequently, the City contracted with engineering firm F&V Operations & Resource Management, Inc., to take over day-to-day operation of the plant. *Id.* ¶ 290 (Page ID #75). By the end of December 2020, the lead levels continued to rise slightly, with the top ten percent having an elevated presence of 24 ppb with the highest sampling at 240 ppb. *Id.* ¶ 291 (Page ID #75). Only in early 2021 did the City begin the process of requesting proposals to develop an optimal corrosion-control process. *Id.* ¶ 296 (Page ID #76)."

"In the fall of 2021, EPA officials visited Benton Harbor and found that the F&V employees charged with managing the plant could not answer simple questions or conduct the tasks and testing necessary to operate it. *Id.* ¶¶ 309–11 (Page ID #78–79). EPA issued a 'scathing' report indicating that City and State officials had failed to comply with relevant regulations and that the lead issues identified three years earlier still were unresolved. *Id.* ¶¶ 316–17 (Page ID #79). On November 2, 2021, EPA filed a unilateral administrative order against the City, requiring the City to distribute public educational materials and to implement monitoring devices throughout the system to ensure the corrosion control was working. *Id.* ¶¶ 330–32 (Page ID #81–82). Testing results around that time remained elevated, with an elevated presence of lead at 15 ppb with the highest sample testing at 48 ppb. *Id.* ¶ 334 (Page ID #82)."

"Throughout this time, 'Plaintiffs regularly drank tap water at home and other locations throughout Benton Harbor.' *Id.* ¶ 360 (Page ID #87). They have since 'been diagnosed with elevated blood-lead and/or bone-lead levels, and/or have exhibited signs and symptoms of lead poisoning.' *Id.* ¶ 364 (Page ID #87). They also 'suffer from cognitive deficits; behavioral issues; difficulty focusing; difficulty completing schoolwork, chores, and/or other tasks; and have other emotional issues.' *Id.* ¶ 366 (Page ID #88). Plaintiffs contend these issues were 'proximately caused by exposure to lead from Benton Harbor's tap water during the relevant time period.' *Id.* ¶ 367 (Page ID #88)."

"The present complaint was filed in the U.S. District Court for the Western District of Michigan on May 27, 2022. Based on the allegations chronicled above, Plaintiffs raised several claims. First, Plaintiffs alleged that the City and State Defendants violated their Fourteenth Amendment rights to bodily integrity (Count II), and to be free from state-created danger (Count I). R. 1 (Compl. ¶¶ 369–404) (Page ID #88–96). Second, Plaintiffs alleged that the engineering firms acted under color of law and violated those same rights (Counts III–IV). *Id.* ¶¶ 405–39 (Page ID #97–104). Third, Plaintiffs alleged state-law claims of negligence and professional negligence against the engineering firms (Counts VII–VIII). *Id.* ¶¶ 440–66 (Page ID #104–09)."

"In December 2022, the City and State Defendants moved to dismiss for failure to state a claim and based on qualified immunity. The engineering companies moved to dismiss for failure to state a claim and asked the court to decline supplemental jurisdiction over the state-law claims. On June 1, 2023, a magistrate judge issued a report and recommendation that the complaint be dismissed in full, and that supplemental jurisdiction be declined." …

"'Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct.' *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A defendant asserting qualified immunity at the motion-to-dismiss stage may argue both that the facts set out in the complaint do not plausibly allege a violation of the plaintiff's statutory or constitutional right—that the complaint fails to state a claim—and that, even if so, the right was not clearly established at the time of the challenged conduct. We review the dismissal of claims for failure to state a claim and on qualified-immunity grounds *de novo*. *In re Flint Water Cases*, 960 F.3d 303, 323 (6th Cir. 2020)."

"Plaintiffs appeal the district court's dismissal of their substantive-due-process claims against the State officials, the City officials, and the City. Plaintiffs assert that the district court erred by concluding that they had not plausibly alleged a violation of their constitutional right to bodily integrity. For the following reasons, we affirm as to the State officials and reverse as to the City officials and the City itself."

"The Fourteenth Amendment prohibits the state from 'depriv[ing] any person of life, liberty, or property, without due process of law.' U.S. Const. amend. XIV, § 1. This due-process right has substantive and procedural components. The substantive component bars the state from depriving people of certain protected rights 'regardless of the fairness of the procedures used to implement them.' *Guertin v. Michigan*, 912 F.3d 907, 918 (6th Cir. 2019) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Among these protected rights is the right to bodily integrity, 'an indispensable right recognized at common law as the 'right to be free from . . . unjustified intrusions on personal security' and 'encompass[ing] freedom from bodily restraint and punishment.'' *Id.* (alteration in original) (quoting *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977))."

"… '[I]ndividuals possess a constitutional right to be free from forcible intrusions on their bodies against their will, absent a compelling state interest.' *Id.* (quoting *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 506 (6th Cir. 2012)). 'Involuntarily subjecting nonconsenting individuals to foreign substances with no known therapeutic value—often under false pretenses and with deceptive practices hiding the nature of the interference—is a classic example of invading the core of the bodily integrity protection.' *Id.* at 920–21."

"To establish a constitutional violation, a plaintiff must demonstrate not only that her bodily integrity was infringed, but also that it was infringed by government officials' discretionary, 'constitutionally repugnant' actions. *Id.* at 922. Actions are constitutionally repugnant in the context of a bodily integrity violation when they 'shock the conscience.' *Id.* (quoting *Lillard v. Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996)). Merely negligent conduct does not shock the conscience, but unjustifiable and intentionally injurious conduct usually does. *Id.* at 923. When conduct falls somewhere between these bookends—in the neighborhood of recklessness or gross negligence—we evaluate the conduct in context to determine if the official was deliberately indifferent to a known risk of harm, 'for what may 'constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.'' *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998)). Among these considerations are 'the time for deliberation, the nature of the relationship between the government and the plaintiff, and whether a legitimate government purpose motivated the official's act.' *Id.* at 924. When, for example, a government official acts recklessly during a fast-paced car chase or amid a prison riot, we are unlikely to find that he was deliberately indifferent to a known risk of harm. *Lewis*,

523 U.S. at 852–53 (citing *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). But when officials have time to consider their actions, but nonetheless subject individuals to an unjustified risk of harm, their behavior is more likely to offend the Constitution. *Id.* at 851–53; *Guertin*, 912 F.3d at 924."

"Beginning in *Guertin*, we have applied these principles in a series of cases concerning the lead contamination of drinking water supplies in Flint, Michigan, and Benton Harbor." …

"We allowed substantive-due-process claims to proceed against many of the municipal and state defendants in the Flint Water Crisis cases. *Guertin*, 912 F.3d at 927-30; *In re Flint Water Cases*, 960 F.3d at 324. When doing so, we reasoned that these officials infringed residents' rights to bodily integrity by 'knowingly and intentionally introducing life-threatening substances into individuals without their consent.' *Guertin*, 912 F.3d at 921. By engineering the shift to the Flint River and then covering up the crisis and offering false assurances to the public, these officials undertook affirmative acts that led individuals to consume contaminated water without their knowing consent. *Id.* at 926–29. Their conduct was conscience shocking because it was undertaken after a lengthy period of decision making and without any legitimate government purpose. *Id.* at 925. '[J]ealously guarding the public's purse cannot, under any circumstances, justify the yearlong contamination of an entire community.' *Id.* at 926."

"At the same time, we refrained from imposing liability on individuals who were aware of issues relating to the water crisis but who were not alleged to have personally made decisions regarding the water-source switch or otherwise caused Plaintiffs to drink the contaminated water. *Id.* at 929–30. We also declined to hold liable certain officials who failed to blow the whistle, but whose inaction was not factually linked to the residents' consumption of the tainted water. *Id.* at 932."

"In sum, when officials took affirmative steps, 'with deliberate and reckless indifference to the likely results,' that caused residents to drink contaminated water without their consent, we determined that a constitutional violation was plausibly alleged. *Id.* at 927. But when officials merely failed to remedy a situation of which they were aware, we did not find a constitutional violation adequately pleaded. *See In re Flint Water Cases*, 960 F.3d at 327–29 (finding deliberate indifference based on officials' alleged role in creating, failing to mitigate, and covering up the crisis)."

"Plaintiffs press substantive-due-process claims against four State officials involved in the Benton Harbor water crisis. Plaintiffs' allegations against the State officials can be grouped in three categories. First, the State officials allowed or encouraged the City to adopt a corrosion inhibitor, Carus 8600, without adequate vetting or a concurrent control study. Second, the State officials did not do enough to ensure that the City corrected the lead water problems. Third, the State officials misled the public about the severity of the crisis."

"Because Plaintiffs do not allege that the State officials acted with any intent to injure, we must consider whether they acted with deliberate indifference. *In re Flint Water Cases*, 960 F.3d at 324." …

"As explained above, our consideration of deliberate indifference requires consideration of contextual factors, including the time to deliberate, the relationship among the parties, and whether the officials acted in service of any legitimate governmental purpose. *Guertin*, 912 F.3d at 924. It is undisputed here that the State officials had time to deliberate over their actions; the conduct allegedly took place over the course of years 'and did not arise out of time-is-of-the-essence necessity.' *Id.* at 925. Because officials had time to consider their actions, we hold them to a higher standard than we would if they had reacted to an instantaneous emergency. *See id.*"

"Plaintiffs also argue that in considering the entirety of the situation, we should take account of Defendants' knowledge of the condition of the Benton Harbor water system, the risks of lead poisoning to children, and the recent experience in Flint. D. 25 (Pls.' Br. at 44). We agree that this contextual information is relevant to the constitutional analysis because an official can be held liable only if he or she is aware of the risks. *See Range v. Douglas*, 763 F.3d 573, 591 (6th Cir. 2014) ('[I]t is the entirety of

the situation that must be assessed, including a defendant's awareness of the kind and degree of risk, and of the right threatened.')."

"Notwithstanding these considerations, the complaint does not allege a constitutional violation by the State officials. We start with Plaintiffs' allegations that the State officials violated their right to bodily integrity by implementing the Carus 8600 corrosion control without adequate study or precautions. This allegation does not support a deliberate indifference claim because Carus 8600 was implemented in furtherance of a legitimate public purpose"

"'[T]o find deliberate indifference, . . . *we [] must make some assessment that [the officer] did not act in furtherance of a countervailing governmental purpose that justified taking that risk*.' *Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 541 (6th Cir. 2008) (emphasis added). 'It is in the very nature of deliberative bodies to choose between and among competing policy options, and yet a substantive-due-process violation does not arise whenever the government's choice prompts a known risk to come to pass.' *Schroder v. City of Fort Thomas*, 412 F.3d 724, 729 (6th Cir. 2005)."

"The Carus 8600 treatment was implemented to further the legitimate government purpose of reducing the levels of lead in Benton Harbor's water supply. *See* R. 1 (Compl. ¶¶ 207–13, 244, 253–59) (Page ID #61–62, 67, 69–70); R. 1-13 (Feb. 13, 2020 Letter) (Page ID #228–30) (urging the City to alter the corrosion-control treatment rate to 'speed up treatment effectiveness' and 'more efficiently lower corrosion rates'). Nothing in Plaintiffs' complaint suggests otherwise. Plaintiffs allege that Carus 8600 was a poor choice among the various corrosion-control options; according to the complaint, it was not tailored to the unique conditions of Benton Harbor's historically neglected water system and was unlike proposals made and implemented in other communities with known lead water issues. R. 1 (Compl. ¶¶ 210–11) (Page ID #61–62). But there is no suggestion in the complaint that the State officials adopted the Carus 8600 treatment 'for some 'arbitrary' reason.' *Jane Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 935 (6th Cir. 2020)."

"We have consistently recognized that poor choices made in furtherance of a legitimate government interest are not deliberately indifferent." …

"Plaintiffs' challenge to EGLE's response is much the same: with the benefit of hindsight, they question the State officials' decisions and suggest they should have done more to optimize the corrosion control and halt the lead levels sooner. Even if employing Carus 8600 had an effect of elevating lead levels for some time (as Plaintiffs suggest), these claims sound in negligence, not deliberate indifference" …

"The State officials' implementation of Carus 8600 is wholly unlike the conduct we deemed deliberately indifferent in *Guertin* or *In re Flint Water Cases*. There, the conduct there was *not* aimed at remedying the situation. To the contrary, we noted that the Flint-related complaints plausibly alleged that the water-source switch was motivated by an unjustified pursuit of cost savings. *Guertin*, 912 F.3d at 926. Any justified failure to implement corrosion control did not explain the initial switch to the Flint River or the coverup that followed. *In re Flint Water Cases*, 960 F.3d at 327. Plaintiffs have offered no competing inference that can be drawn with respect to the purpose underlying the State officials' actions."

"The State officials' failure to take more vigorous action to remedy the lead-water crisis or to require a corrosion-control study also sounds in negligence, not deliberate indifference."…

"Plaintiffs' allegations amount to a claim that the State officials made 'bad choices' in how they responded to an existing lead-water crisis. *Guertin*, 912 F.3d at 924. 'As will often be the case in retrospect,' the State officials 'could have done more.' *Jane Doe*, 954 F.3d at 936; *see Ewolski*, 287 F.3d at 516 ('[I]mprudence and poor execution do not rise to the level of constitutionally arbitrary abuses of power.'). But the State officials' allegedly inept and sluggish efforts are not conscience shocking."

"Finally, Plaintiffs' claim that State officials misled the public about the risks of drinking the Benton Harbor tap water does not alter our conclusion because Plaintiffs have not plausibly alleged that the State officials made misleading statements that caused Plaintiffs to drink the water. We consider the examples on which Plaintiffs principally rely. As to Oswald, Plaintiffs charge that he misled the public in a November 2019 letter to the Great Lakes Environmental Law Center. D. 25 (Pls.' Br. at 29) (citing R. 1 (Compl. ¶¶ 243–44) (Page ID #67)). But the letter itself undermines Plaintiffs' characterization of it. *In re Flint Water Cases*, 960 F.3d at 329 ('When a document attached to the complaint contradicts the allegations, the document trumps the allegations.'). Rather than 'indicat[e] that everything was safe as to the water being treated and distributed' by Benton Harbor, R. 1 (Compl. ¶ 243) (Page ID #67), the letter describes the steps that EGLE was taking in partnership with the City and emphasizes the importance of continuing to filter water in Benton Harbor." …

"As to Sarkipato, Plaintiffs claim that he did not do enough to counteract O'Malley's alleged statement to a resident that the water was safe to drink or upon learning that residents had not received water filters. D. 25 (Pls.' Br. at 32). However, the only allegation concerning Sarkipato's public statements is to the contrary. When the resident called to report O'Malley's comment that the water was safe to drink from the tap, Sarkipato talked to the resident about 'ways residents can reduce their risk.' R. 1-4 (Jan. 9, 2019 Emails at 1) (Page ID #162). This is not enough to suggest that Sarkipato was responsible for misinformation that led Benton Harbor residents to drink unsafe water."

"Finally, a word about EGLE Director Liesl Clark. Plaintiffs do not allege that Clark was specifically involved any of the decisions discussed above. Clark is the director of EGLE, and Plaintiffs argue that she 'failed to take any action to mitigate the crisis, even though her responsibilities as EGLE Director required her to do so.' D. 25 (Pls.' Br. at 26). Plaintiffs' claims against Clark fail because they do not allege any personal action or inaction that caused the people of Benton Harbor to drink lead-contaminated water. While the complaint alleges that she made 'decisions and statements that concealed and prolonged' the Benton Harbor water crisis, R. 1 (Compl. ¶ 70) (Page ID #36), this general statement is not supported by factual allegations. The only factual allegation set forth against Clark is that, three years into the crisis, she first avoided questions posed by a legislative committee, and then admitted the water in Benton Harbor was not safe to drink. *Id.* ¶¶ 322–28 (Page ID #80–81)."

"Although it is true that Clark has a senior role in EGLE, § 1983 is not a doctrine of respondeat superior, and Plaintiffs have not plausibly alleged that Clark is personally responsible for what happened here. *Does v. Whitmer*, 69 F.4th 300, 306–07 (6th Cir. 2023). No specific, factual allegations in the complaint suggest that she 'authorized, approved, or knowingly acquiesced in the unconstitutional conduct . . . of [her] subordinates through the execution of [her] job functions.' *Id.* at 306 (quoting *Crawford v. Tilley*, 15 F.4th 752, 761 (6th Cir. 2021))[.]" …

"In sum, the complaint does not plausibly allege that any of the State officials violated Plaintiffs' rights to bodily integrity. The allegations suggest, at most, that the officials were negligent in performing their duties of ensuring that Benton Harbor residents had a safe water supply."…

"Plaintiffs also assert substantive-due-process claims against the City officials and the City itself. The claims against these defendants turn primarily on the statements the City officials made to the public suggesting that the water in Benton Harbor was safe to drink and that the problem was not as widespread as it turned out to be. Plaintiffs also allege that Watson and O'Malley were deliberately indifferent in implementing the Carus 8600 solution, while failing to conduct a full assessment of the problem and optimal solutions."

"We begin by recognizing, as we did with the State officials, that the decisions here were largely undertaken with the benefit of time. And the residents of Benton Harbor can hardly be understood to stand in a voluntary relationship with the public water supply. So, we turn to whether any of the City officials' actions were undertaken for some legitimate governmental purpose, or whether Plaintiffs have plausibly alleged deliberate indifference here."

"We begin with allegedly misleading statements. There is rarely a justification for misleading the public about the extent of a lead-water crisis; Defendants have offered no legitimate government purpose for providing information that downplayed the extent of the danger. *See Guertin*, 912 F.3d at 926. Accordingly, our question is whether the complaint plausibly alleges that they made false and misleading statements. Unlike the allegations concerning the State officials, the complaint's allegations regarding the City officials tell a plausible tale of deliberate indifference to a known risk of harm."

"Beginning from when the lead-water exceedance was first discovered, the individual City officials each made statements 'downplay[ing] the severity of lead in the water.' R. 1 (Compl. ¶ 173) (Page ID #55). Mayor Muhammad, at an early press conference, undermined an EGLE lead advisory, stating that it was 'not being . . . delivered as a high alert, emergency 911, panic frenzy' but just as an 'FYI.' *Id.* ¶ 174 (Page ID #55). During the same press conference, City Manager Watson falsely stated that the City itself had no lead lines, attributing the problem to isolated connection lines between certain homes and the water mains, even though the City had recently received a grant to replace lead water lines. *Id.* ¶ 175 (Page ID #55). Watson would not correct that statement for another month. *Id.* ¶ 194 (Page ID #58)."

"Just three months later, EGLE officials learned that former Drinking Water Superintendent O'Malley told at least one person that the City's water was clean and could be drunk directly from the tap. *Id.* ¶ 200 (Page ID #60). The EGLE officials also learned that the City had sent letters advising residents that 'the water [was] safe to drink after a first flush.' *Id.* ¶ 199 (Page ID #59). This came as a surprise because City officials previously 'said they would' be 'providing water or filters.' R. 1-4 (Jan 2019 Emails) (Page ID #162). O'Malley also attempted to cover up the extent of the problem or, at least, remained willfully blind to its scale and severity. According to the complaint, O'Malley 'obscur[ed] [the] City's lead testing' by 'refus[ing] to disclose the addresses of the testing sites to EGLE' and attempted to reduce the number of testing sites. R. 1 (Compl. ¶¶ 228–30) (Page ID #64–65). And once the City began implementing the Carus 8600 protocol, 'City officials dishonestly and publicly stated that inroads were being made regarding eliminating lead from the water,' even as lead levels were rising. *Id.* ¶ 245 (Page ID #68). For example, in November 2019, O'Malley told members of a public City committee that the corrosion control was 'having an impact sooner than' expected, even though he had tested only seven homes. *Id.* ¶¶ 246–48 (Page ID #68). O'Malley had to withdraw that statement two months later. *Id.* ¶ 251 (Page ID #69)."

"Meanwhile, as they underplayed the crisis and overplayed the effectiveness of measures taken to address it, the City officials made no serious efforts at studying the problem or its optimal solution and failed meaningfully to respond to EGLE's demands that they do so. Although they implemented the Carus 8600 treatment for, as we have explained, a legitimate public purpose, they repeatedly failed to conduct a corrosion-control study to optimize that treatment or determine if a different approach was needed. *Id.* ¶¶ 179–80, 215–18, 263–71 (Page ID #56, 63, 71–72). Although these actions might indicate mere negligence when viewed in isolation, they further support the Plaintiffs' allegations that City officials acted with deliberate indifference."

"These allegations suffice to advance the claims against the City officials past the motion to dismiss."
…

"The City officials make various arguments in response. First, they suggest that the allegations are not sufficient as to each individual Defendant. Section 1983 liability is assessed individually, based on the affirmative acts of the individual Defendants. *Hart v. Hillsdale County*, 973 F.3d 627, 639 (6th Cir. 2020) ('[E]ach defendant's liability must be assessed individually based on his own actions.') (quoting *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010)). But in reviewing a complaint, we must be careful not to excessively parse statements or reduce generalized allegations to the concrete examples that support them. Here, the complaint generally alleges that the City officials 'misled the public about the true extent of the Benton Harbor water crisis and the dangers of lead.' R. 1 (Compl. ¶ 146) (Page ID #50); *see id.* ¶ 379 (Page ID #91) (alleging that City officials 'deliberately denied, lied about,

covered up, deceived, discredited, and ignored known dangers and risks of harm to which they exposed Plaintiffs, making them more vulnerable to said dangers'). And the complaint supports that general allegation with specific instances attributed to each Defendant. We may infer at this stage based on the specific and general allegations that all three City officials contributed to that misleading impression and thereby caused Plaintiffs to drink the lead-contaminated water. *See Hart*, 973 F.3d at 640 ('Winnowing the defendants is not possible until an evidentiary record is developed.'); *Moderwell v. Cuyahoga County*, 997 F.3d 653, 663–64 (6th Cir. 2021)."

"… [T]he City officials argue that the claims should not move forward because the allegations are not outrageous enough. *See* D. 33 (City Defs.' Br. at 14) (contending that the claims against Mayor Muhammad fail because 'they do not rise to the constitutional level of 'so inspired by malice or sadism . . . that [it] amount[ed] to a brutal and inhumane abuse of official power'' (quoting *Lillard*, 76 F.3d at 725). Although the shocks-the-conscience standard is highly context dependent, *Guertin*, 912 F.3d at 923, we have already recognized that it shocks the conscience when government officials lie to the public about the contamination of the public drinking water with lead. *In re Flint Water Cases*, 960 F.3d at 327–30 (finding deliberate indifference as to multiple state officials who made false and misleading public comments about the safety of the lead and bacteria-contaminated water in Flint); *accord Braziel*, 2024 WL 3966238, at *9 (finding allegations regarding O'Malley's public statements conscience shocking). If Plaintiffs' claims are true—that the City officials lied about the presence of lead in the Benton Harbor water supply, thereby causing residents to drink the water—that would shock the conscience. That is all we need to find for now."

"… [T]he City officials argue that there can be no constitutional violation here because the claims are premised 'solely on inaction, deficient remedial action, or misrepresentation.' D. 33 (City Defs.' Br. at 9). They assert that '*Guertin* is fundamentally different from this case because officials were alleged to have intentionally caused the water contamination by changing water sources despite known risks.' *Id.* But plaintiffs alleging violations of the right to bodily integrity arising from drinking lead-contaminated water do not need to set forth factual allegations identical to the extraordinary mismanagement in the Flint Water Crisis to prevail. In any event, the City officials misread *Guertin* and entirely fail to acknowledge *In re Flint Water Cases*, both of which are binding precedent in this circuit. In both cases, we recognized that officials in Flint independently violated residents' substantive-due-process rights by misrepresenting the safety of the water because '[m]isleading Flint's residents as to the water's safety—so that they would continue to drink the water and Flint could continue to draw water from the Flint River—is no different than the forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional.' *Guertin*, 912 F.3d at 926 (citation omitted); *accord In re Flint Water Cases*, 960 F.3d at 327–30; *Braziel*, 2024 WL 3966238, at *5" …

"Lastly, the City officials argue that qualified immunity shields their actions because Plaintiffs have not demonstrated that the right they assert is clearly established. But we have already recognized that 'government officials who play a 'role in creating, sustaining, and covering up [a water crisis]' have 'violate[d] [the victims'] right to bodily integrity,' and that this right to bodily integrity is clearly established under the Due Process Clause of the Fourteenth Amendment.' *Braziel*, 2024 WL 3966238, at *5 (alteration in original) (quoting *In re Flint Water Cases*, 960 F.3d at 323); *see Guertin*, 912 F.3d at 933–35. In *Guertin* and *In re Flint Water Cases*, we recognized this as a preexisting, clearly established right. … As we recognized in *Guertin*, discovery might reveal that the City officials' actual conduct fell far outside the scope of the clearly established right recognized in our prior decisions or that the City officials were motivated by a legitimate government purpose. *See id.* at 935. The City officials are free to renew this argument at summary judgment. For now, we decline to dismiss based on qualified immunity. The district court's grant of the motion to dismiss as to the City officials will be reversed."

"Plaintiffs finally seek to hold the City liable for the violations of their right to bodily integrity. Plaintiffs rest their *Monell* claim on the actions of the City officials who were allegedly the 'final decision makers with respect to their decisions regarding treatment of the contaminated water, their decisions to conceal the crisis, and their decision to lie about the safety of the water.' D. 25 (Pls.' Br.

at 42). Having concluded that the claims can go forward against the individual City officials, we allow the *Monell* claim to proceed, as well."

"'[A] municipality is liable under § 1983 only if the challenged conduct occurs pursuant to a municipality's 'official policy,' such that the municipality's promulgation or adoption of the policy can be said to have 'cause[d]' one of its employees to violate the plaintiff's constitutional rights.' *D'Ambrosio v. Marino*, 747 F.3d 378, 386 (6th Cir. 2014) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692 (1978)). 'Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.' *Id.* (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). '[W]here action is directed by those who establish governmental policy, the municipality is equally responsible.' *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). Because the claims will move forward against each of the City officials, including Mayor Muhammad, the *Monell* claim survives, as well. *Cf. Braziel*, 2024 WL 3966238, at *10 (concluding *Monell* claim could not proceed because Plaintiffs had not plausibly alleged liability against Muhammad). The district court's grant of the motion to dismiss as to the City of Benton Harbor will be reversed."

8. Fourteenth Amendment - Due process (procedural) - Octopus Group has failed to show that it possessed a protected property interest – Procedural due process requires state and local governments to employ fair procedures when they deprive persons of a constitutionally protected interest in life, liberty, or property, but procedural due process protections do not prevent deprivations of life, liberty, or property but rather guard against substantively unfair or mistaken deprivations of property - Octopus Group is challenging the denial of a special use permit and its inability to reapply as of right for five years - Octopus Group fails to cite to any authority showing that being unable to reapply for a permit deprived it of a protected property interest, nor has Octopus Group asserted that it was entitled to the permit such that it had a property right in the permit itself - Octopus Group has failed to adequately show that it had a protected property interest in the permit or that it has been deprived of the physical property at issue - No due process violation – The determination of whether the Council acted illegally, arbitrarily, or fraudulently is a question of law- illegal, arbitrary, or fraudulent actions include: 1) the failure to follow the minimum standards of due process; 2) the misrepresentation or misapplication of legal standards; 3) basing a decision on ulterior motives; and 4) violating applicable constitutional standards - Statutory rules of construction - Council acted pursuant to one of its published rules of procedure, which provided for reconsideration of a matter before the minutes of the previous meeting had been finalized - It is plain from the rules of procedure that, prior to the approval of the previous meeting's minutes, any matter which has appeared on the agenda and has been acted upon by either a majority vote for approval or rejection, may be brought before the Council for reconsideration - As a general rule, every citizen is presumed to know the law, so Octopus had notice that reconsideration was a possibility

PEOPLE FIRST AUTO SALES, LLC ET AL. v. CITY OF MEMPHIS, TENNESSEE ET AL.
COURT OF APPEALS No. W2024-00323-COA-R3-CVFiled February 11, 2025

See, Common law writ of certiorari – When municipal legislative bodies reserve to themselves the power to grant or deny permits through an ordinance containing a rule or standard to govern them, a later decision implementing this authority is regarded as administrative, as opposed to legislative – page 1

9. Fourteeth Amendment - School shooting – School employees did not violate due process rights by their actions, which does not shock the conscience – This claims of the plaintiffs sounds in tort, not federal constitutional law - For the most part the Constitution sets forth rules for government, both creating (or constituting) its powers and limiting them - The limitation the plaintiffs invoke here is that of due process, and to proceed with those claims, the plaintiffs must allege more than that the school officials in these cases—a counselor and the dean of students—made bad decisions or could have

done more to prevent this tragedy - What the plaintiffs must show in these cases, rather, is that the actions of these two defendants were so outrageous, and so callous in their disregard of the danger posed by the student shooter, as to shock the conscience - The Due Process Clause of the Fourteenth Amendment, imposes a limitation on the State's power to act, not a guarantee of certain minimal levels of safety and security - By its terms, the Fourteenth Amendment regulates only the state's actions—not those of private actors, and here the person who deprived the victims of their lives and health was a private actor - The Sixth Circuit has recognized a theory of state-created dangers—according to which, under narrow circumstances, state actors can be liable for harms caused by private actors - Such a claim has three elements (1) a state official must take an affirmative act that creates or increases the risk that a victim will be harmed by a private actor; (2) this risk must pose a special danger to a specific victi'—meaning a danger, to that victim, greater than the danger to the public generally, and (3) the state official's conduct must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience

JEFFREY FRANZ, et al.; STEVE ST. JULIANA, et al.; WILLIAM MYRE, et al.; KYLIE OSSEGE; MATTHEW MUELLER, et al.; NICHOLETTE ASCIUTTO, et al.; NICOLE BEAUSOLEIL; SANDRA A. CUNNINGHAM,; JARROD WATSON, et al. v. OXFORD COMMUNITY SCHOOL DISTRICT, et al. NICHOLAS EJAK; SHAWN HOPKINS
SIXTH CIRCUIT COURT OF APPEALS Nos. 23-1483 /1484 /1487 /1489 /1490 /1491 /1492 /1493 /1496 /1560 /1561/ 1563/ 1564/ 1565 Decided and Filed: March 20, 2025

"On November 30, 2021, in Oxford, Michigan, a 15-year-old student took a gun to school and used it to shoot ten students and one teacher. Four students died. The shooter, whom we call E.C., pled guilty to first-degree murder and is now serving a life sentence. His parents are likewise in prison after juries convicted them of manslaughter. Meanwhile, victims of the shooting have brought multiple suits in state court, seeking recovery against school and law-enforcement officials on various theories of tort liability. Many of those suits remain pending."

"The consolidated cases here are different. What the plaintiffs assert here 'is not a negligence claim, but one sounding in a rare species of one of the narrowest doctrines of constitutional law.' *Doe v. Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 937 (6th Cir. 2020). For the most part the Constitution sets forth rules for government, both creating (or 'constituting') its powers and limiting them. The limitation the plaintiffs invoke here is that of 'due process.' And to proceed with those claims, the plaintiffs must allege more than that the school officials in these cases—a counselor and the dean of students—made bad decisions or could have done more to prevent this tragedy. What the plaintiffs must show in these cases, rather, is that the actions of these two defendants were so outrageous, and so callous in their disregard of the danger posed by E.C., as to shock the conscience. The district court held that, with one exception, the plaintiffs had not alleged facts supporting any inference to that effect. We reach that same conclusion across the board—and thus we affirm in part and reverse in part."

"We accept as true the facts alleged in the plaintiffs' complaints. *See Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 382-83 (6th Cir. 2016)."

"In early November 2021, a student entered a bathroom stall at Oxford High School and found a jar containing a severed bird's head. E.C.'s journal revealed that he had killed the bird and brought it to school in the jar, though school officials were unaware of those facts then. Around this same time, E.C.'s Spanish teacher told a school counselor, Shawn Hopkins, that E.C. seemed 'sad.' Hopkins offered to talk to E.C., but E.C. declined."

"The weekend before the shooting, E.C.'s mother posted a picture of him at a shooting range with a Sig Sauer 9mm semiautomatic handgun—which she called 'his new Christmas present.' School officials

were unaware of that posting. The next Monday—the day before the shooting—an English teacher saw E.C. looking at photos of bullets on his phone. The teacher reported that to Hopkins, and he asked E.C. about the photos. E.C. said guns were a family hobby. That night, E.C. wrote in his journal: 'the shooting is tomorrow, I have access to the gun and ammo.' On Twitter, he posted, 'Now I am become Death, the destroyer of worlds. See you tomorrow Oxford.' School officials were unaware of those facts too."

"Around 8:30 a.m. the next morning—November 30—another teacher saw E.C. looking at his phone. This time, he was watching videos of shootings. The teacher reported that to Hopkins. Thirty minutes later, a math teacher found a worksheet on which E.C. had sketched a pistol, a person with gunshot wounds, and a bullet. On the same worksheet, E.C. had also written: 'blood everywhere'; 'My life is useless'; and 'The thoughts won't stop help me.'"

"The math teacher promptly alerted dean of students Nicholas Ejak and Hopkins about the worksheet. Within minutes, Hopkins escorted E.C. to the counseling office, while Ejak retrieved E.C.'s backpack from the classroom. Ejak did not look inside the backpack. In the office, E.C. told Hopkins and Ejak that he had been drawing characters from a video game. Hopkins said, 'this does not sound like a video game.' Hopkins asked E.C. whether he was a threat to himself or others. E.C. replied, 'I can see why this looks bad. I'm not going to do anything.'"

"Hopkins then called E.C.'s parents, telling them that he was concerned that E.C. was suicidal, and that they needed to come to the school. They arrived around 10:30 that morning. Hopkins said E.C. needed immediate counseling—that day, if possible. His parents said that was not possible because they needed to go back to work. Then—with E.C. still present—Hopkins told the parents that, if they did not get E.C. counseling within 48 hours, he would call Child Protective Services. E.C.'s mother asked, 'are we done?' Hopkins said yes, and the parents left."

"After the meeting, Hopkins or Ejak (the record does not make clear which) returned E.C's backpack to him and sent him back to class. During the next two hours, Hopkins confirmed that E.C. had arrived at each of his classes. Shortly after noon, however, E.C. left class and went to the bathroom. There, he removed the Sig Sauer from his backpack, returned to the hallway, and began shooting."

"The plaintiffs later brought these suits, claiming the defendants had violated their constitutional rights to due process. The defendants moved for judgment on the pleadings, arguing they were entitled to qualified immunity because (among other grounds) the plaintiffs had not alleged facts showing a constitutional violation. *See* Fed. R. Civ. P. 12(c). The district court largely agreed and dismissed most of the claims in the complaints. But the court held that Hopkins' statement to E.C.'s parents during the meeting—that he would call Child Protective Services if they did not get counseling for E.C. within 48 hours—potentially did support a constitutional claim." …

"We have jurisdiction over these interlocutory appeals because the defendants argue they are entitled to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)." …

"Here, the plaintiffs invoke the Due Process Clause of the Fourteenth Amendment, which provides: '[N]or shall any State deprive any person of life, liberty, or property, without due process of law.' U.S. Const. amend. XIV, § 1. That Clause 'imposes a limitation on the State's power to act, not a guarantee of certain minimal levels of safety and security.' *Doe*, 954 F.3d at 93 (cleaned up)."

"Thus, by its terms, the Fourteenth Amendment regulates only the state's actions—not those of private actors. And here the person who deprived the victims of their lives and health was a private actor, E.C. But our circuit (among others) has recognized a theory of 'state-created dangers'—according to which, under narrow circumstances, state actors can be liable for harms caused by private actors. *See McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 464 (6th Cir. 2006). Such a claim has three elements. First, a state official must take an 'affirmative act' that creates or increases the risk that a victim will be harmed by a private actor. *Doe*, 954 F.3d at 932-33. Second, this risk must pose a 'special danger to

a specific victim'—meaning a danger, to that victim, greater than the danger to the public generally. *Id.* at 933. Third, the state official's conduct must be 'so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.' *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)."

"At the outset, we agree with the district court that two of the putative acts at issue here cannot support liability. First, the plaintiffs argue that the defendants created a danger when, after the meeting in the office, they returned E.C.'s backpack to him and sent him back to class. But those actions put the plaintiffs 'in no worse position' than the one in which they would have been had the defendants 'not acted at all.' *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989). E.C. had a backpack containing a gun before the meeting, and afterward he had the same backpack containing the same gun. (To avoid any misimpression: nothing in the record here supports an inference that the defendants knew the gun was in the backpack.) Thus, for purposes of this theory, the act of returning the backpack to E.C. did 'not satisfy the state-action requirement' because merely 'returning someone to the same dangers that existed' before is not enough. *Bukowski v. City of Akron*, 326 F.3d 702, 709 (6th Cir. 2003)."

"The same is true of the second of the putative acts the plaintiffs cite—namely that Hopkins and Ejak 'concealed' from other school officials the risk that E.C. might shoot other students in the school. (We set to one side the question whether the defendants perceived *that* risk—as opposed to the risk that E.C. would harm himself.) 'Concealed' is a loaded term here. True, on the facts alleged, the defendants failed to tell other officials about a risk that E.C. might harm others. But failures to act usually are not affirmative acts for purposes of this theory. *Stiles, ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 855 (6th Cir. 2016). And the plaintiffs point to nothing in this record that plausibly supports an inference that Hopkins or Ejak sought to cover up any risk of harm. Hence this omission cannot support liability either. *See generally Est. of Romain v. City of Grosse Pointe Farms*, 935 F.3d 485, 492 (6th Cir. 2019)."

"When—as was likely the case here—a state official can reflect before he acts, he violates due process when he perceives a 'substantial risk of serious harm' and then responds to it in 'a manner demonstrating reckless or callous indifference' toward the plaintiff's rights. *Doe*, 954 F.3d at 933-34. Here, the defendants' actions (as alleged in the complaint) show they perceived a serious risk: they summoned E.C.'s parents for an urgent meeting, insisted that he receive counseling within 48 hours, and said they would call Child Protective Services if he did not. (We again set to one side whether the risk they perceived was the risk that materialized.) But those same actions show that Hopkins and Ejak displayed the opposite of callous indifference toward the risk they perceived. That is especially true of the very act on which the plaintiffs would ground liability: namely, Hopkins' demand that E.C.'s parents get him counseling withing 48 hours. Hopkins made that demand to mitigate risk, not to increase it; and his demand was indisputably made for 'a legitimate governmental purpose,' which all but excludes a finding that it was 'conscience shocking.' *Id.* at 934. True, as the plaintiffs emphasize, this case comes to us on the pleadings rather than on summary judgment. But even taking their alleged facts as true, we see nothing in this record that supports an inference that Hopkins or Ejak took any action that shocks the conscience. In substance the plaintiffs' claims sound in tort, not in federal constitutional law. Thus, in these cases, their claims must be dismissed."

10. Due process procedural violation - City tore down a dilapidated mobile home - City did not have a mechanism for a pre-deprivation hearing - City did not provide an opportunity to be heard, which it was required to do before demolition of the mobile home - There was no substantive process violation as the conduct did not shock the conscience - Due process requires a statement 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 - The idea is to give property owners a meaningful chance to object to the proposed destruction of their property - The notice thus must inform the homeowners 'of the availability of an opportunity to present [their]

objections - If generally available state statutes detail procedures for obtaining a hearing before the destruction of the property, a municipality typically need not take other steps to inform the property owner of their options - As to the opportunity to be heard, due process requires some kind of a hearing *before* the State destroys the property, absent an emergency - No emergency existed in this instance, as a month passed between the condemnation notice and the actual demolition of the vacant home, precluding the City from claiming a necessity of quick action or other impracticability that might permit only post-deprivation remedies - That means the City needed to provide the plaintiffs with a hearing before the demolition - While the hearing requirement remains flexible to account for different situations—hence the reference to some kind of a hearing—it remains an imperative - Measured by these principles, the City met its obligation to provide notice to the property owners but did not meet its obligation to provide a pre-demolition hearing to them

MICHAEL MCINTOSH; REBECCA MCINTOSH v. CITY OF MADISONVILLE, KENTUCKY
SIXTH CIRCUIT COURT OF APPEALS No. 24-5383 Filed and Decided: January 21, 2025

"The City of Madisonville condemned one of several mobile homes that Michael and Rebecca McIntosh own in their Kentucky town. The City demolished the property a month later. The McIntoshes filed this § 1983 action in response, alleging that the City deprived them of their due process rights to notice and the opportunity to be heard before tearing down the mobile home, among other claims. The district court granted the City's motion for summary judgment. Because triable issues remain over whether the City provided the McIntoshes an adequate opportunity to be heard, we reverse its disposition of this claim and affirm its handling of the other claims."

"In 1994, the McIntoshes bought a nine-lot mobile home park in Madisonville, Kentucky, located about 150 miles southwest of Louisville. After a few years, they began renting out the mobile homes. In the fall of 2020, a tenant told the City that her mobile home contained mold and mildew and that the McIntoshes failed to fix it."

"The City responded to the complaint. In November 2020, Michael Phillips, the City's code enforcement officer, inspected the home. He discovered 'organic growth' and 'moisture droplets' on the ceiling, doors and windows that would not open, and a floor 'soft' in some areas. R.24-7 at 7. The City's building inspector, Frank Wallace, reported similar findings after his own inspection. He recalled seeing 'vegetative growth' on the walls and unstable two-by-fours supporting the ceiling. R.24-6 at 11. Wallace found that the structure could collapse and deemed the property an unsalvageable danger."

"On November 19, 2020, Wallace mailed the McIntoshes a letter on behalf of the City. It said, among other things:

> The property listed above is in violation of the 2012 International Property Maintenance Code. The structure is unsafe for occupancy and Condemned at this time. Be advised that you have thirty (30) days to submit your plans for the renovation and repairs needed to bring this property up to code.

R.23-3. The City placed a notice on the property that said in relevant part:

WARNING
CONDEMNED
DO NOT ENTER
Under the jurisdiction of the Building Official of the City of Madisonville the building is unsafe for OCCUPANCY
Restricted entry by permission of the Building Officials office only
Please Contact Frank Wallace

R.23-2."

"Mr. McIntosh saw the notice posted on his home and received the condemnation letter. On December 1, he wrote a letter to Wallace and Phillips disputing the City's authority to condemn the home and 'respectfully request[ing]' they withdraw their notice. R.23-4 at 1. Mr. McIntosh called Wallace to request a copy of the City's maintenance code, and Wallace gave it to him."

"The parties' accounts of what happened next diverge at this point."

"The homeowners' account: Mr. McIntosh claims that he tried to contact City officials multiple times to dispute the violations. He called Phillips a few times asking for repair recommendations, but Phillips did not answer and insisted that only Wallace could provide the information. Mr. McIntosh called Wallace's office and, when no one answered, he left a message about the letter and notice. In response, an employee called back and advised him: 'If [you] didn't like Frank Wallace's decision, sue them.' R.24-5 at 10. Mr. McIntosh asked her how to get a hearing at the '[B]oard of [A]djustment,' and she responded that no such board existed. R.24-5 at 10. The City turned off the mobile unit's power. Mr. McIntosh sent a second letter to Wallace and Phillips. He explained that he had 'inspected and cured the cause of the complaint,' a leaking valve on the water heater. R.24-3. He added that he would replace damaged plywood panels before another tenant moved in and disagreed that the unit had structural problems. When Mr. McIntosh again called Wallace's office about his letter, Phillips told him: 'We do not care what your letter said . . . I'm going to tear that house down.' R.24-5 at 18. Wallace and Phillips never reentered the property to see his repairs."

"The City's account: Wallace claims that Mr. McIntosh did not try to contact him after obtaining a copy of the maintenance code. Wallace told Mr. McIntosh that he could work with Madisonville to remedy his property's issues, but Mr. McIntosh rejected the offer. Wallace does not remember seeing a second letter from Mr. McIntosh detailing his repair attempts and asking the City to turn on the electrical power to the unit. Both Wallace and Phillips say that they reinspected the property before tearing it down but found only cosmetic repairs that did not satisfy the Code."

"A month after the initial condemnation, the time for demolition arrived. That day, Mr. McIntosh called the City Attorney, the Mayor's office, and the County Sheriff to delay the demolition. His efforts went nowhere. Mr. McIntosh claimed that Phillips 'understood [his] situation and he wasn't going to tear the house down.' R.24-5 at 9. But when Mr. McIntosh started calling state officials, Phillips changed his mind because 'he didn't like that [McIntosh] was talking to somebody from the State.' R.24-5 at 9. Once more, Mr. McIntosh told Wallace that he had made the necessary repairs and asked him what parts of the Code the home still violated. Wallace responded that he would not discuss the matter and that the City planned to proceed. The City removed the mobile home that day."

"*Procedural due process*. The Fourteenth Amendment says that the States may not 'deprive any person of life, liberty, or property, without due process of law.' When it comes to property that a State or city wishes to condemn, the relevant government unit must give the owner 'notice' and the 'opportunity to be heard' before tearing down the property. *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). A few words are in order about each component of this standard."

"As to notice, due process requires a statement '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.' *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The idea is to give property owners a meaningful chance to object to the proposed destruction of their property. *See Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153, 166 (6th Cir. 1973). The notice thus must 'inform' the homeowners 'of the availability of an opportunity to present [their] objections.' *Memphis Light,*

Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978) (quotation omitted). If 'generally available state statutes' detail procedures for obtaining a hearing before the destruction of the property, a municipality typically 'need not take other steps to inform' the property owner of their 'options.' *City of West Covina v. Perkins*, 525 U.S. 234, 241 (1999)."

"As to the opportunity to be heard, due process requires 'some kind of a hearing *before* the State' destroys the property, absent an emergency. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990). No emergency existed in this instance, as a month passed between the condemnation notice and the actual demolition of the vacant home, precluding the City from claiming a 'necessity of quick action' or other 'impracticability' that might permit only post-deprivation remedies. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (quotation omitted). That means the City needed to provide the McIntoshes with a hearing before the demolition. While the hearing requirement remains flexible to account for different situations—hence the reference to 'some kind of a hearing'—it remains an imperative."

"Measured by these principles, the City met its obligation to provide notice to the property owners but did not meet its obligation to provide a pre-demolition hearing to them."

"Start with notice. Mr. McIntosh received and read the condemnation notice and letter informing him that he had thirty days to submit his plans for 'renovation' and 'repairs.' His subsequent efforts to repair the property and his serial efforts to contact city officials show that the notice worked."

"True, the condemnation letter did not list each of the property's specific defects. But we do not demand a 'level of specificity required of a criminal indictment.' *Yashon v. Hunt*, 825 F.2d 1016, 1025 (6th Cir. 1987). All that was needed was sufficient notice for the McIntoshes to 'quickly and intelligently take available steps to prevent the threatened' action. *Palmer*, 479 F.2d at 166. That happened."

"True also, the letter and posted notice did not explain the couple's right to a hearing before the proposed demolition. But the generally applicable municipal laws sufficed. *City of West Covina*, 525 U.S. at 241. 'Any party aggrieved by any decision of [a] Building Inspector,' the City's Code says, 'may appeal that decision to the Local Appeals Board,' which must convene within fifteen days of receiving an appeal and render a decision five days after that. R.23-6 at 3; Madisonville, Ky., Code of Ordinances § 150.13(C)–(E) (1994). Property owners may then appeal an adverse decision to the Department of Housing, Buildings and Construction. *Id.* § 150.13(E); Ky. Rev. Stat. Ann. § 198B.070(4). While a city would do well to consider providing homeowners direct notice of their right to a hearing before it destroys their property, these generally applicable laws supply the notice required by due process, *Covina*, 525 U.S. at 241, given the background principle that citizens 'are presumptively charged with knowledge of the law,' *Atkins v. Parker*, 472 U.S. 115, 130 (1985)."

"A different conclusion applies to the City's duty to give the McIntoshes an opportunity for a hearing *before* the City destroyed their property. The key problem is that the City Code says that property owners have a right to a hearing before a Local Appeals Board over a grievance against 'any decision of the Building Inspector'—in this instance, Wallace. Madisonville, Ky., Code of Ordinances § 150.13(C)–(D) (1994). But the City never delivered on that promise. In his deposition, Wallace confirmed that 'there's not an appeal board in Madisonville' to hear this type of claim. R.24-6 at 10." …

"The City pushes back, arguing that the McIntoshes had other, less formal opportunities for a pre-deprivation hearing and failed to pursue them. The City claims that, if property owners disagree with a condemnation recommendation, officials 'sit down and have a conversation with' the homeowners about the violation and 'the scope of work' needed for repairs. R.24-6 at 11–12. If property owners remain dissatisfied, they may appeal the Building Official's decision to the Madisonville City Attorney, who acts as 'an arbiter.' R.24-6 at 10."

"Let us assume for the sake of argument that this option—not mentioned in the City's generally applicable laws—constitutes an adequate chance to be heard. Problems remain even still. The only evidence of such a policy arises from Wallace's testimony, not a provision in the City's Code. Unlike appeals processes engrained in statutes, this 'procedure, if it existed at all, depended on the vagaries of word of mouth referral,' creating the imperative that the City tell the McIntoshes about this opportunity. *Memphis Light*, 436 U.S. at 14 n.14 (quotation omitted); *see Palmer*, 479 F.2d at 168 (rejecting the claim that 'the mere theoretical possibility of informal resolution' with company figures—a possibility unknown to customers—meets due process standards). Yet neither the condemnation flyer nor its related letter nor the statements of any official conveyed to the McIntoshes the opportunity to speak with Wallace and the City Attorney about the proposed demolition. Making matters worse, none of those sources ever informed the McIntoshes precisely what provisions of the municipal code their unit violated—and had to be repaired. A reasonable juror could find that no such policy existed or that, even if it did, the City never told the property owners about it."

"Even the possibility of inquiry notice does not help the City. Recall that Mr. McIntosh tried to contact City officials to discuss the state of the property through various calls, two letters, and in-person questions on demolition day. Each time, officials rebuffed him, and each time they failed to mention the possibility of a meeting with Wallace or an appeal to the City Attorney. The property owners asked the very questions inquiry notice might demand, and the City officials never told them about any other route to a hearing or procedure to protect their rights."

"The City adds that a 'property owner may challenge the Building Official's decision in Hopkins District Court.' Appellee's Br. 11. Kentucky law, it is true, permits some challenges along these lines in state court. Ky. Rev. Stat. Ann. § 65.8831. But that law applies only to appeals of *final orders* from a local administrative body or a local hearing officer (who cannot work for the City). *Id.* §§ 65.8828, 65.8829(2)(b), 65.8829(7)(c), 65.8831; *see Short v. City of Olive Hill*, 414 S.W.3d 433, 445 (Ky. Ct. App. 2013) (discussing an appeal from a local code enforcement board's final order). Because no local bodies issued final orders (and indeed no such local bodies even existed, according to Wallace), the McIntoshes could not protect themselves under that provision."

"The City maintains that the McIntoshes forfeited portions of their procedural due process claim in the district court. It objects that the McIntoshes on appeal have identified new statutory and case citations. But raising a new 'particular authority' on appeal does not risk forfeiture 'as long as the issue itself was properly raised' below. *Mills v. Barnard*, 869 F.3d 473, 483 (6th Cir. No. 24-5383 2017). The McIntoshes did just that. They raised claims about the opportunity to be heard in both their amended complaint and in response to Madisonville's motion for summary judgment. The district court addressed the claims on the merits. Nothing prohibited the McIntoshes from reinforcing those arguments with more citations on appeal—a run-of-the-mine feature of nearly every appellate brief and of some appellate court decisions themselves."

"*Substantive due process*. While the language of the Due Process Clause focuses on procedural safeguards, 'the Supreme Court has added discrete substantive protections' for fundamental rights unmentioned in the Constitution. *Gore v. Lee*, 107 F.4th 548, 562 (6th Cir. 2024). One such right—the one the McIntoshes claim that Madisonville violated—is 'the right to be free from conscience-shocking actions.' *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014). Meeting this test is no mean feat. 'Only the most egregious official conduct can be said to be arbitrary in the constitutional,' as opposed to conversational, 'sense.' *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1988) (quotation omitted)."

"The City's actions did not rise to this level. The City condemned the home due to its mold, moisture, and structural weaknesses, all in violation of the International Property Maintenance Code. This routine exercise of the police power, even if a challenged exercise of the police power, does not implicate the kind of conscience-shocking government acts that substantive due process prevents." …

"In challenging this conclusion, the McIntoshes point to evidence that city officials turned off the unit's power to prevent Mr. McIntosh from making further repairs, employed police to intimidate him by

supervising demolition day, and never provided a hearing along the way. But even if a jury credited that evidence, Wallace's police power authority remained legitimate."

CONSTITUTIONAL LAW (TENNESSEE)

1. Mootness -A court should consider whether to exercise its discretion to apply one of the recognized exceptions to the mootness doctrine - These exceptions are as follows: (1) when the issue is of great public importance or affects the administration of justice; (2) when the challenged conduct is capable of repetition and is of such short duration that it will evade judicial review; (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and (4) when the defendant voluntarily stops engaging in the conduct - The Tennessee General Assembly did not intend for a construction of the Act that would defeat its very object and which would result in the death of the statutory scheme as it applied to existing metropolitan governments simply because litigation meant certain deadlines for jurisdictions to make the changes necessary under the Act could not be complied with -While subsection 1(b) is undisputedly moot, subsection 1(a) should not be construed as being conditioned or qualified by that provision - As a result, subsection 1(a) continues to carry the force of law unless prohibited by one of the constitutional provisions raised by Metro Nashville - Exemption clause does not prohibit legislation from imposing limits on the size of Metro government council - The plain language at issue mandates that legislative bodies meet certain requirements, including that the legislative body's membership not exceed twenty-five members, and it states that counties organized under a metropolitan government are exempt from the restrictions contained in this paragraph - Nothing in this language, however, indicates that other restrictions that derive outside of this paragraph are prohibited, nor does the plain language of this paragraph in any way circumscribe the power of the General Assembly to legislate the membership of metropolitan councils - The limitation on membership imposed by section 1 of the Act does not violate Article VII, section 1's exemption clause - Home rule provision and Local Legislation clause - In determining whether the Local Legislation Clause is implicated in a particular situation, three requirements must be met: 1) the statute in question must be local in form or effect; 2) it must be applicable to a particular county or municipality; and 3) it must be applicable to the particular county or municipality in either its governmental or proprietary capacity - If the legislation implicates the Local Legislation Clause but does not require approval by a majority of the county or municipality's local legislative body or voters, it is unconstitutional and void - The inclusion of the now-moot transitional provision does not render subsection 1(a) a local law violative of the Local Legislation Clause - The part of the Act reducing the number of council members is constitutional, as the law is general in its application, and it does not violate the Home Rule clause

METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY ET AL. v. BILL LEE ET AL.
COURT OF APPEALS No. M2024-01182-COA-R3-CV Filed June 3, 2025

"A three-judge panel was convened in this case to determine the constitutionality of 2023 Tennessee Public Chapter 21. While the case was pending, the trial court temporarily stayed implementation of subsection 1(b) of the legislation, the result of which was that the deadlines contained therein were rendered moot. In considering competing summary judgment motions, the trial court unanimously ruled that subsection 1(a) of the act was not also moot. In a divided decision, however, the trial court concluded that the legislation violated two provisions of the Tennessee Constitution: the home rule amendment and a clause exempting metropolitan governments from a twenty-five-member cap on county legislative bodies. Both parties appeal. We affirm the trial court's ruling that subsection 1(a) is

not moot. We reverse, however, its conclusion that the statute is barred by either constitutional provision at issue."

"On March 9, 2023, 2023 Tennessee Public Chapter 21 ('the Act') was signed into law. Pursuant to subsection 1(a) of the Act, '[n]otwithstanding a provision of a metropolitan government charter or § 7-2-108 to the contrary, the membership of a metropolitan council must not exceed twenty (20) voting members, as further provided in this section.'" …

"The Act further provided that the cap on membership would apply to metropolitan governments formed after the effective date of the Act and did not prohibit the metropolitan government from either specifying in its charter the manner in which to hold a special election to fill a vacancy on the council or, by a change to the metropolitan charter, reducing its membership to fewer than twenty members in the future. ***Id***. § 1(c)–(e). Section 2 of the Act contained similar limitations on the membership of municipal governing bodies. *See generally* ***id***. § 2. Finally, section 3 of the Act provided that

> If any provision of this act or its application to any person or circumstance is held invalid, then the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to that end, the provisions of this act are severable.

Id. § 3. The Act became effective upon its enactment. ***Id***. § 4."

"Two separate lawsuits were filed in the Davidson County Chancery Court ('the trial court') in relation to the enactment of the Act against Respondent/Appellant the State of Tennessee ('the State'). First, on March 13, 2023, the Metropolitan Government of Nashville and Davidson County, Tennessee ('Metro Nashville'), filed a complaint seeking a declaratory judgment and injunctive relief preventing the Act, which Metro Nashville coined as the Metro Nashville Reduction Act, from being implemented. Therein, Metro Nashville asserted that in forcing Metro Nashville to halve its current metropolitan council (from forty members to twenty members) without local voter approval, the Act violated the Local Legislation Clause of the Home Rule Amendment to the Tennessee Constitution, which prohibits the Tennessee General Assembly from passing 'local' or 'special' laws 'applicable to a particular county or municipality.' Tenn. Const. art. XI, § 9. In support of this argument, Metro Nashville noted that while two other counties had chosen to form a consolidated metropolitan government, only Metro Nashville's metropolitan council had more than twenty members and therefore it would be the only government subject to a reduction under the Act."

"Metro Nashville further argued that the Act violated the Tennessee Constitution's Consolidation Clause, in that Metro Nashville was created pursuant to the Home Rule Amendment and granted the power to determine its own structure of government via its charter."

"Finally, Metro Nashville argued that the Act violated the Exemption Clause of the Tennessee Constitution, which placed a twenty-five-member cap on the membership of county legislative bodies but specifically exempted metropolitan governments from this rule. Tenn. Const. art. VII, § 1."

"On April 10, 2023, the trial court issued a unanimous opinion ruling that Metro Nashville was likely to prevail on its constitutional challenge to subsection 1(b) of the Act under the Local Legislation Clause and that a temporary injunction against implementation of subsection 1(b) should be entered. The trial court ruled, however, that Metro Nashville was unlikely to prevail on its constitutional challenges to subsection 1(a).4 Metro Nashville therefore was not required to comply with the council-reduction provision contained in subsection 1(b) during the August 2023 local election."

"Following that election, the parties filed cross-motions for summary judgment." …

"On July 29, 2024, the trial court issued an order granting in part and denying in part the competing motions. First, the trial court ruled that it would confine its review to only subsections 1(a) and 1(b) of the Act, as other provisions of the Act were 'not applicable to or challenged in this action.' The trial court then unanimously held that the claims challenging subsection 1(b) of the Act were moot, as the parties had conceded. But the trial court further ruled that the mootness of subsection 1(b) did not render subsection 1(a) moot at well. The trial court then ruled that subsection 1(a) did not violate the Consolidation Clause. But two members of the three-judge panel concluded that subsection 1(a) of the Act was unconstitutional as it violated both the Local Legislation Clause and the Exemption Clause. The trial court concluded, however, that subsection 1(a) of the Act could be elided from the remaining portions of the Act, leaving subsections 1(c), 1(d), 1(e), and section 2 of the Act intact. So the trial court permanently enjoined enforcement of only subsection 1(a) of the Act. Judge Joseph T. Howell dissented in part, however, and concluded that the Act violated neither the Local Legislation Clause nor the Exemption Clause, such that the Act—save the moot subsection 1(b)—should be enforced in its entirety. The State thereafter promptly appealed to this Court."

"At its most fundamental level, this case represents a power struggle between State government and local government. The Tennessee General Assembly, the legislative branch of the State of Tennessee, generally wields considerable power, limited by the other co-equal branches and constitutional requirements. *Cf., e.g.*, ***Bowling v. Carnahan***, 171 Tenn. 26, 100 S.W.2d 232, 235 (1937); ***S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.***, 58 S.W.3d 706, 710 (Tenn. 2001). In contrast, local governments, like Metro Nashville, 'derive the whole of their authority solely from the General Assembly[.]' ***S. Constructors, Inc.***, 58 S.W.3d at 710. Thus, 'Article II, section 3 of our Constitution confers upon the General Assembly the whole of the state's legislative power, and with limited exception, the General Assembly has the sole and plenary authority to determine whether, and under what circumstances, portions of that power should be delegated to local governments.' ***Id.*** at 711 (internal citation omitted). As a result, 'without some form of constitutional authorization, local governments in Tennessee possess only those powers and authority as the General Assembly has deemed appropriate to confer upon them.' ***Id.*** at 711–12."

"An amendment to the Tennessee Constitution in 1953 altered this power dynamic. Importantly, the Constitution was amended to allow 'municipal governments to adopt and operate under home rule authority[.]' ***Id.*** at 714 (citing Tenn. Const. art. XI, § 9). 'The effect of the home rule amendments was to fundamentally change the relationship between the General Assembly and these types of municipalities, because such entities now derive their power from sources other than the prerogative of the legislature.' ***Id.***"

"Within this amendment, Tennessee also permitted counties to form consolidated metropolitan governments. *See generally* ***Frazer v. Carr***, 210 Tenn. 565, 569, 360 S.W.2d 449, 451 (Tenn. 1962)." …

"Under the consolidated metropolitan form of government, the legislative body is referred to as the metropolitan council and wields 'all the authority and functions of the governing bodies of the county and cities being consolidated, with such exceptions and with such additional authority as may be specified elsewhere in chapters 1-6 of this title[.]' Tenn. Code Ann. § 7-2-108(a)(11). The metropolitan charter shall also determine 'the size, method of election, qualification for holding office, method of removal, term of office and procedures of the metropolitan council, with such other provisions with respect to the council as are normally related to the organization, powers and duties of governing bodies in cities and counties[.]' Tenn. Code Ann. § 7-2-108(a)(12)."

"Metro Nashville formed a consolidated metropolitan government pursuant to this authority in 1962. Under Metro Nashville's charter, its metropolitan council totals forty voting members, thirty-five from geographic districts and five at-large members."

"Section 1 of the Act at issue, however, seeks to limit the size of consolidated metropolitan councils to no more than twenty voting members. There appears to be no dispute that the General Assembly had the power to limit the size of metropolitan councils unless prohibited by the Tennessee Constitution.

See generally ***Cnty. of Shelby v. McWherter***, 936 S.W.2d 923, 933–34 (Tenn. Ct. App. 1996) ('There is no constitutional provision that prohibits the Legislature from enacting laws which in some form or fashion are contrary to a local law set forth in a county's home rule charter. To the contrary, there is ample authority for the proposition that when the Legislature acts through general legislation, the Legislature retains power over a county, despite the county's home rule status, and this is true even with respect to functions that are governmental or political in nature.'); Tenn. Const. art. XI, § 9, cl. 5 ('[N]o charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly'). To that end, Metro Nashville argues in this appeal, and a divided panel of the trial court ruled, that subsection 1(a) of the Act is prohibited by two separate provisions of the Tennessee Constitution—the Local Legislation Clause of the Home Rule Amendment and the Exemption Clause.10 The State, of course, argues that neither the Local Legislation Cause nor the Exemption Clause prohibit the General Assembly's proper exercise of power through the Act."

"Before we reach those constitutional provisions, however, Metro Nashville asserts that any enforcement of subsection 1(a) of the Act has been rendered moot by the undisputed mootness of subsection 1(b). Questions of justiciability such as mootness are often threshold issues. ***Northshore Corridor Ass'n v. Knox Cnty.***, 633 S.W.3d 561, 571 (Tenn. Ct. App. 2021) (citing ***City of Memphis v. Hargett***, 414 S.W.3d 88, 96 (Tenn. 2013)). Moreover, this Court has a duty to avoid deciding constitutional issues if the case can be decided on non-constitutional grounds. ***Owens v. State***, 908 S.W.2d 923, 926 (Tenn. 1995). So we consider Metro Nashville's mootness argument first."

"'The central question in a mootness inquiry is whether changes in the circumstances existing at the beginning of the litigation have forestalled the need for meaningful relief.' ***McIntyre v. Traughber***, 884 S.W.2d 134, 137 (Tenn. Ct. App. 1994). When a case is rendered moot while an appeal is pending, it 'should [be] dismiss[ed,]' unless an exception is present. ***Hooker***, 437 S.W.3d at 433 (quoting ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 210)."

"Still, we 'do not apply the mootness doctrine mechanically.' ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 204. The Tennessee Supreme Court has therefore recognized that even where a case has become moot, 'a court should consider whether to exercise its discretion to apply one of the recognized exceptions to the mootness doctrine.' ***Hooker***, 437 S.W.3d at 417. These exceptions are as follows:

> (1) when the issue is of great public importance or affects the administration of justice;
> (2) when the challenged conduct is capable of repetition and is of such short duration that it will evade judicial review;
> (3) when the primary subject of the dispute has become moot but collateral consequences to one of the parties remain; and
> (4) when the defendant voluntarily stops engaging in the conduct.

Id. at 417–18 (quoting ***Norma Faye Pyles Lynch Fam. Purpose LLC***, 301 S.W.3d at 204). Thus, the first question this Court must answer is whether implementation of subsection 1(a) has been rendered moot by the undisputed mootness of subsection 1(b). If we conclude that subsection 1(a) is moot, then we must proceed to consider whether a recognized exception to the mootness doctrine should be applied in this Court's discretion."

"Metro Nashville's mootness argument rests largely on the language of the Act and the purported necessity of subsection 1(b) to the implementation of subsection 1(a). Specifically, Metro Nashville points out that the State concedes, as it must, that while implementation of the Act was stayed by the trial court, the deadlines for action contained in subsection 1(b) passed and Metro Nashville simply cannot comply with those deadlines. Metro Nashville further argues that the cap on metropolitan council membership in subsection 1(a) is 'qualifie[d]' by the language that the cap is to be effected 'as further provided in this section[,]' i.e., in subsection 1(b). According to Metro Nashville, this language

indicates the Tennessee General Assembly's intent that the two subsections work in concert to effect the Act's purpose. In other words, Metro Nashville argues that the Act should be interpreted in such a way that the validity of subsection 1(a) is conditioned on the effectiveness of subsection 1(b), given the 'as further provided' language. And given that Metro Nashville cannot comply with subsection 1(b), it argues that the Act imposes no ongoing obligation to reduce the size of its metropolitan council membership. Thus, Metro Nashville argues that the undisputed ineffectiveness of subsection 1(b) is also fatal to enforcement of subsection 1(a)."

"The State disagrees with Metro Nashville's reading of the Act. Rather, the State argues that subsection 1(a) imposes ongoing legal obligations on all metropolitan governments in the state and that it operates independently of subsection 1(b). As for the 'as further provided' language, the State argues that this language merely clarifies the details about how subsection 1(a) operates, in that after-formed metropolitan governments must comply with the twenty-member cap and all metropolitan councils are permitted under the Act to have less than twenty members. As for subsection 1(b), the State argues that it is only a transitional provision that does not affect the validity of the remaining portions of the Act."

"It appears that Metro Nashville posits a fairly novel argument. Indeed, neither party cites any caselaw from this state or elsewhere in which a court was tasked with determining whether the mootness of one subsection of an act, and in particular mootness due to the passage of time while the statute was enjoined, should alone necessitate invalidation of other portions of the act.11 In the trial court, the State likened this question to an issue of elision, which applies 'where the valid portion of the statute is not so dependent upon the portion said to be void that the Court cannot presume that the Legislature would not have enacted the valid portion in the absence of the inclusion within the enactment of that portion which is said to be void.' ***Davidson Cnty. v. Elrod***, 191 Tenn. 109, 111–12, 232 S.W.2d 1, 2 (1950). The trial court rejected this argument, however, concluding that because subsection 1(b) was not declared unconstitutional, elision did not apply.12 *See* ***Willeford v. Klepper***, 597 S.W.3d 454, 470 (Tenn. 2020) ('Under the doctrine of elision, a court may, under appropriate circumstances and in keeping with the expressed intent of a legislative body, elide an **unconstitutional** portion of a statute and find the remaining provisions to be constitutional and effective.' (emphasis added) (quoting ***Lowe's Cos., Inc. v. Cardwell***, 813 S.W.2d 428, 430 (Tenn. 1991))). *But see* Tenn. Code Ann. § 1-3-110 ('It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be exscinded if the code would otherwise be unconstitutional **or ineffective**. If any one (1) or more sections, clauses, sentences or parts shall **for any reason** be questioned in any court, and shall be adjudged unconstitutional **or invalid**, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part in any one (1) or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.' (emphasis added)). The State appears to have abandoned any argument in favor of elision in this appeal."

"In essence, Metro Nashville contends that to treat the 'as further provided in this section' language in subsection 1(a) as if it does not exist violates statutory principles. And based on the plain language of the Act, subsection 1(b) is 'the sole implementation mechanism' by which existing metropolitan councils with too many members may reduce their membership. So then, the mootness of subsection 1(b) renders subsection 1(a) moot, in turn."

"We note, however, that statutes must also be construed 'with the saving grace of common sense.' ***State ex rel. Maner v. Leech***, 588 S.W.2d 534, 540 (Tenn. 1979). Thus, 'a construction which impairs, frustrates or defeats the object of a statute should be avoided[.]' ***Id.*** (citing ***First Nat'l Bank v. McCanless***, 186 Tenn. 1, 207 S.W.2d 1007 (Tenn. 1948)). Moreover, while 'we presume that every word in a statute has meaning and purpose and should be given full effect,' this rule applies only 'if the obvious intention of the General Assembly is not violated by so doing' ***Colonial Pipeline Co. v. Morgan***, 263 S.W.3d 827, 836 (Tenn. 2008) (citing ***In re C.K.G.***, 173 S.W.3d 714, 722 (Tenn. 2005))."

The obvious intention of the Tennessee General Assembly in enacting section 1 as a whole was to place a cap on the membership of metropolitan councils that applies to both existing councils and future councils.13 *Cf*. ***Norma Faye Pyles Lynch Family Purpose LLC***, 301 S.W.3d at 213 (stating that our primary goal in statutory construction is to 'carry out the General Assembly's intent'). Our legislature also clearly and unequivocally expressed its intent that invalid portions of the Act could be severed from valid portions. *See* 2023 Tenn. Pub. Chapter 21 § 3 (providing that if any provision of the Act was 'held invalid' the invalid portion could be severed so long as the other provisions could be given effect without the invalid portion). The Tennessee Supreme Court has held that '[t]he inclusion of a severability clause' in an act is 'evidence [of] an intent on the part of the legislature to have the valid parts of the statute in force' despite the invalidity of other portions of the statute. ***Gibson Cnty. Special Sch. Dist. v. Palmer***, 691 S.W.2d 544, 551 (Tenn. 1985) (involving unconstitutionality). Thus, while the doctrine of elision may not be strictly applicable here, the severability clause itself is evidence of the Tennessee General Assembly's intent that subsection 1(a)'s validity was not purposefully and compulsorily qualified or conditioned on the validity of subsection 1(b) or any other subsection."

"Moreover, the plain language of the Act does not lead us to conclude that subsection 1(b) is necessary to either the operation of subsection 1(a) or to carry out the intent of the legislature. … As an initial matter, Metro Nashville offers no legal authority mandating that the Tennessee General Assembly adopt specific provisions directing Metro Nashville in how to implement the Act's twenty-member cap. *Cf*. ***Civ. Serv. Merit Bd. v. Burson***, 816 S.W.2d 725 (Tenn. 1991) (involving a general law that altered the qualifications of members of civil service merit boards without including specific guidance as to how Knox County, the only county required to make changes to comply with the act, was to meet this aim, other than specifying that the legislation did not abridge the term of any incumbent member of the board but would apply upon a vacancy). While it may be true that the Tennessee General Assembly intended subsection 1(b) to be the sole implementation mechanism applicable to Metro Nashville *when that subsection was of legal effect*, there is no language in the Act to suggest that should subsection 1(b) become invalid, the aims of the statute should also die or that existing metropolitan governments could not take other appropriate action to meet that aim going forward. *Cf*. ***State v. Bonds***, 502 S.W.3d 118, 162 (Tenn. Crim. App. 2016) ('As near as one body can reason the collective minds of another body, we believe the legislature would choose the survival of subsection (c) and the remaining provisions of Section 40-35-121 as opposed to the death of the entire statute.'). Thus, even though MetroNashville is not bound by the specific deadlines imposed by subsection 1(b), nothing appears to prevent it from nevertheless meeting the overarching aims of subsection 1(a) going forward."

"Still, we concede that the 'as further provided in this section' language points to the General Assembly's intent that an existing metropolitan government with a council membership exceeding twenty voting members would comply with subsection 1(b) in order to effectuate that goal. But that is not the only provision that was 'further provided' in section 1 of the Act. Subsections 1(c), 1(d), and 1(e) all provide guidance as to how the overarching rule imposed by subsection 1(a) is to be implemented on an ongoing basis. *See* 2023 Tenn. Pub. Chapter 21 § 1(c) (involving how the cap would apply to newly formed metropolitan governments), (d) (permitting the metropolitan government to specify in its charter how vacancies would be filled), (e) (permitting metropolitan governments to make future changes to the size of their councils so long as membership does not exceed twenty members). Reading these subsections as providing specific and clarifying guidance as to how subsection 1(a)'s general rule is to be implemented does not render any part of the Act surplusage, but is instead the most reasonable reading of the Act as a whole to further the intent of the legislature. *Cf*. ***Atl. Richfield Co. v. Christian***, 590 U.S. 1, 14 n.5 140 S. Ct. 1335, 1350, 206 L. Ed. 2d 516 (2020) (noting that the legislature may 'employ[] a belt and suspenders approach' to ensure that its purpose is achieved and that sometimes it is better to read a statute as including 'some redundancy') (citation omitted). Thus, it does not appear that subsection 1(b)'s guidance was so integral to the functioning of subsection 1(a) or section 1 as a whole that subsection 1(a) cannot survive its mootness."

"Finally, there is perhaps even more reason to uphold the remaining portions of the Act in this case than in the context of a partially unconstitutional statute. While the unconstitutionality of a legislative act may result from the good faith, yet mistaken belief in the legislation's validity by our General Assembly, the mootness of subsection 1(b) results solely from the injunction put in place by the trial court.19 It would certainly frustrate the intent of the legislature to hold that an entire act, or at least a large portion thereof, could be invalidated solely because a discrete portion of the legislation was rendered ineffective by a challenge to the act making its way through our courts, regardless of the success of that challenge on its merits. *See* ***State ex rel. Maner***, 588 S.W.2d at 540 (noting that we should avoid a construction that frustrates the object of a statute). Rather, it is our conclusion that the Tennessee General Assembly did not intend for a construction of the Act that would defeat its very object and which would result in the death of the statutory scheme as it applied to existing metropolitan governments simply because litigation meant certain deadlines for jurisdictions to make the changes necessary under the Act could not be complied with. ***Id.*** So we conclude that while subsection 1(b) is undisputedly moot, subsection 1(a) should not be construed as being conditioned or qualified by that provision. As a result, subsection 1(a) continues to carry the force of law unless prohibited by one of the constitutional provisions raised by Metro Nashville. We therefore proceed to address those questions."

"The State next argues that the trial court erred in ruling that the Act violated what the parties refer to as the Exemption Clause of the Tennessee Constitution." …

"Article VII, section 1 of the Tennessee Constitution provides certain requirements applicable to local legislative bodies. In particular, the second paragraph of section 1 states as follows:

> The legislative body shall be composed of representatives from districts in the county as drawn by the county legislative body pursuant to statutes enacted by the General Assembly. Districts shall be reapportioned at least every ten years based upon the most recent federal census. The legislative body shall not exceed twenty-five members, and no more than three representatives shall be elected from a district.

Tenn. Const. art. VII, § 1, cl. 2. The clause further provides, however, that '[a]ny county organized under the consolidated government provisions of Article XI, Section 9, of this Constitution shall be exempt from having a county executive and a county legislative body as described in this paragraph.' ***Id.***"

"On appeal, the State argues that the trial court misconstrued the Exemption Clause as prohibiting the General Assembly's valid exercise of power through the Act. While the State concedes that the twenty-five-member cap contained in Article VII, section 1 does not apply to Metro Nashville or any other consolidated metropolitan government, the State asserts that nothing in that provision restricts the legislature from imposing such a statutory cap on metropolitan council membership."

"Metro Nashville concedes in its brief that, despite the trial court's apparent conclusion to the contrary, 'the Constitution does not explicitly prohibit the General Assembly from altering legislative body size for metropolitan governments.' But Metro Nashville contends that the inquiry is not ended by this fact. Rather, it asserts that the language of Article VII, section 1 should be read to 'exempt[] consolidated city/county governments from **any** limit on the size of their legislative bodies[.]' (Emphasis added)."

"In construing a constitutional provision, 'we begin by reading the plain language and giving terms 'their ordinary and inherent meaning.'' ***McNabb v. Harrison***, -- S.W.3d --, 2025 WL 730065, at *3 (Tenn. Mar. 7, 2025) (quoting ***State v. Phillips***, 159 Tenn. 546, 21 S.W.2d 4, 5 (Tenn. 1929)). We therefore 'construe a constitutional provision as it is written' and '[w]hen a constitutional provision has a clear meaning[,]' we do not apply another meaning or create an ambiguity. ***Id.*** (citations omitted). Finally, when the Constitution is silent as to an issue within the legislature's purview, it has been held that the subject is left to the sound discretion of the legislature. *See* ***Caruthers v. Andrews***, 42 Tenn.

378, 381 (Tenn. 1865) ('The constitution of 1796 was silent upon the subject of interest, leaving that subject to the sound discretion of the legislature. In other words, there was no constitutional inhibition upon the legislature, upon the subject of interest.'); *see also* ***McFarland v. Pemberton***, 530 S.W.3d 76, 86 (Tenn. 2017) ('It is well settled that the power of the Legislature, except as restrained by the Constitution, is supreme . . . in the creation of subordinate governmental agencies, and in prescribing their powers and duties.' (quoting ***Waldauer v. Britton***, 172 Tenn. 649, 113 S.W.2d 1178, 1181 (1938))).''

"Here, the plain language at issue does two things. First, it mandates that legislative bodies meet certain requirements, including that the legislative body's membership not exceed twenty-five members. Then, it states that counties organized under a metropolitan government are exempt from the restrictions contained 'in this paragraph.' Nothing in this language, however, indicates that other restrictions that derive outside of 'this paragraph' are prohibited. Nor does the plain language of this paragraph in any way circumscribe the power of the General Assembly to legislate the membership of metropolitan councils."

"A somewhat similar argument was rejected by the Tennessee Supreme Court in ***Bailey v. County of Shelby***, 188 S.W.3d 539, 544 (Tenn. 2006). In ***Bailey***, current members of the Shelby County Board of Commissions challenged term limits adopted in the Shelby County Charter under Article VII, section 1 of the Tennessee Constitution. On appeal, the plaintiffs argued, inter alia, that Article VII, section 1 should be construed 'as establishing terms of four years with no limit.' ***Id***. at 544 (citing Tenn. Const. art. VII, § 1, cl. 1 ('The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property.')).''

"The Tennessee Supreme Court disagreed with this reading of the Tennessee Constitution:

> Although it is true that Article VII states that county officials shall be elected for 'terms of four years,' we do not construe this phrase to mean that such officials must be capable of being elected to more than one term. Rather, the phrase 'terms of four years' merely refers to the duration of each term. There is nothing in the language of the constitution to prevent a county from placing a limit on the number of terms that may be served.

Id. at 544–45."

'Metro Nashville advances essentially the same argument that the plaintiffs in ***Bailey*** employed. It asks this Court to read Article VII, section 1 so expansively that not only are metropolitan governments exempt from the explicit twenty-five-member cap contained in that paragraph, but also the legislature is prohibited from exercising its power to impose any such cap on a metropolitan government. But there is simply 'nothing in the language of the constitution to prevent' the Tennessee General Assembly from imposing its own limit on the voting membership of a metropolitan council. ***Id***. Given that we must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality,' we cannot condone interpreting the Tennessee Constitution's silence such that the legislature's power is curtailed in this manner. ***Gallaher***, 104 S.W.3d at 459; *see also* ***Waldauer***, 113 S.W.2d at 1181. We therefore conclude that the limitation on membership imposed by section 1 of the Act does not violate Article VII, section 1's Exemption Clause."

"Finally, we turn to consider whether subsection 1(a) of the Act violates the Local Legislation Clause of the Home Rule Amendment to the Tennessee Constitution. This clause provides as follows:

> [A]ny act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or

> requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. art. XI, § 9, cl. 2. The intent of the Local Legislation Clause was 'to strengthen local self-government.' ***Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.***, 645 S.W.3d 141, 149 (Tenn. 2022) (citation omitted). Indeed, '[t]he whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments.' ***S. Constructors, Inc.***, 58 S.W.3d at 714 (quoting ***Burson***, 816 S.W.2d at 729)."

"In determining whether the Local Legislation Clause is implicated in a particular situation, three requirements must be met: '1) the statute in question must be local in form or effect; 2) it must be applicable to a particular county or municipality; and 3) it must be applicable to the particular county or municipality in either its governmental or proprietary capacity.' ***Metro. Gov't***, 645 S.W.3d at 150. If the legislation implicates the Local Legislation Clause but does not require approval by a majority of the county or municipality's local legislative body or voters, it is unconstitutional and void. *See* ***id.*** In this appeal, the question of whether the statute in question is local in form or effect is dispositive. We therefore confine our analysis to that question."

"While the phrase 'private or local in form or effect' is not defined by the Tennessee Constitution, courts have understood the term in the negative—that is, it does not constitute a general law. ***Metro. Gov't of Nashville & Davidson Cnty. v. Tennessee Dep't of Educ.***, No. M2020-00683-COA-R9-CV, 2020 WL 5807636, at *6 (Tenn. Ct. App. Sept. 29, 2020), *aff'd in part, rev'd in part on other grounds*, 645 S.W.3d 141 (Tenn. 2022). And a general law is 'one 'neither for one or more particular persons, nor to operate exclusively in particular part or parts of a state.'' ***Id.*** (quoting ***Nashville Gas & Heating Co. v. City of Nashville***, 152 S.W.2d 229, 234 (Tenn. 1941)). In order to determine whether a law is general, the Tennessee Supreme Court has explained,

> The test is not the outward, visible or facial indices, nor the designation, description or nomenclature employed by the Legislature. Such a criterion would emasculate the purpose of the amendment. The whole purpose of the Home Rule Amendment was to vest control of local affairs in local governments, or in the people, to the maximum permissible extent. The sole constitutional test must be whether the legislative enactment, irrespective of its form, is local in effect and application.

Farris v. Blanton, 528 S.W.2d 549, 551 (Tenn. 1975). In applying this test, we are directed to 'determine whether th[e] legislation was designed to apply to any other county in Tennessee, for if it is potentially applicable throughout the state it is not local in effect even though at the time of its passage it might have applied to [a single county] only.' ***Id.*** at 552. 'But in determining potential applicability we must apply reasonable, rational and pragmatic rules as opposed to theoretical, illusory or merely possible considerations.' ***Id.***"

"Here, there is no dispute that three counties have formed metropolitan governments: Nashville and Davidson County, Lynchburg and Moore County, and Hartsville and Trousdale County. There is also no dispute that only Metro Nashville's metropolitan council exceeds the new twenty-member cap." …

"The State argues that the trial court was incorrect in its conclusion as to the applicability of subsection 1(a). Rather, the State argues that subsection 1(a), considered as a whole, applies to all governments that currently or potentially could adopt a metropolitan form of government, with subsection 1(b) adding transitional provisions to help Metro Nashville accomplish the purpose of the Act."

"The Tennessee Supreme Court addressed a similar issue in ***Civil Service Merit Board of the City of Knoxville v. Burson***. In ***Burson***, members of the City of Knoxville's civil service merit board challenged the enactment of a statute that would 'make uniform the qualifications and procedures for the nomination of members serving on the municipal civil service boards in Tennessee's most populous

counties.' 816 S.W.2d at 727. Specifically, the challenged legislation applied only to the civil service boards in counties with populations greater than 300,000 but excluded municipalities with a mayor-alderman form of government. ***Id***. at 728."

"Current members of the civil service merit board argued that this legislation violated the Local Legislation Clause. ***Id***. The trial court denied the challenge, ruling that the law applied to civil service merit boards in both Davidson and Shelby Counties, as well as 'boards of municipalities located in counties that may grow to meet the act's population requirements[.]' ***Id***."

"In affirming the decision of the trial court, the Tennessee Supreme Court first noted that '[n]ot every statute that affects a single county will automatically be found to be unconstitutional[.]' ***Id***. at 729. Indeed, the court noted that prior legislation was upheld as constitutional even where it applied only to Davidson County, as the single county that had formed a metropolitan government at that time. ***Id***. (citing, e.g., ***Doyle v. Metro. Gov't***, 225 Tenn. 496, 471 S.W.2d 371 (Tenn. 1971)). The court distinguished those cases from ***Farris*** in that the law permitting counties to form metropolitan governments was still in existence, whereas no counties could elect a mayor at the time of ***Farris*** without action by the Tennessee General Assembly. ***Id***. (citing ***Farris***, 528 S.W.2d at 554–55)."

"Applying this to the legislation at issue, the ***Burson*** court concluded that because, in effect, the legislation applied to three counties who met both the population and mayor-alderman requirements, it did not constitute local legislation. ***Id***. at 730. Importantly, the court noted that even though only one of these three counties would be required to take affirmative action to comply with the law, this fact did not alter its conclusion[.] … Moreover, population changes could result in additional counties 'eventually becom[ing] subject to the provisions of [the challenged act].' ***Id***. Thus, the court held that the subject law was not local in effect and therefore did not require local approval to withstand constitutional scrutiny. *See also* ***Bd. of Educ. of Shelby Cnty. v. Memphis City Bd. of Educ.***, 911 F. Supp. 2d 631, 656 (W.D. Tenn. 2012) (citing ***Burson*** and holding that the Local Legislation Clause 'does not require that legislation apply to 'every part of' or 'everywhere' in Tennessee')."

"Metro Nashville contends, however, that ***Burson*** does not control here. Rather, Metro Nashville contends that while the legislation in ***Burson*** applied uniformly to all three applicable counties, that is not the case under the Act. Instead, Metro Nashville asserts, it alone is subject to unique and unreasonable provisions forcing it to reduce its metropolitan council on an expedited timeline and by specific measures, i.e., pursuant to subsection 1(b)."

"In response, the State points out that the only way that Metro Nashville attempts to demonstrate that it is treated any differently under the Act is by pointing to subsection 1(b). But as Metro Nashville so forcefully emphasizes, subsection 1(b)'s mandates are moot and therefore no longer impose any requirements on Metro Nashville."

"In resolving this dispute, we remember that it is our duty 'to resolve every reasonable doubt in favor of the constitutionality of a legislative enactment[.]' ***Maner***, 588 S.W.2d at 536. Moreover, we look to the effect of section 1 of the Act in a pragmatic manner, rather than dealing in hypotheticals. ***Farris***, 528 S.W.2d at 552. Applying these principles, we must conclude that the inclusion of subsection 1(b)'s now-moot transitional provisions does not render subsection 1(a) a local law violative of the Local Legislation Clause."

"While it is true that Tennessee courts' previous consideration of transitional provisions under the Local Legislation Clause has involved legislative enactments required to effectuate constitutional amendments, nothing in those cases states that their analysis is confined to only that type of legislation. Rather, the cases apply roughly the same Local Legislation Clause analysis that was employed in ***Burson***. Indeed, the presumption in favor of the constitutionality of our statutes applies with equal force regardless of whether legislation was enacted to execute a constitutional amendment or otherwise. *See, e.g.*, ***McWherter***, 936 S.W.2d at 936 (applying the 'strong' presumption to legislation that was not precipitated by a constitutional amendment); ***Maner***, 588 S.W.2d at 536

(applying the presumption to legislation required to effectuate a constitutional amendment). Moreover, courts in both situations based their conclusions not on the catalyst of the legislature's enactment of the subject provisions, but on the fact that the laws were generally applicable and only necessitated transitional provisions due to the special circumstances present in certain counties. *See, e.g.*, ***Burson***, 816 S.W.2d at 729–30; ***Maner***, 588 S.W.2d at 540–41."

"The same is true in this case. Here, of the three counties currently governed by a consolidated metropolitan form of government, only Davidson County's metropolitan council has a membership that exceeds the new statutory cap. Thus, in order to bring Davidson County 'into synchronization with the statutory scheme,' the Tennessee General Assembly enacted subsection 1(b). ***Marion Cnty. Bd. of Comm'rs***, 594 S.W.2d at 683. But these transitional provisions simply do not transform subsection 1(a) of the Act from what it clearly is: a law of general application applicable to all counties that have formed a consolidated metropolitan government or will do so in the future."

"Moreover, there is even less risk here that subsection 1(b)'s transitional provisions have altered the fundamental nature of section 1 from a law of general application to a law local in effect. As repeatedly pointed out by both parties in this case, subsection 1(b) is moot and the State has correctly conceded that it cannot be enforced. Thus, in reality, Metro Nashville has already succeeded in invalidating what it deems the expedited and unreasonable timeline imposed by subsection 1(b). So Metro Nashville's insistence that we invalidate subsection 1(a) of the Act due to the purported locality of subsection 1(b) alone is an argument divorced from the reality that subsection 1(b) is of no legal effect and therefore places no ongoing special or unique burdens on Metro Nashville. *Cf.* ***Farris***, 528 S.W.2d at 552."

"In reaching this conclusion, we note that a different panel of this Court recently came to the opposite conclusion regarding another statute enacted by the Tennessee General Assembly in 2023. Specifically, in ***Metropolitan Government of Nashville and Davidson County v. Governor Bill Lee et al.***, Metro Nashville argued, inter alia, that a statute vacating the existing boards of airport authorities and appointing new commissions to staggered terms ending in 2028 targeted Metro Nashville alone. No. M2023-01678-COA-R3-CV, 2025 WL 1218089, at *1–2 (Tenn. Ct. App. Apr. 28, 2025). The new law applied if three conditions were met: (1) the county had a metropolitan form of government; (2) the county had a population exceeding 500,000 based on the 2020 federal census or a subsequent federal census; and (3) the county had established a metropolitan airport authority. ***Id.*** at *8 (citing 2023 Tenn. Pub. Acts, ch. 488, § 2(1)(A)). The only Tennessee county to meet all three requirements was Metro Nashville. A three-judge panel therefore concluded that the law established 'a closed class of counties' that could only apply to Davidson County. ***Id.*** at *9–10. As a result, the trial court declared the subject law local in effect and therefore in violation of the Local Legislation Clause. ***Id.*** at *4."

"This Court affirmed the decision of the trial court that the law was local in effect. ***Id.*** at *10. As the Court explained,

> Although the original Metropolitan Airport Authority Act was enacted in 1969, only four counties have established metropolitan airport authorities since that time. Assessing the likelihood or immediacy of other counties doing so would be clear speculation. In addition, although there will likely be population growth in other counties, a new federal census will not be released until 2030 at the earliest. Given the timeframes set forth in section two of the Act for expiration of the new board members' initial terms, the only other county that could meet the population threshold within those timeframes was Shelby. No other county in Tennessee could possibly comply with the population requirement until 2030. Most importantly, of the counties meeting the first two requirements, Davidson County is the only county with a metropolitan form of government. No evidence was presented that Shelby County had impending plans to adopt such a form of government. Accordingly, the layering of the statute's applicability requirements renders the possibility that the Act could apply to any other

county theoretical at best. We therefore conclude that the trial court correctly determined section two of the Act to be local legislation.

Id."

"The facts in the above case are readily distinguishable from the present action. In that case, the law contained 'layer[ed]' applicability requirements that meant that application beyond Metro Nashville was not only not imminently feasible, but also unlikely to potentially arise in the future. Here, other than the transitional provisions that are undisputedly moot and of no effect, section 1 of the Act clearly applies to all counties that have formed or will form a consolidated metropolitan government. And even subsection 1(a) alone applies to all three existing metropolitan governments regardless of the fact that only one of those governments will have to take affirmative action to bring itself into compliance with the Act. *See* ***Burson***, 816 S.W.2d at 730. Thus, the 'class created' by section 1 of the Act, is not 'so narrowly designed that only one county can reasonably, rationally, and pragmatically be expected to fall within that class[.]' ***Metro. Gov't***, 2025 WL 1218089 at *9 (quoting ***Bd. of Educ. of Shelby Cnty.***, 911 F. Supp. 2d at 656). We therefore reverse the decision of the trial court that subsection 1(a) of the Act is local in effect and therefore void in violation of the Local Legislation Clause of the Home Rule Amendment."

2. Home Rule Amendment – Statute violated the Home Rule clause of the Tennessee constitution – Statute was applicable only to Nashville Metro and does restrain Metro from performing duties it previously had appointed board members of the Airport Authority – The third requirement for implication of the Home Rule Amendment is that section two of the Act must be applicable to a particular county or municipality in either its governmental or proprietary capacity - Because section two of the Act implicates the Home Rule Amendment and does not require approval by a majority of the municipality's local legislative body or voters, it is unconstitutional and void - Section 2 of the Act is elided in its entirety – The layering of the statute's applicability requirements renders the possibility that the Act could apply to any other county theoretical at best, and the trial court correctly determined section two of the Act to be local legislation - No equal protection violation as there was a rational basis to treat Nashville differently - Nashville airport differs from the other airports under the Metropolitan Airport Act Authority - Given the deferential rational basis standard, drawing a distinction between Nashville International Airport and Memphis International Airport, or Chattanooga or Knoxville, is not unreasonable - Nashville International Airport has more than five times as many boarded passengers as the next closest Tennessee airport, Memphis International Airport

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY v. GOVERNOR BILL LEE ET AL. COURT OF APPEALS Appeal from the Chancery Court for Davidson County No. M2023-01678-COA-R3-CV Filed April 28, 2025

"In this dispute, the trial court found that certain subsections of 2023 Tennessee Public Acts, chapter 488, violated the home rule amendment and the equal protection guarantee found in the Tennessee Constitution. The defendants, who are officials of the State of Tennessee, have appealed the trial court's ruling. Following our thorough review, we affirm the trial court's determination that section two of the act is unconstitutional. However, we reverse the trial court's determination that sections two, six, seven, eight, and nine of the Act violate the equal protection guarantee found in the Tennessee Constitution. We therefore also reverse the trial court's elision of sections six, seven, eight, and nine from the statute."

"This appeal arises from a lawsuit filed by the Metropolitan Government of Nashville and Davidson County ('Metro Nashville') against Governor Bill Lee, Speaker of the Senate Randy McNally, and Speaker of the House Cameron Sexton (collectively, 'the State'), as well as the Metropolitan Nashville Airport Authority ('MNAA'). The State has appealed an order granting partial summary judgment in favor of

Metro Nashville and ruling that certain provisions of a state law concerning the governance of municipal airport authorities were unconstitutional. MNAA did not appeal the trial court's order."

"In 2023, the Tennessee General Assembly amended the existing Metropolitan Airport Authority Act, which provided that '[a]ny city or metropolitan government having a population of not less than one hundred thousand (100,000), or any county including any such city, may create a metropolitan airport authority in the manner provided in this section.' Tenn. Code. Ann. § 42-4-104(a) (West October 1, 2007, to current). The parties agree that four metropolitan airport authorities have been created in Tennessee since passage of the Metropolitan Airport Authority Act: the Chattanooga Metropolitan Airport Authority, the Memphis-Shelby County Airport Authority, the Metropolitan Knoxville Airport Authority, and MNAA. Once an airport authority was created, the act formerly provided that '[t]he governing body of the authority shall be a board of commissioners . . . appointed by the executive officer of the creating municipality and approved by its governing body[.]' Tenn. Code Ann. § 42-4-105(a)(1)(A) (West October 1, 2007 to July 1, 2023)."

"The 2023 amendment to the Metropolitan Airport Authority Act, 2023 Tennessee Public Acts, chapter 488 ('the Act'), in section two, contained the following provision vacating the existing boards governing the airport authorities in counties meeting certain requirements:

> The board of commissioners of the authority in a county having a metropolitan form of government with a population of more than five hundred thousand (500,000), according to the 2020 federal census or a subsequent federal census, is vacated and reconstituted to consist of eight (8) commissioners as follows:
>
> > (i) Two (2) persons to be appointed by the speaker of the house of representatives;
> > (ii) Two (2) persons to be appointed by the speaker of the senate;
> > (iii) Two (2) persons to be appointed by the governor; and
> > (iv) Two (2) persons appointed by the mayor of the county having the metropolitan form of government[.]

2023 Tenn. Pub. Acts, ch. 488, § 2(1)(A). This section of the Act took effect on July 1, 2023, and there is no dispute that the only county that met the population and form-of-government requirements at that time was Davidson County. Accordingly, the Act required that the current board of MNAA be vacated."

"… Other sections of the Act grant these new boards the authority to, *inter alia*, exercise eminent domain powers, regulate aircraft hazards, and control sections of public streets and public utilities via license or easement. *See* 2023 Tenn. Pub. Acts, ch. 488, §§ 3-9. The Act does contain a severability clause. 2023 Tenn. Pub. Acts, ch. 488, § 10."

"On June 12, 2023, Metro Nashville filed a complaint in the Davidson County Chancery Court ('trial court') against Governor Lee, Speaker McNally, and Speaker Sexton in their official capacities as officers of the State of Tennessee. In the complaint, Metro Nashville alleged that the Act violated Article XI, Section 9 of the Tennessee Constitution, known as the 'Home Rule Amendment.' Metro Nashville asserted that pursuant to the Home Rule Amendment, any act passed by the General Assembly that was only applicable to a particular county was void unless approved by the local legislative body or voters. Metro Nashville further argued that the Act only applied to it inasmuch as Metro Nashville was the sole county that met the population and government-form criteria found in the statute. Metro Nashville posited that there was 'no reasonable expectation that the Act will apply to any other local government's airport authority absent future legislative action' and that the Act was therefore void under Article XI, Section 9. Metro Nashville also alleged that the Act violated the equal protection provision found in Article XI, Section 8 of the Tennessee Constitution by 'treat[ing] the [Nashville International Airport] differently than any other metropolitan airport authority in the State for no rational purpose.'"

"Metro Nashville concomitantly filed a notice, pursuant to Tennessee Supreme Court Rule 54, that a three-judge panel should be assigned to adjudicate this matter based on Tennessee Code Annotated § 20-18-101(a), which requires that all civil actions that (1) challenge the constitutionality of a state statute, (2) include a claim for declaratory or injunctive relief, and (3) are filed against a state official in his or her official capacity, be heard by a three-judge panel appointed by the Tennessee Supreme Court. On June 27, 2023, the Tennessee Supreme Court found that the present matter met these criteria and assigned a three-judge panel to hear the case."

"On June 15, 2023, MNAA filed a motion to intervene as a party defendant, which the trial court later granted. On June 30, 2023, Metro Nashville amended its complaint to add an additional claim: that the Act violated the Tennessee Constitution's 'Anti-Ripper Clause' by ripping county officials from their offices when the Act vacated MNAA's current board of commissioners and abridged their terms of office." …

"On August 25, 2023, MNAA filed a motion seeking a grant of summary judgment concerning the claims asserted by Metro Nashville insofar as those claims sought to invalidate any portions of the Act other than section two. MNAA took no position as to the constitutionality of section two; instead, MNAA argued that the trial court should find the remainder of the Act constitutional because the remaining sections 'supplement and/or clarify the rights, obligations, and authority of relevant metropolitan airport authorities with respect to land use and other matters.' MNAA asserted that the remaining sections of the Act (1) were not local legislation because they could apply to multiple counties, (2) did not contravene a general law of mandatory statewide application, and (3) satisfied the rational basis standard. MNAA requested that the trial court uphold, pursuant to the severability clause contained in the Act, the constitutionality of the remaining sections of the Act independent of its determination as to the constitutionality of section two."

"The State concomitantly filed a motion seeking a grant of summary judgment. In its motion, the State asserted that no sections of the Act violated the Tennessee Constitution inasmuch as the Act was not local in form or effect, the Act did not 'rip' Metro Nashville officers from office, and the Act satisfied rational basis analysis, thereby ensuring equal protection. The State further asserted that Metro Nashville lacked standing to bring an equal protection claim."

"Metro Nashville likewise sought a grant of summary judgment. In its motion, Metro Nashville argued that the Act constituted local legislation because it only applied to one airport authority, MNAA, and was therefore unconstitutional because it lacked a local approval clause. Metro Nashville further contended that the Act removed the current MNAA board members, who were county officers, from their seats in violation of the Anti-Ripper Clause. In addition, Metro Nashville urged that the Act failed rational basis review and therefore violated equal protection."

"On October 6, 2023, the trial court conducted a hearing as to all three motions for summary judgment. In a final order entered on October 31, 2023, the court found that Davidson County and Shelby County are the only two counties in Tennessee that have populations in excess of 500,000 as reported in the 2020 federal census. The court further found that the 'City of Memphis and Shelby County have considered consolidating their local governments into a metropolitan government multiple times in the past but have not done so.' The court observed that prior to passage of the Act, members of the old MNAA board were serving terms scheduled to expire in 2024, 2025, 2028, and 2029 but that these positions were 'vacated under the terms of the Act.'"

"With respect to its analysis of whether the Act violated the Home Rule Amendment, the trial court recounted that the 'Local Legislation Clause' of the Home Rule Amendment requires that 'any act passed by the General Assembly that is 'private or local in form or effect' and applies to a particular county or municipality either in its governmental or propriety capacity is void' unless, by its terms, it requires local approval. *See* Tenn. Const., art. XI, § 9, cl. 2. The court enumerated the three requirements that our Supreme Court has indicated must be satisfied concerning when a particular

state law requires local approval: '(1) the statute in question must be local in form or effect; (2) it must be applicable to a particular county or municipality; and (3) it must be applicable to the particular county or municipality in either its governmental or proprietary capacity' (citing *Metro. Gov't of Nashville & Davidson Cnty. v. Tenn. Dep't of Educ.*, 645 S.W.3d 141, 150 (Tenn. 2022)). Because the parties disagreed regarding whether these requirements had been satisfied in this matter, the trial court addressed each requirement in turn."

"In determining whether the Act was local in form or effect, the trial court found it necessary to determine whether 'this legislation was designed to apply to any other county in Tennessee.' *See Farris v. Blanton*, 528 S.W.2d 549, 551 (Tenn. 1975). '[I]f it is potentially applicable throughout the state it is not local in effect even though at the time of its passage it might have applied to [one county] only.' *Id.* at 552. The trial court found the critical question to be 'whether the law actually is or was designed to be limited locally, and could not potentially be applicable to other localities, or throughout the state.' *See id.*"

"Regarding the Act, the trial court determined that it was local in form and effect. The court noted that only two counties in Tennessee satisfied the population requirement—Shelby and Davidson. The court further noted that this would remain true until release of the 2030 federal census. In addition, the court observed that of these two counties, only Davidson County had a metropolitan form of government."

"The trial court next analyzed whether the Act was applicable to Metro Nashville and determined that it was, reasoning that the Act removed appointment authority for most of the board of commissioners from Metro Nashville's mayor and council. Accordingly, the court determined that the Act 'governs or regulates Metro.' Finally, the court determined that the third requirement, whether the statute was applicable to Metro Nashville in either its governmental or proprietary capacity, had also been met. The court stressed that Metro Nashville had exercised its governmental authority in establishing MNAA as its board and in appointing members thereto. The court found that the Act stripped Metro Nashville of that power. Based on these findings, the court granted summary judgment in favor of Metro Nashville on this issue, determining that section two of the Act violated the Home Rule Amendment and was unconstitutional."

"The trial court then proceeded to analyze whether the statute violated the Anti-Ripper Clause found in the Home Rule Amendment. The court explained that 'ripper' bills 'target particular local offices by altering their existing salaries, shortening their terms, or removing incumbents from office.' *See Frazer v. Carr*, 360 S.W.2d 449, 456 (Tenn. 1962). The court noted that the State had also contested whether Metro Nashville maintained standing to bring an Anti-Ripper claim because Metro Nashville and MNAA were distinct entities."

"With respect to standing, the trial court determined that the commissioners of MNAA's board were officers of Metro Nashville because MNAA carried out 'public, governmental functions on behalf of Metro as its instrumentality.' The court also observed that the commissioners were appointed by Metro Nashville's chief executive and approved by its legislative body. The court therefore concluded that Metro Nashville maintained standing to bring this claim. Having already found that the Act was local in effect and also finding that it prematurely removed county officers from their offices, the court determined that section two of the Act violated the Anti-Ripper Clause."

"Finally, regarding the equal protection claim, the trial court determined that Metro Nashville had standing to assert the claim predicated on prior case law providing that 'the provisions of Article I, Section 8, protect cities and counties as well as individuals.' *See Civ. Serv. Merit Bd. of Knoxville v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991). Applying rational basis review, the court found that sections two, six, seven, eight, and nine of the Act violated the equal protection guarantee found in the Tennessee Constitution because those sections treated MNAA differently from other airport authorities without a reasonable relationship to a legitimate state interest. Furthermore, based on the severability clause found in the Act, the court determined that it could 'elide the offending provisions' that it had

found to be unconstitutional. The court therefore granted Metro Nashville's summary judgment motion in part and declared its order to be final. The State timely appealed."

"The trial court granted summary judgment in part, determining that portions of the Act were unconstitutional. Because constitutional issues are inherently questions of law, our review of those issues is *de novo*. *See State v. Robinson*, 29 S.W.3d 476, 480 (Tenn. 2000) ('As the constitutionality of a statute is a question of law, our review is de novo without a presumption of correctness given to the lower courts' judgments.'). Tennessee courts generally presume the constitutionality of statutes enacted by the legislature. *See Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) ('In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.'). Accordingly, we must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.' *Id.* (quoting *State v. Taylor*, 70 S.W.3d 717, 721 (Tenn. 2002))."

"The Local Legislation Clause found within the Home Rule Amendment provides:

> [A]ny act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.

Tenn. Const. art. XI, § 9, cl. 2." …

"Our Supreme Court further determined that three requirements must be met for the Home Rule Amendment to be implicated: '1) the statute in question must be local in form or effect; 2) it must be applicable to a particular county or municipality; and 3) it must be applicable to the particular county or municipality in either its governmental or proprietary capacity.' *Metro. Gov't*, 645 S.W.3d at 150. If the Act implicates the Home Rule Amendment and does not require approval by a majority of the county or municipality's local legislative body or voters, it is unconstitutional and void. *See id.*"

"The first requirement for applicability of the Home Rule Amendment is that the statute in question be 'local in form or effect.' *See Metro. Gov't*, 645 S.W.3d at 150." …

"In *Farris*, our Supreme Court was asked to rule upon the constitutionality of a statute that applied to counties with a mayor as head of the county's executive branch. *Id.* at 553. At the time the statute was enacted, Shelby County was the only county in Tennessee that met that criterion. *See id.* at 552. Shelby County's government was structured in this manner due to a private act of the legislature, and the Supreme Court noted that '[n]o other county may have such a form of government except by the affirmative action of the General Assembly.' *Id.* Accordingly, the High Court concluded that the statute in question related only to Shelby County and thus was local in effect. *See id.* at 556. In so ruling, the Court noted that it could not 'conjecture what the law may be in the future' and could not 'speculate upon the future action of the General Assembly' with respect to forms of government in other counties. *See id.* at 555."

"In subsequent cases, our Supreme Court has upheld the constitutionality of a statute containing a county population minimum, which resulted in only two counties meeting the criterion, *see Bozeman v. Barker*, 571 S.W.2d 279, 280 (Tenn. 1978), as well as a statute containing a form-of-government requirement in addition to a population requirement, which resulted in only one county meeting the criteria, *see Burson*, 816 S.W.2d at 728." …

"In the case at bar, however, section two of the Act contains three limiting criteria:

1. It applies to counties that have established a metropolitan airport authority;

> 2. It applies to counties that have a population exceeding 500,000 'according to the 2020 federal census or a subsequent federal census'; and
> 3. It applies to counties that have a metropolitan form of government.

See 2023 Tenn. Pub. Acts, ch. 488, § 2(1)(A). As the trial court found, the only county in Tennessee that met all three criteria at the time of the Act's enactment was Davidson County. In addition, section two of the Act provided that the metropolitan airport authority board of any county meeting the above conditions would immediately be vacated and a new board appointed, whose members would serve staggered terms ending in 2025, 2026, 2027, and 2028. *See* 2023 Tenn. Pub. Acts, ch. 488, § 2(1)(C)."

"In *Bd. of Educ. of Shelby Cnty.*, the statute in question dealt with the formation of municipal school districts. *See* 911 F. Supp. 2d at 639. As the district court explained: 'Chapter 905 establishes three separate but necessary criteria for the creation of municipal school districts. Population is only one criterion; it is not the focus of the classification created by the Tennessee General Assembly.' *Id.* at 657. In analyzing whether the statute was therefore applicable 'throughout the state,' *see Farris*, 528 S.W.2d at 552, the district court explained:

> 'Throughout the state' is more appropriately understood as throughout the class created by the Tennessee General Assembly. If the class created by a statute is so narrowly designed that only one county can reasonably, rationally, and pragmatically be expected to fall within that class, the statute is void unless there is a provision for local approval.

Bd. of Educ. of Shelby Cnty., 911 F. Supp. 2d at 656."

"Based on the statute's three conditions for applicability in *Bd. of Educ. of Shelby Cnty.*, the district court determined that only Shelby County could meet all three criteria. *Id.* at 657." …

"Similarly, here, the trial court determined that 'the timeframe provided in Section 2(1)(C), when read in conjunction with the limitations of Section 2(1)(A), establishes a closed class of counties that encompasses only Davidson County and Shelby County.' … We agree with the trial court's analysis. Based on the three criteria specified in section two of the Act, Davidson County is the only county in Tennessee that meets all three criteria."

"With regard to the first criterion—that the county has established a metropolitan airport authority—only four counties meet this condition: Davidson, Shelby, Knox, and Hamilton. Respecting the second criterion—that the county have a population exceeding 500,000 'according to the 2020 federal census or a subsequent federal census'—only two counties, Shelby and Davidson, met this condition as of the 2020 federal census. Finally, concerning the third criterion—that the county have a metropolitan form of government—Davidson County was the only remaining county that met the final condition."

"Although the original Metropolitan Airport Authority Act was enacted in 1969, only four counties have established metropolitan airport authorities since that time. Assessing the likelihood or immediacy of other counties doing so would be clear speculation. In addition, although there will likely be population growth in other counties, a new federal census will not be released until 2030 at the earliest. Given the timeframes set forth in section two of the Act for expiration of the new board members' initial terms, the only other county that could meet the population threshold within those timeframes was Shelby. No other county in Tennessee could possibly comply with the population requirement until 2030. Most importantly, of the counties meeting the first two requirements, Davidson County is the only county with a metropolitan form of government. No evidence was presented that Shelby County had impending plans to adopt such a form of government. Accordingly, the layering of the statute's applicability requirements renders the possibility that the Act could apply to any other county theoretical at best. We therefore conclude that the trial court correctly determined section two of the Act to be local legislation."

"The second requirement, that section two of the Act 'must be applicable to a particular county or municipality,' has been described as requiring that the statute 'regulate' or 'govern' that county or municipality. *See Metro. Gov't*, 645 S.W.3d at 152." …

"In *Metro. Gov't*, the Supreme Court was asked to rule on the constitutionality of a statute that allowed eligible students in certain school districts to 'directly receive their share of state and local education funds, which would ordinarily be provided to the public-school system they attend, to pay for a private school education and associated expenses.' *Id.* at 152. The Metropolitan Government of Nashville and Davidson County sought a declaration that the statute was unconstitutional, but the Supreme Court found that the statute was not 'applicable to' the municipality because it did not regulate or govern it. *See id.* at 152-53. The Court rejected the municipality's argument that the statute applied to it because the statute impacted the municipality's allotment of funding to the public school system; instead, the Court concluded that the statute regulated only the local education agency's conduct regarding its counting of enrolled students. *See id.* The Court further noted that the municipality's obligation to fund the local education agency derived from a different statutory scheme. *Id.*" …

"In a footnote to the *Metro. Gov't* opinion, the Supreme Court rejected the municipality's argument that the statute in question was 'applicable to' it because the statute would affect the municipality's funding obligation to the public school system." …

"The Supreme Court in *Metro. Gov't* also quoted with approval an earlier opinion, *Fountain City Sanitary Dist. v. Knox Cnty. Election Comm'n*, 308 S.W.2d 482, 486 (Tenn. 1957), wherein Justice Swepson noted in his concurring opinion that 'drainage districts, water districts, sanitary districts, school districts, etc.,' despite being 'designated quasi-municipal corporations' or having 'a number of powers that are similar to or the same in substance as certain powers possessed by cities,' were 'simply not included within the intention of the framers of the Home Rule Amendment.' The High Court in *Metro. Gov't* ultimately concluded that the Home Rule Amendment was not implicated because the statute in question was not applicable to the municipality. *Metro. Gov't*, 645 S.W.3d at 154."

"In the case at bar, although we find the *Metro. Gov't* decision to be instructive to our analysis of the issue before us, we do not find it to be factually on point. In *Metro. Gov't*, the statute in question only regulated the actions of the educational agency. The statute neither burdened the municipality with additional duties nor restrained it from performing any duties. *See Metro. Gov't*, 645 S.W.3d at 152-54. Accordingly, the Supreme Court concluded in that case that the Home Rule Amendment was not implicated because the statute was not applicable to the municipality. *See id.*"

"By contrast, here, section two of the Act does restrain Metro Nashville from performing duties that it previously had been directed to perform. Section two of the Act also imposes a duty upon Metro Nashville's mayor of appointing two MNAA board members with no oversight from Metro Nashville's 'governing body.'"

"As the trial court succinctly explained:

> … Unlike the statute before the Tennessee Supreme Court in *Tennessee Department of Education*, 645 S.W.3d 141, the Act not only eliminates Metro Council's responsibilities as to MNAA but also reassigns a reduced portion of Metro's prior appointment authority for the reconstituted body to the Metro Mayor. Both in a negative sense—removing appointment authority for most of the commissioners from the Metro Mayor and approval and removal authority from Metro Council entirely—and in a positive sense—providing the reduced appointment authority to the Metro Mayor—the Act governs or regulates Metro. We therefore conclude the Act is applicable to Metro."

"We agree with this analysis and find the Act to be distinguishable from the statute at issue in *Metro. Gov't* inasmuch as the Act does restrain Metro Nashville from performing duties that it had previously

been given in the prior version of the statute. The Act only allows Metro Nashville's mayor to appoint two members, rather than the entire board, and further removes Metro Nashville council's oversight of those appointments by approval or removal power. Ergo, the Act regulates and restrains the power and duties of Metro Nashville."

"The third requirement for implication of the Home Rule Amendment is that section two of the Act must be applicable to a 'particular county or municipality in either its governmental or proprietary capacity.' *Metro. Gov't*, 645 S.W.3d at 150. As our Supreme Court has previously recognized, counties and municipalities act in a 'dual capacity' by either exercising powers that are 'public, legislative, political, or governmental' or powers that are 'private, quasi-private, proprietary, business, commercial, ministerial, or merely municipal.' *See Memphis Power & Light Co. v. City of Memphis*, 112 S.W.2d 817, 820 (Tenn. 1937). Ergo, this requirement encompasses the exercise of either type of municipal power. We therefore agree with the trial court that all three requirements found in *Metro. Gov't*, 645 S.W.3d at 150, have been met."

"Because section two of the Act implicates the Home Rule Amendment and does not require approval by a majority of the municipality's local legislative body or voters, it is unconstitutional and void. *See Metro. Gov't*, 645 S.W.3d at 150. We therefore affirm the trial court's determination that section two of the Act violates the Local Legislation Clause."

"Although the trial court ultimately elided section two from the Act, the State argues that the trial court should have simply elided section 2(1)(C) and its staggered term dates and left the remainder of section two intact. The State asserts that 'elision would not impair the act's ability 'to accomplish the dominant purpose . . . intended by the [legislature]'' (quoting *Citicorp Fin. Servs. Corp. v. Adams*, 674 S.W.2d 705, 709 (Tenn. 1984)), which the State concedes was to 'vacate the boards of covered authorities and fill them with new commissioners.' Accordingly, the State urges that eliding section 2(1)(C) would result in reversion to the term-staggering provisions found in Tennessee Code Annotated § 42-4-105(d)(1)(A) (West October 1, 2007, to June 30, 2023) as it existed prior to July 2023. The conundrum presented by this approach is that doing so would cause the newly appointed board members to serve terms of 'one (1), two (2), three (3), four (4), five (5), six (6) and seven (7) years, respectively.' *See id.* As denoted by the word, 'respectively,' these staggered terms corresponded with the seven-person board provided for in the prior version of the statute as opposed to the eight-person board provided for in the current version of the statute. Accordingly, as Metro Nashville succinctly states, this would amount to 'put[ting] an octagonal peg in a heptagonal hole.'"

"In addition, Tennessee Code Annotated § 42-4-105(d)(1)(A) (West October 1, 2007, to June 30, 2023) previously provided that after their initial terms, board members would serve terms of seven years' duration. However, section 2(1)(D) of the Act sets board members' terms at four years after their initial terms. The State does not sufficiently address this obvious conflict. We therefore conclude that elision of only section 2(1)(C) does not present a viable solution, and we affirm the trial court's decision to elide section two in its entirety."

"The trial court also determined that section two of the Act violated the Anti-Ripper Clause found within the Home Rule Amendment. Because we have determined that section two violated the Local Legislation Clause and was thus unconstitutional, we deem this issue to be pretermitted as moot."

"The trial court additionally found that sections two, six, seven, eight, and nine of the Act violated the equal protection guarantee found in the Tennessee Constitution."

"The State argues that Metro Nashville lacks standing to assert an equal protection claim with reference to sections six through nine of the Act because these sections have not caused Metro Nashville to suffer a 'distinct and palpable injury.' *See City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (internal citation omitted). While conceding that sections six through nine confer power upon MNAA to, *inter alia*, acquire land by eminent domain and exercise zoning authority, the State urges that such 'conferral does not injure Metro Nashville, which retains its sovereign authority to

exercise eminent domain and zoning control.' We disagree. An obvious conflict exists between Metro Nashville's 'sovereign authority to exercise eminent domain and zoning control,' as the State points out, and the powers granted to MNAA by sections six through nine of the Act, which include the power to acquire property by eminent domain; the power to construct, alter, or relocate public streets; and the power to affect zoning changes based on the needs of the airport. We fail to see how the same range of powers can be granted to both entities without infringement on one by the other. We agree with the trial court, which noted that certain of the Act's provisions 'place[] a burden on the qualifying county by elevating an agency to a competing entity in the exercise of those powers.' We therefore determine the State's argument regarding Metro Nashville's purported lack of injury to be unavailing, and we affirm the trial court's determination that Metro Nashville maintained standing to assert its equal protection claim."

"Turning to the merits of the equal protection claim, Metro Nashville posited that the Act violated the Tennessee Constitution's equal protection guarantee because the Act irrationally treated MNAA differently than the other airport authorities. The trial court agreed, determining that section two and sections six through nine violated the equal protection guarantee of the Tennessee Constitution."

"As noted above, the parties agree that the applicable level of scrutiny in assessing the constitutionality of the Act is rational basis." …

"'[C]lassification is a necessary ingredient of laws. Virtually all laws create distinctions between persons or groups.' Jeffrey M. Shaman, *The Equal Protection Clause*, 3 ENCYCLOPEDIA OF THE AMERICAN JUDICIAL SYSTEM: STUDIES OF THE PRINCIPAL INSTITUTIONS AND PROCESSES OF LAW 1038 (ed. Robert Joseph Janosik 1987). In assessing an equal protection challenge to statutory distinctions utilizing a rational basis mode of analysis, the Tennessee Supreme Court has indicated '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.' *Gallaher*, 104 S.W.3d at 461. Unless the challenger 'can establish that the differences are unreasonable, the statute must be upheld.' *Lynch v. City of Jellico*, 205 S.W.3d 384, 396 (Tenn. 2006) (quoting *Brown v. Campbell Cnty. Bd. of Educ.*, 915 S.W.2d 407, 414 (Tenn. 1995)). In an equal protection challenge, the rational basis test 'examines 'whether the classifications have a reasonable relationship to a legitimate state interest.'' *Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 716 (Tenn. 2017) (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993)). The statutory discrimination will be permissible 'as long as the discrimination is founded upon a reasonable distinction or difference in state policy.' *Hughes*, 514 S.W.3d at 720 (quoting *Gallaher*, 104 S.W.3d at 461). Reasonable distinctions 'must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law. . . .' *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, C. & St. L. Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)). In engaging in this assessment, the Tennessee Supreme Court has indicated that '[i]t 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.' *Gallaher*, 104 S.W.3d at 461."

"In the present case, this Court, as argued by Metro Nashville and found by the trial court, has concluded that the statutory measures apply solely to Metro Nashville and not to any other county or city in the State of Tennessee. Given that conclusion, when assessing the constitutionality of such legislation under a rational basis standard, actual distinctions between Nashville International Airport and other airports can potentially provide a rational basis for the statutory differential treatment between it and other airport authorities. In other words, given that the legislation treats Nashville International Airport differently, when determining whether there is a rational basis for the differential treatment, it is appropriate to consider if there are actual variances among the airports that rationally provide a basis for that differential treatment."

"In defending the constitutionality of the Act, the State asserts that the Act (1) promotes growth among metropolitan airport authorities; (2) renders metropolitan airport authority boards more

accountable to the regions they serve; (3) provides the State with control over appointment of the metropolitan airport authority board members, especially important when the airport is of 'statewide concern'; and (4) provides geographic diversity for such boards."

"Additionally, the State observes the following regarding distinctions between Nashville International Airport and the airports operating under airport authorities in Chattanooga, Knoxville, and Memphis:

> Nashville International Airport has over four times more commercial traffic than any other metropolitan airport, and that traffic has grown at a faster rate than any other metropolitan airport. That new traffic creates unique problems among metropolitan airports, including an unprecedented need for more gates, more concourses, more parking, and more amenities. Along with the singular regulatory problems that growth in traffic creates for Nashville International Airport, it also generates unparalleled economic growth. In 2019, Nashville International Airport generated nearly $10 billion in economic growth and supported over 76,000 jobs. That was more than the economic effects contributed by the three other metropolitan airport authorities *combined*. *See* Tenn. Dep't of Transp., Aviation Impact Study 18-19 (2021), https://bit.ly/3xxDd83.

(Internal citations to record omitted.) Based on these factors, the State argues that the unique characteristics of Nashville International Airport place it in a 'class of its own.'"

"The trial court concluded that the State's distinguishing between the airports was unpersuasive in light of the exclusion from the challenged statutory amendments of the Memphis International Airport, which the trial court regarded as closely akin to Nashville International Airport and described as the 'world's busiest cargo airport.' Similarly, Metro Nashville emphasizes the difference in treatment of these two airports despite the clear importance of Memphis International Airport and its traffic."

"From our review of the record, we disagree with the trial court's determination that the State failed to establish a rational basis for the differential treatment of MNAA in section two and sections six through nine of the Act. All four airport authorities are plainly of significance to the State of Tennessee, and Memphis International Airport is a more significant airport for cargo than Nashville International Airport. Nevertheless, given the deferential rational basis standard, we cannot conclude that drawing a distinction between Nashville International Airport and Memphis International Airport, or Chattanooga or Knoxville, is unreasonable. Nashville International Airport has more than five times as many boarded passengers as the next closest Tennessee airport, Memphis International Airport. The economic effects of Nashville International Airport on the state are greater than the Chattanooga, Knoxville, and Memphis airports combined. Considering the factual evidence presented, *see Tester*, 879 S.W.2d at 826, we cannot say that, in exercising greater state and regional influence over MNAA or expanding its powers, drawing a distinction between Nashville International Airport and the other airports is irrational."

DECLARATORY JUDGMENT

1. Taxpayers suing the government are not required to allege a distinct injury as long as they (1) allege a specific illegality in the expenditure of public funds and (2) have made a prior demand on the governmental entity asking it to correct the alleged illegality - Plaintiffs have alleged specific illegality in the expenditure of the IMPROVE Act tax funds, but there is nothing in the complaint or the record to show that a demand to correct the alleged illegality was made, so plaintiffs' fail to have standing under the declaratory judgment act

See also ELECTIONS – Improve Act referendum – Under the election contest statutes, there are two grounds upon which an election contest may be based: (1) a claim that the election was valid, but that the outcome was not properly determined; and (2) a claim that the election itself was null and void -

Nothing in the IMPROVE Act defines connectivity or sets parameters on the location of connected non-mass transit improvements, and in light of the discretion given by the act in this area, the court found that the proposal approved by the electorate is fully consistent with the IMPROVE Act, with one exception - the purchase of land for housing development and parks – The court failed to see how the purchase of property for housing development and parks is consistent with Tenn. Code Ann. § 67-4-3201(3) - Property purchased with the surcharge must be used for the public transit system as defined in Tenn. Code Ann. § 67-4-3201(3), and yet the purchase of land for housing development and parks is not a purchase for the transit system, nor does it provide connectivity for the transportation facility to any other non-mass transit system transportation infrastructure, including, but not limited to, interstates, highways, roads, streets, alleys, and sidewalks, page 177.

COMMITTEE TO STOP AN UNFAIR TAX ET AL. v. FREDDIE O'CONNELL ET AL.
COURT OF APPEALS No. M2025-00072-COA-R3-CV Filed April 15, 2025

"The plaintiffs brought an election contest and a declaratory judgment action against the defendants to enjoin the implementation of Metro Ordinance No. BL2024-427, which implements Metro's transit improvement plan created pursuant to the Improving Manufacturing, Public Roads and Opportunities for a Vibrant Economy Act. The trial court found that the plan and ballot question complied with the Act in all respects. We affirm, except that we find that the surcharge in the transit improvement plan cannot be used for the acquisition of land for housing and parks."

"In 2017, the Tennessee General Assembly enacted the Improving Manufacturing,Public Roads and Opportunities for a Vibrant Economy Act (the 'IMPROVE Act'), 2017 TENN. PUB. ACTS, ch. 181. Among other things, the IMPROVE Act allowed local governments to increase certain taxes to fund investment in a transit improvement program ('TIP'). A TIP is defined as 'a program consisting of specified public transit system projects and services.' Tenn. Code Ann. § 67-4-3201(5). In turn, the IMPROVE Act defined 'public transit system' as:

> any mass transit system intended for shared passenger transport services to the general public, together with any building, structure, appurtenance, utility, transport support facility, transport vehicles, service vehicles, parking facility, or any other facility, structure, vehicle, or property needed to operate the transportation facility or provide connectivity for the transportation facility to any other non-mass transit system transportation infrastructure, including, but not limited to, interstates, highways, roads, streets, alleys, and sidewalks[.]

Tenn. Code Ann. § 67-4-3201(3)."

"In 2024, the mayor's office began working on a transit plan to submit to the voters pursuant to the Improve Act. Beginning in February 2024, until the eve of the referendum, there were many meetings, events, council member listening sessions, and advisory committee meetings seeking public comment. Metro also provided a website concerning the proposed plan. On March 1, 2024, the Tennessee Comptroller of the Treasury approved the Metro Finance Director's selection of Kraft CPAs PLLC to review the financial feasibility of the proposed TIP. On April 24, 2024, the Comptroller approved the procedures to be used by Kraft in analyzing the TIP." …

"… The plan was introduced in the Metro Council as Bill No. BL2024-427 and was enacted on July 19, 2024. The ordinance included the language that appeared on the ballot. On August 1, 2024, the Davidson County Election Commission voted to place the referendum on the November 5, 2024 ballot and the referendum election was held on November 5, 2024. The certified election results were 183,663 for and 96,544 against."

"On November 27, 2024, the plaintiffs, Committee to Stop an Unfair Tax and Emily Evans, the Committee's chair, filed this lawsuit against the defendants Mayor Freddie O'Connell and the Davidson County Election Commission, pursuant to the election contest statute, Tenn. Code Ann. §§ 2-17-101-

117, and the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101-113. The chancellor tried the matter on January 8, 2025. Michael Briggs, a leader of the mayor's team on the transit plan, testified as to the plan and its development. He was the only person to testify at trial. The chancellor issued her decision on January 13, 2025."

"The trial court concluded that the lawsuit was not an election contest – there was 'no challenge to the conduct of the election such as allegations of illegal ballots or fraud.' While the plaintiffs claimed that the Mayor intentionally misled voters, the court found that such an allegation did not 'rise to the level of an election contest as contemplated by the statute.' As for the declaratory judgment part of the lawsuit, the court took that portion as 'challenging the validity of the Ordinance, and specifically whether the Plan qualifies as a TIP under the IMPROVE Act.' The court found the language of the act to be clear and unambiguous and concluded that the legislative intent could be found from the text. The trial court found the Plan to meet the definition of a TIP[.]"

"The trial court also rejected the plaintiffs' challenge to the financial feasibility of the plan: 'They provided no proof that it is not financially feasible, or the review by Kraft, or the material that it relied upon in doing its review, was suspect or inaccurate.' The ballot language, the trial court found, complied with the requirements of the act, including the costs being listed in current dollars."

"Defendants' counsel conceded during oral argument that this matter is an election contest."

"Under the election contest statutes, there are two grounds upon which an election contest may be based: (1) a claim that the election was valid, but that the outcome was not properly determined; and (2) a claim that the election itself was null and void. *Barrett v. Giles Cnty.*, No. M2010-02018-COA-R3-CV, 2011 WL 4600431, at *2 (Tenn. Ct. App. Oct. 5, 2011) (citing *Stuart v. Anderson Cnty. Election Comm'n*, 237 S.W.3d 297, 303 (Tenn. Ct. App. 2007). The plaintiffs seek a determination that the election is void. They base their claims on allegations of fraud. There are no allegations of the casting of fraudulent ballots. Rather, the plaintiffs maintain that 'the voters were misled and did not understand the consequence of their vote.' As phrased in prior cases, this is 'fraud and illegality rendering the election uncertain,' *Fraternal Order of Police v. Metro. Gov't of Nashville*, 582 S.W.3d 212, 217 (Tenn. Ct. App. 2019), or fraud so permeating the election 'that it cannot be said to fairly reflect the will of the voters.' *Forbes v. Bell*, 816 S.W.2d 716, 720 (Tenn. 1991). They alleged three instances of supposed ballot fraud: 'burying' the surcharge amount at the end of the ballot, using the current cost of the project instead of the initial cost, and proposing a plan that goes beyond the parameters of the IMPROVE Act. Thus, they have presented grounds, if proven, on which to invalidate the election."

"The ballot requirements for the referendum are found in the IMPROVE Act.

> (b) A transit improvement program must indicate and describe in reasonable detail the public transit system projects and services to be funded and implemented under the program.
> (c) A transit improvement program must state:
> (1) The type and rate of a surcharge that will provide funding to the program;
> (2) When a surcharge will terminate or the date or conditions upon which the surcharge will be terminated or reduced;
> (3) Any other sources of funding for the program;
> (4) An estimate of the initial and recurring cost of the program;
> (5) The implementing agencies responsible for carrying out the program; and
> (6) The geographic location of the public transit system projects.
> . . .
> (f) The ordinance or resolution must contain a brief summary of the transit improvement program for which revenue from the surcharge will be used, written in a clear and coherent manner using words with common everyday meanings, and not exceeding two hundred fifty (250) words in length, and must include the information

> listed in subsections (b) and (c). The brief summary shall be placed on the ballot pursuant to § 67-4-3202(b)(1).

Tenn. Code Ann. § 67-4-3206(b)-(c), (f)."

"The brief summary, as adopted by the Metro Council and as it appeared on the ballot, states:

> Passage of this measure adopted by Ordinance BL2024-427, allows the Metropolitan Government to complete the entire priority sidewalk network when combined with annual capital spending, provide significantly expanded 24-hour public transportation service 365 days a year including frequent service on major routes, add more neighborhood transit centers, improve safety for all roadway users, and upgrade and modernize nearly two-thirds of the city's signalized intersections.
>
> This program's capital cost is estimated to have a current cost of $3,096,000,000. Once construction is complete, the estimated value of recurring annual operating and maintenance costs is approximately $111,000,000. The Metropolitan Transit Authority (WeGo), Nashville Department of Transportation and Multimodal Infrastructure, Metro Planning Department, and Mayor's Office, in partnership with other Metro departments, will undertake implementation of the program.
>
> This program will be funded by federal grants, revenues from transportation system fares, debt, and a sales tax surcharge of 0.5%. The tax surcharge will end once all debt issued for the transit improvement program has been paid and the Metropolitan Council determines by resolution that the revenues from the tax surcharges are no longer needed for operation of the program.
>
> FOR or AGAINST

"The information listed in Tenn. Code Ann. § 67-4-3206 (b) and (c) is present on the ballot as required by (f). The plaintiffs have not challenged the word limit requirement. The plaintiffs' specific arguments regarding the ballot requirements are addressed below."

The plaintiffs' argument regarding the surcharge consists of the following:

> As to whether the language is [sic] 'clear and coherent' manner, the language does not mention the surcharge until the next to the last sentence of the ballot referendum and, thus, the increase in taxes, which is the primary purpose of seeking the voters' approval, is not clear from the ballot language. Additionally, the statute indicates that the 'surcharge' be printed first , then the 'brief summary.' Instead of following the statute, the Mayor buried the revelation of the increase in taxes at the bottom of the referendum language after the summary of the TIP." …

"In a 186-word ballot question, where the surcharge is placed in the ballot language is not as important as what the surcharge language says. The relevant sentence states, 'This program will be funded by federal grants, revenues from transportation system fares, debt, and a sales tax surcharge of 0.5%.' There is no ambiguity in this sentence. It is clear and direct with no possibility of misunderstanding. Additionally, Tenn. Code Ann. § 67-4-3202(b)(1) mentions the surcharge first, but does not require the surcharge to be placed first in the ballot language."

"'A transit improvement program must state: (4) An estimate of the initial and recurring cost of the program.' Tenn. Code Ann. § 67-4-3206(c)(4). The brief summary on the ballot must also contain this information. Tenn. Code Ann. § 67-4-3206(f). In what the plaintiffs label 'the most egregious violation of the statutory requirements,' the monetary figure for the initial cost is listed on the ballot as $3,096,000,000. The plaintiffs maintain that the plain meaning of the term 'initial' cost is the ten-year

cost of the program. Financial feasibility requires, the plaintiffs maintain, that it is the cost of the plan through its life that matters, not the current cost."

"The plaintiffs make policy arguments for providing voters with the ten-year cost of the plan. However, we must deal with what the legislature said, not what may or may not be most informative to the voters. The legislature said 'initial' cost. It provided no definition or example of the word 'initial.' Thus, we are left with the natural and ordinary meaning of the word. 'Initial' means 'of or relating to the beginning.' https://www.merriam-webster.com/dictionary/initial (last accessed March 11, 2025). Synonyms include 'earliest,' 'first,' 'leadoff,' and 'inaugural.' *Id.* Without further instruction from the legislature, we cannot conclude that the word 'initial' means ten years down the road."

"What projects does the IMPROVE Act cover, and what projects does it not cover? This is a central question of this litigation. To answer this question, we must go back to the definition of 'public transit system':

> any mass transit system intended for shared passenger transport services to the general public, together with any building, structure, appurtenance, utility, transport support facility, transport vehicles, service vehicles, parking facility, or any other facility, structure, vehicle, or property needed to operate the transportation facility or provide connectivity for the transportation facility to any other non-mass transit system transportation infrastructure, including, but not limited to, interstates, highways, roads, streets, alleys, and sidewalks[.]

Tenn. Code Ann. § 67-4-3201(3). The program of 'specified public transit system projects and services' that Metro developed is called a 'Transit improvement program' ('TIP'). Tenn. Code Ann. § 67-4-3201(5)."

"The definition of public transit system determines what is legitimately part of the TIP. Both sides of this litigation focus on the word 'connectivity.' The plaintiffs view the word narrowly; the defendants view it more broadly. The plaintiffs correctly point out that Tenn. Code Ann. § 67-4-3201(3) lists 'interstates, highways, roads, streets, alleys, and sidewalks,' in a non-exclusive list of non-mass transit system transportation infrastructure. The plaintiffs would limit the term 'connectivity' to the construction of any 'facility, structure, vehicle, or property needed to connect a transportation facility to 'interstates, highways, roads, streets, alleys, and sidewalks' in the immediate vicinity of the transportation facility. For example, the TIP plans for installation of 86 miles of sidewalks, safety improvements at 35 high-injury intersections and adding or upgrading 35 miles of bike facilities. With little explanation the plaintiffs view these matters as not being authorized by the IMPROVE Act."

"The defendants and the trial court take a somewhat broader view. They emphasize that the plan contains mass transit All-Access Corridors. The TIP states on page 41 that:

> All-Access Corridors include a high-frequency by line with strategically located dedicated transit-only lanes, ensuring increased service reliability for passengers. These routes have more frequent service times and higherquality stop/station amenities than standard bus routes. These corridors will include transportation upgrades for pedestrians and cyclists and signal upgrades, including transit signal priority that allows busses to move through intersections quicker than cars and new or upgraded sidewalks within ¼ or ½ mile.

As the chancellor observed, the sidewalks and roads are in the corridors. Along with the improved signals and bike routes, they connect the mass transit system to neighborhoods, apartment buildings, and other concentrations of people."

"Nothing in the IMPROVE Act defines connectivity or sets parameters on the location of connected non-mass transit improvements. In light of the discretion given by the act in this area, we find that the

proposal approved by the electorate is fully consistent with the IMPROVE Act, with one exception --- the purchase of land for housing development and parks. We fail to see how the purchase of property for housing development and parks is consistent with Tenn. Code Ann. § 67-4-3201(3). Property purchased with the surcharge must be used for the public transit system as defined in Tenn. Code Ann. § 67-4-3201(3). Yet the purchase of land for housing development and parks is not a purchase for the transit system, nor does it 'provide connectivity for the transportation facility to any other non-mass transit system transportation infrastructure, including, but not limited to, interstates, highways, roads, streets, alleys, and sidewalks[.]' Tenn. Code. Ann. § 67-4-3201(3). Such property is a place of origination or destination. Metro's goal is laudable, but the IMPROVE Act does not provide the means. Metro will have to find other funds to accomplish this goal. We reverse the trial court's decision on the purchase of property for housing and parks."

"The financial feasibility of the transit system project must be established by meeting the requirements of Tenn. Code Ann. § 67-4-3206." … Metro followed these steps.

"The procedures for Kraft to use to evaluate the reasonableness and financial feasibility of the TIP were proposed by Metro and Kraft and approved by the Comptroller. Metro's assertions include that the TIP will receive $1.52 billion in federal and state grants and that 'All Federal and state grant sources are based on current Metro experiences and recent grant awards made to similar transportation systems.' Kraft's procedures to approve the financial feasibility of the TIP include determining 'that all federal and grant sources are based on the experience of similar transportation systems. Review supporting documentation . . . related to Bipartisan Infrastructure Law Grants Programs, as well as any other Federal, State, or local grants to determine the reasonableness of the plan estimates.' Kraft concluded that,

> In our opinion, management's assertions related to the Plan of Finance about the methodology and assumptions used in the financial forecasts and projections supporting its analysis that the proposed transit program is financially feasible, and assertion about the amount of the transit improvement program's infrastructure to be financed through bonds, sales tax surcharges, or other financing methods, provide a reasonable basis for Metro Nashville's Plan of Finance and are presented in accordance with criteria set forth in Sections 67-4-3201 through 67-4-3206, Tennessee Code Annotated, in all material respects."

"In our opinion, Kraft found that the TIP's reliance on federal funds is reasonable and financially feasible."

"The Chancellor viewed the declaratory judgment claim in the plaintiffs' complaint as a challenge to the validity of the ordinance. Indeed, paragraph 124 of the complaint seeks a 'declaratory judgment that Ordinance BL2024-427 is invalid.' The defendants claim that the plaintiffs do not have standing and that their claims are not ripe. These are 'viable defenses' to a declaratory judgment action. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008). The plaintiffs seek standing as taxpayers. '[T]axpayers suing the government are not required to allege a distinct injury as long as they '(1) allege[] a 'specific illegality in the expenditure of public funds' and (2) ha[ve] made a prior demand on the governmental entity asking it to correct the alleged illegality.'' *Case v. Wilmington Trust, N.A.*, 703 S.W.3d 274, 290 n.14 (quoting *Fannon v. City of LaFollette*, 329 S.W.3d418, 427 (Tenn. 2010) (quoting *Cobb v. Shelby Cnty. Bd. of Comm'rs*, 771 S.W.3d 124, 126 (Tenn. 1989)). The plaintiffs have alleged specific illegality in the expenditure of the IMPROVE Act tax funds, but there is nothing in the complaint or the record to show that a demand to correct the alleged illegality was made. Thus, the plaintiffs' fail to have standing under the declaratory judgment act."

2. Declaratory judgment or writ of mandamus - Cities with municipal courts that exercise general sessions jurisdiction are not required to provide funding for an assistant district attorney position for the general sessions cases – Mandamus writ was not issued as the plaintiff had a right to declaratory judgment - The general rule regarding the issuance

of a writ of mandamus is that the writ is not issued to control or coerce discretionary power by a board or officer but will lie to enforce the performance of an official duty and to compel the exercise of power - A court will generally not issue a writ of mandamus against a public official unless the proof shows that the official is clearly refusing to perform some nondiscretionary, ministerial act - A petitioner's ability to pursue a declaratory judgment meant that there was an alternative form of relief which provided the same relief sought by the writ of mandamus - The cities were entitled to a declaratory judgment stating that Tennessee Code Annotated section 8-7-103(1) does not require a municipality to provide prosecutorial personnel in order for the district attorney general's duty to prosecute cases to be triggered - Thus, there was another remedy available to the cities which was equally convenient, complete, beneficial, and effective as the writ of mandamus would have been - Therefore, despite our agreement with the trial court as to the interpretation of the statute, we must reverse its decision to grant the writ of mandamus

CITY OF MILAN, TENNESSEE, ET AL. v. FREDERICK H. AGEE
COURT OF APPEALS No. W2024-00200-COA-R3-CV Filed May 2, 2025

"This appeal arises from a dispute between two municipalities and the district attorney general responsible for prosecuting cases in the jurisdiction in which the municipalities lie. The district attorney general threatened to cease the prosecution of cases in the courts of the municipalities and stated that he would only continue to do so if the municipalities provided an additional assistant attorney general position for his office or funding for such a position. The district attorney general justifies his threat by citing Tennessee Code Annotated section 8-7-103(1), which he asserts requires municipalities to fund additional prosecutorial personnel in order for his duty to prosecute cases in municipal court to be triggered. The municipalities filed a complaint for writ of mandamus and later amended their claims to include a request for declaratory judgment. The trial court ordered that the municipalities were entitled to a declaratory judgment 'that they ha[d] provided 'sufficient personnel'' to the district attorney general and that he could not avoid the responsibility of prosecuting cases 'by invoking Tenn. Code Ann. § 8-7-103(6).' The trial court also determined that the district attorney general had a 'clear statutory mandate' and issued a 'peremptory writ of mandamus' compelling the district attorney general to comply with the statute. The district attorney general appeals. Finding that Tennessee Code Annotated section 8-7-103(1)'s 'personnel requirement' does not refer to prosecutorial personnel, we affirm in part and reverse in part."

"This action involves a conflict between Mr. Frederick H. Agee, District Attorney General for the 28th Judicial District of Tennessee and two of the municipalities within his district. As relevant to the office of the District Attorney General, the 28th Judicial District includes four circuit courts, three juvenile courts, one domestic violence court, four general sessions courts, and two municipal courts located in Trenton and Milan, Tennessee. This conflict involves the municipal courts in Trenton and Milan, and those cities are the appellees."

"General Agee was sworn in as District Attorney General for the 28th Judicial District on October 21, 2020. He was appointed to finish out the term of General Garry Brown, who retired. General Agee completed General Brown's term and then won an elected term in August 2022. At some point in the fall of 2021, General Agee began to inquire about certain changes to be made to the municipal court in Milan, Tennessee, as court days were running past the 'normal close of business hours.' General Agee, Milan Municipal Court Judge Collins Bonds, the Milan Police Chief, and other city officials attended a meeting and discussed the idea of Milan Municipal Court meeting weekly instead of bi-weekly. After this meeting, General Agee began to consider what his office was 'getting out of staffing this Municipal Court.' He reached out to other district attorney generals in Tennessee and the Tennessee Attorney General's office. Later, Tennessee Code Annotated section 8-7-103 and various Attorney General opinions were brought to his attention. He concluded that, pursuant to the statute, the municipalities

'should be staffing a prosecutor – at a minimum' and that he 'did not have to staff the court unless they provided a prosecutor.'"

"After coming to this conclusion, General Agee contacted the City of Milan to inform it of his conclusion. Various meetings and negotiations about the issue took place, and at some point, the City of Trenton was also informed of the conclusion. After eight or nine months of negotiation, no agreement had been reached. At that point, General Agee sent a letter to the City of Milan stating that, beginning on September 1, 2022, he would no longer be prosecuting cases in the city's municipal court, and at some point, he communicated with the City of Trenton to inform it of the same thing. In response, both the City of Milan and the City of Trenton ('the Cities') filed a 'complaint for writ of mandamus' on September 6, 2022, seeking to compel General Agee to continue prosecuting cases in their respective municipal courts."

"The trial court entered an Alternative Writ of Mandamus on September 6, 2022, directing General Agee to continue prosecuting criminal law violations in the cities' municipal courts 'pending further orders' and ordered him to show cause, if any, why he should not be required to do so. Subsequently, General Agee filed a motion to dismiss and a motion to revise or vacate the alternative writ. In that motion, General Agee claimed the writ issued by the trial court did not comply with Tennessee Code Annotated section 29-25-102(b) because it compelled him to continue prosecuting cases and to show cause as to why he should not be required to do so, rather than requiring him to perform one of those actions as an alternative to the other. This motion was discussed during a hearing on October 12, 2022, in which General Agee's counsel indicated that it was his intent to not appear in municipal court and then to show cause as to why he was not required to do so. This led to an issue regarding whether the trial court should appoint a pro tempore district attorney general until the dispute was resolved. However, during the proceedings on November 1, 2022, General Agee communicated his intent to continue to appear in the municipal courts at least through the end of that month, and perhaps for the rest of the litigation, depending on how the proceedings progressed. It appears that this issue became moot, as despite the litigation, General Agee's office never failed to appear in municipal court. Regardless, after these hearings, the writ of mandamus was revised by the trial court to provide General Agee with an alternative to performance by showing cause as to why he was not required to do so by filing a sworn answer and going to trial. Subsequently, the trial court ruled on General Agee's motion to dismiss, which it denied after the November 1, 2022, hearing by order dated November 2, 2022."

"On December 20, 2022, the cities filed a motion to amend the complaint. This amended complaint maintained that the cities were entitled to a writ of mandamus but added an additional claim for relief pursuant to the Declaratory Judgment Act. *See* Tenn. Code Ann. § 29-14-101 *et. seq*. The court granted the motion to amend by order dated January 18, 2023. General Agee filed an answer on March 21, 2023 which was followed by a motion for summary judgment filed on July 28, 2023. This motion was denied, and the parties proceeded to trial on September 20-21, 2023."

"General Agee was then called to testify. General Agee began by explaining that he was initially appointed to his position on October 12, 2020, and then was elected to a full term in August 2022. He stated that, when he began, he had six assistant district attorney generals on staff, as well as having been approved for a DUI prosecutor funded by a federal grant. He stated that, since then, he has had one additional position approved and has hired a person to fill this position pending bar passage. General Agee also explained that his office was largely funded by the General Assembly's appropriations, which are allocated by the district attorney general's conference, and some prosecutors and support staff are funded directly by counties and cities and in some cases the federal government. He stated that the cities of Milan and Trenton had never provided this type of funding during his term, and he had inquired to the conference as to them having done so in the past and was informed that they had not."

"General Agee was then asked about Tennessee Code Annotated section 16-2-506(28)(B), which states that the 28th judicial district is entitled to five assistant district attorney general positions. He stated

that '[the District Attorney General's] Conference doesn't follow [the statute] anymore.' General Agee then explained the allocation committee process in which the legislature allocates a certain number of positions to the conference as a whole, district attorney generals submit any staffing requests, and a committee of district attorney generals who have not made staffing requests determine how the available resources are to be allocated. General Agee also reaffirmed that he believed that Tennessee Code Annotated 8-7-103(1) requires the municipalities to provide prosecutorial personnel for their respective municipal courts."

"General Agee was later asked about the activities of his staff and Judge Bonds's testimony that his predecessors sent typically one assistant district attorney to municipal court. General Agee confirmed that he typically directs multiple assistant district attorney generals to be present in court rather than just one as his predecessor did, as he 'ha[s] a different policy than [his] predecessor.' He explained that his 'objective [was] to keep cases out of Circuit Court,' and he directs more personnel to attend lower courts to accomplish this goal and increase efficiency for his office and the courts."

"On cross-examination, General Agee maintained that the schedule for Milan City Court was becoming a problem during the fall of 2021. He explained court days were going past the normal close of business and that the issue needed to be addressed for the well-being of his employees. He stated that he initially reached out to Milan officials to discuss the possibility of municipal court meeting weekly. General Agee stated that, during one of those meetings, Judge Bonds indicated if court was going to meet more often, he would require a pay raise. General Agee indicated at this juncture he began to wonder what his office was 'getting out of staffing this municipal court that's created under a private act.' He stated that he reviewed Attorney General opinion number 01-120 (2001) and that his takeaway was that municipalities are required to provide personnel to the district attorney generals in order for the district attorney to have the duty to prosecute cases in their municipal courts. As to Attorney General opinion number 00-042 (2000), he stated that this opinion led him to believe that he 'did not have to staff the court unless they provided a prosecutor.' He also indicated that he later became aware of some of the statute's legislative history, in which a senator indicated the statute required a city to pay for a district attorney to prosecute in municipal court and this was consistent with his conclusion."

"General Agee stated that after reaching this conclusion and consulting with the district attorney general's conference and the Attorney General's office, he informed the cities of Milan and Trenton they needed to pay to provide him with prosecutorial personnel." …

"Next, Mr. Jerald Campbell testified. Mr. Campbell began working as an assistant district attorney general in the 28th Judicial District in November 2001 when General Brown was serving as district attorney general. He worked with General Brown for approximately 16 years and often prosecuted cases in Milan's municipal court. Mr. Campbell explained that he would be sent to court alone to handle the docket, unless he was conflicted out of a case, or some other issue had arisen. He also indicated that another assistant district attorney shared these responsibilities in Trenton's municipal court. Mr. Campbell left his employment during the summer of 2017 but was later rehired by General Brown on April 1, 2020, and was still working in the office when General Agee was appointed. Mr. Campbell claimed that, at first, his arrangement was the same as it was during his first interval working at the office. He would usually go to municipal court alone, but after the conflict between General Agee and the cities arose, General Agee began sending multiple prosecutors to municipal court. Mr. Campbell stated that he asked General Agee why he was sending more assistant district attorney generals to municipal court and claimed he responded by saying he was doing so as a 'show of force.'"

"Mr. Campbell also stated that he had formerly brought Tennessee Code Annotated section 8-7-103 to General Brown's attention as a method to obtain additional staffing, but General Brown stated it was not necessary at the time. Mr. Campbell then explained that at all times he was working cases in municipal court, he never had to stay late, and only one person would consistently stay late for court and that was caused only by her own inability to commit to a decision in cases rather than the size of

the docket. Mr. Campbell also stated that he believed one assistant district attorney's presence was sufficient to handle the respective municipal court dockets. He stated that General Agee's concern with the funding issue began when Judge Mueller decided not to run for a new term as the municipal court judge in Trenton." …

"The defendants first called Mr. Jody Pickens, who serves as the District Attorney General for the 26th Judicial District. General Pickens stated that he has 17 total assistant district attorney generals, one of which is funded by the City of Jackson. General Pickens was then asked about his understanding of Tennessee Code Annotated section 8-7-103(1). He responded by stating that he understood the statute to mean that district attorneys are not required to prosecute cases in municipal court unless they are provided sufficient personnel, including prosecutorial personnel. He stated that the arrangement was in place when he started working in the office as an assistant district attorney general in 1996. General Pickens explained that the situation was in line with his understanding of Tennessee Code Annotated section 8-7-103(1) despite the fact the arrangement predated the specific enactment of the section."

"Next, Mr. Danny Goodman, the District Attorney General for the 29th Judicial District, testified. General Goodman stated that he has seven assistant district attorney generals, and one of those positions is funded by the cities of Newbern and Dyersburg. This person handles cases in the municipal courts of both cities, which both have general sessions jurisdiction. He stated that he believes the statute means that a district attorney general does not have to prosecute in municipal court unless the cities provide personnel, including prosecutorial personnel."

"The defendants also submitted the deposition testimony of Mr. Steve Mulroy, the District Attorney General for the 30th Judicial District. General Mulroy explained that there are three municipal courts in his jurisdiction, each with general sessions jurisdiction, and each has 'their own suburban prosecutor.' He stated that these prosecutors are hired and paid by the respective city, and they swear the same oath as any regular prosecutor, and they are under his supervision. However, he did clarify that he had never been involved with hiring a person for these roles, as he had 'inherited' the present prosecutors and additionally, he did not know whether he could fire them. General Mulroy also stated that the arrangement was in place when he came into office and that he is unaware as to any written agreements binding the cities to this situation. He was also unaware as to how the arrangement began. However, General Mulroy did express his belief that Tennessee Code Annotated section 8-7-103(1) requires the provision of prosecutorial personnel by the municipality involved."

"The trial court entered its final order on January 12, 2024. The trial court first determined that the cities were entitled to a declaratory judgment 'that they ha[d] provided 'sufficient personnel' to Defendant' and the defendant could not avoid the responsibility of prosecuting cases 'by invoking Tenn. Code Ann. § 8-7-103(6) as set forth herein.' The trial court also determined that the defendant has a 'clear statutory mandate' and thus the cities were 'entitled to a peremptory writ of mandamus compelling Defendant to comply with the statute.' Finally, the trial court determined that none of the underlying motivations alleged by the cities were sufficiently proven as a basis for a ruling. General Agee filed this appeal."

"General Agee's primary argument as to why the trial court erred is that the trial court misinterpreted the language of Tennessee Code Annotated section 8-7-103(1). To reiterate, this subsection provides that:

> Each district attorney general:
>
> (1) Shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto, including prosecuting cases in a municipal court where the municipality provides *sufficient personnel* to the district attorney general for that purpose.

Tenn. Code Ann. § 8-7-103(1) (emphasis added). General Agee claims that the term 'sufficient personnel' refers to prosecutorial personnel. He further argues that this language serves as a condition precedent to his duty to prosecute cases in municipal court being triggered, and thus, unless the cities provide prosecutorial personnel or funding for prosecutorial personnel, he is not obligated to prosecute cases in their respective municipal courts. Conversely, the cities contend that the term 'sufficient personnel' refers to 'court personnel.' This would include personnel such as bailiffs and clerks, which are necessary for adjudicating cases which involve concurrent general sessions jurisdiction, mostly violations of state criminal laws, and thus, the statute does not require they provide 'prosecutorial personnel' as averred by General Agee. The resolution of this case is predicated solely on the interpretation of this statute, as there is no real dispute of fact in this case. Both parties have acknowledged that neither municipality has provided a prosecutor or money for a prosecutor to General Agee, and thus, the outcome will be determined based on whether the statute requires the provision of prosecutorial personnel or not."

"First, we consider the plain language of the statute. General Agee claims this 'settles this case in [his] favor' as '[a] reasonable reader would understand that the statute' only imposes a duty to prosecute cases in municipal court where 'prosecutorial personnel' is provided. General Agee claims that the text is 'unambiguous,' as the statute's language requires the municipality to 'provide[ ] sufficient personnel to the district attorney general.' Tenn. Code Ann. § 8-7-103. He contends that the only personnel who could fulfill this requirement is prosecutorial personnel, as prosecutors are the only persons able to prosecute cases in municipal court and thereby fulfill the statute's requirements. The cities take a different view of the text. They agree the statute requires personnel to be provided to the district attorney general but claim the personnel referenced refers to personnel that can be provided, such as clerks, deputy clerks, judges, bailiffs, and transportation personnel, all of which they already provide. They support this reading with the fact that the cities are not empowered to hire prosecutors. Accordingly, they argue, under General Agee's reading, it would be impossible for them to provide personnel, and thus, impossible for them to comply with the statute. On the face of the statute, both readings could be reasonable because, while the statute is clear that personnel must be provided, it does not define what type of personnel is satisfactory. Therefore, we cannot say that the statutory language is unambiguous as claimed by General Agee, and we must employ our other rules of statutory construction and interpretation to determine the meaning of the statute."

"Next, we will attempt to interpret the statute based on its place in the broader statutory scheme. The trial court seems to have relied on this factor most heavily when determining that the cities' reading of the statute was correct. General Agee asserts that his interpretation of the statute is consistent with the broader scheme because 'nothing in Title 16 cuts against the plain meaning of Tenn. Code Ann. § 8-7-103.' He further asserts that the trial court erred when it determined that his reading of the statute was inconsistent with the statutory scheme and contends that what he deems to be the plain language of the statute should prevail."

"The first statute to be considered is Tennessee Code Annotated section 16-18-311, which is a subsection of the 'Municipal Court Reform Act of 2004.' Tenn. Code Ann. §16-18-301 *et seq*. This particular section of the act prescribes certain steps to be takenwhen a municipality is determining whether to confer general sessions jurisdiction upon a municipal court. Tenn. Code Ann. § 16-18-311. The municipal and county legislative bodies are instructed to 'appoint a feasibility study committee.' Tenn. Code Ann. § 16-18-311(5). This committee is to consist of several officials from the municipal and county governments, as well as the district attorney general and the district public defender who serve the jurisdiction. *Id.* The feasibility committee is instructed to consider several factors when determining whether an additional court with general sessions jurisdiction is necessary for the jurisdiction. Tenn. Code Ann. § 16-18-311(6)(A)-(F). One of those factors is instructive as to the present situation. Factor (E) states the feasibility study committee is to consider '[t]he extent, if any, to which the proposed plan would unduly burden the existing staffs of the district attorney general or district public defender and the extent, *if any*, to which the plan proposes adequate funding for additional staff requirements.' Tenn. Code Ann. § 16-18-311(6)(E) (emphasis added)."

"The statute instructs the committees to address any undue burden of the district attorney general and the provision of any funding to alleviate that burden 'if any.' Tenn. Code Ann. § 16-18-311(6)(E). This 'if any' language indicates that there would be situations in which the addition of a municipal court with general sessions jurisdiction to a jurisdiction would not require additional funding or staff for the court to operate without unduly burdening the district attorney general's office. If, as General Agee suggests, a municipality were required to provide funding any time a municipal court was granted concurrent general sessions jurisdiction, then it would be unnecessary for the committee to consider 'if any' funding was necessary or 'if any' burden was being placed on the existing staff as it would be statutorily required to provide additional staffing and/or funding regardless of the burden placed on the office. This statute also helps to explain the relationships which exist among some of the other municipal courts and their respective jurisdictions as it indicates that a municipality is permitted to provide funding for additional staff requirements if the proposed plan would unduly burden the existing staff of the district attorney general. *Id.*"

"Thus, Tennessee Code Annotated section 16-18-311(6)(E), when read in conjunction with Tennessee Code Annotated section 8-7-103(1), indicates that the 'provides sufficient personnel' language contained in section 8-7-103(1) does not refer to 'prosecutorial personnel.' We determine this because Tennessee Code Annotated section 16-18-311(6)(E) must be given meaning. The General Assembly is presumed to know 'the state of the law on a subject under consideration at the time it acts [.]' *Smith v. Tennessee Nat'l Guard*, 551 S.W.3d 702, 710 (Tenn. 2018). Thus, in 2009, when the version of Tennessee Code Annotated section 16-18-311 was enacted which first included the requirement that the feasibility committees consider any undue burden on the district attorneys' staff and/or the need for additional staff funding, the General Assembly presumably knew that Tennessee Code Annotated section 8-7-103(1) already compelled the municipalities to 'provide[ ] sufficient personnel.' Therefore, the General Assembly must have had a goal to accomplish through enactment of section 16-18-311(6)(E) which was not accomplished by section 8-7-103(1). Accordingly, we must find a way to reconcile these statutes in a way which provides both with purpose and meaning. Frankly, this would be impossible using General Agee's reading of the statute. If section 8-7-103(1) required prosecutorial personnel to be provided whenever a municipal court is granted General Sessions jurisdiction, there would be no need for section 16-18-311(6)(E) to compel feasibility committees to consider whether funding for staff would be necessary, as the municipalities would already be compelled to provide funding for said staff. Conversely, these two sections can be read in harmony if section 8-7-103(1) refers to court personnel as averred by the Cities. It makes perfect sense that section 16-18-311(6)(E) would compel the municipalities to consider funding for prosecutorial staff if section 8-7-103(1) does not contemplate prosecutorial personnel but rather, court personnel. This distinction in the function of the proposed readings of Tennessee Code Annotated section 8-7-103(1) demonstrates that the Cities' reading is more consistent with the broader statutory scheme. The Cities' reading permits sections 8-7-103(1) and 16-18-311(6)(E) to function harmoniously whereas General Agee's reading of section 8-7-103(1) would render section 16-18-311(6)(E) virtually meaningless."

"Another portion of the statutory scheme which is instructive on our interpretation of Tennessee Code Annotated section 8-7-103(1) is Tennessee Code Annotated section 16-2-506. This subsection sets out the state's judicial districts and prescribes the number of assistant district attorney general positions and criminal investigator positions to which a district attorney general is entitled. *Id.*" …

"While it appears that the attorney general's conference does have a system in which it allocates assets to the specific jurisdictions on a yearly basis, this section clearly sets out a baseline entitlement for prosecutorial staffing. General Agee's testimony that he understood that this statute is no longer followed was not supported by any law and is contradicted by the fact this statute remains in effect and amendments are still being proposed by the legislature. *See* Tennessee S.B. 166, H.B.181, 114 G.A. (2025). The subsections above demonstrate that the legislature is aware of how to provide avenues for counties and municipalities to provide additional staff to their respective district attorney generals and can even condition the provision of some staff on the funding for a position coming from non-state sources. *See* Tenn. Code Ann. § 16-2-506(23)(B). This is further demonstrated in Tennessee Code Annotated section 16-2-508(a) which states that '[n]othing in this part shall be construed as affecting a

county's authority to provide staff and other resources to the district attorney general of the district in which the county is located.' This again shows that the relationships between the municipalities and municipal courts cited for support by General Agee are permitted by statute, but there is no indication they are required by statute. Had the legislature intended to condition the duty to prosecute cases in municipal court on the provision of additional staffing, it would have worded the statute accordingly."

"As it stands, the legislature has made it clear that funding can be provided from municipal and county governments to the district attorney general for the purpose of providing staff. *See* Tenn. Code Ann. § 16-18-311(6)(E); Tenn. Code Ann. § 16-2-506; Tenn. Code Ann. § 16-2-508. Further, the legislature is clearly aware of to how to condition staffing positions on funding from non-state sources. *See* Tenn. Code Ann. § 16-2-506(23)(B). Despite this, the legislature did not specify that the personnel to be provided was prosecutorial personnel, and likewise, the presence of such a requirement would be incongruous with the 'if any' language of Tennessee Code Annotated section 16-18-311(E). Accordingly, we agree with the Cities' reading of the statute."

"Next, General Agee avers that he has the 'ultimate discretion in the exercise of [the duty to prosecute].' He claims that due to this discretion, he cannot be compelled to prosecute cases in municipal court, regardless of the interpretation of Tennessee Code Annotated section 8-7-103(1). General Agee supports his claim based on Tennessee Code Annotated section 8-7-103(6), which provides that district attorney generals '[s]hall have discretion in the performance of duties . . . any other law notwithstanding.' He claims this 'notwithstanding clause' overrides the command set out in subsection (1) which provides that district attorney generals '[s]hall prosecute in the courts of the district all violations of the state criminal statutes.' Tenn. Code Ann. § 8-7-103(1). He contends that '[i]ndependent of any interpretation of subsection (1)' the trial court's ruling should be reversed because of the district attorney's 'unassailable discretion.' The Cities acknowledge that district attorney generals are granted a great deal of discretion but claim this discretion lies in the performance of their duties, rather than determining what those duties are."

"… General Agee's claim that he has the discretion to refuse to prosecute cases based upon the court in which they are filed rather than according to their respective qualities contradicts Tennessee Code Annotated section 8-7-103(1)'s language, which states that the district attorney general 'shall prosecute in the courts of the district all violations of the state criminal statutes and perform all prosecutorial functions attendant thereto.'"

"… We disagree with General Agee's contention that his discretion as a district attorney general permits him to refuse to discharge the constitutional and statutory *obligations* associated with his position as to do so would run contrary to the terms of both Tennessee Code Annotated section 8-7-103(1) and the terms of the Tennessee Constitution, which both place the *obligation* of prosecuting cases on the district attorney general. Tenn. Const. art. VI, § 5. *See Effler*, 614 S.W.3d at 689 (relying on Tenn. Const. Art. VI § 5 when it held that 'District Attorneys have the duty to 'attend and prosecute according to law' those cases falling with a judicial district's criminal jurisdiction.')"

"As for General Agee's reliance on the 'notwithstanding clause,' while we acknowledge that these types of clauses function to exempt certain sections of law from the effects of other sections of law, the legislature is presumed to give meaning to every word of a statute. *Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 85-86 (Tenn. 2018). It would be frankly confounding if the legislature were to place the words 'shall prosecute' in subsection (1) of this statute to then turn around and repeal this command in subsection (6) by function of a notwithstanding clause. This would also function to make the terms of subsection (1) functionally meaningless, and we are loathe to interpret a statute in such a way. *Falls v. Goins*, 673 S.W.3d 173, 180 (Tenn. 2023)."

"For these reasons, we are not convinced that the discretion granted to district attorney generals would permit the refusal to prosecute cases in the courts of this state."

"Next, in support of his reading of the statute, General Agee refers to the relationshipsbetween several other municipalities with municipal courts, and the district attorney generals in their respective jurisdictions. The evidence of these relationships includes the testimony of District Attorney Generals Jody Pickens of the 26th Judicial District, Danny Goodman of the 29th Judicial District, and Steve Mulroy of the 30th Judicial District. Each district attorney general testified that one or more municipalities within their respective districts pay to provide at least one prosecutor to operate in the municipal courts of those districts. However, none of the district attorney generals were able to testify that the arrangement came into existence because of enforcement of Tennessee Code Annotated section 8-7-103(1), despite their individual belief the statute required the arrangement. For example, General Pickens stated that the arrangement was in place when he joined the district attorney general's office as an assistant district attorney in 1996, which predated the enactment of Tennessee Code Annotated section 8-7-103 in 1998. Likewise, General Mulroy stated that he was unaware how the relationship between his office and the various 'suburban' prosecutors came into effect and whether he would have the authority to hire and fire those people. Further, the simple fact that certain municipalities are engaging in an activity does not mean that the activity is mandated by statute. While it appears that these situations are mutually beneficial for the district attorney generals and municipalities involved, there is no indication the relationships commenced because Tennessee Code Annotated section 8-7-103(1) required the provision of prosecutorial personnel. Accordingly, this evidence does not weigh on our interpretation of Tennessee Code Annotated section 8-7-103(1)."

"Finally, we consider the legislative history of the statute at issue. General Ageeclaims that this history supports his reading of the statute and relies on some statements from one of the sponsors of the bill that amended Tennessee Code Annotated section 8-7-103(1) to include the disputed language. During a meeting of the senate judiciary committee, Senator Robert Rochelle, the bill's senate sponsor, was asked the following question: 'so if [the district attorneys] feel like they don't have enough staff to prosecute they just stop prosecuting in city court?' Senator Rochelle responded, '[y]eah basically, I think that's it.' He went on to say, 'in other words, the city has to pay if they want the district attorney to supply a prosecutor for the city court.' Conversely, the House Sponsor of the Bill, Representative Jere Hargrove, appears to have never indicated that the bill intended to require municipalities to pay their district attorney generals. Four recordings of Representative Hargrove were contained in the record and in each of them, he described the bill was intended to consolidate and simplify the statutory duties placed on district attorney generals but did not state the amended language was intended to compel municipalities to pay for district attorney generals to prosecute cases in their municipal courts."

"… Here, we cannot predicate our interpretation of this statute on the provided legislative history. Senator Rochelle made the comments relied on by the District Attorney General in response to a question posed, rather than in an opening statement or initial description of the bill. Representative Hargrove was never asked this question or a similar question. Therefore, his thoughts on whether this was one of the bill's functions are unknown. Regardless, the fact that neither included a statement that the bill was intended to make municipalities 'pay the DA' in their explanation of the bill's purpose and function indicates to us that this was not the primary goal of the bill. This is further supported by the qualifying language used by Senator Rochelle in the form of 'I think' when initially answering the question posed to him regarding whether the bill would require municipalities to pay District Attorney Generals. Senator Rochelle's comments would certainly be more convincing if the other evidence related to the statute also supported General Agee's interpretation. However, as explained *supra*, the evidence concerning Tennessee Code Annotated 8-7-103(1)'s place in the broader statutory scheme is not supportive of this view and is candidly much more convincing. Therefore, we find the legislative history to be unconvincing in this matter."

"General Agee also claims that the trial court erred when it issued a writ of mandamus compelling him to prosecute cases in the cities' respective municipal courts. He claims that the writ was inappropriate as there was no clear right to be enforced by the writ. He also argues that the decision to prosecute is a discretionary duty rather than a mandatory one and thus is not appropriate for compulsion by a writ of mandamus."

"The general rule regarding the issuance of a writ of mandamus is that the writ is not issued to control or coerce discretionary power by a board or officer but will lie to enforce the performance of an official duty and to compel the exercise of power.' *Tusant v. City of Memphis*, 56 S.W.3d 10, 18 (Tenn. Ct. App. 2001). A court will generally 'not issue a writ of mandamus against a public official unless the proof shows that the official is clearly refusing to perform some nondiscretionary, ministerial act.' *Avery v. Blackburn*, No. M2021-01482-COA-R3-CV, 2022 WL 3905089, at *5 (Tenn. Ct. App. Aug. 31, 2022). Usually, a writ of mandamus is 'addressed to ministerial acts' but one 'may be addressed to discretionary acts when the act is done in an 'arbitrary and oppressive manner' or where there has been a 'plainly palpable' abuse of discretion.' *Meighan v. US Sprint Commc'ns Co.*, 942 S.W.2d 476, 479 (Tenn. 1997) (quoting *Peerless Const. Co. v. Bass*, 14 S.W.2d 732, 733 (Tenn. 1929))."

"However, because it is such an extraordinary remedy, mandamus will only be issued where the petitioner does not have 'a legal remedy that is equally convenient, complete, beneficial, and effective, but the remedy which would preclude mandamus must be equally as convenient, complete, beneficial, and effective as mandamus, and must also be sufficiently speedy to prevent material injury.' *Meighan*, 942 S.W.2d at 479 (citing 52 Am. Jur. 2d Mandamus §§ 46, 49 (1970)). We have previously found that a petitioner's ability to pursue a declaratory judgment meant that there was an alternative form of relief which provided the same relief sought by the writ of mandamus. *State ex rel. Aina-Labinjo v. Metro. Nashville Bd. of Pub. Educ.*, No. M2012-01176-COA-R3-CV, 2013 WL 2492653, at *6 (Tenn. Ct. App. June 6, 2013) (finding despite the fact the chancery court had jurisdiction to issue a writ of mandamus, that the cause was appropriate for remand 'for an evidentiary hearing and a declaration pursuant to the provisions of [the declaratory judgment act].'); *see Brewer v. Metro. Gov't Of Nashville and Davidson Cnty.*, No. M2008-02307-COA-R3-CV, 2009 WL 4263680, at *7 n.10 (Tenn. Ct. App. Nov. 30, 2009) (stating that 'if a declaratory judgment is deemed to be equally convenient, complete, beneficial, effective, and sufficiently speedy, then mandamus would not be appropriate')."

"As stated above, the cities were entitled to a declaratory judgment stating that Tennessee Code Annotated section 8-7-103(1) does not require a municipality to provide prosecutorial personnel in order for the district attorney general's duty to prosecute cases to be triggered. Thus, there was another remedy available to the cities which was equally convenient, complete, beneficial, and effective as the writ of mandamus would have been. *Meighan*, 942 S.W.2d at 479. Therefore, despite our agreement with the trial court as to the interpretation of the statute, we must reverse its decision to grant the writ of mandamus."

ELECTIONS

1. Improve Act referendum – Under the election contest statutes, there are two grounds upon which an election contest may be based: (1) a claim that the election was valid, but that the outcome was not properly determined; and (2) a claim that the election itself was null and void - Nothing in the IMPROVE Act defines connectivity or sets parameters on the location of connected non-mass transit improvements, and in light of the discretion given by the act in this area, the court found that the proposal approved by the electorate is fully consistent with the IMPROVE Act, with one exception - the purchase of land for housing development and parks – The court failed to see how the purchase of property for housing development and parks is consistent with Tenn. Code Ann. § 67-4-3201(3) - Property purchased with the surcharge must be used for the public transit system as defined in Tenn. Code Ann. § 67-4-3201(3), and yet the purchase of land for housing development and parks is not a purchase for the transit system, nor does it provide connectivity for the transportation facility to any other non-mass transit system transportation infrastructure, including, but not limited to, interstates, highways, roads, streets, alleys, and sidewalks.

COMMITTEE TO STOP AN UNFAIR TAX ET AL. v. FREDDIE O'ONNELL ET AL.
COURT OF APPEALS No. M2025-00072-COA-R3-CV Filed April 15, 2025

See DECLARATORY JUDGMENT - Taxpayers suing the government are not required to allege a distinct injury as long as they (1) allege a specific illegality in the expenditure of public funds and (2) have made a prior demand on the governmental entity asking it to correct the alleged illegality - Plaintiffs have alleged specific illegality in the expenditure of the IMPROVE Act tax funds, but there is nothing in the complaint or the record to show that a demand to correct the alleged illegality was made, so plaintiffs' fail to have standing under the declaratory judgment act, page 163.

EMINENT DOMAIN

1. Order of possession does not require city to construct of replacement parking lot and there was no private use of the property – The court found that the Order of Possession did not require the City to construct replacement parking - Given that there is no dispute concerning the public purpose of the greenway project, we affirm the trial court's finding that the City's taking was for a public purpose

CITY OF PIGEON FORGE, TENNESSEE v. RLR INVESTMENTS, LLC
COURT OF APPEALS No. E2023-01802-COA-R3-CV Filed April 30, 2025

"In this condemnation action, the trial court entered an order of possession granting to the petitioner city two greenway easements and two construction easements over two tracts of land owned by the respondent corporation. In the order of possession, the court found that the city's taking was for the public purpose of the city's greenway project. The corporation filed two successive motions for summary judgment, claiming that because the taking was partially for a private purpose, it violated the Fifth Amendment Takings Clause of the United States Constitution and Article I, Section 21 of the Tennessee Constitution. The corporation averred that the order of possession required the city to construct parking spaces on one of the corporation's tracts to replace parking spaces taken from the other tract and that this would yield only a private benefit. The corporation also asserted that the city had abandoned its taking by failing to construct the replacement parking despite the completion of the greenway. The trial court denied both motions for summary judgment, determining that the order of possession had not required the city to build replacement parking and that no abandonment had occurred. Following a jury trial regarding compensation, the trial court entered a judgment approving the jury's monetary award to the corporation with prejudgment interest. The corporation has appealed. Discerning no reversible error, we affirm. We deny the corporation's request for an award of costs and attorney's fees on appeal."

"The petitioner, the City of Pigeon Forge ('the City'), filed a petition for condemnation on June 4, 2015, naming RLR Investments, LLC ('RLR'), and The Provident Bank as respondents. Relying on Tennessee's eminent domain statutory scheme, the City sought 'to acquire certain property rights for greenway easement' along the Little Pigeon River and asserted that the property rights sought were for a public purpose. The petition involved two tracts of improved real property, both owned by RLR in fee simple. According to undisputed facts subsequently filed by RLR, the first tract is 'a hotel property used as a private resort for RLR's employees' ('the Hotel Property'), and the second tract 'is adjacent to the Hotel Property and contains a duplex, parking area, and open green space' ('the Duplex Property'). The City requested a permanent greenway easement traversing each tract, comprised of 2,138 square feet over the Hotel Property and 1,870 square feet over the Duplex Property. The City also requested a temporary construction easement consisting of 1,786 square feet over the Hotel Property and a temporary construction easement consisting of 5,210 square feet over the Duplex Property. The City stated that it had determined the amount to which the respondents would be entitled as compensation to be $131,450.00 and had deposited this amount with the trial court clerk."

"On July 2, 2015, RLR filed an 'Objection to the Right to Take and Answer,' asserting that Tennessee's eminent domain statutory scheme did not authorize the City to condemn the property sought for use as

a greenway. RLR also maintained that the amount deposited by the City with the court clerk was inadequate to compensate for the property if the petition were granted. The City subsequently amended its condemnation petition to add further statutory citations concerning eminent domain."

"Regarding the procedure involved in an eminent domain action, Tennessee Code Annotated § 29-17-104(a)(2)(B) (West July 9, 2012, to current) provides that if the right to take is challenged in a timely filed answer, 'the court shall promptly determine, as a matter of law, whether the condemner has the right to take the property or property rights sought to be condemned.' The statute further provides: 'If the court determines that the condemner has the right to take, the condemner shall thereupon have the right to take possession thereof.' *Id.* The statute also provides for bifurcated proceedings, culminating in a trial addressing damages after the issue of possession has been determined. *See* Tenn. Code Ann. § 29-17-104(b) (West July 9, 2012, to current) ('When a condemner has the right to take possession of property or property rights, if necessary, the court shall issue a writ of possession to the sheriff of the county to put the condemner in possession. The writ may be issued prior to a trial on the damages.')."

"Following an evidentiary hearing, the trial court entered an 'Order of Possession' in favor of the City on May 31, 2016, granting the requested easements. Diagrams of the tracts with the respective easements noted were attached as collective 'Exhibit A' to the Order of Possession. The court also incorporated a transcript of its findings made from the bench, wherein the court stated:

> The Court is satisfied that the city has carried its burden of proof that the Greenway project is for public purpose and convenience to the public, that it['s] [a] proper exercise of the eminent domain powers of the city; and the Court will grant the city possession.
>
> The princip[al] arguments revolve around certifications. The city says it has all applicable certifications in place. Any project, this one in particular because there are regulations that must be complied with, must be completed and finished in accordance with all applicable state, Federal regulations and the city's own ordinances. That's the city's burden. That's the city's responsibility as it would [be] if the city were simply building a sidewalk. The same principles apply, and it is the city's responsibility to carry out all its activity in accordance with those regulations. That does not, in the Court's opinion, have anything to do with the city's right to take and proceed.
>
> The Court has heard and I don't know the specific numbers, but a large number of tracts have already been taken on either end, either side of Tracts 4 and 5 and the Greenway's construction has been commenced on those properties. Th[ese are] the last remaining tracts within this project. In order to complete the project, which the Court finds is for a public purpose, the city needs these two tracts.

Much of the arguments raised, particularly with respect to the parking lots, have to do with issues perhaps of damages, the amount of compensation."

"The City recorded the Order of Possession with the Sevier County Register of Deeds on May 31, 2016."

"On May 30, 2018, RLR filed a motion to enforce the terms of the Order of Possession. RLR asserted that in accordance with the Order of Possession, the City had demolished RLR's six parking spaces on the Hotel Property to make way for the greenway. However, the City had not commenced construction of replacement parking spaces on the Duplex Property, which RLR claimed was required by the temporary construction easement granted over that tract in the Order of Possession. RLR alleged that the City was disregarding this portion of the order. RLR requested that the trial court 'order the City to comply with the terms of the Order of Possession, including but not limited to, by constructing the replacement parking depicted in Exhibit A to the Order of Possession on the Duplex Property.'"

"The City filed a response, denying that it had abandoned any portion of the property rights granted to it by the Order of Possession. The City alleged that RLR had 'repeatedly stated that [the City] was substantially damaging its second tract of property by placing parking on it.' The City further alleged that RLR had taken the position that the City had no right to construct the parking on the Duplex Property. The City stated that it had 'determined that it would not construct the parking on [RLR's] adjoining lot because of the significant and continuing concerns raised by [RLR].' The City concomitantly filed a motion requesting that the trial court declare the parties' rights and responsibilities under the Order of Possession and 'close[] the temporary construction easement originally granted for construction of the parking at issue.' RLR filed a response, asserting that the City was attempting to unilaterally modify the Order of Possession."

"Following a hearing conducted in July 2018, the trial court entered an order on September 4, 2018, finding that the greenway project had been completed, declaring that the 'temporary construction easement at issue [was] terminated,' and determining that there had been 'no abandonment of the project through the City not constructing replacement parking for the six (6) parking spaces taken from one of the lots owned by [RLR].' The court further determined:

> [T]he Court does not find that [the City] was specifically ordered to construct the parking at issue on property owned by [RLR], and the Court further does not find that to be for a public purpose. The Court finds that the public purpose in the taking at issue was construction of the Greenway itself."

"On March 11, 2019, RLR filed a motion for summary judgment, alleging that (1) the City had partially abandoned its condemnation action and (2) the condemnation petition was 'improperly based, in part, on taking of property not necessary nor for a proper public purpose.' RLR also requested costs and fees pursuant to Tennessee Code Annotated § 29- 17-912(b)(2)(B). The City filed a response on May 10, 2019, contending that RLR had filed its summary judgment motion improperly because the trial court had already ruled on the issues raised by RLR in the court's Order of Possession and in its September 2018 order. The City maintained that the proper vehicle for RLR to contest the Order of Possession had been the Rule 59.04 motion previously filed but that RLR had voluntarily withdrawn that motion. The City requested sanctions against RLR for the filing of a 'baseless' summary judgment motion. RLR filed a reply, asserting that new facts had arisen since entry of the Order of Possession because during the July 2018 hearing, the City had admitted that the temporary construction easements were not for a public purpose because the replacement parking would have privately benefited RLR."

"On June 17, 2019, the trial court conducted a hearing concerning RLR's summary judgment motion, as well as various discovery and pretrial motions. The court entered an order on October 15, 2019, and, as pertinent here, denied RLR's summary judgment motion. The court found that RLR's 'request to dismiss [the City's] action because one of the temporary construction easements taken by [the City] was not for a public purpose' 'would yield a draconian result.' The court attached the entire hearing transcript to its order and incorporated its findings of fact and conclusions of law rendered from the bench." …

"After various proceedings related to the upcoming trial regarding damages compensation, RLR filed a 'Renewed Motion for Summary Judgment' on April 29, 2022."

"The City filed a response opposing RLR's renewed summary judgment motion on June 22, 2022, arguing that RLR was seeking 'judgment as a matter of law on the same legal grounds and with the same justifications that were rejected on at least three previous occasions.'" …

"On June 29, 2022, the trial court conducted a hearing on RLR's renewed motion for summary judgment, as well as pretrial motions concerning the damages trial. In an order entered on July 26, 2022, the court denied RLR's renewed summary judgment motion upon determining that 'the property interests sought in the Petition for Condemnation were for a proper public purpose' and that the City had 'not abandoned any of the interests it was granted in the May 31, 2016 Order of Possession.' The

court stated that it was relying on its findings in the Order of Possession, the September 2018 order terminating the construction easement over the Duplex Property, and the October 2019 order denying RLR's initial summary judgment motion."

"Following various pretrial evidentiary matters, the trial court tried the compensation portion of the case before a jury on November 13 to 16, 2023. The trial court entered an 'Order of Judgment' on December 6, 2023, approving the jury's verdict regarding compensation due to RLR. The court detailed the judgment as follows:

> The jury gave a judgment in the amount of $276,931.62 finding just compensation for the fair cash value of the land taken to be $131,511.87 and incidental damages due to the landowner to be $145,419.75. The jury credited $0.00 for special benefits. Further, pursuant to the terms of Tenn. Code Ann. § 29-17-913, [RLR] is awarded prejudgment interest at the rate of 5.5% on the amount of the judgment in excess of that on deposit with the Clerk of Court equal to $59,978.29 through November 27, 2023 and an additional $21.92 per day between November 27, 2023 and the date of entry of this Order."

"RLR timely appealed, raising issues concerning the trial court's entry of the Order of Possession and denial of RLR's summary judgment motions. Neither party has raised an issue regarding the jury verdict and compensation awarded to RLR. On January 5, 2024, the trial court entered an agreed order directing the trial court clerk to invest the funds deposited with the clerk in an interest-bearing account. The court noted that the City had deposited a total judgment amount of $337,107.19, which included the interest awarded."

"In this bifurcated action, the issues raised on appeal concern the trial court's finding that the City was properly exercising the power of eminent domain and the trial court's denial of RLR's motions for summary judgment. Whether the power of eminent domain has been exercised properly is a question of law, which we review 'de novo with no presumption of correctness afforded the trial court's conclusions.' *Metro. Gov't of Nashville & Davidson Cnty. v. Allen Family Trust*, No. M2008-00886-COA-R3-CV, 2009 WL 837731, at *4 (Tenn. Ct. App. Mar. 27, 2009) (citing *Pickler v. Parr*, 138 S.W.3d 210, 213 (Tenn. Ct. App. 2003))."

"The City asserts that on appeal, RLR 'specifically challenges only the Trial Court's entry of the Order of Possession and denial of its April 29, 2022 Motion for Summary Judgment.' … The City further asserts that RLR made the 'curious choice' not to challenge the September 2018 order wherein the trial court denied RLR's motion to enforce the terms of the Order of Possession, declared the construction easement over the Duplex Property to be terminated, and found that no abandonment had been committed by the City. Upon careful review, we disagree with the City's characterization of RLR's challenge to the trial court's rulings."

"To delineate the pertinent procedural history, the trial court entered the May 2016 Order of Possession upon determining that the greenway project was for a public purpose and that it constituted a proper exercise of the City's eminent domain authority. RLR timely filed a Rule 59.04 motion to alter or amend, which was subsequently withdrawn by agreement of the parties. In May 2018, RLR filed its motion to enforce the Order of Possession, arguing for the first time that the City had abandoned the construction easement over the Duplex Property, and thus had partially abandoned the condemnation proceeding, by failing to construct replacement parking. In its September 2018 order, the trial court denied RLR's motion to enforce upon determining that (1) the Order of Possession had not required the construction of replacement parking, (2) the greenway project had been completed, and (3) the City had not abandoned its condemnation proceedings. The court declared the construction easement at issue to be terminated."

"RLR filed its first motion for summary judgment in March 2019 on the bases of partial abandonment and an improper private purpose for a portion of the condemnation action. In its October 2019 order,

the trial court denied RLR's first summary judgment motion, emphasizing its previous finding that the greenway project had been completed. RLR filed its renewed motion for summary judgment in April 2022, arguing the same bases for summary judgment but attaching new deposition testimonies that had been given by City officials. In July 2022, the court entered its order denying the renewed summary judgment motion, reiterating its determinations that the property interests sought by the City were for 'a proper public purpose' and that no abandonment had occurred."

"As an additional procedural argument, the City contends that although the Order of Possession was an interlocutory order, it 'constitute[d] a final decision on the merits of the first stage of the bifurcated proceedings' and should have been challenged via a Tennessee Rule of Civil Procedure 59.04 motion to alter or amend within thirty days of the order's entry. While not overtly arguing that RLR's motions for summary judgment were untimely challenges to the Order of Possession, the City does argue that this Court should treat the renewed motion for summary judgment as a motion to alter or amend and thus review the trial court's decision to deny the motion under an abuse of discretion standard. *See Stricklin v. Stricklin*, 490 S.W.3d 8, 11 (Tenn. Ct. App. 2015) ('On appeal, we review a trial court's decision regarding a motion to alter or amend a judgment under an abuse of discretion standard.')."

"RLR responds that '[w]hile a Rule 59.04 motion may be used to challenge an Order of Possession, it is not the exclusive manner in which a party can challenge the trial court's judgment.' RLR posits that a possession order could be challenged at any point prior to entry of the final order in a condemnation proceeding. We agree with RLR on this point. This Court has determined that despite the bifurcated nature of condemnation proceedings, an order of possession may not be declared a final order under Tennessee Rule of Civil Procedure 54.02 because a possession order does not 'dispose of an entire claim or party as required by that rule.' *See Town of Collierville v. Norfolk S. Ry. Co.*, 1 S.W.3d 68, 70 (Tenn. Ct. App. 1998)." …

"In support of its argument that the trial court's denial of RLR's renewed summary judgment motion should be treated as a denial of a Rule 59.04 motion to alter or amend, the City relies on this Court's decision in *Metro. Dev. & Hous. Agency v. Eaton*, 216 S.W.3d 327 (Tenn. Ct. App. 2006). In *Eaton*, the defendant landowners attempted to perfect an interlocutory appeal and then an extraordinary appeal from the trial court's possession order that had vested title over the landowners' property to the plaintiff agency via eminent domain. *Eaton*, 216 S.W.3d at 334. The trial court denied the landowners' application for an interlocutory appeal, filed pursuant to Tennessee Rule of Appellate Procedure 9, and this Court denied the landowners' application for an extraordinary appeal, filed pursuant to Tennessee Rule of Appellate Procedure 10. *Id.* Upon the agency's subsequent motion to alter or amend, the trial court amended the possession order to add provisions based on redevelopment plan objectives that had been submitted by the agency and that the landowners objected to as infringing on their property development rights. *Id.* at 334-35. After the trial court had entered a final judgment approving a jury verdict awarding damages to the landowners, and approximately four years after entry of the original possession order, the landowners filed a Rule 59.04 motion to alter or amend the trial court's judgment, challenging both the original and the amended possession orders. *Id.* at 329-31. Upon the trial court's denial of the landowners' Rule 59.04 motion, the landowners appealed to this Court. *Id.* at 329. Determining that in the Rule 59.04 motion, the landowners had 'simply sought to relitigate matters that had already been adjudicated,' this Court concluded that the trial court had not abused its discretion by denying the motion. *Id.* at 343."

"Here, the City states that the *Eaton* Court 'analyzed [the landowners'] motions to reconsider prior rulings under Tenn. R. Civ. P. 59' with an abuse of discretion standard. The City urges that this Court should conclude that any motion for summary judgment filed by RLR 'after adjudication of the Order of Possession was, in substance, a motion to alter or amend subject to the standards of Rule 59.04.' We disagree. We find *Eaton* to be procedurally distinguishable from the instant action. The *Eaton* landowners appealed from the trial court's denial of a Rule 59.04 motion, necessitating appellate review under the discretionary standard provided by that rule. *See Eaton*, 216 S.W.3d at 343. Here, the trial court treated RLR's 'renewed' summary judgment motion as a motion for summary judgment and not as a motion to alter or amend the Order of Possession."

"In a pretrial hearing conducted on September 5, 2023, the City's counsel announced that two of the City's motions *in limine* were unopposed, stating the following:

> The first two basically was just to confine at the trial the issue of valuation. There will be no proof on public use or public purpose, no proof on abandonment. The City understands RLR has asserted those arguments. Those are preserved for appeal. We expect those to be litigated after trial.

RLR's counsel agreed that the issues of public use and abandonment would not be presented at trial. The court then stated:

> I've read the motions and the responses. That makes sense. I mean, I ruled on those. That's for me, not the jury. And they absolutely have the right to raise that on appeal if it goes that far. But I don't think it's appropriate for jury trial. But their rights need preserved. So we're all in one accord on that.

Counsel for both parties agreed with no objection voiced by the City concerning RLR's right to appeal the trial court's prior rulings on the issues of public use and abandonment."

"The culmination of those prior rulings was the trial court's denial of RLR's renewed motion for summary judgment, which included the incorporation of the court's findings in the Order of Possession, the order denying RLR's motion to enforce, and the order denying RLR's first summary judgment motion. The renewed summary judgment motion was based in part on facts not in evidence at the time of the condemnation hearing, namely the City's decision not to construct replacement parking and the deposition testimonies given by Ms. Teaster and Mr. Goodwin. We discern no error in the trial court's treatment of the renewed motion as one for summary judgment. Accordingly, we will review the trial court's denial of the motion under the summary judgment standard of review. The City is not entitled to relief on this issue."

"Regarding appellate review of the Order of Possession, the City contends that because RLR has failed to provide a full transcript of the April 21, 2016 evidentiary hearing concerning the condemnation petition, this Court must presume that the trial court's findings in the Order of Possession were correct. In its reply brief, RLR counters that the transcript attached by the trial court to the Order of Possession was sufficient for appellate review. However, the excerpt from the hearing transcript attached to the Order of Possession is limited to the trial court's findings of fact and conclusions of law. No transcript of the evidentiary portion of the April 2016 hearing is in the record."

"In its designation of the record on appeal, RLR included transcripts of several hearings, including the hearings addressing RLR's two motions for summary judgment. However, RLR did not designate the transcript of the April 2016 hearing for inclusion in the record. In its subsequent designation of additional materials to be included, the City also did not designate the April 2016 hearing transcript. The transcript attached to and incorporated into the Order of Possession begins with the trial court's findings of fact, specifically with the following statement: 'The Court's listened very carefully today and previously when we had some arguments on this.' The record contains no transcript or statement of the evidence describing what the court heard before making its findings of fact. The trial court stated in the Order of Possession that it had reached its decision upon consideration of the City's condemnation petition and RLR's objection and answer, as well as 'testimony of witnesses, statements of counsel, and the entire record.' In its ruling, the trial court summarized the arguments presented during the hearing as related to certifications for the greenway project, construction of the greenway project that had begun on other properties, and damages for the property proposed to be taken from RLR."

"Without a transcript or statement of the evidence describing the testimonies and arguments, we must presume that the record of the evidentiary portion of the hearing, had it been fully preserved, would

have supported the trial court's factual findings. *See Sherrod*, 849 S.W.2d at 783. However, because the proper exercise of the power of eminent domain is a matter of law, we will review the trial court's conclusions of law in the Order of Possession *de novo* with no presumption of correctness. *See Allen Family Trust*, 2009 WL 837731, at *4."

"RLR advances the position that the temporary construction easement across the Duplex Property was unconstitutional because the City had planned to construct replacement parking that would have been for the private benefit of RLR as the owner of the Motel Property. RLR urges that because a portion of the City's taking was purportedly for a private purpose, this Court should reverse the entire Order of Possession as unconstitutional. The City counters that the trial court properly found that the Order of Possession did not require the City to build replacement parking on the Duplex Property and that because the greenway project was completed by July 2018, the construction easement traversing the Duplex Property had terminated with the greenway's completion. The City also postulates that if this Court were to find that the Order of Possession included a plan for replacement parking, such a private benefit to RLR would have been incidental to the overarching public purpose of the greenway project. Upon careful review, we agree with the trial court's finding that the Order of Possession did not require the City to build replacement parking on the Duplex Property. Moreover, we conclude that the Order of Possession did not violate the United States Constitution or Tennessee Constitution because it was entered for the public purpose of the greenway project."

"Tennessee Code Annotated § 29-17-102(1) (West May 28, 2024, to current) provides:

> 'Eminent domain' means the authority conferred upon the government, and those entities to whom the government delegates such authority, to condemn and take, in whole or in part, the private property of another, so long as the property is taken for a legitimate public use in accordance with the fifth and fourteenth amendments to the United States Constitution, the Constitution of Tennessee, Art. I, § 21, and chapter 863 of the Public Acts of 2006[.]

The 'Takings Clause' of the Fifth Amendment to the United States Constitution establishes that private property shall not 'be taken for public use, without just compensation.' It is made applicable to the states by the Fourteenth Amendment. *See Kelo v. City of New London, Conn.*, 545 U.S. 469, 472 n.1 (2005). Article I, § 21 of the Tennessee Constitution provides that 'no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.'"

"The version of Tennessee Code Annotated § 29-17-102(2) (West July 9, 2012, to May 17, 2017) in effect when the condemnation petition was filed provided, in relevant part, the following definition of 'public use':

> 'Public use' shall not include either private use or benefit, or the indirect public benefits resulting from private economic development and private commercial enterprise, including increased tax revenue and increased employment opportunity, except as follows:
>
> (A) The acquisition of any interest in land necessary for a road, highway, bridge, or other structure, facility, or project used for public transportation;
>
> * * *
>
> (D) Private use that is merely incidental to a public use, so long as no land is condemned or taken primarily for the purpose of conveying or permitting the incidental private use.

As this Court has explained:

> Tennessee courts have long held that 'the power of eminent domain is against common right and all grants of such power are to be construed strictly against the condemner and liberally in favor of the rights of property.' *Vinson v. Nashville, Chattanooga & St. Louis Ry.*, 45 Tenn. App. 161, 321 S.W.2d 841, 844 (1959). 'Of course the power of eminent domain is to be strictly construed and the procedure prescribed by statute must be followed.' *Id.* at 844. '[T]he courts have the right and duty to determine the existence of authority to take, the existence of legitimate public use and related questions.' *Duck River Elec. Membership Corp. v. City of Manchester*, 529 S.W.2d 202, 204 (Tenn. 1975). In *Pickler v. Parr*, 138 S.W.3d 210, 213 (Tenn. Ct. App. 2003), *perm. app. denied* (Tenn. March 8, 2004), this Court explained 'the well-traveled analysis of the government's right to take.' The *Pickler* Court employed a multi-step test to determine whether a taking is appropriate. *Id.* at 213. The first step is to determine whether the condemning authority has the right to take. *Id.* The second step in the analysis is to determine whether the taking is for public or private use. *Id.* If these questions are resolved in favor of the condemning authority, the authority's determination as to the need for the property is 'conclusive upon the courts' unless the opponent to the taking establishes 'a clear and palpable abuse of power, or fraudulent, arbitrary or capricious action.' *Id.* (quoting *Maryville v. Edmondson*, 931 S.W.2d 932, 935 (Tenn. Ct. App. 1996), *perm. app. denied* (Tenn. July 8, 1996)). Although the determination of whether private property is being taken for a public use is a judicial question, ''all other incidents of the taking are political questions, for the determination of the sovereign, and not judicial questions, for the determination of the courts.'' *City of Knoxville v. Heth*, 186 Tenn. 321, 210 S.W.2d 326, 331 (1948) (quoting *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 148 S.W. 662, 665 (1912)). Deciding which property shall be taken, ''determining its suitableness for the use to which it is proposed . . . as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take.'' *Id.* A municipality's determination of 'the necessity for the taking is not a question for resolution by the judiciary and, absent a clear and palpable abuse of power, or fraudulent, arbitrary or capricious action, it is conclusive upon the courts.' *Duck River*, 529 S.W.2d at 204. In the context of eminent domain, a taking is arbitrary and capricious if it 'can be characterized as a 'willful and unreasonable action without consideration or in disregard of facts or law or without determining principle.'' *City of Chattanooga v. Classic Refinery*, No. 03A01-9712-CV-00552, 1998 WL 881862, at *6 (Tenn. Ct. App. Dec. 17, 1998) (quoting *Black's Law Dictionary* 105 (6th ed. 1990)).

City of Memphis v. Tandy J. Gilliland Family, LLC., 391 S.W.3d 60, 67-68 (Tenn. Ct. App. 2012)."

"In this case, RLR does not question the City's authority to take private property for a public purpose through its ordinance powers. *See* Tenn. Code Ann. § 6-19-101(9) (West May 25, 2017, to current) (stating that incorporated cities may '[c]ondemn property, real or personal or any easement, interest, or estate or use therein, either within or without the city, for present or future public use'). RLR's argument focuses on the second step in the *Pickler* analysis: whether the taking is for public or private use. *See City of Memphis*, 391 S.W.3d at 67 (citing *Pickler v. Parr*, 138 S.W.3d 210, 213 (Tenn. Ct. App. 2003)). While acknowledging that the greenway project itself was for a legitimate public purpose, RLR asserts that the construction easement over the Duplex Property was for a private purpose and therefore rendered the entire Order of Possession unconstitutional."

"As noted previously, the trial court expressly relied on its findings from the May 2016 Order of Possession, the September 2018 order denying the motion to enforce, and the October 2019 order denying the first summary judgment motion in its order denying RLR's renewed motion for summary judgment. In the September 2018 order, the trial court elucidated:

> That the Court does not find that [the City] was specifically ordered to construct the parking at issue on property owned by [RLR], and the Court further does not find that to be for a public purpose. The Court finds that the public purpose in the taking at issue was construction of the Greenway itself.
>
> That the Court finds the project at issue, the Greenway, to be completed and finds that the temporary construction easement at issue is terminated.

(Paragraph numbering omitted.) The court agreed with RLR's position that construction of 'the parking at issue on property owned by [RLR]' would not have been for a public purpose. However, the court simultaneously found that the Order of Possession had not included a specific order that the City build the replacement parking. The court declared the 'temporary construction easement at issue' to be terminated with the completion of the greenway project, which the court reiterated was for a public purpose."

"Indeed, the Order of Possession contains no mention of construction of replacement parking spaces. RLR maintains that the diagram of the Duplex Property attached to the Order of Possession set out the replacement parking and that therefore the order required the City to construct the parking.7 In its reply brief on appeal, RLR has circled an area on the diagram that includes lines drawn that could indicate parking spaces between the 'Construction Easement' and 'New Area.' However, these lines are not labeled in any way, and the term, 'parking,' appears nowhere on the diagram. RLR also propounds that the size of the construction easement on the Duplex Property—5,210 square feet as compared to 1,786 square feet on the Hotel Property—would indicate that it was intended to include the replacement parking. Although RLR's assertion on this point may be true, the fact remains that the Order of Possession contains no directive that the City construct replacement parking on the Duplex Property."

"In the Order of Possession, the trial court found that the City was 'entitled to the Permanent Greenway Easements and the Temporary Construction Easements sought in the Petition.' Regarding the Duplex Property, the City requested in the petition that the permanent easement be '[g]ranted together with a temporary construction easement 10-feet outside of the construction area, containing a total of 5,210 square feet.' The petition did not mention the construction of a parking area. Having thoroughly reviewed the Order of Possession and the record as a whole, we determine that the Order of Possession did not require the City to construct replacement parking. Given that there is no dispute concerning the public purpose of the greenway project, we affirm the trial court's finding that the City's taking was for a public purpose."

"RLR contends that despite the jury verdict awarding compensation to RLR for the City's taking, RLR has still sustained an uncompensated injury because the City has not filed a release of the construction easement over the Duplex Property 'on the title record.' However, within the Order of Possession, the description of the easements for each tract includes a provision stating: 'The temporary construction easement shall expire upon the completion of construction as it pertains to this tract.' In its September 2018 order, the trial court determined that the temporary construction easement on the Duplex Property was terminated. With this order, both parties had notice that the construction easement had been terminated. As the City states in its appellate brief, the City's 'right to enter was terminated by the Trial Court by order entered September 4, 2018 at the close of construction.' According to the provision set forth in the Duplex Property description within the Order of Possession, the temporary construction easement over the Duplex Property expired 'upon the completion of construction as it pertains to this tract.' We interpret this to mean that upon the trial court's declaration that the construction had been completed, the construction easement was terminated. *See, e.g.*, *Cellco P'ship v. Shelby Cnty.*, 172 S.W.3d 574, 582 (Tenn. Ct. App. 2005) (noting that according to the provision of a deed, a temporary construction easement would 'expire and terminate upon installation of easement improvements or three (3) years from the date of this instrument whichever comes first.'). The trial court's September 2018 order is a matter of public record, easily ascertainable by anyone seeking to discover the status of the construction easements over RLR's property."

"To the extent that RLR relies on what it terms 'judicial admissions' of the City's former counsel and the 2022 deposition testimonies of city officials to establish that replacement parking was part of the City's initial plan for the Duplex Property, we find such reliance unavailing. During the July 2018 hearing that led to the September 2018 order, the City's counsel stated the following concerning replacement parking:

> This is parking on private land that does not benefit the public purpose of the greenway.
>
> So we believe that RLR got it right when they were complaining, your Honor, that we should not be burdening their other lot with this parking. So the city reconsidered its position and changed its plans in relation to [the] greenway. And I think the city has that right, your Honor, in terms of modifying plans.

Counsel's statement aligns with the trial court's conclusion in the September 2018 order that replacement parking would have been for a private purpose. Although the statement indicates that the City initially had planned to construct the parking, this fact in no way affects the trial court's legal conclusion that replacement parking simply was not required by the Order of Possession." …

"… [W]e determine that the trial court's Order of Possession, which contains no mention of replacement parking as part of the construction easement across the Duplex Property, must be presumed accurate as to the scope of the City's taking of RLR's property. Having determined, as a matter of law, that the Order of Possession did not include a directive to the City to construct replacement parking, we decline to address the City's alternate argument that the private benefit of replacement parking would have been incidental to the overall public purpose of the greenway project. *See* Tenn. Code Ann. § 29-17-102(2)(D)."

"RLR contends that the trial court erred by allowing the City to abandon its interest in the construction easement over the Duplex Property without awarding to RLR statutory costs and fees pursuant to Tennessee Code Annotated § 29-17-912(b)(1). Based on the same statutory provision, RLR requests an award of costs and attorney's fees on appeal. Tennessee Code Annotated § 29-17-912(b)(1) (West May 18, 2017, to current) provides:

> Notwithstanding subsection (a) [regarding the amount of compensation awarded at trial], the state court having jurisdiction of a proceeding initiated by any person, agency or other entity to acquire real property for the purpose of a public utility or for a road, highway, bridge, or other structure, facility, or project used for public transportation by condemnation shall tax the bill of costs prepared by the clerk against the condemner and shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for the owner's reasonable disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of condemnation proceedings, only if:
> (A) The final judgment is that the acquiring party cannot acquire the real property by condemnation; or
> (B) <u>The proceeding is abandoned by the acquiring party</u>.

(Emphasis added.) 'This Court has held that to constitute an abandonment under this section, there must be 'a voluntary act by the condemning authority.'' *Knox Cnty. ex rel. Schumpert v. Union Livestock Yard, Inc.*, 59 S.W.3d 158, 164 (Tenn. Ct. App. 2001) (quoting *Metro. Gov't of Nashville & Davidson Cnty. v. Denson*, No. 01A01-005-CV-00174, 1990 WL 154646, at *9 (Tenn. Ct. App. Oct. 17, 1990))."

"Inasmuch as we have concluded that the Order of Possession did not require the City to construct replacement parking as part of the construction easement over the Duplex Property, we determine the issue of abandonment to be pretermitted as moot because RLR's argument is grounded in its assertion that the City failed to construct the replacement parking. Moreover, we agree with the City's point that it has not abandoned this condemnation proceeding at any point during the pendency of the action. *See* Tenn. Code Ann. § 29-17-912(b)(1)(B). Accordingly, we deny RLR's request for a statutory award of costs and attorney's fees on appeal."

GTLA

1. Plaintiff did not cross a public street at the crosswalk but rather mid-block – While crossing the street plaintiff was struck by a vehicle driven by a city employee - Remanded to trial court to reconsider the allocation of fault under comparative fault and the allocation of damages - To establish a claim for common law negligence, a plaintiff must establish the following elements: (1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause - Negligence per se is not a separate cause of action, but rather a form of ordinary negligence, that enables the courts to use a penal statute to define a reasonably prudent person's standard of care - Under Tennessee's system of modified comparative fault, the trier of fact should first determine the total amount of the plaintiff's damages without regard to fault, and then apportion damages on the percentage of fault attributable to each tortfeasor

SANDRA EASLEY v. CITY OF MEMPHIS
COURT OF APPEALS No. W2023-00437-COA-R3-CV Filed January 2, 2025

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."

"Plaintiff was injured after attempting to cross a street outside of a crosswalk and being struck by a city-owned vehicle driven by a city employee. The trial court found that the city was vicariously liable for the employee-driver's negligence and directly liable for its negligent hiring and retaining of the employee-driver. The trial court ultimately found the plaintiff 10% at fault for her injuries. The city appealed, and this Court reversed, finding that there was no proof of negligent hiring and that the evidence preponderated against the trial court's allocation of fault. Instead, this Court concluded that the plaintiff was at least 50% at fault, barring recovery. The Tennessee Supreme Court vacated the judgment as failing to afford the trial court's findings of fact appropriate deference, but acknowledged the plaintiff's failure to appeal the conclusion that the negligent hiring finding was unsupported. On remand, we affirm in part, reverse in part, vacate in part, and remand the matter to the trial court for the re-allocation of fault and calculation of damages."

"Plaintiff/Appellee Sandra Easley ('Plaintiff') filed a complaint in the Shelby County Circuit Court ('the trial court') on October 18, 2018. Therein, Plaintiff alleged that she was injured on December 8, 2017, when she was 'suddenly and without warning' struck by a vehicle driven by an employee of Defendant/Appellant the City of Memphis ('the City'). Plaintiff explained that at the time of the accident she was attempting to cross A.W. Willis Avenue in Memphis, Tennessee, approximately forty feet from the North Main Street intersection." …

"In its answer, the City denied 'caus[ing] or in any way contribut[ing] to cause Plaintiff's alleged injuries and damages.' Instead, the City alleged that 'Plaintiff suddenly and without warning stepped into the path of the vehicle being operated lawfully on the city streets of Memphis by Paul A. Haynie

and as a result of Plaintiff's dodging into the path of the vehicle[,] contact was made.' The City raised, inter alia, the affirmative defenses of comparative fault and negligence per se."

"The bench trial was held on November 10, 2022. Plaintiff and Mr. Haynie were the only witnesses. Plaintiff explained that at the time of the accident she was part of a group of pedestrians attempting to cross A.W. Willis Avenue approximately forty feet from the intersection. Plaintiff testified that the City truck driven by Mr. Haynie and one other vehicle were driving up A.W. Willis Avenue, and that both vehicles came to a stop to let the group of pedestrians cross, with the truck in the rightmost lane, closest to the sidewalk, and the other vehicle in the middle lane. Plaintiff also testified that the light at the North Main Street intersection was red. Plaintiff testified that she watched the driver of the truck as she attempted to cross in front of it, and that she observed the driver using his cell phone."

"According to Plaintiff, the rest of the pedestrians had successfully crossed in front of both the truck and the other vehicle, but she '[w]asn't even in the middleways of the truck' when she was struck by the front passenger side of the truck. Plaintiff testified that she was hit 'in [her] waist area' and landed on her right side. Plaintiff complained of pain in both legs."

"After being struck, Plaintiff was able to walk back toward the side of the street where she had attempted to cross. She explained that Mr. Haynie was still on the phone upon exiting the truck, but 'didn't actually say anything' when Plaintiff asked if he realized that he had hit her."

"Plaintiff was able to call for an ambulance and was transported to Methodist North Hospital, where she underwent an x-ray and MRI and received muscle relaxers and Ibuprofen. Plaintiff was also provided with crutches, which she used for approximately one month. Plaintiff was discharged and told to follow up with her primary care physician or the emergency room if the pain continued. Plaintiff testified that she returned to the emergency room four days later, having 'more issues' with her left leg and knee area. Plaintiff again received muscle relaxers and Ibuprofen."

"Plaintiff conceded that a crosswalk was available and that she would not have come into contact with the City truck if she had stayed on the sidewalk. But Plaintiff further testified that she would not have stepped off the sidewalk into the street if the City truck and the other vehicle were not stopped."

"Prior to the close of her proof, Plaintiff read into the record a portion of Mr. Haynie's response to discovery requests, in which he acknowledged that he was driving a City-owned truck in the course his employment. Mr. Haynie further stated in his response that:

> I was stopped behind two vehicles at the light of A.W. Willis and Front Street [sic]. When the light turned green, the two vehicles in front of me began to move. As I let my foot off of the brake of my vehicle, the plaintiff suddenly and without warning walked into my truck.

Additionally, the deposition transcript of Dr. Apurva R. Dalal, Plaintiff's non-treating physician expert, was entered into the record as an exhibit, over the City's objection."

"At the close of Plaintiff's proof, the City made an oral motion for the involuntary dismissal of Plaintiff's claims. A written motion was subsequently filed. In its motion, the City argued that because Plaintiff admitted to crossing the street not at a crosswalk, she was at least 50% at fault. Thus, Plaintiff's injuries would not have occurred but for her own negligent conduct, such that she could not recover."

"The trial court denied the City's motion, and Mr. Haynie was called to testify. Mr. Haynie denied stopping to let pedestrians cross the street and he did not recall any other pedestrians crossing in front of his truck prior to Plaintiff. Mr. Haynie further denied being on his cell phone. According to Mr. Haynie, at the time of the accident, he was stopped at a red light, and '[w]hen the light turned green, [he] let [his] foot off the brake and [Plaintiff] stepped into [his] truck.' He clarified that '[w]hen the

light turned green, [he] looked at [Plaintiff], she was standing on the sidewalk; [he] let [his] foot off the brake, and simultaneously she stepped off the curb.'"

"The trial court issued its Bench Trial Ruling on January 18, 2023, and the transcript thereof was filed by the City on January 25, 2023. The trial court then entered its findings of fact, conclusions of law, and judgment on February 28, 2023.6 The trial court explained that it 'weighed the testimony of the truck driver, the City employee, to that of [Plaintiff,]' and specifically found that Plaintiff's 'sworn testimony was consistent and more probable than not.' The trial court concluded that (1) Plaintiff did not walk into the truck, but 'was lagging behind the group who were allowed to cross the street'; and (2) Mr. Haynie was 'not paying attention to what he was doing as he was on his cellphone at the time that Plaintiff was struck' and 'further failed to yield the right of way to Plaintiff' as she crossed the street."

"In the Bench Trial Ruling, the trial court found that Mr. Haynie was 90% at fault 'by allowing [Plaintiff] and others to cross outside of the crosswalk and eventually hitting [Plaintiff]' and Plaintiff was 10% at fault because 'she did not cross at the crosswalk and may have been lagging behind the others who were allowed to cross beyond the crosswalk.' However, in the February 2023 order, the trial court found that the City was 90% negligent and Plaintiff was 10% negligent, with no fault allocated to Mr. Haynie individually."

"Relying on the deposition testimony of Dr. Dalal, the trial court found that the $22,432.95 in medical bills incurred by Plaintiff was 'reasonable and necessary and directly caused by the motor vehicle pedestrian accident[.]' The trial court noted that Plaintiff also sought $525.00 in lost wages for the two weeks of work she missed, and that Plaintiff had requested $67,307.85 in compensatory damages for her pain and suffering in her closing argument. The trial court concluded that Plaintiff was entitled to a total of $106,580.06 in damages 'for physical pain and suffering, past, present, and future medical expenses, and loss of earning capacity.' This amount was reduced by Plaintiff's 10% fault for a total award of $95,858.56."

"The City appealed the trial court's judgment on March 24, 2023. This Court issued its Opinion on May 1, 2024. ***Easley v. City of Memphis***, No. W2023-00437-COA-R3-CV, 2024 WL 1916227 (Tenn. Ct. App. May 1, 2024), *vacated*, 699 S.W.3d 268 (Tenn. 2024) (per curiam)." …

"Plaintiff subsequently applied for permission to appeal this Court's ruling to the Tennessee Supreme Court on June 27, 2024. The court issued an order with two main rulings on October 2, 2024. Our high court first concluded that 'the Court of Appeals' opinion is inconsistent with the applicable standard of review and fails to give appropriate weight to the Circuit Court's factual findings and credibility determinations.' ***Easley***, 699 S.W.3d at 270. The court emphasized the trial court's express determination that Plaintiff's description of the accident was credible and Mr. Haynie's claims were not, as well as the lack of evidence in the record to override these findings. ***Id***. at 270–71. The court further explained that the question on appeal is 'whether the trial court exceeded its 'considerable latitude in allocating percentages of fault to [the] negligent parties[,]'' and remanded the case for the evaluation of 'whether the record preponderates against the [trial court's] presumptively correct allocation of fault.' ***Id***. at 272 (quoting ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995))."

"Second, our high court noted that Plaintiff had not appealed this Court's conclusion that the record did not support the trial court's finding that the City negligently hired and failed to train Mr. Haynie. We were directed, on remand, to 'consider, as necessary whether the case should be remanded to the [trial court] to re-allocate fault among the parties given the [trial court's] unsupported finding that the City was negligent in hiring and failing to train the truck driver.' ***Id***. So too were we directed to consider, as necessary, the previously pretermitted issues raised by the City. ***Id***."

"Thus, the court granted Plaintiff's application, vacated the May 1, 2023 appellate judgment, and remanded the matter to this Court for further consideration."

"In cases tried without a jury, the trial court's findings of fact are reviewed de novo, with a presumption of correctness set aside only if the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d)." …

"'When a trial court's factual finding is based on its assessment of a witness's credibility, appellate courts afford great weight to that determination and will not reverse it absent clear evidence to the contrary.' ***In re Markus E.***, 671 S.W.3d 437, 457 (Tenn. 2023) (citing ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002); ***In re Justice A.F.***, No. W2011-02520-COA-R3-PT, 2012 WL 4340709, at *7 (Tenn. Ct. App. Sept. 24, 2012)); *see also* ***Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999) ('[A]ppellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.')."

"However, this standard is based on the premise that 'trial courts are able to observe witnesses as they testify and to assess their demeanor,' and so are better equipped to make credibility determinations. ***Wells***, 9 S.W.3d at 783 (citations omitted). Such is not the case when considering 'documentary proof, such as depositions or other forms of testimony presented to the trial court in a 'cold' record[.]' ***Id.*** Because a trial court has no better ability to gauge the credibility of witness providing such proof, an 'appellate court[] may make an independent assessment of the credibility of the documentary proof it reviews, without affording deference to the trial court's findings.' ***Id.*** at 783–84 (citing ***Elmore v. Travelers Ins. Co.***, 824 S.W.2d 541, 544 (Tenn. 1992); ***Corcoran v. Foster Auto GMC, Inc.***, 746 S.W.2d 452, 456 (Tenn. 1988))."

"In our view, the City's appellate issues may be consolidated into three mainassessments of error against the trial court. The City alleges that the trial court erred in (1) finding proof of negligence; (2) allocating fault; and (3) establishing damages. We will address each category in turn."

"The City first questions the trial court's finding that Mr. Haynie was negligent, for which it was vicariously liable. The City argues that Plaintiff's admitted failure to use the crosswalk was the direct and proximate cause of her injuries. It asserts that the evidence supporting this theory of causation evenly matched Plaintiff's uncorroborated and disputed testimony that the accident was caused by Mr. Haynie using his cellphone. Thus, it argues, Plaintiff failed to establish her claim by a preponderance of the evidence and no reasonable factfinder could conclude that Plaintiff's own actions were not the proximate cause of her injuries. Based on Plaintiff's failure to present a prima facie case of negligence, the City argues that the trial court's denial of its motion for involuntary dismissal was also in error."

"Negligence involves 'the failure to exercise reasonable care.' ***Giggers v. Memphis Hous. Auth.***, 277 S.W.3d 359, 364 (Tenn. 2009). To establish a claim for common law negligence, a plaintiff must establish the following elements: '(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.' ***Id.*** (quoting ***McCall v. Wilder***, 913 S.W.2d 150, 153 (Tenn. 1995)). Negligence per se is not a separate cause of action, but rather 'a form of ordinary negligence, that enables the courts to use a penal statute to define a reasonably prudent person's standard of care.' ***Rains v. Bend of the River***, 124 S.W.3d 580 (Tenn. Ct. App. 2003) (citations omitted)."

"'While cause in fact establishes that the plaintiffs' injury would not have occurred 'but for' the defendant's conduct, proximate cause focuses on whether the law will extend responsibility for that conduct.' ***West v. E. Tenn. Pioneer Oil Co.***, 172 S.W.3d 545, 553 (Tenn. 2005) (citing ***Kilpatrick v. Bryant***, 868 S.W.2d 594, 598 (Tenn. 1993)). Proximate cause must be proven by a preponderance of the evidence, which requires that Plaintiff 'demonstrate that the negligence *more likely than not* caused the injury.' ***Kilpatrick v. Bryant***, 868 S.W.2d 594, 598–99 (Tenn. 1993) (citing ***Lindsey v. Miami Dev. Corp.***, 689 S.W.2d 856, 861 (Tenn. 1985) ('[p]laintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.')). The proximate cause of a plaintiff's injury is an issue of

fact to be determined by the factfinder. ***Kim v. State***, 622 S.W.3d 753, 760 (Tenn. Ct. App. 2020) (citing ***McClung v. Delta Square Ltd. P'ship***, 937 S.W.2d 891, 905 (Tenn. 1996))."

"Motions for involuntary dismissal under Tennessee Rule of Civil Procedure 41.02(2) 'do not raise questions of law but rather challenge the sufficiency of the plaintiff's proof.' ***Burton v. Warren Farmers Co-op.***, 129 S.W.3d 513, 520 (Tenn. Ct. App. 2002) (citations omitted). When faced with such a motion, a trial court must 'impartially weigh and evaluate the plaintiff's evidence just as it would after all the parties had concluded their cases and may dismiss the plaintiff's claims if the plaintiff has failed to make out a prima facie case by a preponderance of the evidence.' ***Id.*** (citing ***Thompson v. Adcox***, 63 S.W.3d 783, 791 (Tenn. Ct. App. 2001)). This Court 'will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or unless the trial court has committed an error of law affecting the outcome of the case.' ***Id.*** at 521."

"Here, the trial court found that Mr. Haynie was on his cellphone at the time of the accident and not paying appropriate attention to his surroundings while operating a vehicle. The trial court found this conduct to be a breach of his duty to maintain a proper lookout, exercise reasonable care and caution, and devote full-time attention during the operation of a vehicle. The trial court further found that Mr. Haynie breached the standard of care set out in Tennessee Code Annotated section 55-8-136, requiring that 'every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway'; section 55-10-205 and Memphis City Ordinance 11-16-44, both prohibiting reckless driving, defined as driving a vehicle in a 'willful or wanton disregard for the safety of persons or property'; Memphis City Ordinance 11-16-2, requiring a driver to 'devote full time and attention to operating such vehicle when such failure, under the then existing circumstances, endangers life, limb or property'; and Memphis City Ordinance 11-16-3, requiring every driver to drive at a safe speed, maintain a safe lookout, and keep the vehicle under control. And although the trial court found that Plaintiff's admitted failure to cross within the crosswalk factored into the ultimate allocation of fault, it concluded that Plaintiff's injuries were caused by Mr. Haynie's negligent actions."

"As explained by our high court, the trial court relied heavily on its credibility determinations in finding that Plaintiff successfully established the causation elements of her negligence claim by a preponderance of the evidence. *See* ***Easley***, 699 S.W.3d at 279–71. The trial court specifically explained that it weighed the testimony of both Plaintiff and Mr. Haynie as to their description of the accident and their respective roles therein, and that it found Plaintiff's testimony credible and 'more probable than not[.]' The trial court explicitly stated that it did not believe Mr. Haynie's explanation that he was not on his cellphone and Plaintiff simply walked into the truck."

"The trial court also did not find any merit to the City's argument that Plaintiff's admitted failure to cross in a crosswalk absolved Mr. Haynie of his negligence. As our supreme court noted, the trial court clearly factored Plaintiff's admitted failure to cross within the crosswalk into its consideration of the responsibility for Plaintiff's injuries. ***Id.*** at 271." …

"In sum, the trial court was faced with conflicting testimony regarding the cause of the accident, and resolved the dispute in favor of Plaintiff. Our review of the record does not reveal any evidence that would warrant the reversal of these credibility-based factual findings on appeal. ***In re Markus E.***, 671 S.W.3d at 457; ***Wells***, 9 S.W.3d at 783. Nor does the evidence preponderate against the trial court's ultimate finding that Mr. Haynie's conduct was more likely than not a substantial factor in causing Plaintiff's injuries by supporting another finding with greater convincing effect. ***Kilpatrick***, 868 S.W.2d at 598–99; ***Cook***, 2023 WL 6638988, at *2. We therefore affirm the trial court's ruling that Mr. Haynie, and vicariously, the City, were negligent. Because Plaintiff's proof was sufficient to establish her negligence claim, the trial court's denial of the City's motion for involuntary dismissal in relation to that claim is also affirmed."

"The trial court also found that the City was directly negligent in its hiring and retention of Mr. Haynie. In our prior Opinion, we determined that the 'complete lack of evidence supporting any claim for negligent hiring or retention' required a reversal of the trial court's ruling in Plaintiff's favor on that

issue. ***Easley***, 2024 WL 1916227, at *5. And, as noted by our high court, Plaintiff did not challenge that aspect of this Court's ruling in her application for permission to appeal to that court. ***Easley***, 699 S.W.3d at 272. Generally, an issue not raised on appeal is waived. Tenn. R. App. P. 13(b); *see also* Tenn. R. App. P. 1 (specifying that the Rules govern procedure in proceedings before the Tennessee Supreme Court). As such, we conclude that Plaintiff has waived any argumentregarding further consideration of the merits of the trial court's unsupported finding of direct negligence by the City, and that aspect of the trial court's judgment is reversed. This conclusion also requires the reversal of the trial court's denial of the City's Rule 41.02 motion in relation to this claim."

"The City also disputes the trial court's finding that Plaintiff was only 10% at fault. In connection with this argument, the City asserts that '[t]he preponderance of the evidence supports a wors[t] case finding that [Plaintiff] is guilty of 100% fault and a best case finding that if there [is] an equivalence of the parties' respective duties the fault is equal, 50% each, entitling [the City] to Judgment in its favor either way.'"

"The City emphasizes that, despite the trial court finding that Mr. Haynie failed to yield the right of way to Plaintiff, Plaintiff did not have the right of way based on her failure to cross within the crosswalk. The City argues that crossing outside of the crosswalk constituted negligence per se, which should have rendered Plaintiff at least 50% at fault, and thus, unable to recover. These arguments were addressed by our supreme court as follows:

> [A] plaintiff's negligence—even negligence per se—is not an automatic bar to recovery under Tennessee's comparative-fault system. . . . In fact, drivers are statutorily required to use due care to watch for and avoid hitting all pedestrians, including pedestrians crossing outside of a crosswalk. *See* Tenn. Code Ann. § 55-8-136(b) (providing that drivers have a duty to 'maintain[] a safe lookout' and 'avoid colliding with any other vehicle or person' '[n]otwithstanding any . . . right-of-way rules that may be applicable'); *see also* ***Seahorn v. Karr***, 35 Tenn. App. 38, 242 S.W.2d 331, 334 (1951) (explaining that 'a pedestrian who undertakes to cross a street or highway at any point other than a [crosswalk] must yield the right of way to vehicles' but '[t]his does not mean . . . that the driver of a vehicle is relieved of the duty of maintaining a reasonable lookout for pedestrians between intersections').

Easley, 699 S.W.3d at 271; *see also* ***Norman v. Prather***, 971 S.W.2d 398, 401 (Tenn. Ct. App. 1997) ('We believe the provisions of the statutes in question [including section 55-8-136] are clear and unambiguous in stating that notwithstanding the various rights and duties placed upon drivers and pedestrians by the 'rules of the road,' and notwithstandingnthat pedestrians not in crosswalks must yield the right-of-way to vehicles upon the roadway, drivers of vehicles on the roadway do not have a license to run over pedestrians who are not following the rules.'). Thus, while perhaps inaccurate to say that Plaintiff had the right of way, the trial court correctly noted that Mr. Haynie was nevertheless obligated to yield to her crossing the street outside of the crosswalk and Plaintiff's failure to use the crosswalk was not fatal to her right to relief. *See* Tenn. R. App. P. 36(b) ('A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process.')."

"Our high court also noted, however, that the reversal of the negligent hiring and retention claim may require an adjustment of the trial court's allocation of fault. ***Easley***, 699 S.W.3d at 271. We conclude that it does."

"Here, the trial court allocated 10% of the fault to Plaintiff. The remaining 90% of the fault was allocated to the City, based on the trial court's determination that the City was both vicariously *and* directly negligent. In other words, although a single entity, the City was assigned two shares of fault: the fault attributable to Mr. Haynie's actions, for which it was held responsible, and the fault attributable to its own actions in hiring and retaining Mr. Haynie.14 With the conclusion that the City

was not directly negligent, this second share of fault must be taken out of the equation. When allocating fault between only Mr. Haynie's actions and Plaintiff's actions, the trial court might find it necessary to alter its initial distribution.15 *See* ***Binns v. Trader Joe's E., Inc.***, 690 S.W.3d 241, 252 (Tenn. 2024) (noting, in discussing the interplay between the preemption rule and the respondeat superior doctrine, that 'it is more than conceivable that eliminating the employer's alleged direct negligence from the jury's consideration may result in a plaintiff or additional defendant being allocated a greater percentage of fault')."

"Accordingly, we vacate the trial court's allocation of fault. On remand, and without hearing further proof, the trial court should consider only the City's vicarious liability for Mr. Haynie's actions in determining the distribution of fault between the parties."

"Finally, the City questions both the amount of damages awarded to Plaintiff and the categories of those damages. The City also takes issue with the trial court's reliance on the deposition testimony of Dr. Dalal in finding that Plaintiff's medical expenses were reasonable and necessary."

"In her complaint, Plaintiff requested a judgment of $350,000.00 for 'personal injuries, pain and suffering, loss of enjoyment of life, loss of earnings and earning capacity, medical expenses, workers compensation liens, fees, and expenses[.]' According to the trial court, Plaintiff requested $22,432.95 in past medical bills, $525.00 in lost wages, and $67,307.85 in pain and suffering at trial. These amounts total $90,265.80."

"In its Bench Trial Ruling, the trial court explained that the amount of judgment included $53,521.50 'for the medical bills, past, present, and future,' and $17,662.22 in '[p]hysical pain and suffering, past and future[.]' These amounts total $71,183.72."

"Ultimately, however, the trial court concluded that Plaintiff was entitled to $106,508.56 in damages. In its judgment, which incorporated the Bench Trial Ruling, the trial court explained that the award comprised 'physical pain and suffering, past, present and future medical expenses, and loss of earning capacity.'"

"The obvious inconsistency within these rulings render us unable to effectively review whether the preponderance of the evidence supports the trial court's award." …

"Additionally, '[u]nder Tennessee's system of modified comparative fault, the trier of fact 'should first determine the total amount of the plaintiff's damages without regard to fault, and then apportion damages on the percentage of fault attributable to each tortfeasor.'' ***Lindgren***, 88 S.W.3d at 585 (citing ***Grandstaff***, 36 S.W.3d 482). While the potential change in the allocation of fault contemplated, *supra*, will not necessarily have any effect on the total amount of damages, in light of the fact that the trial court must reevaluate at least one aspect of this case, it does not appear prudent to solider on to consider these issues despite the order's inconsistencies. We therefore conclude that the best course of action is to vacate the award of damages and remand the matter back to the trial court for the entry of more specific findings, both in light of the evidence produced at trial and the reversal of the negligent hiring and retaining claim."

"While full substantive review of the trial court's award is currently untenable, we note that some of the categories mentioned in the trial court's various descriptions of the award had not been discussed in a significant capacity since Plaintiff's complaint. Indeed, it does not appear that any proof was offered regarding present or future medical bills, future pain and suffering, or loss of earning capacity. On remand, the trial court should be mindful to award only those damages for which reasonably certain proof was presented. *See* ***Overstreet***, 4 S.W.3d at 703."

"Here, Plaintiff presented the deposition testimony of Dr. Dalal as proof that her medical expenses were reasonable, necessary, and caused by the accident. The City argues that the trial court abused its discretion in admitting this testimony because the opinion was untrustworthy. The City highlights that

Dr. Dalal did not physically meet Plaintiff prior to offering his opinion, mistakenly stated that Plaintiff was seated on the sidewalk at the time of the accident, and had been paid by Plaintiff's counsel to testify in this case and in other cases over a multi-year period. Alternatively, the City argues that we should conduct our own review of the testimony and afford it less weight based on these same factors."

"From our review of Dr. Dalal's deposition, we do not find that the trial court abused its discretion in admitting his testimony. Dr. Dalal testified that he was a Board-certified orthopedic surgeon, licensed in Tennessee and two other states. Dr. Dalal further testified that he had previously worked in a hospital's emergency department and had familiarity with medical record review, billing codes, the reasonable and necessary treatment for injuries such as those sustained by Plaintiff, and the customary charges for medical treatment in Shelby County, Tennessee. Dr. Dalal's testimony was offered based on a reasonable degree of medical certainty. The admission of this testimony did not result from an erroneous assessment of the proof or reach an illogical conclusion, and as such, the trial court was within its discretion to admit Dr. Dalal's testimony on the issue of damages. ***Lowe***, 552 S.W.3d at 865."

"Nor do we find that the trial court improperly credited Dr. Dalal's testimony. Deposition testimony does not need to be 'read and evaluated in a vacuum.' ***Thomas v. Aetna Life & Cas. Co.***, 812 S.W.2d 278, 283 (Tenn. 1991). While the reasonableness, necessity, and causation of medical treatment must be established by expert testimony, 'such testimony must be considered in conjunction with the lay testimony of the [plaintiff] as to how the injury occurred and the [plaintiff's] subsequent condition.' ***Id.*** (citing ***Smith v. Empire Pencil Co.***, 781 S.W.2d 833, 835 (Tenn. 1989)). And again, 'considerable deference must be given to the trial court's evaluation of such oral testimony.' ***Id.*** Dr. Dalal's deposition testimony regarding the medical treatment and billing aligned with Plaintiff's oral testimony regarding the nature of the accident, which the trial court expressly credited. Moreover, while the City points to various issues that it asserts undermine Dr. Dalal's conclusions, including his alleged financial bias in favor of Plaintiff's attorneys, the City produced no countervailing expert proof demonstrating that Plaintiff's medical bills were not reasonable and necessary under the circumstances of this case. Given Plaintiff's testimony, our independent review of Dr. Dalal's deposition, and the record as a whole, we cannot conclude that the trial court erred in relying on Dr. Dalal's conclusion that Plaintiff's medical expenses were reasonable and necessary."

2. Motion to dismiss granted – Public duty doctrine- The public duty doctrine provides an additional layer of defense to acts or omissions not immune under the GTLA - It shields governmental entities and their employees from suits for injuries that are caused by the breach of a duty owed to the public at large - The duties alleged in the complaint—to protect a citizen from harm and to arrest a suspected criminal—are public duties – No special duty alleged – The Tennessee Supreme Court has adopted three scenarios that justify application of a special duty of care - Ms. Franklin relies on two, (1) a special duty of care may exist if the officials, by their actions, affirmatively undertook to protect her, and she relied upon the undertaking or (2) if the complaint alleges a cause of action involving intent, malice, or reckless misconduct – The trial court determined that the first scenario could not apply because the complaint failed to allege an affirmative act and reliance - Ms. Franklin insists that she alleged both, and points out, the complaint alleged that the police department directed her to submit to a forensic medical examination to gather physical evidence of the crime,and she complied with this directive - But not every action by a police officer satisfies the exception's criteria - The formulation adopted by the Tennessee Supreme Court court requires an affirmative undertaking to protect the plaintiff The alleged directive does not meet that standard, and does not indicate that the police department assumed a special duty to protect Ms. Franklin in particular - GTLA only waived immunity for ordinary negligence, not gross negligence or recklessness - In so doing it restricts the application of the special duty exception in tort actions against

municipalities - Because Ms. Franklin cannot assert a claim for reckless misconduct against the City, she cannot avail herself of this method of satisfying the special duty exception

ALICIA FRANKLIN v. CITY OF MEMPHIS, TENNESSEE
COURT OF APPEALS No. W2023-01142-COA-R3-CV Filed May 14, 2025

"A crime victim filed a tort action against a city under the Governmental Tort Liability Act, alleging police misconduct. Arguing that it was immune from liability for the alleged misconduct, the city moved to dismiss the complaint. The trial court dismissed the complaint with prejudice. We conclude that the city is immune from liability for the asserted negligence under the public duty doctrine and that the allegations in the complaint do not support application of the special duty exception. So we affirm the dismissal."

"On September 21, 2021, Cleotha Abston a/k/a Cleotha Henderson kidnapped and raped Alicia Franklin at gunpoint. About a year later, Ms. Franklin filed a tort action against the City of Memphis, Tennessee. She alleged that the Memphis police department's failure to conduct an adequate investigation of the crime and to use available evidence to identify and arrest her assailant before he committed another violent felony caused her emotional and physical injuries, including being raped. The operative complaint alleged that the City of Memphis was liable for its employees' negligent and reckless conduct under the Governmental Tort Liability Act ('GTLA'). *See* Tenn. Code Ann. § 29-20-205 (2024)."

"According to the complaint, Ms. Franklin reported the crime to authorities immediately after the perpetrator left the scene. She was 'directed to submit to a forensic medical examination,' during which a 'sexual assault kit' was gathered. A sexual assault kit includes physical evidence from the victim that can be tested for DNA from the suspect. The perpetrator's DNA was 'already on file and reasonably accessible' to investigators because he had previously committed a violent felony."

"Shortly after Ms. Franklin's report, police officers accompanied her to the crime scene. Ms. Franklin alleged that they processed the scene but collected no direct physical evidence. She provided the officers with several clues as to the perpetrator's identity, such as the name he gave her, the car he drove, and a telephone number. She also told the officers that she believed he had committed similar violent acts before."

"Early in the investigation, police officers questioned a woman who lived near the crime scene. Ms. Franklin alleged that the information obtained from this woman incriminated the woman's boyfriend, Cleotha Abston."

"Around this same time, the officers showed Ms. Franklin photos of several potential suspects, including Cleotha Abston. Ms. Franklin identified Cleotha Abston 'as the one who looked most like her assailant.'"

"A couple of days later, the officers submitted Ms. Franklin's sexual assault kit to the Tennessee Bureau of Investigation ('TBI'). Although they could have requested expedited processing, they did not. Nor did they give the TBI any additional information about the case or a potential suspect."

"Ms. Franklin alleged that the police knew or should have known sufficient information to establish probable cause for an arrest even without testing the sexual assault kit. But they failed to make an arrest. A few months later, Ms. Franklin called the police department for an update on her case. She was told that the police had no updated information to share."

"In due course, the TBI processed the sexual assault kit from Ms. Franklin's case. Nearly a year after the crime was committed, a TBI scientist matched DNA from the kit to Cleotha Abston. Within days, Cleotha Abston was indicted on multiple charges in connection with the rape of Ms. Franklin. But by then, he had already kidnapped and murdered another woman."

"The City filed a motion to dismiss the complaint for failure to state a claim. *See* TENN. R. CIV. P. 12.02(6). It argued that the facts alleged in the complaint did not establish a cognizable duty of care, a breach, or causation—all necessary elements of a negligence claim. It also asserted that sovereign immunity under either the GTLA or the public duty doctrine barred Ms. Franklin's action. Alternatively, the City moved to strike 'certain immaterial, impertinent and scandalous allegations' from the complaint."

"Ms. Franklin disagreed with the City's assessment. In her view, the complaint contained sufficient factual allegations to state a claim for negligence. She conceded that the GTLA did not waive immunity for recklessness. *See Lawson v. Hawkins Cnty.*, 661 S.W.3d 54, 63 (Tenn. 2023). But she maintained that the GTLA did remove immunity for the negligence alleged in the complaint. She also asserted that the special duty exception negated immunity under the public duty doctrine."

"The trial court granted the City's motion and dismissed the complaint withprejudice. Because the complaint failed to allege any negligent conduct that occurred before the rape, the court dismissed the claim that the City's negligence caused the underlying crime. Otherwise, it found that the complaint contained sufficient factual allegations to state a claim for negligence. The court dismissed the reckless misconduct claim based on the GTLA. But it ruled that the GTLA did not mandate dismissal of Ms. Franklin's negligence claim. Viewed liberally, the alleged misconduct supporting the negligence claim could be operational. Still, the alleged misconduct concerned breach of a public duty. Because the allegations in the complaint did not establish a basis for application of the special duty exception, the court dismissed the negligence claim."

"When faced with this type of motion, the court must 'construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit ofall reasonable inferences.' *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002). A complaint 'need not contain detailed allegations of all the facts giving rise to the claim,' but it 'must contain sufficient factual allegations to articulate a claim for relief.' *Webb*, 346 S.W.3d at 427 (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103-04 (Tenn. 2010)). The complaint should not be dismissed 'unless it appears that the plaintiff can establish no facts supporting the claim that would warrant relief.' *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999). This determination presents a question of law, which we review de novo, with no presumption of correctness. *Id.*"

"Ms. Franklin challenges the trial court's conclusion that the public duty doctrine bars her negligence claim. The public duty doctrine is an affirmative defense. *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998). Even so, dismissal is an appropriate remedy when 'an affirmative defense clearly and unequivocally appears on the face of the complaint.' *Anthony v. Tidwell*, 560 S.W.2d 908, 909 (Tenn. 1977); *see Ezell v. Cockrell*, 902 S.W.2d 394, 403 (Tenn. 1995) (affirming dismissal because '[t]he plaintiff's allegations d[id] not support application of a 'special-duty' of care'). Thus, a Rule 12.02(6) motion may 'be used as a vehicle to assert an affirmative defense' when the allegations in the complaint 'show that an affirmative defense exists and that this defense legally defeats the claim for relief.' *Jackson v. Smith*, 387 S.W.3d 486, 491-92 (Tenn. 2012)."

"When a municipality asserts sovereign immunity, the 'threshold question is whether immunity has been removed under the [GTLA].' *Lawson*, 661 S.W.3d at 60; *Chase*, 971 S.W.2d at 385 (directing courts to 'first look to the GTLA'). … If the GTLA does not remove immunity, the inquiry ends. *Lawson*, 661 S.W.3d at 60 ('We need not consider the public-duty doctrine or its exceptions unless we first conclude that the Act waives immunity.'); *Matthews v. Pickett Cnty.*, 996 S.W.2d 162, 164-65 (Tenn. 1999) ('The public duty doctrine, however, is only viable as a defense to liability when immunity has been removed under the GTLA.'). Here, the trial court ruled that the GTLA waived immunity for the negligent acts of the police department because the alleged acts were operational, not discretionary. *See* Tenn. Code Ann. § 29-20-205(1)."

"Assuming the trial court's determination was correct, the next consideration is the public duty doctrine. *Chase*, 971 S.W.2d at 385. The public duty doctrine 'provide[s] an additional layer of defense

to acts or omissions not immune under the GTLA.' *Matthews*, 996 S.W.2d at 165. It 'shields governmental entities and their employees from 'suits for injuries that are caused by the . . . breach of a duty owed to the public at large.'' *Lawson*, 661 S.W.3d at 60 (quoting *Ezell*, 902 S.W.2d at 397). The duties alleged in the complaint—to protect a citizen from harm and to arrest a suspected criminal—are public duties. *See Ezell*, 902 S.W.2d at 401 (duty to detain suspected drunk driver); *Kimble v. Dyer Cnty.*, No. W2019-02042-COA-R3-CV, 2020 WL 7389381, at *5 (Tenn. Ct. App. Dec. 16, 2020) (duty to warn motorists of hazardous road condition); *Fleming v. City of Memphis*, No. W2018-00984-COA-R3-CV, 2019 WL 1040389, at *6 (Tenn. Ct. App. Mar. 5, 2019) (duty to protect citizens from dangerous animals); *Holt v. City of Fayetteville*, No. M2014-02573-COA-R3-CV, 2016 WL 1045537, at *4 (Tenn. Ct. App. Mar. 15, 2016) ('The decision to arrest a suspect and properly secure him or her is a duty owed to the public at large.'); *Hurd v. Woolfork*, 959 S.W.2d 578, 581 (Tenn. Ct. App. 1997) (reasoning that the 'duty to keep the peace . . . includes the execution of arrest warrants and is a public duty'). So unless the allegations in the complaint support application of a special duty of care, the public duty doctrine bars Ms. Franklin's negligence claim."

"Our supreme court has adopted three scenarios that justify application of a special duty of care. *Ezell*, 902 S.W.2d at 402. Ms. Franklin relies on two. A special duty of care may exist if the 'officials, by their actions, affirmatively undert[ook] to protect [her], and [she] relie[d] upon the undertaking' or if the complaint 'alleges a cause of action involving intent, malice, or reckless misconduct.' *Id.*"

"The trial court determined that the first scenario could not apply because the complaint failed to allege an affirmative act and reliance. Ms. Franklin insists that she alleged both. As she points out, the complaint alleged that the police department directed her to submit to a forensic medical examination to gather physical evidence of the crime. And she complied with this directive. But not every action by a police officer satisfies the exception's criteria. *See Hurd v. Flores*, 221 S.W.3d 14, 28-29 (Tenn. Ct. App. 2006). The formulation adopted by our supreme court requires an affirmative undertaking to protect the plaintiff. *Ezell*, 902 S.W.2d at 402; *see, e.g.*, *Matthews*, 996 S.W.2d at 165 (order of protection); *Chase*, 971 S.W.2d at 385 (animal shelter undertook to protect the plaintiff from dangerous animals). The alleged directive does not meet that standard. It does not indicate that the police department assumed a special duty to protect Ms. Franklin in particular. *See Holt*, 2016 WL 1045537 at *5 (explaining that for this scenario to apply, the special 'duty must be particular to the Plaintiff[], not to a class of individuals of which Plaintiff[] happen[s] to be [a] member[]'). So even if the complaint does allege reliance, as Ms. Franklin contends, it does not support this method of establishing the special duty exception."

"Although the trial court recognized that the complaint alleged a cause of action involving reckless misconduct, it rejected Ms. Franklin's argument that she established a special duty of care. The court reasoned that '[t]he special duty exception . . . cannot be used to remove immunity afforded by the GTLA." *Chase*, 971 S.W.2d at 385. And the GTLA provides immunity to governmental entities for the reckless misconduct of their employees. *Lawson*, 661 S.W.3d at 64. So 'based upon the law as it exists today,' the court ruled that "Ms. Franklin cannot apply the special duty exception for recklessness."

"Ms. Franklin contends that her negligence claim involves allegations of reckless misconduct which can be used to negate immunity under the public duty doctrine. Ms. Franklin misapprehends the import of our supreme court's decision in *Lawson v. Hawkins County*. The question presented in *Lawson* was whether the GTLA allows 'a plaintiff to sue a governmental entity for employee conduct that exceeds mere negligence.' *Lawson*, 661 S.W.3d at 58. The supreme court's answer was 'no.' *Id.* at 64. It held that the GTLA only waived immunity for 'ordinary negligence, not gross negligence or recklessness.' *Id.* at 64. In so doing, the court acknowledged that its holding would restrict the application of the special duty exception in tort actions against municipalities. *See id.* at 68. Although this acknowledgment could be viewed as dicta, it is a strong indication of the supreme court's view. And we are bound to follow the supreme court's lead. *Barger v. Brock*, 535 S.W.2d 337, 340 (Tenn. 1976). Because Ms. Franklin cannot assert a claim for reckless misconduct against the City, she cannot avail herself of this method of satisfying the special duty exception."

"Ms. Franklin's remaining issues involve the trial court's denial of her combined motion to alter or amend the dismissal and for permission to file an amended complaint. '[O]nce a judgment dismissing a case has been entered, the plaintiff cannot seek to amend [the] complaint without first convincing the trial court to set aside its dismissal.' *Lee v. State Volunteer Mut. Ins. Co., Inc.*, No. E2002-03127-COA-R3-CV, 2005 WL 123492, at *11 (Tenn. Ct. App. Jan. 21, 2005). To that end, Ms. Franklin moved to set aside the dismissal under Tennessee Rule of Civil Procedure 59.04. A Rule 59.04 motion 'provide[s] the trial court with an opportunity to correct errors before the judgment becomes final.' *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). It may 'be granted when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice.' *Id*."

"We discern no abuse of discretion in the court's refusal to set aside the dismissal. We have already addressed Ms. Franklin's challenge to the trial court's analysis of the public duty doctrine and its exceptions. And the supreme court's release of the *Lawson* decision does not provide a basis for setting aside the dismissal. *Lawson* did not change the controlling law; it clarified the plain meaning of the GTLA." …

"Nor can we fault the court for refusing to set aside its dismissal order based on Ms. Franklin's newly obtained evidence. She submitted an affidavit from the perpetrator's former girlfriend, who gave additional details about her interactions with the police during the initial investigation. To Ms. Franklin, the new evidence suggested that the police department may have been actively protecting her assailant and avoiding execution of outstanding warrants for his arrest. But the discovery of new evidence does not warrant revision of a decision based on 'an examination of the pleadings alone.' *Webb*, 346 S.W.3d at 426."

"This is especially true when, as here, the evidence would not have changed the outcome. While leave to file an amended pleading should be freely given when justice so requires, '[t]rial courts are not required to grant a motion to amend if the amendment would be futile.' *Runions v. Jackson-Madison Cnty. Gen. Hosp. Dist.*, 549 S.W.3d 77, 84-85 (Tenn. 2018); *see* TENN. R. CIV. P. 15.01. Ms. Franklin contends that the new evidence supports her claim that the City's negligence caused her rape and bolsters her allegations of reckless misconduct. But 'the execution of arrest warrants . . . is a public duty.' *Woolfork*, 959 S.W.2d at 581. And Ms. Franklin cannot rely on her allegations of reckless misconduct to defeat immunity under the public duty doctrine. *See Lawson*, 661 S.W.3d at 68. Without any allegations to support application of the special duty exception, the proposed amendment would be futile."

"Alternatively, Ms. Franklin asked the court to reject the public duty doctrine altogether. As it now stands, the public duty doctrine remains viable in Tennessee. *Id.* at60. Decisions of our supreme court are binding on the lower courts. *Barger*, 535 S.W.2d at 340. It is the province of our supreme court, not the trial court or even this Court, to 'abolish obsolete common-law doctrines.' *Cary v. Cary*, 937 S.W.2d 777, 781 (Tenn. 1996); *State v. Thomas*, 687 S.W.3d 223, 239 (Tenn. 2024); *Hodge v. Craig*, 382 S.W.3d 325, 337 (Tenn. 2012) (recognizing the supreme court's 'power to develop and adapt common law principles and their application')."

3. Comparative fault and statute of limitations and - Plaintiff, was injured by tripping on a sidewalk, and filed suit against the private property owners and city but failed to properly serve the city - In their original answer, the private property owners asserted the city's comparative fault but not in express terms - Plaintiff voluntarily dismissed the city as a defendant, and in an amended answer, the private property owners expressly asserted comparative fault against the city - Plaintiff promptly amended her complaint to add the city as a defendant under T.C.A. section 20-1-119, which provides a plaintiff 90 days after the filing of an answer asserting comparative fault against a non-party to add that non-party as a defendant, even if doing so would otherwise be barred by a statute of limitations - The city asserted this was not in accordance with the statute because the

private property owners asserted comparative fault against the city in the original answer - The trial court determined that, although the original answer did raise comparative fault of the city, this did not trigger the 90-day window under the statute because the city was a party at the time - The trial court concluded that the amended answer was timely filed within 90 days of the filing of the first answer alleging comparative fault against a non-party, which was the amended answer – The court of appeals affirmed the decision - The determination of the city's status as a non-party is measured by considering the point when Ms. Sands sought to amend her complaint, which was the filing of her amended complaint - At that point, the city had been dismissed and qualified as a non-party, and this was within 90 days of the Williards asserting comparative fault against a non-party tortfeasor in their amended answer - The Williards' original answer did not, as asserted by the city, trigger Ms. Sands's 90-day window - At the time of the filing of the original answer, the city was still, as it concedes, a party. As was her right under T.C.A. section 20-1-119(a)(1), Ms. Sands properly filed within 90 days of the first amended answer in which comparative fault was asserted against the City as a non-party

BRENDA SANDS v. ROBERT WILLIARD ET AL
COURT OF APPEALS No. W2024-00772-COA-R9-CV Filed January 24, 2025

"The Plaintiff, who was injured by tripping on a sidewalk, filed suit against the private property owners and city but failed to properly serve the city. In their original answer, the private property owners asserted the city's comparative fault but not in express terms. The Plaintiff voluntarily dismissed the city as a defendant. In an amended answer, the private property owners expressly asserted comparative fault against the city. The Plaintiff promptly amended her complaint to add the city as a defendant under Tennessee Code Annotated section 20-1-119, which provides a plaintiff 90 days after the filing of an answer asserting comparative fault against a non-party to add that non-party as a defendant, even if doing so would otherwise be barred by a statute of limitations. The city asserted this was not in accordance with the statute because the private property owners asserted comparative fault against the city in the original answer. The trial court determined that, although the original answer did raise comparative fault of the city, this did not trigger the 90-day window under the statute because the city was a party at the time. The trial court concluded that the amended answer was timely filed within 90 days of the filing of the first answer alleging comparative fault against a non-party, which was the amended answer. The city appeals. We affirm"

"According to her complaint, in December 2019, Brenda Sands was injured when she tripped on a rise in the sidewalk on Neshoba Road in Germantown, Tennessee. The alleged incident occurred in front of Robert and Theresa Williard's property. In November 2020, Ms. Sands filed a complaint alleging negligence against the Williards individually and against the City of Germantown under the Tennessee Government Tort Liability Act, Tennessee Code Annotated section 29-20-101 *et seq.* (GTLA)."

"In its answer, the City raised an issue related to service of process, alleging that Ms. Sands did not properly serve the mayor or city attorney. In their original answer, filed in April 2021, the Williards admitted to allegations in certain paragraphs of the complaint related to the City's potential negligence, namely:

> 17. Plaintiff charges and avers that the City of Germantown was under a duty of care, which is the care that an ordinary careful person would use to avoid an injury to themselves and/or to others under the same or similar circumstances.
>
> 18. Plaintiff charges and avers that the City of Germantown's acts and/or omissions created and/or allowed an unreasonably dangerous condition to exist, which constitutes gross negligence."

"Beyond admitting to these paragraphs in the complaint, the Williards' original answer did not specifically assert comparative fault against the City, nor did it use the term 'comparative fault.'"

"By May 2022, Ms. Sands had not secured a new summons to resolve the service issue with the City. As a result, the City filed a motion for summary judgment based on the running of the GTLA's one-year statute of limitations. *See* Tenn. Code Ann. § 29-20-305(b). In October 2022, while the City's motion for summary judgment was pending, the Williards moved to amend their answer to, in part, assert comparative fault against the City. In February 2023, before the trial court ruled on either pending motion, Ms. Sands moved to voluntarily dismiss the City. In her motion, Ms. Sands referenced the City's pending motion for summary judgment related to service of process, the statute of limitations, and the Williards' pending motion to amend their answer. Ms. Sands expressly stated that the purpose of the dismissal was to avoid the alleged outstanding service issues." …

"The court granted Ms. Sands's motion to voluntarily dismiss the City and the Williards' motion to amend their answer. In their amended answer, filed February 23, 2023, the Williards specifically stated that they were asserting comparative fault against the City. A few days after the amended answer was filed, Ms. Sands filed an amended complaint that re-added the City as a party under Tennessee Code Annotated section 20-1-119."

"The City responded to the amended complaint with a motion to dismiss in which it asserted that the negligence claim against it was barred by the one-year statute of limitations. The City argued that Ms. Sands could not utilize Tennessee Code Annotated section 20-1-119 to add the City back into the lawsuit because she did not file her amended complaint within 90 days of the first answer to assert comparative fault against the City. Under the City's theory, the Williards' original April 2021 answer, not the February 2023 amended answer, was the first to raise comparative fault when the Williards admitted that the City had a duty of care and had allowed an unreasonably dangerous condition to exist. Therefore, the City argued the amended complaint was filed well outside the statutory period, as it was filed nearly two years after the original answer was filed, thus depriving Ms. Sands of the benefit of being able to use Tennessee Code Annotated section 20-1-119 to add the City."

"In its written order denying the City's motion to dismiss, the trial court agreed with the City insofar as it concluded that the Williards' original answer did raise comparative fault. The trial court concluded, however, that the City was a party at the time, so this did not trigger Tennessee Code Annotated section 20-1-119. The trial court indicated that the Williards' amended answer, filed in February 2023, was the triggering answer, as it raised comparative fault against the City during the time when the City was not a party to the suit. Therefore, because Ms. Sands filed her amended complaint to re-add the City within the 90-day window provided by the statute, she had properly made use of Tennessee Code Annotated section 20-1-119 to add the City back into the case."

"The issue before this court on appeal is whether the trial court correctly applied Tennessee Code Annotated section 20-1-119 when it held that Ms. Sands properly amended her complaint to add the City as a defendant within 90 days of the Williards' amended answer."

"There are three cases that are of particular importance to the parties' arguments in the present case: (1) *Scales H.G. Hill Realty Co., LLC*, No. M2017-00906-COA-R3-CV, 2018 WL 625117 (Tenn. Ct. App. Jan. 30, 2018); (2) *Townes v. Sunbeam Oster Co.*, 50 S.W.3d 446 (Tenn. Ct. App. 2001); and (3) *Queen's Tree Surgery, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M20030-0228-COA-R3-CV, 2003 WL 22768689 (Tenn. Ct. App. Nov. 24, 2003)."

"We address each in turn, beginning by addressing *Scales*, the circumstances of which bear a remarkable resemblance to those of the present case. In an entirely appropriate concession at oral argument, the City conceded that the *Scales* decision, which is an unpublished decision of this court, must have been wrongly decided in order for the City to prevail on appeal in the present case.2 In *Scales*, after a slip and fall at a grocery store, the plaintiff brought a lawsuit against Publix and also H.G. Hill Realty Co., LLC, and Hill Center at Belle Meade, LLC (the Hill defendants). *Scales*, 2018 WL

625117, at *1. In their answers, Publix and the Hill defendants asserted comparative fault against each other. *Id.* During litigation, the Hill defendants filed a motion to compel discovery against the plaintiff, which led the plaintiff to voluntarily dismiss the Hill defendants. *Id.* Later, Publix filed an amended answer where it again asserted comparative fault against the Hill defendants. *Id.* Although the statute of limitations had run, the plaintiff then, within 90 days of the amended answer, filed an amended complaint that re-added the Hill defendants, specifically citing Tennessee Code Annotated section 20-1-119. *Id.* The question before the *Scales* Court mirrored the question in the present case: whether the plaintiff properly added the Hill defendants back into the case after the amended answer asserted comparative fault. *Id.* at *3."

"The *Scales* Court concluded that the Hill Defendants were properly added in response to Publix's amended answer, which was the second answer to raise comparative fault against the Hill Defendants but the first to do so when they were non-parties. *Id.* at *5. The *Scales* Court stated that

> [a] plain reading of the statute indicates that a plaintiff is permitted to assert a claim against a person not already a party to the complaint within 90 days if (1) a defendant is named in an original or amended complaint within the applicable statute of limitations, (2) that defendant alleges in an answer or amended answer that a person not a party to the suit caused or contributed to the injury at issue, and (3) the plaintiff's cause(s) of action against that person would be barred by the applicable statute of limitations were it not for the statute.

Id. at *4."

"Referencing prior precedent from the Tennessee Supreme Court, the *Scales* Court also made clear that the Hill Defendants previously having been parties did not affect the plaintiff's ability to bring them back into the case. *Id.* (citing *Mann v. Alpha Tau Omega Fraternity*, 380 S.W.3d 42, 52 (Tenn. 2012)) ('We hold that 'a person not a party to the suit,' for purposes of Tennessee Code Annotated section 20-1-119, includes any defendant previously dismissed . . . .'). Although the Hill defendants made similar arguments as the City here, this court rejected the contentions and plainly stated the following: 'The first time Publix identified the Hill Defendants as tortfeasors when they were not parties to the suit and when the statute of limitations against them had run was when Publix filed its answer to Ms. Scales's amended complaint.' *Id.* at *5. Only upon the filing of the amended answer were all three requirements of the statute met. Publix was a named party, it alleged in an amended answer that a person not a party to the suit, the Hill defendants, contributed to the injury, and the plaintiff's cause of action against the Hill defendants would be barred by the statute of limitations but for Tennessee Code Annotated section 20-1-119. *Id.* Therefore, the *Scales* Court concluded that the plaintiff could utilize the route afforded by Tennessee Code Annotated section 20-1-119 to add the Hill defendants back into the case. *Id.*"

"This case largely mirrors the facts of *Scales*." …

"The City, however, argues that this court should not follow *Scales*, as it believes the opinion directly contradicts a published opinion of this court in the *Townes* case and unpublished opinion of this court in *Queen's Tree Surgery* case. In the second of the three cases at the center of this appeal, *Townes*, the plaintiffs brought a products liability action in response to sustaining injuries as a result of a propane grill explosion. *Townes*, 50 S.W.3d at 449. The plaintiffs filed suit against multiple defendants including, among others, the manufacturer of the grill and the manufacturer of the propane tank. *Id.* During the course of litigation, the plaintiffs nonsuited the grill manufacturer apparently under a mistaken understanding that they were not involved in any way with the manufacture of the propane tank only to later learn that propane tank manufacturer ordinarily included certain safety features with its tanks that were not included with the tanks for this grill manufacturer at the grill manufacturer's request. *Id.* In response to learning this information, the plaintiffs filed a second amended complaint seeking to add new claims against the grill manufacturer, whom the plaintiffs had previously voluntarily dismissed. *Id.* The trial court granted permission to file this second amended complaint. *Id.*

The grill manufacturer, subsequently, moved for summary judgment based upon the contention that the new claims were barred by the statute of limitations. *Id.* at 450. While this motion for summary judgment was pending, the propane tank manufacturer filed an amended answer raising comparative fault as a defense against the grill manufacturer. *Id.* The plaintiffs defended the permissibility of their action under Tennessee Code Annotated § 20-1-119. *Id.* The trial court rejected their contention and concluded the claims against the grill manufacturer were time-barred and dismissed the grill manufacturer from the case. *Id.* The plaintiffs then promptly filed a third amended complaint reasserting the claims against the grill manufacturer and arguing that their action against the grill manufacturer was now permissible pursuant to Tennessee Code Annotated § 20-1-119. *Id.*"

"This court concluded in *Townes* that the trial court had properly determined that the plaintiffs could not use Tennessee Code Annotated section 20-1-119 as a basis for defending against the statute of limitations bar with regard to their second amended complaint because the grill manufacturer was still a party at the time with the trial court having permitted the second amended complaint. *Id.* at 454. However, this court concluded that the trial court erred in not allowing plaintiffs to re-add the grill manufacturer as a defendant with their third amended complaint because at time of their third amended complaint the grill manufacturer was no longer a party and the third amended complaint was filed within 90 days of the propane manufacturer's amended answer raising comparative fault against the grill manufacturer. *Id.*"

"*Townes* dealt with the question of whether a dismissed party fell under the purview of Tennessee Code Annotated section 20-1-119 when they were known to the plaintiff before being named as a potential tortfeasor by a current defendant. *Id.* at 451. The *Townes* Court held that the plaintiff's knowledge of the existence of other potential defendants was irrelevant to the application of Tennessee Code Annotated section 20-1-119. *Id.*"

"The City cites the *Townes* case primarily for the proposition that

> an added defendant's status as a party should be determined, not when the original defendant names the added defendant as an additional comparative tortfeasor in its answer or amended answer, but rather when the plaintiff either seeks to amend its complaint to name the additional comparative tortfeasor as an additional defendant or to file a separate complaint against the additional comparative tortfeasor.

Id. at 454. The City argues that this holding contradicts *Scales*, and, accordingly, also the trial court's decision in the present case."

"*Townes*, however, actually supports both *Scales* and the trial court's decision in the present case. The determination of the City's status as a non-party is measured under *Townes* by considering the point when Ms. Sands sought to amend her complaint, which was the filing of her amended complaint. At that point, the City had been dismissed and qualified as a non-party, and this was within 90 days of the Williards asserting comparative fault against a non-party tortfeasor in their amended answer. Additionally, the *Townes* Court concluded that the plaintiff's prior awareness of the defendant's potentially being another tortfeasor, such as Ms. Sands possessed in the present case, was irrelevant to the application of Tennessee Code Annotated section 20-1-119. *See id.* at 453('In light of the plain language of Tenn. Code Ann. § 20-1-119, we conclude that a plaintiff's knowledge of the existence of other persons who might be liable for the plaintiff's injuries is irrelevant.')."

"The third case at the center of this dispute, *Queen's Tree Surgery*, is quite similar to *Townes*, involving the same issue regarding whether a party known to the plaintiff, particularly one named in the original complaint, could qualify as a 'person not a party to the suit' under Tennessee Code Annotated section 20-1-119. *Queen's Tree Surgery, Inc.*, 2003 WL 22768689, at *1. The court applied *Townes* in holding that a party could dismiss a defendant and then, the very same day, file an amended complaint to re-add that party." …

"While the City perceives a conflict between the *Scales* decision and the *Townes* and *Queen's Tree Surgery* decisions, we perceive these decisions as existing quite harmoniously. It is not apparent to this court how the *Townes* and *Queen's Tree Surgery* decisions bolster the City's contention that the initial answer filed by the Williards creates the critical filing in this case for triggering the start of the 90-day clock for adding the City as a party under Tennessee Code Annotated section 20-1-119. The City concedes that it was a party at the time of the filing of the Williards' initial answer in the case. And, there is no holding in either *Townes* or *Queen's Tree Surgery* that reflects the Williards' original answer starting the running of the 90-day clock under Tennessee Code Annotated section 20-1-119."

"The City also contends that the *Scales* decision and the trial court's ruling in the present case are contrary to the plain language of Tennessee Code Annotated section 20-1-119(a)(1). The statute provides:

> (a)(1) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against that person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging that person's fault, either:
>
> (A) Amend the complaint to add the person as a defendant pursuant to Tenn. R. Civ. P. 15 and cause process to be issued for that person;
> or
> (B) Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an original complaint initiating the suit or an amended complaint for purposes of this subsection (a)."

"We agree with the *Scales* Court's understanding of the statute and disagree with the City's reading. The trial court's ruling in the present case tracks the plain language of Tennessee Code Annotated section 20-1-119(a)(1). The City places its emphasis on the initial answer from the Williards having been their first assertion of comparative fault against the City. Ms. Sands disputes that the Williards' first answer was sufficient to constitute an assertion of comparative fault against the City, but we assume for purposes of argument that it was. Even with this assumption, the City's argument is still unavailing under the plain language of Tennessee Code Annotated section 20-1-119(a)(1)."

"The statutory text provides that 'the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging that person's fault . . . [a]mend the complaint to add the person as a defendant . . . [or] [i]nstitute a separate action against that person by filing a summons and complaint.' Tenn. Code Ann. § 29-20-119. The statutory reference to 'that person' refers the person identified earlier in the same statutory sentence as 'a person not a party to the suit' and as to whom the defendant is alleging that the person 'caused or contributed to the injury or damage for which the plaintiff seeks recovery.' *Id.* The two options afforded to a plaintiff under Tennessee Code Annotated section 20-1-119(a)(1)(A) & (B) also make plain that 'the person' or 'that person' is an individual who is a non-party to the suit. The options are, otherwise, non-sensical. The City's reading of the statutory provision would require us to ignore the plain text of the statute that the person being referenced is 'not a party to the suit.'"

"Simply stated, the trial court properly applied the statute. The Williards' original answer did not, as asserted by the City, trigger Ms. Sands's 90-day window. At the time of the filing of the original answer, the City was still, as it concedes, a party. As was her right under Tennessee Code Annotated

section 20-1-119(a)(1), Ms. Sands properly filed within 90 days of the first amended answer in which comparative fault was asserted against the City as a non-party."

4. **Negligent hiring claim and negligent act of that employee were the proximate cause of injuries to a child - No claim for negligence can succeed in the absence of any of the following elements: (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 - Teachers are not expected to be insurers of the safety of students and are not required to supervise all activities at all times - Teachers do, however, have a duty to safeguard students from reasonably foreseeable dangerous conditions – To establish a claim for negligent hiring, a plaintiff must first prove all of the elements of a negligence claim, a plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an employee if he establishes, in addition to the elements of a negligence claim, that the employer had knowledge of the employee's unfitness of the job - But as the trial court found, the Wherrys failed to establish the elements of a negligence claim and the court affirmed the dismissal of the negligent hiring claim**

COURTNEY L. WHERRY ET AL. v. OBION COUNTY BOARD OF EDUCATION ET AL.
COURT OF APPEALS No. W2024-00693-COA-R3-CV Filed April 28, 2025

"This negligence action arose when Courtney L. Wherry ('Ms. Wherry'), a member of the South Fulton High School sideline cheerleading team, fell and injured her neck while performing a 'shoulder sit' stunt in the end-zone of a football field prior to a high school football game. Ms. Wherry and her parents, Jason T. Wherry and Jaime L. Tidwell, (collectively, 'the Wherrys') brought suit against the Obion County Board of Education and Obion County School District (collectively, 'the School District') under the Tennessee Governmental Tort Liability Act to recover damages for the injuries sustained by Ms. Wherry. The Wherrys sought recovery based upon two negligence theories: (1) that the school district's selection and hiring of the South Fulton High School cheerleading coach Nichole Harrell ('Ms. Harrell') was negligent, and (2) that the negligent acts and omissions of Ms. Harrell on the night of the accident related to the football field conditions were the cause in fact and proximate cause of Ms. Wherry's injuries. Following a bench trial, the trial court found in favor of the School District on both negligence theories. The Wherrys appeal. We affirm the judgment of the trial court."

"On August 23, 2019, the South Fulton High School ('SFHS') sideline cheerleading team traveled to a nearby high school for the first football game of the season. It had rained earlier in the week; however, it was not raining when the SFHS cheerleaders arrived at the game."

"Ms. Harrell, an English teacher at SFHS, had recently been hired as the SFHS cheerleading coach. Upon arrival at the football field, Ms. Harrell observed that there was mud and standing water near the visitor's bleachers where the SFHS cheerleaders would perform their sideline cheers. Having observed these conditions, Ms. Harrell instructed the cheerleaders to refrain from performing any stunts in that area. She then inquired about the conditions of the football field and was informed that it had been cleared for play by the Tennessee Secondary School Athletic Association ('TSSAA'). Nevertheless, for safety reasons, Ms. Harrell limited the cheerleaders to performing a 'shoulder sit' stunt on the field and no other stunts."

"Because it was the first football game of the season, the cheerleaders planned to hold up a banner in the endzone for the SFHS football team to break through as they ran onto the field. To elevate the banner, the cheerleaders would execute two 'shoulder sits' with each 'flyer' cheerleader holding one end of the banner. One of the two stunt groups consisted of Ms. Wherry, who acted as the 'flyer,' and her teammate Claudia Colston ('Ms. Colston'), who acted as the 'base.' On the night in question, Ms. Wherry was a junior at SFHS and was 16 years of age."

"Prior to the commencement of the game, some of the SFHS cheerleaders went to the end zone to cut the banner. Upon returning to the sideline, those cheerleaders expressed no concerns regarding the field conditions and informed Ms. Harrell that they felt comfortable performing on the field. Ms. Harrell observed no wetness, mud, or loose grass on the shoes of the cheerleaders who had returned from the field."

"With Ms. Harrell observing from the sideline, the cheerleaders moved to the grass near the endzone to practice the shoulder sit. Both stunt groups executed the stunt without incident. The cheerleaders then moved to the endzone. There, they practiced the stunt again without incident and safely dismounted for the playing of the national anthem. After the national anthem, both groups positioned themselves to re-execute the stunt. Ms. Wherry placed her right foot on Ms. Colston's right thigh and swung her left leg over Ms. Colston's left shoulder. However, as she attempted to swing her right leg over Ms. Colston's right shoulder, her right foot slipped on Ms. Colston's nylon shorts. She fell forward over Ms. Colston's head, striking her head on the ground. The fall caused serious injury to Ms. Wherry's neck. Another cheerleader quickly stepped in to replace Ms. Wherry and the football players ran through the banner."

"Approximately one year later, on August 21, 2020, the Wherrys commenced this action against the School District under the Tennessee Governmental Tort Liability Act ('TGTLA'), Tenn. Code Ann. § 29-20-205. The Wherrys filed the petition in the Circuit Court for Obion County, Tennessee. In their petition, the Wherrys sought compensatory damages in the amount of $300,000 for, *inter alia*, medical bills they incurred as a result of Ms. Wherry's injuries while she was a minor."

"The Wherrys sought recovery based on two negligence theories. One, they claimed the School District was vicariously liable for the negligent acts and omissions of Ms. Harrell on the evening of August 23, 2019 as an employee of the School District acting within the scope of her employment. Specifically, they claimed that Ms. Harrell failed to 'exercise reasonable care to prevent unreasonable risk of injury to Ms. Wherry' by failing to (1) observe and recognize the hazardous condition posed by the 'slippery and muddy' condition of the field, (2) warn the cheerleaders of the hazardous condition, and (3) instruct the cheerleaders to refrain from performing any ariel stunts on the field. The Wherrys claimed that these negligent acts or omissions were the cause in fact and proximate cause of Ms. Wherry's fall and resulting injuries. Two, they claimed that the School District was negligent in selecting and hiring Ms. Harrell."

"After the completion of discovery, the case was scheduled for a two-day bench trial on March 13 and 14, 2024. Over these two days, several witnesses testified in person, including Ms. Harrell, Ms. Wherry, and Ms. Colston. Ms. Harrell testified that while she did not personally inspect the endzone of the football field on the evening in question, she received reports from TSSAA officials, the SFHS football coach's wife, Jamie Knott, and the SFHS cheerleaders that the field was in safe condition. She also testified that she observed no standing water on the field from her position on the sideline, which testimony was corroborated by photographs and video footage presented at trial showing no standing water on the playing field."

"For her part, Ms. Colston testified that there was only 'a little moisture on the ground' on the evening of the accident and that, at the time, she had not felt it was unsafe to perform the shoulder sit on the field. Ms. Wherry took the stand next. She stated that she had been cheerleading since the first grade and had participated in cheerleading throughout elementary school, for two years in middle school, and during both her freshman and sophomore years of high school. Ms. Wherry testified that, while on the SFHS cheerleading squad, she had regularly performed shoulder sits and more advanced stunts as a flyer. Similar to Ms. Colston, Ms. Wherry testified that she had felt it was safe to perform the shoulder sit on the night in question."

"The court also heard testimony from Catherine Leigh Carr, the School District's expert on high school cheerleading in Tennessee. Based on her thirty years of experience, Ms. Carr opined that performing a shoulder sit on a damp surface created no increased risk of injury. She testified that high school

cheerleaders often perform far more advanced stunts on damp surfaces. Additionally, SFHS superintendent Timothy Watkins testified that, prior to high school football games, TSSAA officials examine the football field for any safety concerns that may be present for both football players and cheerleaders alike."

"On April 11, 2024, the trial court entered judgment in favor of the School District. Based upon numerous detailed findings of fact, the court concluded as follows:

> As this matter is brought under the Governmental Tort Liability Act, the Plaintiffs' cause of action for negligent hiring of Ms. Harrell as cheer coach must fail since the hiring decision was a discretionary matter and therefore the immunity of Defendant is not removed.
>
> As to Ms. Harrell's failure to personally inspect the end-zone where the accident occurred, the Court finds that any failure or omission to personally inspect the end-zone would not be the cause in fact or the proximate cause of the injury, as it was simply a tragic accident.

Therefore, the judgment is DENIED and the case is dismissed with costs taxed to Plaintiffs."

"The claims at issue on appeal are governed by the TGTLA. The TGTLA codifies the common law rule that 'all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities.' Tenn. Code Ann. § 29-20-201(a). Nevertheless, the statutory scheme provides several exceptions to this general declaration of immunity. In pertinent part:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:
>
> > (1) The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused[.]

Tenn. Code Ann. § 29-20-205."

"… [T]he trial court determined that (1) Ms. Wherry's injuries were the result of a 'tragic accident' and were not factually or proximately caused by Ms. Harrell's failure to inspect the endzone where the accident occurred, and (2) the decision to hire Ms. Wherry was a 'discretionary function' within the meaning of the TGTLA. Accordingly, the court found that the School District retained immunity under the TGTLA and was not liable under either of the Wherry's negligence theories. The Wherrys contend on appeal that this was in error."

"No claim for negligence can succeed in the absence of any of the following elements: ''(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.'' *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993) (citing *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993)). Absent a finding of negligence on behalf of the governmental employee, the governmental entity will retain immunity under the TGTLA. *See* Tenn. Code Ann. § 29-20-201(a); § 29-20-205."

"Duty is the legal obligation owed by one person to another to conform to a reasonable person standard of care for protection against unreasonable risks of harm. *Mason ex rel. Mason v. Metro. Gov't of Nashville & Davidson Cnty.*, 189 S.W.3d 217, 221 (Tenn. Ct. App. 2005) (citing *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)). In Tennessee, school teachers must exercise reasonable and ordinary care under the circumstances to ensure the safety of their students. *Roberts v. Robertson Cnty. Bd. of Educ.*, 692 S.W.2d 863, 870 (Tenn. Ct. App. 1985). 'The extent to which a teacher must

supervise the activities of his or her students must be determined with reference to the age and inexperience of the students, their maturity, and the dangers to which they may be exposed.' *King by King v. Kartanson*, 720 S.W.2d 65, 68 (Tenn. Ct. App. 1986) (citing *Townsley v. Yellow Cab Co.*, 145 Tenn. 91, 237 S.W. 58 (1922))."

"Teachers are not expected to be insurers of the safety of students and are not required to supervise all activities at all times. *Roberts*, 692 S.W.2d at 870. Teachers do, however, have a duty to safeguard students from reasonably foreseeable dangerous conditions. *Hopper v. Obion Cnty. Sch. Sys.*, No. W2021-00805-COA-R9-CV, 2022 WL 2116482, at *4 (Tenn. Ct. App. June 13, 2022) (citing *Roberts*, 692 S.W.2d at 871). 'There is no liability for the results of an accident that could not have been foreseen by a reasonably prudent person.' *Brackman v. Adrian*, 472 S.W.2d 735, 739 (Tenn. Ct. App. 1971) (citing Prosser on the Law of Torts, 117 (2d Ed., 1955); *Smith et ux. v. Roane-Anderson Co.*, 30 Tenn. App. 458, 207 S.W.2d 353))."

"The Wherrys contend that by failing to personally inspect the condition of the endzone and prohibit the SFHS cheerleaders from performing a stunt thereon, Ms. Harrell's conduct fell below the applicable standard of care. Whether a defendant has breached a duty of care is a question of fact. *Payne v. Tipton Cnty.*, 448 S.W.3d 891, 899 (Tenn. Ct. App. 2014) (citing *Hardeman Cnty. v. McIntyre*, 420 S.W.3d 742, 747–48 (Tenn. Ct. App. 2013))."

"The record reveals that Ms. Harrell exercised reasonable care in ensuring that the endzone of the football field would be safe for stunting on the evening of August 23, 2019. Prior to the performance of the stunt, Ms. Harrell spoke with multiple parties regarding the conditions of the football field, including the football coach's wife, Jamie Knott, and the cheerleaders who had recently been on the field. Neither of these parties expressed concern regarding the field conditions. Ms. Harrell also spoke to the TSSAA officials on the field. They too expressed no concerns about the field conditions and informed Ms. Harrell that the field had been cleared for play."

"The Wherrys insist that it was unreasonable for Ms. Harrell to rely upon the TSSAA's field clearance given that the TSSAA rules did not govern sideline cheerleading in August of 2019. We find this argument unconvincing. To be fair, the trial court found that sideline cheerleading was not recognized as a sport by TSSAA on the date of the accident. However, SHFH's superintendent Timothy Watkins testified at trial that TSSAA officials inspected the areas where the cheerleaders would be performing regardless of whether sideline cheerleading was governed by the TSSAA guidelines."

"While Ms. Harrell observed mud and standing water near the visitor's bleachers, she specifically testified, and the trial court found, that she did not observe mud or standing water near the endzone where the shoulder sit would be performed. Her testimony was supported by photographs and recorded video evidence presented at trial showing no standing water on the field. Ms. Harrell observed no mud, loose grass, or wetness on the shoes of the cheerleaders who returned from the endzone after preparing the banner."

"Furthermore, the evidence fails to establish that Ms. Wherry's injuries were foreseeable. As the trial court found, 'a shoulder sit is a basic stunt with very little difficulty in execution' and Ms. Wherry was 'a skilled and advanced cheerleader.' The court also found that Ms. Harrell watched the cheer team warm up and practice the shoulder sit in the endzone without any problems before dismounting for the playing of the National Anthem. The trial court found that Ms. Harrell was familiar with Ms. Wherry's advanced stunting abilities and had observed her safely and successfully complete the shoulder sit with Ms. Colston on multiple occasions. Further, both Ms. Colston and Ms. Wherry testified that they felt comfortable performing the shoulder sit prior to the accident."

"As noted above, duty is the legal obligation owed by one person to another to conform to a reasonable person standard of care for protection against unreasonable risks of harm. *Mason*, 189 S.W.3d at 221 (citing *McCall*, 913 S.W.2d at 153). Based on the entire record, including the trial court's findings of fact, which are supported by a preponderance of the evidence, we conclude that the Wherrys failed to

establish a breach of duty on the part of Ms. Harrell. As a result, their negligence claim must fail. *See Kilpatrick*, 868 S.W.2d at 598 (finding that a negligence claim may not succeed without a showing of breach of duty)."

"The Wherrys contend the trial court erred by finding that the School District was immune from liability for negligent hiring pursuant to Tennessee Code Annotated § 29-20-205(1) of the Tennessee Governmental Tort Liability Act. We affirm the dismissal of this claim, albeit on different grounds."

"To establish a claim for negligent hiring, a plaintiff must first prove all of the elements of a negligence claim. *See Doe v. Catholic Bishop for Diocese of Memphis*, 306 S.W.3d 712, 717 (Tenn. Ct. App. 2008) ('A plaintiff in Tennessee may recover for negligent hiring, supervision or retention of an **employee if he establishes, in addition to the elements of a negligence claim**, that the employer had knowledge of the employee's unfitness of the job.') (emphasis added). But as the trial court found, the Wherrys failed to establish the elements of a negligence claim. Thus, we affirm the dismissal of the negligent hiring claim."

EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. Plaintiff filed a declaratory judgment action that its proposed use of its property was permitted under the Grandfather Act – Plaintiff did not submit any plans or apply for a permit - Where the relief sought in a declaratory judgment action is the same relief that is available under common law writ of certiorari, the action will be treated as a certiorari action, and the requirements of such action will be applied – Trial court treated declaratory judgment action as a writ of certiorari because the claimed use was a matter of discretion - Where the relief sought in a declaratory judgment action is the same relief that is available under common law writ of certiorari, the action will be treated as a certiorari action - If exhaustion of remedies is not mandated by the plain words of the statute governing the issue, then it is not statutorily required, then it is a matter of judicial discretion - There is no statutory requirement in the present case, thus, we use our discretion to determine whether Trezevant Enterprises should have been required to exhaust its administrative remedies before filing the subject action – The court found that Trezevant Enterprises was required to exhaust its administrative remedies prior to filing a petition for a common law writ of certiorari and the failure to do so meant 'a writ of certiorari was not available

TREZEVANT ENTERPRISES, INC. v. CITY OF GERMANTOWN, TENNESSEE
COURT OF APPEALS No. W2024-00420-COA-R3-CV Filed April 3, 2025

"This appeal arises from a landowner's complaint seeking a declaratory judgment that proposed construction was consistent with a permitted non-conforming use on its property. The parties agreed that the property was rezoned in 1957 and that certain non-conforming uses are permitted on the property. However, the city opposed the declaratory action due to the landowner's refusal to submit plans to the city administrative zoning body to obtain its decision on whether the proposed use was a permissible extension of that nonconforming use. The city asserted that, without the landowner having applied for a building permit, the action was not ripe for adjudication. The trial court determined that the matter was ripe and that the landowner had standing, that it was entitled to a judgment as a matter of law, and that the proposed use was protected by the terms of the grandfather statute. Because the city was never permitted to rule on the proposed non-conforming use, we find that the matter was not ripe for review. Accordingly, the decision of the trial court is reversed, and the case is dismissed."

"The underlying facts of this case appear to be undisputed. In 1955, the City of Germantown ('the City'), the appellant, annexed certain parcels of real property. Included in that annexation were the

parcels located at 7038 Poplar Avenue, 7040 Poplar Avenue, and 7092 Poplar Avenue. The underlying lawsuit and this appeal concern only the 7038 Poplar Avenue and 7040 Poplar Avenue parcels, but all three parcels are now under the common ownership of Mr. Stanley 'Trip' Trezevant III, the owner of Trezevant Enterprises, Inc. ('Trezevant'), the appellee. In 1957, the parcels were owned by Mr. Bilbo Jones and were rezoned from commercial to residential use. At some time prior to the rezoning, Mr. Jones had begun using all three parcels to operate a commercial nursery business called Jones Brothers Tree Nursery and Landscape Company, and the business continued as a pre-existing non-conforming use of the property. An office building existed on the 7092 Poplar Avenue property prior to the rezoning, and Mr. Jones used it for the administration of the nursery activities which occurred on the 7038 and 7040 Poplar Avenue parcels. In April 1977, Mr. Jones sold the 7038 and 7040 Poplar Avenue parcels to Mr. Norman Brown. Later, Mr. Jones passed away, and the 7092 Poplar Avenue property was ultimately inherited by Ms. Yvone P. Rhea. Ms. Rhea conveyed the 7092 Poplar Avenue parcel to Mr. Brown by warranty deed dated August 24, 1987. Shortly thereafter, Mr. Brown began renting the office located on the 7092 Poplar property to a business called Carson's Tree Services. Sometime in 1990, Mr. Brown began renting another portion of the office located on 7092 Poplar to Germantown Lawn Service and Pest Control for office and administrative purposes."

"Subsequently, the 7092 Poplar Avenue parcel was subject to litigation initiated in approximately 1992.1 *See City of Germantown v. Norman Brown, Jr., et al.*, Shelby County Circuit Court No. 39807-7. The City sued Mr. Brown and the pest control business leasing the office on the property, claiming that the use violated the City's zoning ordinance and state law. In a judgment dated April 7, 1993, the Circuit Court applied Tennessee Code Annotated section 13-7-208 and Germantown Zoning Ordinance 25-388, to determine that the 'use of the property [did] not violate either the city or state law.' This decision was never appealed. Mr. Trezevant then purchased the 7092 Poplar Avenue property from Mr. Brown on May 25, 1993."

"In the meantime, on October 16, 1986, Mr. Trezevant began leasing the 7038 and 7040 Poplar Avenue parcels, which are the subject of this litigation, from Mr. Brown. Mr. Trezevant started operating a plant nursery business called 'Trip's Nursery' on the property. At some point, Mr. Trezevant decided that he wanted to stop operating the nursery business, raze the existing facilities, and construct a new structure which could be leased to third party businesses. Subsequently, Mr. Trezevant's attorney met with the Germantown City Attorney, Mr. C. Thomas Cates, to discuss whether the proposed use would be permissible. Following this meeting, Mr. Cates sent a letter to Mr. Trezevant's counsel dated April 5, 2005, recounting the discussion. In the letter, Mr. Cates agreed that certain non-conforming uses were permitted on the property due to those uses pre-dating the rezoning of the area to residential use. *See* Tenn. Code Ann. 13-7-208(c). He indicated that the nursery use was consistent with the use prior to the zoning change and could continue. However, he also stated that while expansions of pre-existing non-conforming use can be permitted by the statute, changes in the type of business or activity were not permitted. Thus, without evidence that an office use had begun on the subject property prior to the rezoning, the proposed change in use would not be permissible as the 'leasing of office space [was] not a permitted non-conforming use.'"

"Mr. Trezevant also met with Mr. Jerry Cook, who was serving as the Director of Community Development for the City of Germantown at the time. In this role, Mr. Cook often met with property developers to discuss construction or architectural plans, though he was not empowered to approve these plans or issue building permits. During these meetings, Mr. Trezevant and Mr. Cook discussed the desired building and Mr. Cook sketched out some rough drawings of the proposed office building. However, Mr. Cook later stated in a sworn affidavit that he had '[a]dvis[ed] Trip Trezevant that[,] in my opinion, he would not obtain the support for building an office building or buildings on the subject property as the Mayor and Board of Alderman at the time did not want any construction upon the subject property other than residential.' After these two interactions, Mr. Trezevant decided to seek a declaratory judgment stating that the property could be used for the purpose of conducting retail sales of goods to the public and/or for the purpose of general offices. However, Mr. Trezevant never applied for a building permit to construct an office or other building on the subject property."

"The original complaint in this matter was filed on September 1, 2005, by Trezevant Enterprises, Inc., and sought a declaratory judgment establishing that the subject property could be used for the retail sale of goods and merchandise to the public and/or for the purpose of general offices pursuant to Tennessee Code Annotated section 13-7-208(g). The City responded by filing a motion to dismiss, claiming that Trezevant was not the real party in interest as it did not own the subject property but only leased it. On December 20, 2005, an amended complaint was filed in which Mr. Norman Brown, Jr., both individually and as the Trustee of the Brown Family Trust, joined the lawsuit as a plaintiff. The City filed additional motions to dismiss for failure of the plaintiffs to apply to the City for the approval of the requested improvements prior to filing the lawsuit and claiming the relief sought should have been under a petition for writ of certiorari rather than a declaratory judgment action. The trial court denied the motion to dismiss in an order entered on June 29, 2007, and subsequently, Germantown filed an answer to the complaint on July 16, 2007."

"On May 31, 2013, while the proceedings were stayed, Trezevant purchased the subject property from the Brown Family Trust. Subsequently, Mr. Brown voluntarily nonsuited the claims asserted by him individually and on behalf of the trust. The case remained stayed until July 26, 2021, at which point, Trezevant filed a notice of filing 'specific written plans' and submitted a one-page drawing of a building to be constructed on the subject property. The parties then filed competing motions for summary judgment. During a hearing, the trial court raised concerns with the issues of standing and ripeness, and the parties were instructed to brief the issues by an order entered on July 13, 2023. Both parties submitted briefs and a hearing on the matter took place on January 24, 2024. The trial court announced its decision on February 5, 2024, and determined that it could resolve the dispute. The trial court also reviewed the transcript of the February 8, 2012 proceedings which resulted in the order of stay so that it could establish the position of the trial court at the time the order was entered. The trial court then stated that it would be ruling '[b]ased on the premise that lots 7038 and 7040 are to be treated as lots 7092 and that all are one lot.'"

"The trial court also recognized that the order staying the proceedings contained an 'instruction to submit a plan of use – to present that plan to the City and if denied, the Court [would] make a determination.' The trial court considered whether the plans submitted by Trezevant complied with the order. The court stated that '[o]rdinarily, [it] would conclude that [the plans submitted] [did] not comply' and would have 'require[d] the [p]laintiff to submit the detailed plans as it would be required by the City of Germantown.' However, the trial court stated that as the City's position was 'unequivocal as to not allowing the proposed building, it would be an effort in futility to require Plaintiff to expend resources to [apply] for a building permit.' The trial court 'conclude[d] that the proposed use [was] consistent with the use of a commercial building with offices for rent.' A written order was entered on February 23, 2024, which incorporated these findings and awarded Trezevant a judgment as a matter of law, stating that the 'proposed use of 7038 and 7040 Poplar Avenue as commercial buildings with offices for rent to others is permitted under the Grandfather Statute, Tenn. Code Ann. § 13-7-208, *et seq.*' The City filed this appeal."

"The City's primary argument emanates from its assertion that the action should have been treated as a prematurely-filed common law writ of certiorari rather than a declaratory judgment action. The City contends that the action should be treated as a writ of certiorari, that a writ of certiorari requires an administrative decision to review, here there is no administrative decision to review because Trezevant did not follow the administrative process, and thus, the claims are not ripe for review."

"Trezevant claims that it filed the petition pursuant to the Declaratory Judgment Act seeking a 'declaration of the Grandfather Statute's application to the Subject Property.' Trezevant relies primarily on our State Supreme Court's opinion in *Holdredge v. City of Cleveland*. 402 S.W.2d 709 (Tenn. 1966). In *Holdredge*, the Court determined that a declaratory judgment action was appropriate where the challenge was to 'the validity of [an] ordinance amending [a] zoning ordinance' and thus 'certiorari [was] not the exclusive remedy.' *Id.* at 713-14. The Court specified that '[t]he adoption of the amendment was a legislative act.' *Id.* at 712. Trezevant also claims that the communications with Mr. Cates and with Mr. Cook constitute rejections of the proposed plans and thus, the case was ripe for

adjudication. The trial court agreed with Trezevant and found that the action was brought 'pursuant to the Declaratory Judgment Act' and was ripe for review."

"The distinction between whether a writ of certiorari or a declaratory judgment action is the correct procedure to obtain the type of relief Trezevant seeks weighs heavily on the remainder of this opinion. Therefore, we begin by addressing this issue. It is well-settled that the designation or label that a plaintiff places upon his or her claim for relief is not conclusive and binding upon the courts. As we have previously stated, '[c]ourts should, when appropriate, give effect to the substance of a pleading rather than its form.' *Duracap Asphalt Paving Co. Inc. v. City of Oak Ridge*, 574 S.W.3d 859, 864 (Tenn. Ct. App. 2018) (citing *Brundage v. Cumberland Cnty.*, 357 S.W.3d 361, 371 (Tenn. 2011)). Tennessee courts have previously treated actions filed as declaratory judgment actions as writs of certiorari, and *vice versa*. *See McCallen v. City of Memphis*, 786 S.W.2d 633, 639-40 (Tenn. 1990) (treating an action styled as a petition for a declaratory judgment as a petition for a writ of certiorari); *Fallin v. Knox Cnty. Bd. of Comm'rs*, 656 S.W.2d 338, 342 (Tenn. 1983) (treating an action styled as a petition for a writ of certiorari as an action for a declaratory judgment.) As we have explained, '[w]here the relief sought in a declaratory judgment action is the same relief that is available under common law writ of certiorari, the action will be treated as a certiorari action, and the requirements of such action will be applied.' *State ex rel. Moore & Assocs., Inc. v. West*, 246 S.W.3d 569, 581 (Tenn. Ct. App. 2005) (citing *Johnson v. Metro. Gov't for Nashville Davidson Cnty., Tenn.*, 54 S.W.3d 772, 774 (Tenn. Ct. App. 2001))."

"A writ of certiorari is the vehicle by which a party may seek judicial review of the decision of an inferior tribunal, board, or officer exercising judicial functions, to determine whether that entity 'has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.' Tenn. Code Ann. § 27-8-101. We have previously stated that, '[a] party subject to the decision of a local zoning board may seek judicial review of that decision 'by filing a petition for a common law writ of certiorari pursuant to Tenn. Code Ann. § 27-8-101.'' *Swann v. City of Kingsport*, No. E2023-01679-COA-R3-CV, 2024 WL 4678009, at *2 (Tenn. Ct. App. Nov. 5, 2024) (*quoting Cash v. Wheeler*, 356 S.W.3d 913, 915 (Tenn. Ct. App. 2011))."

"Conversely, 'a declaratory judgment action is a mere procedural device by which various types of substantive claims may be asserted.' *Dehoff v. Att'y Gen.*, 564 S.W.2d 361, 363 (Tenn. 1978) (citing *Luckenbach Steamship Co. v. United States*, 312 F.2d 545 (2d Cir. 1963)). A declaratory judgment action permits a party 'interested under a deed,will, written contract, . . . or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise' to 'have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.' Tenn. Code Ann. § 29-14-103."

"As stated, the parties' positions differ as to the appropriate action which the appellee should have filed: a common law writ of certiorari or a declaratory judgment action. A common law writ of certiorari is appropriate where a party seeks to challenge an action of lower authority which 'is administrative or quasi-judicial in nature, rather than legislative in nature.' *Moore & Assocs.,* 246 S.W.3d at 575 (citing Tenn. Code Ann. §27-8-101; *McCallen*, 786 S.W.2d at 640). Conversely, in the context of zoning, a declaratory judgment action 'is the proper remedy to be employed by one who seeks to invalidate an ordinance, resolution or other legislative action of county, city or other municipal legislative authority enacting or amending zoning legislation.' *Fallin*, 656 S.W.2d at 342. To determine whether a petition for a writ of certiorari or a declaratory judgment action is the appropriate mechanism by which to seek judicial review, the court must determine what type of decision or action is being challenged."

"In *Moore & Associates*, we explained the process used to determine whether an action of a lower authority is administrative or legislative in nature. 246 S.W.3d at 575. We repeated the test used to determine whether a government function is legislative or administrative, which is 'whether it 'makes new law or executes one already in existence.'' *Id.* (quoting *McCallen*, 789 S.W.2d at 639). We also

found that '[d]eciding whether a particular situation meets the requirements of a zoning ordinance is an administrative function.' *Id.* at 576. (Citing *McCallen*, 786 S.W.2d at 640). We then opined that ''[t]he meaning of a zoning ordinance and its application to a particular circumstance are in the first instance, questions for the local officials to decide.'' *Id.* (quoting *Whittemore v. Brentwood Planning Com'n, City of Brentwood*, 835 S.W.2d 11, 16 (Tenn. Ct. App. 1992)). Finally, we reiterated that '[a] decision to issue or not to issue a building permit is an administrative decision, whether made by an official or a board.' *Id.* (*citing Thompson v. Metro Gov't of Nashville and Davidson County*, 20 S.W.3d 654, 659 (Tenn. Ct. App. 1999); *Harrell v. Hamblen Cnty. Q. Court*, 526 S.W.2d 505, 509 (Tenn. Ct. App. 1975)). Accordingly, we determined that the decision not to certify a certificate of compliance 'was an administrative decision, subject to review by common law writ of certiorari.' *Moore & Associates*, 246 S.W.3d at 577."

"Later in that opinion, we considered the builder's argument that it should have been permitted to seek judicial review through a declaratory judgment action because 'it was not entitled to obtain review by writ of certiorari' as it had not appealed the administrative decision to the board of zoning appeals. *Id.* at 580. We noted that '[w]here the relief sought in a declaratory judgment action is the same relief that is available under common law writ of certiorari, the action will be treated as a certiorari action.' *Id.* at 581 (citing *Johnson*, 54 S.W.3d at 774; *Campbell v. Bedford Cnty. Regional Planning Comm'n*, No. M2003-00025-COA-R3-CV, 2004 WL 626724, at *4-5 (Tenn. Ct. App. March 29, 2004); *Kielbasa v. B & H Rentals, LLC.*, No. M2002-00129-COA-R3-CV, 2003 WL 21297315 (Tenn. Ct. App. May 22, 2003)). Accordingly, we determined that the proper method for seeking judicial review was a common law writ of certiorari, and thus, the builder was not entitled to proceed through a declaratory judgment action. *Id.* at 581."

"In the present case, Trezevant seeks to establish what it is and is not permitted to do on its property. The parties agree the property was rezoned for residential use in 1957, and that Tennessee Code Annotated section 13-7-208, commonly referred to as the 'Grandfather Clause,' permits certain non-conforming commercial activities to be conducted on the property. The dispute concerns whether the commercial office use proposed by Trezevant constitutes a reasonable extension of that non-conforming use or if it constitutes a change in the use of the property. To determine whether the action was properly brought as a declaratory judgment action or should have been brought as a writ of certiorari, we must determine whether the zoning authority's decision regarding the proposed extension of a non-conforming use permitted on the land by the Grandfather Clause was 'administrative or quasi-judicial in nature' or 'legislative in nature.' *Moore & Assocs.*, 246 S.W.3d at 575."

"Our case law supports a finding that this is a matter of discretion for the applicable zoning authority."
…

"Had Trezevant followed the administrative process, the City's zoning authority would have received an application for the proposed construction and would then have used its discretion to determine whether it complied with the applicable zoning laws, including whether it was a permissible extension of a pre-existing, non-conforming use permitted by the Grandfather Clause. *See Thompson*, 20 S.W.3d at 659 (stating that '[i]t is well established that the decision to grant or not grant a building permit is an administrative determination.') Importantly, this decision would not have considered whether the protections of the Grandfather Clause applied to the land, but rather, to the scope of the non-conforming use permitted, a question dependent on the facts of the case. … Any issue with that decision could have been appealed to the board of zoning appeals, and any subsequent issue proper for judicial review through the filing of a common law writ of certiorari.6 Accordingly, we find that the key issue for review here was subject to the discretion of the City's zoning authority because, rather than making a new law, this decision would be one which ''executes one already in existence.'' *Moore & Assocs.*, 246 S.W.3d at 575 (quoting *McCallen*, 786 S.W.2d at 639). Because it was a matter of discretion, any appeal of a decision regarding the issue would be proper through a common law writ of certiorari, not a declaratory judgment action. Therefore, we will treat the complaint as a common law writ of certiorari. *See Moore*, 246 S.W.3d at 581."

"Having determined that Trezevant's complaint should be treated as a petition for a common law writ of certiorari, we now turn to the City's argument that Trezevant's failure to engage in the administrative process meant the common law writ of certiorari filed was unavailable and thus the claim was not ripe for review. … Having reviewed the record, we find that the filing of the writ of certiorari was premature and thus, the matter was not ripe for review and should be dismissed."

"The doctrine of ripeness is intended to aid 'the courts in determining whether a particular case presents a justiciable legal issue.' *B & B Enter. of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 848 (Tenn. 2010). 'The ripeness doctrine focuses on whether the dispute has matured to the point that it warrants a judicial decision.' *Id.* Ripeness 'is closely related to the 'exhaustion of remedies' doctrine.' *Id.* (citation omitted). The City's argument is akin to one claiming that Trezevant failed to exhaust its administrative remedies prior to filing the lawsuit. As our Supreme Court has previously explained, '[g]enerally when a statute provides an administrative remedy, one must exhaust this administrative remedy prior to seeking relief from the courts.' *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn. 1997). The purpose of this doctrine is to permit an administrative body to:

> (1) function efficiently and have an z expertise without the threat of interruption; and (3) compile a record which is adequate for judicial review. In addition, an agency has an interest in discouraging frequent and deliberate flouting of the administrative process.

Id. However, if exhaustion of remedies is not mandated by the ''plain words'' of the statute governing the issue, then it is 'not statutorily required.' *Id.* (*quoting Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985)). We have previously stated that, if exhaustion is not mandated by the statute, then it is a matter of judicial discretion. *Reeves*, 691 S.W.2d at 530. There is no statutory requirement in the present case, thus, we use our discretion to determine whether Trezevant Enterprises should have been required to exhaust its administrative remedies before filing the subject action. *See Moore & Assoc.*, 246 S.W.3d at 580."

"Clearly, whether a party is required to exhaust its administrative remedies prior to seeking judicial review of a zoning decision is dependent on the facts of the individual case. Thus, we must determine whether the facts of this case lead to the conclusion that the City's zoning authority 'would have afforded [ ] review over the key issues' of the claim, whether it could have provided a remedy, or if some other good reason existed to permit Trezevant Enterprises to proceed with this litigation despite its failure to formally apply to the proper zoning authorities prior to initiating this litigation. *See Cherokee Country Club*, 152 S.W.3d at 479. The 'key issue' in this instance, is whether the proposed extension of the non-conforming use of the property is permissible pursuant to the Grandfather Clause. As stated *supra*, our Tennessee case law supports the contention that this type of decision is one subject to the discretion of the zoning authority. Thus, an application for a building permit at the subject property and any subsequent review would have permitted the local zoning authority to exercise its experience and expertise to determine whether the extension was proper, 'afford[ing] [ ] review over the key issue[ ].' *See Cherokee Country Club*, 152 S.W.3d at 479. The board also would have been able to grant the requested remedy as it had the power to issue a building permit if it determined the office constituted a reasonable extension of the non-conforming use."

"The extent of the proceedings which occurred prior to the filing of the complaint seem to be that Trezevant Enterprises received a letter from the City's attorney which stated that the operation of the nursery business could continue but the 'nature of that business' could not be changed and that 'it [was] clear that such leasing of office space is not a permitted non-conforming use.' Mr. Trezevant also met with the City's Director of Community Development, who indicated that he did not think the Mayor or Alderman of the City would permit the construction of the office. The trial court determined that these facts showed that the City's position was that the office construction would not be permitted. The City disagrees and claims the communications were advisory only, rather than binding rulings, and

that it has been deprived of the opportunity to rule on the request due to Trezevant's refusal to apply for a building permit."

"Importantly, neither the City's attorney nor Mr. Cook represented the administrative body which would have held the discretion to make this decision. Further, these communications were made over ten years prior to Trezevant's filing of plans and thus, could not have been rulings on the plans which were submitted. Therefore, we find that the record does not support the trial court's finding that these communications proved the filing of an application would have been futile. Accordingly, we find that Trezevant Enterprises was required to exhaust its administrative remedies prior to filing a petition for a common law writ of certiorari and the failure to do so meant 'a writ of certiorari was not available.' *Moore & Assoc.*, 246, S.W.3d at 577. Accordingly, the case should be dismissed."

"Because Trezevant Enterprises never engaged in the administrative process, no inferior tribunal, board or officer, exercised a judicial function as required by the statute. *See* Tenn. Code Ann. § 27-8-101. Logically, for a court to conduct a review of an inferior entity, that entity must have engaged in some judicial function. Accordingly, where no judicial function has occurred, certiorari review is not ripe for review. Further, no good reason exists to excuse the failure of Trezevant Enterprises to exhaust its administrative remedy of applying for a building permit and, if necessary, to appeal any unfavorable decision to the board of zoning appeals. We would also note that, as stated above, 'an agency has an interest in discouraging frequent and deliberate flouting of the administrative process.' *Thomas*, 940 S.W.2d at 566. If we were to permit Trezevant Enterprises to bypass the administrative process by filing this action, we would permit the 'flouting of the administrative process.' *Id.* At that point, there would be little point for the administrative process to exist."

"Because the complaint was a petition for a writ of certiorari, the claim was not ripe for review by the trial court on a writ of common law certiorari as Trezevant failed to exhaust its administrative remedies, and there was no ruling or record of the board of zoning appeals available for review." …

ORDINANCES

1. Amending an ordinance is a legislative act intended to protect the health, safety, and welfare of the citizens living in the community covered by the ordinance – Legislative bodies are given broad discretion in enacting or amending an ordinances – When the act of a local government body is legislative, judicial review is limited to whether any rational basis exists for the legislative action and, if the issue is fairly debatable, it must be permitted to stand as valid legislation – The General Plan approved by the local government contains express language reflecting the advisory nature of the land use classifications, and the density limitations are expressly recommendations, not requirement – Rezoning was consistent with the General Plan, which by statute is controlling

THOMPSON SCHOOL NEIGHBORHOOD ASSOCIATION, ET AL. v. KNOX COUNTY, TENNESSEE, ET AL.
COURT OF APPEALS No. E2024-00310-COA-R3-CV Filed February 2, 2025

> **I was not able to reproduce the case as it was on the Court's website on in a picture format, so I included the summary paragraph and the information I would have used in the summary above.**

"This appeal arises from a declaratory judgment action regarding a decision of the Knox County Commission to amend zoning for the subject property. The trial court affirmed the rezoning. Finding no error, we affirm the ruling of the trial court."

"The property subject to rezoning in this action consists of 108 acres located in Knox County at 7921 and 7923 Thompson School Road" …

This case involved the Growth Plan statute of the state.

PRISON LITIGATION REFORM ACT

1. The Prison Litigation Reform Act (PLRA) requires prisoners to seek relief from state prison officials before filing a federal lawsuit - This is called an exhaustion requirement since prisoners must exhaust their administrative remedies before suing - Michigan statute of limitations tolling provision apply to the Act, so suit was timely filed

LAMONT BERNARD HEARD v. YARNICE STRANGE; JEFFREY OOSTERHOF; ADAM DOUGLAS; CHRISTIAN ALCORN
SIXTH CIRCUIT COURT OF APPEALS No. 23-1624 Decided and Filed: January 29, 2025

"Prisoners often have complaints about prison life. When these complaints arise, prisoners can't go straight to federal court. The Prison Litigation Reform Act ('PLRA') requires prisoners to seek relief from state prison officials before filing a federal lawsuit. This is called an 'exhaustion' requirement since prisoners must exhaust their administrative remedies before suing."

"Michigan's 'tolling provision' doesn't affect that requirement. Instead, it merely pauses Michigan's statute of limitations while a claim is pending in court. That way, if an otherwise timely claim is later dismissed for procedural reasons (like a failure to exhaust administrative remedies), the plaintiff has an opportunity to re-file the claim. So how could Michigan's tolling rule be inconsistent with the PLRA's exhaustion requirement? The district court said that it was, reasoning that Michigan's tolling rule conflicted with unexpressed purposes that Congress might have harbored when enacting the PLRA. But as federal judges, we can't speculate about the hypothetical purposes of a law. We have to follow the text that Congress enacted. Because the plain text of the PLRA casts no doubt on state tolling provisions, we reverse the judgment below."

"Lamont Heard is a Michigan prisoner serving a life sentence. Heard claims that various prison officials retaliated against him for his litigation activities by transferring him to a different housing unit, called the Burns unit. Thus, he wants to sue the prison officials under 42 U.S.C. § 1983 for allegedly violating his First Amendment rights."

"This case hinges on the procedural timeline. Heard says that he was wrongfully transferred to the Burns unit on January 10, 2017. And one day after the transfer occurred, he filed a grievance. He claims that this grievance was returned months later with instructions to file it with the local grievance coordinator, that he did so, and that the coordinator never responded."

"Heard then sued on December 4, 2017, but that suit complained of a different prison transfer, not the transfer to the Burns unit. On March 2, 2018, Heard moved to amend his complaint to add the Burns claim. The district court dismissed the Burns claim on July 31, 2019, for Heard's failure to exhaust—since Heard didn't appeal this grievance and thus didn't fully exhaust the Burns claim."

"In the wake of this dismissal, Heard exhausted the Burns claim with the prison. Back in federal court again, Heard sued on January 19, 2021, bringing his now-exhausted claim alleging that his transfer to the Burns housing unit violated his First Amendment rights."

"All in all, Heard filed his lawsuit four years and nine days after his cause of action accrued on January 10, 2017—the date of his allegedly wrongful transfer. *See Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 867 n.8 (6th Cir. 2020). Michigan's statute of limitations for personal injury actions—which is three years long—applies to Heard's First Amendment claim. Mich. Comp. Laws § 600.5805(2); *Garza*, 972 F.3d at 867 n.8. So when using straight math, Heard's suit is untimely. However, Michigan has another law—called a 'tolling provision'—that pauses the statute of limitations while a claim is pending in court. Mich. Comp. Laws § 600.5856. Under that provision, the statute of limitations would be tolled from

March 2, 2018 (when Heard added the Burns claim) to July 31, 2019 (when the district court dismissed that claim). *Sherrell v. Bugaski*, 425 N.W.2d 707, 710 (Mich. Ct. App. 1988). That statute would put over 16 months back on Heard's clock, making his First Amendment suit timely."

"The parties dispute whether Heard can benefit from Michigan's tolling provision here. The State argues that he can't, since (in the State's view) Michigan's tolling provision is 'inconsistent with' the Prison Litigation Reform Act of 1995. Pub. L. No. 104-134, § 101, 110 Stat. 1321, 1321–66 (1996). That is the sole question we must answer here."

"Congress gave individuals a cause of action to sue state officials for violations of their constitutional rights. 42 U.S.C. § 1983. But § 1983 doesn't include a statute of limitations. So Congress instructed us in § 1988 to borrow from the 'common law, as modified and changed by the constitution and statutes of the State,' as long as the state's law 'is not inconsistent with the Constitution and laws of the United States.' 42 U.S.C. § 1988(a). Thus, we use state statutes of limitations for § 1983 actions. *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)."

"If that were the end of the story, this case would be open and shut." …

"But Congress passed a new law in 1996: the Prison Litigation Reform Act. Among other things, the PLRA requires prisoners like Heard to exhaust their administrative remedies in prison before suing in federal court. 42 U.S.C. § 1997e(a). And the State contends that Michigan's tolling provision weakens the PLRA's exhaustion requirement and thwarts the PLRA's goal of reducing burdensome prisoner litigation. Michigan's logic goes like this. Section 600.5856 can be abused: A prisoner can bring his unexhausted claims to court, have his claims dismissed for failure to exhaust, and then come back to court with his (now-exhausted) claims. Those claims won't be time-barred under Michigan law because the statute of limitations would've been tolled in the meantime. So, the prisoner wouldn't be penalized for first suing without exhausting. And without that deterrent, the prisoner won't bother exhausting in the first place."

"So, is Michigan's tolling rule inconsistent with the PLRA? The answer is no." …

"… [A]s discussed above, using state law tolling rules is consistent with history and tradition. Federal courts have borrowed state timing rules since at least 1830. *McCluny v. Silliman*, 28 U.S. (3 Pet.) 270, 276–77 (1830) (borrowing Ohio statute of limitations for lawsuit against federal officer). Thus, Congress enacted the PLRA against a well-established backdrop of federal courts borrowing tolling rules for § 1983 suits. *Wilson*, 471 U.S. at 266–67; *Tomanio*, 446 U.S. at 483–84. In fact, Congress does this all the time. *See Bond v. United States*, 572 U.S. 844, 857 (2014) ('Congress legislates against the backdrop of certain unexpressed presumptions.') (quotation marks omitted). Given the federal courts' long tradition of borrowing state statutes of limitations and tolling periods for § 1983 suits, we can presume that Congress didn't disturb that practice when it passed the PLRA. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 n.12 (1983)."

"… [S]ince federal courts routinely create their own equitable tolling rules for prisoner suits subject to the PLRA, it'd be odd to find Michigan's tolling rule inconsistent with the PLRA. For instance, the Sixth Circuit tolls while state prisoners exhaust their administrative remedies. *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000). Other circuits do the same. *Battle v. Ledford*, 912 F.3d 708, 718–19 (4th Cir. 2019); *Gonzalez v. Hasty*, 651 F.3d 318, 323–24 (2d Cir. 2011); *Brown v. Valoff*, 422 F.3d 926, 942–43 (9th Cir. 2005). The Fifth Circuit even authorized tolling during a prisoner's first lawsuit on top of tolling while the prisoner exhausted—a rule that resembles Michigan's. *Clifford v. Gibbs*, 298 F.3d 328, 333 (5th Cir. 2002)."

"Even if we looked to the purposes of the PLRA, Michigan's tolling rule doesn't conflict. First off, prisoners didn't have to exhaust administrative remedies until 1980. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). Then Congress gave district courts discretion to stay § 1983 suits while the prisoners exhausted their claims. *See* Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, § 7, 94 Stat. 349, 352

(1980); *Woodford*, 548 U.S. at 84. Next, the PLRA made exhaustion mandatory. *See* 42 U.S.C. § 1997e(a)."

"Why did Congress make exhaustion mandatory? As the Supreme Court has explained, '[b]eyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits.' *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Exhaustion lets the prison address complaints first, reduces litigation by resolving some complaints in-house, and improves litigation by developing an administrative record. *Jones*, 549 U.S. at 219. Indeed, the 'centerpiece' of the PLRA is the exhaustion requirement. *Woodford*, 548 U.S. at 84."

"Michigan's tolling provision is consistent with these policies. Tolling the statute of limitations doesn't eliminate the exhaustion requirement. Heard still had to, and did, exhaust his claims. So the prison got the chance to address his complaints in the first instance and develop a record for Heard's later federal lawsuit. That doesn't defeat the purposes of mandatory exhaustion. *See Jones*, 549 U.S. at 219. So we see no reason to 'overread the PLRA's silence on tolling, misread the PLRA's purpose, and ignore the text of . . . § 1988.' *Battle*, 912 F.3d at 717."

RECUSAL

1. Rule 10B of the Tenn.Sup. Ct. R. requires the filing of a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal – Plaintiff's attorney failed to move for recusal in a timely manner - Ms. Payne failed to timely move for recusal, and the court further noted that the alleged basis for recusal in this case was meritless - The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal - The Code of Judicial Conduct does not require judges to remain isolated from other members of the bar and from the community

JACQUELINE PAYNE v. SHELBY COUNTY, TENNESSEE, ET AL.
COURT OF APPEALS No. W2024-00641-COA-R3-CV Filed May 23, 2025

"This is an appeal from a trial court's award of damages to the plaintiff after a bench trial in an auto accident case. The trial court declined to award the plaintiff all of the damages she sought because it concluded that her most significant injury, a torn rotator cuff, was not caused by the auto accident at issue. The plaintiff then filed a motion to recuse and to set aside the judgment due to a friendship between the trial judge's son and counsel for the defendant, but the trial court denied the motion. The plaintiff appeals. We affirm in part, reverse in part, and remand for further proceedings."

"Jacqueline Payne worked for Signature Healthcare of Memphis as a certified nursing assistant. At around 1:30 p.m. on the afternoon of June 16, 2021, she was accompanying a patient on a medical transport shuttle bus when the bus was involved in an accident. The bus had been stopped at a red light for a few minutes when it was rear-ended by a Shelby County Sheriff's Department patrol car. The following photograph depicts the shuttle bus and the patrol car: Ms. Payne was seated in the front row on the passenger side of the shuttle bus. According to the investigating officer's bodycam footage, Ms. Payne stated that she was 'hurting' after the accident, but she declined an ambulance and stated that she intended to 'take [her]self to the doctor.'"

"That evening, Ms. Payne, who was 57 years old at the time, was examined at Baptist Minor Medical Center. Ms. Payne reported being in an auto accident earlier that day in a company van in which she was a restrained passenger and the van was struck from behind at a stop light. She complained of pain from her neck to her low back. Her physical examination revealed tenderness and spasms present in her back, pain with movement, and decreased range of motion. Ms. Payne was diagnosed with neck pain, acute midline low back pain, and elevated blood pressure. She was referred to the emergency

room for a full evaluation and instructed to follow up at Baptist Minor Medical once she was cleared by the emergency department."

"That same evening, Ms. Payne was examined at the emergency department of Saint Francis Hospital. She again reported being in a rear end collision earlier that afternoon in which she was wearing a lap belt and was 'jolted' from the impact. She complained of sharp pain from her neck down to her buttocks, reporting that the degree at onset was minimal but the degree at present was severe (8 out of 10), with movement exacerbating her symptoms. After x-rays of her back revealed no fractures, Ms. Payne was diagnosed with strains of the muscles and tendons in her neck and back. She was prescribed medication for pain and muscle spasms and instructed to follow up with her primary care physician within one to two days or return to the emergency room if her symptoms worsened."

"The following morning, which was June 17, Ms. Payne returned to Baptist Minor Medical for a follow-up visit. According to her medical record, she reported 'her pain is 8/10 from her neck to low back and right shoulder blade.' Her physical examination revealed back spasms, tenderness, and decreased range of motion. Ms. Payne was again diagnosed with neck pain, back pain, and elevated blood pressure. She was instructed to continue her medication and rest. Her workers' compensation paperwork was completed, and she was permitted to return to work at transitional duty with restrictions, such as no lifting more than five pounds, no pushing/pulling, etc. Ms. Payne was instructed to return to Baptist Minor Medical in one week, on June 24, and to return to the emergency room if her symptoms worsened."

"When Ms. Payne returned for her follow-up visit on June 24, she reported that her pain was 'unchanged' and mild to moderate. She was only working light duty. This time, Ms. Payne was diagnosed with 'whiplash injury syndrome.' The doctor referred Ms. Payne to physical therapy to evaluate and treat her 'pain in limb/spine,' with the therapy recommended to occur three times per week for up to two weeks. Ms. Payne was again instructed to return to Baptist Minor Medical for a recheck in one week."

"Ms. Payne returned for her one-week recheck at Baptist Minor Medical the following day, which was July 1. She reported that she was still experiencing neck and back pain and had started physical therapy but was not getting better. Her doctor contacted the emergency department at Saint Francis Hospital and learned that Ms. Payne had x-rays of her back at the previous ER visit but none of her neck. As such, the doctor advised Ms. Payne that she needed further management of her persistent neck pain at the emergency room. She was instructed to return to the clinic the following morning if she was cleared by the emergency room."

"Ms. Payne returned for her follow-up visit with Baptist Minor Medical the following day, on July 2. Her medical records indicate that she was still taking various pain medications and muscle relaxers with no relief, and that she had been 'referred to orthopedic for further evaluation and management.'"

"On July 21, Ms. Payne had her first appointment at TriState Orthopaedics, with orthopedic surgeon Dr. Apurva Dalal. Her medical record from that date states that the reason for her appointment was neck, upper back, and right shoulder pain." …

"Dr. Dalal recorded the following note based upon his examination of her shoulder:

> Examination of the right shoulder shows tenderness over the acromioclavicular joint. There is tenderness of the biceps tendon. Range of motion is painful and limited. Active forward flexion is 90 degrees, abduction is 80 degrees. Crossarm test, impingement test, load shift test, drop arm test, empty can test and supraspinatus test are all positive. Neurovascularly patient is intact.

Given Ms. Payne's complaints and Dr. Dalal's physical examination, his primary assessment was a complete tear of the right rotator cuff, but he ordered an MRI of the right shoulder to confirm his

assessment. He also gave Ms. Payne a cortisone injection in her right shoulder. She was instructed to return in three weeks."

"On September 15, Ms. Payne returned to TriState after the completion of her MRI. Dr. Dalal's medical record states:

> … Right shoulder examination shows significant loss of motion. This motion was measured with active and passive range of motion which is extremely painful. Her active forward flexion is 80 degrees and abduction is 70 degrees. Cross arm test, impingement test, load shift test, drop arm test, and empty can test all are positive. Neurovascularly she appears to be intact passively when I tried to forward flex her shoulder it is extremely painful and she cries.
> . . . .
> 9-5-21: MRI right shoulder showed
> i. Partial thickness bursal sided insertional tearing of the supraspinatus tendon is noted.
> 2. No additional discrete rotator cuff tendon tear is seen. Relatively mild appearing infraspinatus and subscapularis tendinosis are present.
> 3. Proximal biceps tendinosis was noted.
> 4. Mild appearing subacromial/subdeltoid bursitis.

The medical record reflects that Dr. Dalal discussed the MRI results with Ms. Payne in detail and answered her questions. It also states that the cortisone injection in Ms. Payne's shoulder had only helped 'minimally.' Dr. Dalal's record states,

> This patient needs to have surgery on the right shoulder for repair of rotator cuff with possible distal clavicular excision, subacromial decompression, and acromioplasty.
> . . . .

"The surgery was scheduled for the following week."

"On September 21, three months after the June 16 auto accident, Ms. Payne underwent surgery to repair her torn rotator cuff. She then had a period of physical therapy. In January 2022, Dr. Dalal discharged Ms. Payne from his care, noting that she still had moderate pain and loss of motion but had reached maximum medical improvement. He assigned her an impairment rating of six percent impairment to the right upper extremity and four percent of the body as a whole, meaning her injury was permanent in nature."

"On June 6, 2022, Ms. Payne filed this lawsuit against Shelby County, Tennessee, and Deputy Vincent Jennings, seeking to recover damages for the injuries she sustained in the accident, including those related to the torn rotator cuff. A consent order was entered dismissing the claims against Deputy Jennings. A bench trial was held in March 2024 before Judge Rhynette Hurd. The trial transcript begins with a brief exchange reflecting that Judge Hurd and counsel for Shelby County, Chip Chockley, were laughing and talking about a chocolate cake recipe. However, nothing more was said about the matter at that time, and the trial proceeded as scheduled."

"At the outset, Shelby County stipulated that Deputy Jennings was liable for the rear end collision, he was acting in the course and scope of his employment with Shelby County, and any fault assigned to him was imputed to the County. During opening statements, counsel for Ms. Payne suggested that the only issues to be decided were causation and damages. Counsel stated that Ms. Payne was seeking damages for over $65,000 in medical bills, lost wages of nearly $19,000, as well as pain and suffering and permanent impairment. Counsel for Shelby County conceded that Ms. Payne 'suffered some sort of injury in this accident,' but he suggested that her 'course of treatment for such a minor accident was unusually extensive' given that she had eight medical visits primarily focusing on her neck and back, and '[i]t's not until over a month after the accident when she show[ed] up at Dr. Dalal's office at Tri-

State Orthpedics that her complaints begin to focus on the shoulder.' Counsel for Shelby County asked the court to 'review the medical history in this case with a careful eye,' given the fact that this was a 'low speed impact,' Ms. Payne had been in three prior auto accidents and settled those cases, and she asked for the accident report number at the scene."

"The trial court heard testimony from Ms. Payne; her live-in partner, Ridley Taylor; Deputy Jennings; and the investigating officer at the scene of the accident, Deputy Michael Lange. In addition, the deposition testimony of Dr. Dalal was read into evidence. We begin with the deposition testimony, as the trial court did."

"Dr. Dalal testified that he had been licensed to practice medicine in Tennessee since 2003. He was certified by the American Board of Orthopaedic Surgery." …

"Ms. Payne's counsel questioned Dr. Dalal as follows regarding the cause of her injuries:

> Q. Doctor, are those injuries consistent with Ms. Payne being involved in this motor vehicle collision on June 16th, 2021?
> A. Yes, sir.
> Q. Do you have an opinion whether those injuries were caused by the motor vehicle collision?
> A. With a reasonable degree of medical certainty I can state that her injuries were caused by motor vehicle accident.

Dr. Dalal explained that Ms. Payne's rotator cuff tendon, where it attached to the bone, was torn. He added, 'There was some inflammation in the subacromial/subdeltoid space, but main diagnosis was rotator cuff tear.' When asked, again, if he had an opinion as to what caused Ms. Payne's injuries, Dr. Dalal stated, 'Her cervical strain, lumbar strain and tear of the rotator cuff on the right shoulder occurred due to the automobile collision.'"

"On cross-examination, counsel for Shelby County asked Dr. Dalal if Ms. Payne's medical records from other providers reflected any complaints about shoulder pain. Dr. Dalal pointed out that the records from the second visit to the emergency department at Saint Francis specifically described Ms. Payne's complaint of right shoulder pain. When asked about the records from Baptist Minor Medical, Dr. Dalal noted that Ms. Payne had been diagnosed with a pinched nerve in her neck following a motor vehicle accident. He explained that for a pinched nerve or a shoulder rotator cuff problem, 'the pain overlaps.'" …

"Next, counsel for Shelby County asked Dr. Dalal if anyone had described to him 'the circumstances of the accident.' Dr. Dalal stated that he did not recall anything about 'the circumstances of the accident.' Counsel then attempted to 'summarize' it in order to see if it had any effect on his opinions. Counsel stated that Ms. Payne was riding on a bus that was stopped at a red light, with an officer stopped behind her at a complete stop, and when the light turned green, the bus 'apparently' did not immediately move forward but the officer did and hit the back of the vehicle. Counsel asked Dr. Dalal if, under those circumstances, a tear of the rotator cuff could occur. He replied unequivocally, 'Yes it can.' Dr. Dalal explained that he always tells lawyers 'sometimes you are lucky' and walk away from a bad accident scratch-free, and sometimes a trivial accident can cause soft tissue injuries. He said it just depends on, at that particular moment, how the person was sitting, what kind of impact occurred, and 'in which direction it came and jerked them.' Dr. Dalal testified that the rotator cuff is a tendon and is 'pretty thin' so 'it can easily tear.' Counsel then asked Dr. Dalal, 'Do you know or have an idea of the mechanism of the actual injury in this accident, do you know how she tore her rotator cuff?' Dr. Dalal said, 'No. All I know is she was wearing this lap belt and when she got hit she got jerked in front [is] what she told me.' He said he did not know, for example, if when she jerked forward her hand was caught in the back. However, Dr. Dalal concluded by stating that in his experience injuries such as a torn rotator cuff can happen in such relatively minor low speed accidents."

"… In conclusion, Dr. Dalal reiterated that none of the questions asked during cross-examination had changed any of the opinions he expressed during his direct examination. He said he still felt confident that this wreck was the cause of the injuries he diagnosed. This concluded the testimony from Dr. Dalal's deposition."

"Deputy Michael Lange testified next. He was an investigator and accident reconstructionist with the traffic division of the Sheriff's Department. Deputy Lange had responded and investigated the accident involving Deputy Jennings and the shuttle bus. According to Deputy Lange, when he spoke with Deputy Jennings at the scene, Deputy Jennings said that he was stopped behind the bus and watching something suspicious at a nearby gas station, and when the light turned green, he saw other vehicles starting to go, 'let his foot off the brake and started to go,' but ran into the back of the bus. The investigation summary Deputy Lange prepared stated that the bus began to go forward and then stopped again, and the patrol car was too close to avoid colliding with it. Deputy Lange testified that this characterization of the accident was based on the statements of Deputy Jennings that the bus had started and then stopped suddenly. Deputy Lange acknowledged that the bus was located in the crosswalk beyond the stop line after the accident. In any event, Deputy Lange noted that in a rear end collision, the driver in the front is not responsible. He gave a ticket to Deputy Jennings, citing him for following too closely."

"Based on the extent of the damage to the front of the patrol car, a Dodge Charger, Deputy Lange agreed that this was not a situation in which the car was traveling only two miles an hour. However, the airbag did not deploy in the patrol car. Deputy Lange stated that '[i]f the airbag did not deploy it could be up to eight miles an hour.' He also testified that the rear bumper of the bus was damaged. Deputy Lange testified that he knew, while at the scene, that Ms. Payne was complaining of an injury. He had indicated in his report that she was suspected for minor injuries. He also stated that she was concerned about getting the accident report or accident report number."

"… Deputy Jennings testified that he could not recall if the bus moved forward before he hit it or if it remained at a complete stop. He described the impact as 'moderate.' When asked to rate the impact on a scale of zero to ten, with zero being 'no impact' and ten being 'like running into a brick wall,' he estimated this was a '4 or 5.' He was not injured, and his airbag did not deploy, but his vehicle was not operational and had to be towed. Deputy Jennings said he asked the driver of the bus if the passengers were injured, and he thought she said everybody seemed to be okay."

"Ms. Payne explained that she was seated on the right passenger side, on the very front seat of the bus, on the day of the accident. She testified that the seat had a lap belt, which she had fastened, but not a shoulder belt. Ms. Payne explained that in front of her there was 'a vertical metal bar and a metal plate coming across.' She said that the bus was stopped at the intersection for a couple of minutes, positioned before the crosswalk, and they did not have any idea that an impact was coming before being hit. She described it as a 'hard' impact and said she thought they had been 'hit by a truck. It was just that hard.' She also noted that the bus was over the crosswalk after the impact."

"Ms. Payne said that her body 'went forward really hard.' She said she informed one of the officers at the scene that she was injured. Ms. Payne testified that she was in pain and in shock. She described the pain as going '[f]rom the right side of my neck all the way down to the middle of my back, the right side.' When asked why she declined an ambulance, Ms. Payne said she 'didn't want to incur that bill,' and she could drive herself to the doctor. Ms. Payne said the reason she asked the deputy about the police report and who was getting the ticket was because she was worried about the fact that one sheriff's deputy was investigating a wreck involving another deputy and feared that something could get misconstrued."

"After Ms. Payne's surgery, she was in a sling for six to eight weeks and then had physical therapy for three months. Although she had been discharged from Dr. Dalal's care, she testified that she was still experiencing discomfort and restricted range of motion at the time of trial. She was not able to cast a

reel to fish, tend to her flowerbeds, or perform all of her previous duties at work, but she was given accommodations by her employer."

"On cross-examination, Ms. Payne acknowledged that she had been involved in three previous car accidents, and all involved injuries to her neck and back. She said she sought medical treatment for those injuries, was represented by counsel, and settled those cases. However, Ms. Payne testified that those accidents involved 'fairly quick and full recoveries from those injuries,' with no injuries to her shoulders. Ms. Payne explained that after the accident in this case, she chose Baptist Minor Medical for treatment because she was dealing with workers' compensation and had to pick a location on her employer's profile. She said the same was true about Dr. Dalal; he was on the profile and so she 'just picked him' for treatment."

"This concluded Ms. Payne's proof at trial, and Shelby County did not call any witnesses. During closing arguments, counsel for Ms. Payne suggested that with her medical expenses of roughly $65,000, lost wages of about $19,000, pain and suffering, and permanent injury, the trial court should award a total sum of damages in the range of $400,000 to $500,000. Counsel for Shelby County asked the trial court to consider the fact that Ms. Payne did not complain of any shoulder injury on the day of the accident; she only mentioned neck and back pain. Counsel acknowledged that Ms. Payne complained the following morning of pain in her right shoulder blade, at Baptist Minor Medical, and again on July 1 during her second visit to the emergency room at Saint Francis, she complained of shoulder pain. However, he emphasized that Ms. Payne consistently complained of pain in her neck and back, and some of the medical records did not mention shoulder pain. Counsel noted that it was not until July 21, one month after the accident, when Ms. Payne first saw Dr. Dalal, and he diagnosed the torn rotator cuff. He stated that 'the County is not trying to argue that Ms. Payne was not injured in this accident[.]' But, he added, 'on the other hand the County is not a cash register for claimants like Ms. Payne.' He asked the court to consider the normal amount of distance between two vehicles at a red light and how fast Officer Jennings could have possibly been going and asked, 'Is that $65,000 in medical bills?' Counsel characterized Ms. Payne's claims as 'extravagant.' He asked the court to carefully consider her 'course of medical treatment' and the facts of the accident and make a reasonable award, being 'circumspect in its examination of the facts of this case.' In rebuttal, counsel for Ms. Payne asked the trial court to look at the amount of damage to the vehicles involved, Ms. Payne's complaint of right shoulder pain the very next morning, the physical therapy record detailing her shoulder pain being so severe that it could not be rotated, and Dr. Dalal's testimony that neck and shoulder pain are often combined."

"At the conclusion of the bench trial on March 6, the trial judge took the matter under advisement and informed the parties that she would let them know a date when they could return for her to announce her oral ruling." …

"Because the transcript of the trial judge's oral ruling was later incorporated into its final order, we quote the remainder of the ruling in full:

> … And so based on all of that the Court finds that the plaintiff really did not prove by preponderance of the evidence that the rotator cuff condition resulted from the automobile accident of July 16, 2021."

"The trial court awarded Ms. Payne damages related to her neck and back pain but excluded anything related to the rotator cuff. She announced a total damage award of $75,362."

"After discussing who would draft the order, the following exchange occurred between counsel for Ms. Payne and Judge Hurd:

> MR. FAIRCHILDS: Correct. But, listen, this is going to have to go up on appeal and so I would appreciate the exhibits, but also I would like on the record something that I had

heard. Is it true that your son and Mr. Chockley [counsel for Shelby County] were best friends growing up and that --
THE COURT: And I don't see him at all, but you can include that, and if you want to, if you need a recusal –
MR. FAIRCHILDS: I would just like that to be on the record.
THE COURT: That's fine, yeah.
MR. FAIRCHILDS: Is that true?
THE COURT: It's absolutely true. They were best friends, but I didn't even know Mr. Chockley was a lawyer until I got back on the bench. I mean it's been years. This is when my kid – we moved from that house in 1991. I didn't know what Mr. Chockley was -- was doing. I still have his mother's recipe, this is no doubt, but, you know, I, and, Mr. Fairchilds, honest to goodness I understand, you do what you need to do. You can file a motion for recusal if you like. Go ahead.
MR. FAIRCHILDS: Well, based on that do[es] Your Honor think you should have recused yourself --
THE COURT: No.
MR. FAIRCHILDS: -- prior to this trial starting?
THE COURT: Absolutely not.
MR. FAIRCHILDS: There was absol -- okay. Thank you, Your Honor.
THE COURT: Very good.
MR. FAIRCHILDS: Have a great weekend.

Three weeks after the oral ruling was announced on March 15, the trial court entered its written order on April 5. The written order largely restated the trial court's oral ruling and also incorporated it by reference. Relevant to this appeal, the trial court found that Ms. Payne failed to prove by a preponderance of the evidence that her torn rotator cuff resulted from the accident on June 16, for the reasons set forth in the transcript above."

"Nearly two weeks later, Ms. Payne filed a motion to recuse or disqualify Judge Hurd and to set aside the judgment, citing Tennessee Supreme Court Rule 10B and Tennessee Rules of Civil Procedure 59 and 60. The motion asserted that, '[u]nbeknownst to [Ms. Payne], Mr. Chockley has a personal relationship with Judge Hurd and her son.' The motion stated that Judge Hurd's son and Mr. Chockley 'were best friends growing up' and likely had play dates, meals together, and sleepovers. Ms. Payne alleged that the relationship was not disclosed prior to the date of trial and that she had no opportunity to investigate it or draft a motion for recusal prior to commencement of the trial. Thus, Ms. Payne asked Judge Hurd to recuse herself and set aside the order in order to avoid an appearance of impropriety."

"Shelby County filed a response, asking the trial court to deny the motion. First, Shelby County argued that the recusal motion was untimely given that comments were made alerting Ms. Payne of the personal relationship before trial. Shelby County noted that on the first day of trial, before the proceedings began, Judge Hurd told Ms. Payne's counsel about a cake recipe she still had from Mr. Chockley's family. According to Shelby County, the transcript did not reveal the entire conversation, but Judge Hurd also informed counsel for Ms. Payne at that time that her son and Mr. Chockley were friends as children for several years in the 1980s. Shelby County noted that counsel for Ms. Payne did nothing in response to raise any issue about impartiality. Instead, they tried the case to its conclusion, and Judge Hurd announced that she would render an oral ruling at a later date. Shelby County noted that counsel for Ms. Payne had another opportunity to seek recusal when the parties appeared before Judge Hurd for her to announce her oral ruling nine days later. However, Ms. Payne waited until after Judge Hurd announced her decision to question Judge Hurd about the allegedly improper relationship. Ms. Payne then waited a month to file her motion for recusal, after the trial court had entered its written order. Thus, Shelby County asserted that Ms. Payne did not act promptly in seeking recusal and instead engaged in 'strategic conduct to gain a procedural advantage by waiting to see if the Court would award the amount of the judgment Plaintiff sought before seeking recusal as a backup plan.' Accordingly, Shelby County asked the trial court to deny the recusal motion on that basis."

"Alternatively, Shelby County argued that Judge Hurd's impartiality could not reasonably be questioned based on events that occurred four decades earlier. Shelby County attached a declaration from Mr. Chockley, who stated that he became friends with Judge Hurd's son when they were in the third grade in 1980, and they had playdates at each other's houses and occasional sleepovers. However, Mr. Chockley stated that, when they were in ninth grade, they drifted apart and no longer socialized outside of school regularly. Mr. Chockley stated that he had only seen Judge Hurd's son on a few occasions since high school, and the last time they socialized or intentionally spent time together was over thirty years earlier when they were minors. Mr. Chockley stated that he had fond memories of Judge Hurd from his childhood, but no personal relationship had existed between them since his childhood. He stated that his only encounters with Judge Hurd since she became a trial judge in 2010 had been inside the courtroom. Thus, Shelby County argued that a childhood friendship between Judge Hurd's son and Mr. Chockley forty years ago was not a sufficient basis for recusal, and this provided an alternative basis for denying the recusal motion."

"At a hearing on the recusal motion, counsel for Ms. Payne began by conceding that 'right before our trial started you [Judge Hurd] had mentioned that Mr. Chockley and your son were friends when they were children and you mentioned something about a chocolate cake recipe[.]' However, counsel suggested that '[t]he trial started 10 seconds later,' and he learned 'seven or eight days later,' when the matter was discussed following Judge Hurd's oral ruling, that they were best friends. Judge Hurd stated that she typically mentions the childhood friendship between Mr. Chockley and her son anytime Mr. Chockley is on a case before her 'just in case someone wants to ask about the relationship.' Counsel for Ms. Payne then suggested that it put him in a difficult position when he was informed of the relationship 'literally 10 seconds before the trial started' because he was 'caught off guard,' did not know all of the facts, and left in an extremely difficult position with no time to file a recusal motion before the trial began. He denied engaging in any 'gamesmanship' and suggested that he was the one who was 'ambushed 10 seconds before the trial started.' Judge Hurd reiterated that '[i]t's been like 40 years' since the relationship existed. She stated that she is a native Memphian and simply cannot recuse herself from every matter involving someone who was once a friend of her children. Judge Hurd noted that she informed counsel for Ms. Payne of the childhood friendship prior to trial in order to give him an opportunity to ask questions about it, and he could have sought a continuance at that time. She said that the issue was raised in front of counsel and his client, and they could have asked for time to discuss the matter. However, Judge Hurd also pointed out that after the trial court concluded, she took the matter under advisement for over a week before announcing her oral ruling. She noted that no issue regarding recusal was raised in the interim eight or nine days, even after the parties were notified that she had come to a decision. Judge Hurd stated that everyone appeared for the oral ruling, no one mentioned recusal at the outset, 'and then I read my ruling and the minute I finished you raised recusal; not anytime before that. That's what I see as a problem. . . . I give you the dollar figure, immediately recusal. That to me is the problem.' Thus, Judge Hurd denied the motion to recuse and to set aside, and she entered a written order to that effect. The order clarified that Ms. Payne sought recusal because counsel for Shelby County was a childhood friend of the judge's son, but, 'except perhaps for an incidental encounter, [Shelby County's] counsel and the judge's son have not seen each other in over 40 years.' Thus, Judge Hurd found that a reasonable person in the judge's position, knowing all the facts, would not question the judge's impartiality in this case. The order further stated that Judge Hurd had no actual bias or prejudice for or against either party."

"'In addition,' the court found that Ms. Payne's motion was 'untimely and appears to be presented for an improper purpose.' Judge Hurd found that Ms. Payne was aware of the relationship prior to trial but 'failed to seek recusal until after the court rendered its verdict awarding Plaintiff $75,362.00 instead of the amount requested during Plaintiff's closing.' Thus, Ms. Payne's counsel 'did not mention recusal until seconds after the judge rendered the verdict – nine days after disclosure of the relationship.' Under those circumstances, Judge Hurd found that Ms. Payne's delay in seeking recusal rendered the motion untimely and suggested it was presented for the improper purpose of having a chance to relitigate the issues she had already decided. The trial court found no basis for relief under Rule 10B or Rules 59.04 or 60.02. Ms. Payne timely filed a notice of appeal."

"Tennessee Supreme Court Rule 10B provides, in pertinent part:

> Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record . . . shall do so by a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal.

Tenn. Sup. Ct. R. 10B, § 1.01. This Court reviews a trial court's decision on a motion forrecusal under a de novo standard of review. Tenn. Sup. Ct. R. 10B § 2.01."

"The Tennessee Supreme Court recently summarized the following standards that guide courts regarding recusal motions:

> "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)).

Adams v. Dunavant, 674 S.W.3d 871, 878-79 (Tenn. 2023)."

"As previously noted, Rule 10B requires the filing of 'a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal.' Tenn. Sup. Ct. R. 10B, § 1.01. 'Promptness is mandatory and its importance is declared at the very beginning of the rule.' *Harris v. Allen*, No. W2023-01794-COA-T10B-CV, 2024 WL 137453, at *2 (Tenn. Ct. App. Jan. 11, 2024). …

"Regarding timeliness, our Supreme Court has also explained,

> If a litigant knows of facts indicating that a judge cannot fulfill the judicial obligations of fairness and impartiality, the litigant should request the judge's recusal by filing a written motion. See Tenn. Sup. Ct. R. 10B, § 1.01. Recusal motions should be filed when 'the facts forming the basis of that motion become known.' Bean v. Bailey, 280 S.W.3d 798, 803 (Tenn. 2009) (citing Davis v. Tenn. Dep't of Emp't Sec., 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999)). A litigant cannot manipulate the judicial process by knowing of allegedly improper judicial conduct but remaining silent until after the legal matter has been resolved unfavorably to the litigant. Id. (quoting Tenn. Dep't of Emp't Sec., 23 S.W.3d at 313). Therefore, a claim of judicial bias may be deemed waived if a litigant either fails to file a written recusal motion or fails to file a written recusal motion in a timely manner after learning the facts that form the basis of the request. Id. (citing Tenn. Dep't of Emp't Sec., 23 S.W.3d at 313).

Cook, 606 S.W.3d at 254. 'The frequently cited rule that 'a party must complain and seek relief immediately after the occurrence of a prejudicial event and may not silently preserve the event as an 'ace in the hole' to be used in the event of an adverse decision,' applies in cases where a party challenges a judge's impartiality.'' *Eldridge v. Eldridge*, 137 S.W.3d 1, 8 (Tenn. Ct. App. 2002) (quoting *Gotwald v. Gotwald*, 768 S.W.2d 689, 694 (Tenn. Ct. App. 1988))."

"Here, Ms. Payne and her counsel were made aware of the childhood friendship between Judge Hurd's son and counsel for Shelby County before the trial began. Ms. Payne concedes in her brief that Judge

Hurd stated, before trial, that 'Mr. Chockley and her son were friends as children and that Mr. Chockley's mother had previously shared a chocolate chip cake recipe with her.' However, Ms. Payne did not express any objection to that fact when it was disclosed, during the remainder of the trial that day, in the week that followed while the matter was under advisement, or when they appeared in court to hear Judge Hurd's oral ruling. However, once Judge Hurd announced her decision, counsel for Ms. Payne immediately asked, 'Is it true that your son and Mr. Chockley were best friends growing up[?]' After this discussion of the matter on March 15, Ms. Payne then waited another month before filing a written recusal motion on April 18. This timing compels the conclusion that Ms. Payne 'purposely decided to use the impartiality issue as [her] 'ace-in-the-hole' in the event that [she] lost the [trial] on the merits,' or at least was unhappy with the amount of damages awarded. *Eldridge*, 137 S.W.3d at 8 (quoting *Davis*, 23 S.W.3d at 313). " …

"Even though we conclude that Ms. Payne failed to timely move for recusal, we further note that the alleged basis for recusal in this case was meritless. In *State v. Cannon*, 254 S.W.3d 287, 307 (Tenn. 2008), the Tennessee Supreme Court considered a case in which a defendant argued that 'a friendship between the trial judge and ADA Moore, one of the Assistant District Attorneys General prosecuting the case, created a serious appearance of impropriety that warranted the recusal of the trial judge.' The defendant argued that 'their participation in a group overseas vacation, frequent visits to the trial judge's home by ADA Moore, and ADA Moore's admission that she and the trial judge are 'close friends,' mandates recusal[.]' *Id.* However, our Supreme Court explained,

> The mere existence of a friendship between a judge and an attorney is not sufficient, standing alone, to mandate recusal." …

"This Court has reached the same conclusion in other cases involving friendships.
See, e.g., *In re Conservatorship of Milem*, No. W2023-01743-COA-T10B-CV, 2024 WL 326863, at *6 (Tenn. Ct. App. Jan. 29, 2024) ('Son alleges a 'lengthy friendship' between the Trial Judge and one of ElderCare's attorneys . . . . Son provides no supporting information describing the alleged friendship or the extent of such friendship other than it began in 2001 or 2002 when Ms. Baker was a clerk for the prior judge. This Court has held that the Code of Judicial Conduct does not require judges to remain isolated from other members of the bar and from the community. Son has not demonstrated a friendship between the Trial Judge and Ms. Baker that would cause the judge's impartiality to reasonably be questioned.') (quotation omitted); *Allen v. Allen*, No. E2023-01660-COAT10B-CV, 2023 WL 8598662, at *5-6 (Tenn. Ct. App. Dec. 12, 2023) ('[T]he theatrical play Mother and Judge Cook both participated in had occurred in 2016, nearly seven years before the motions to recuse filed by Father." …

"Keeping these principles in mind, we conclude that the childhood friendship between Judge Hurd's son and counsel for Shelby County over thirty years ago does not warrant recusal in this case. A person of ordinary prudence in the judge's position, knowing all the facts known to the judge, would not find a reasonable basis for questioning the judge's impartiality. *See Cook*, 606 S.W.3d at 255. We affirm the denial of the motion for recusal."

"We now turn to Ms. Payne's second issue, which she frames as '[w]hether the Trial Court erred in finding that Plaintiff's right shoulder injury was not related to the subject wreck when virtually all of the evidence introduced at trial preponderated in favor of causation, including undisputed expert medical testimony, the medical records and lay witness testimony.' As previously discussed, the trial court gave several specific reasons to explain why it found that Ms. Payne failed to prove causation. As such, we will review each of those stated reasons in turn."

"We note that issues as to causation of an injury are questions of fact. *Hall v. Am.Freight Sys., Inc.*, 687 S.W.2d 713, 713 (Tenn. 1985)." …

"Initially, we note that in the trial court's description of the circumstances surrounding the accident, it found that there was some conflicting evidence regarding whether the bus had started moving prior to

the collision. In any event, the court found that photographs showed that 'the Dodge Charger absorbed the brunt of the energy in the wreck and sustained significantly more damage than the bus.' We agree that the police cruiser sustained significantly more damage, as it was not operational and had to be towed from the scene."

"After stating its finding that '[Ms. Payne's] right shoulder injury was not caused by the wreck,' the first reason the trial court gave for its conclusion related to Ms. Payne's complaints of pain following the accident. The order states,

> The Court finds that Plaintiff sustained injuries to her neck and back as a result of the wreck, however the Court finds that the right shoulder injury was not caused by the wreck. The Court finds that the Plaintiff reported only neck and lower back pain at her initial hospital visits, which were several in number and several days in a row and then also on other days. The Court finds that as of July 1, 2021, Plaintiff denied any new symptoms and there was only reference in the medical records to neck and back pain. The Court finds that as of July 2, 2021, there was only reference of neck and back pain, not shoulder pain, in the medical records. The Court finds that the physical therapy reports made no reference to shoulder pain.

Ms. Payne argues that these findings are factually incorrect, and we agree."

"Initially, we note that Ms. Payne did not visit the hospital 'several days in a row.' Instead, she visited Saint Francis Hospital twice, once on the evening of June 16 after the accident, when she was referred there by Baptist Minor Medical, and again on July 1, after being sent there by Baptist Minor Medical due to continued neck pain. Ms. Payne did not visit Baptist Minor Medical 'several days in a row' either. She went there on the day of the accident, the following morning as she was instructed to return for a follow-up visit, for two weekly follow-up visits thereafter, and an additional follow-up visit after her second emergency room referral, as she was instructed."

"More importantly, however, we conclude that the trial court erred in finding that Ms. Payne reported 'only neck and lower back pain' at her initial visits. The morning after the accident, at Baptist Minor Medical, Ms. Payne reported, according to her medical records, 'her pain is 8/10 from her neck to low back *and right shoulder blade*.' (emphasis added). The record from her next visit, one week later, stated she reported 'her pain is unchanged.' When she started physical therapy the following week, on June 30, she reported 'her aching pain is mainly on the R,' according to the therapist's records. He indicated that when evaluating her shoulder internal rotation, he was '[u]nable to assess on R due to pain.' According to Dr. Dalal, this meant that it was very painful when the therapist was rotating the shoulder, and so painful that they could not even turn the arm internally. Then, at Ms. Payne's second emergency room visit, on July 1, she reported painful range of motion in her neck with pain that went into both superior shoulders."

"Thus, the trial court's factual finding that Ms. Payne only reported neck and back pain at her 'initial' visits is not supported by the preponderance of the evidence." …

"The next reason the trial court gave for its decision concerned the medical records of Dr. Dalal. The trial court's order states:

> The Court finds that in September of 2021, Dr. Apurva Dalal noted in his medical records that Plaintiff's injury was three (3) months prior and that she progressively lost motion in her right shoulder. The Court finds that it is not clear that Dr. Dalal was referring to the motor vehicle accident that occurred three (3) months prior. The Court finds that the medical record from Plaintiff's first visit with Dr. Dalal references a motor vehicle collision three (3) months prior; however all of the subsequent medical records from Dr. Dalal's office reference a work related condition without mention of a

> motor vehicle collision. The Court finds that the term 'work related condition' is not indicative that Plaintiff was involved in a motor vehicle collision while at work.

From this paragraph, we can only surmise that the trial court believed Dr. Dalal's references in the medical records to a 'work related condition' suggested some type of injury had occurred unrelated to the motor vehicle accident. However, a review of *all* the evidence simply does not support such a conclusion."

"As the trial court acknowledged, the medical record from Ms. Payne's first appointment with Dr. Dalal specifically referenced the motor vehicle accident. It stated:

> Patient is a very pleasant 57-year-old African-American female who comes today with complaints of severe pain in her neck, right shoulder and mid to low back. *She tells me all of this pain began after a work-related event on June 16, 2021. She states that she works for a nursing facility and while transporting a patient she was sitting in one of the front rows of the bus when the bus was rear-ended by the sheriff's department car. She tells me that they only have lap seatbelts and she went forward upon collision.* …

(emphasis added). This passage makes clear that the 'work related event' in question was the June 16 car crash." …

"The record from Ms. Payne's September appointment, which the trial court also referenced, stated, 'Patient returns today after MRI of the right shoulder. Her injury was 3 months ago/. and she has progressively lost motion in the right shoulder.' This is entirely consistent with the first record, as it indicates that the injury occurred three months prior to September, meaning in June. We find no support for the trial court's finding that 'it is not clear that Dr. Dalal was referring to the motor vehicle accident that occurred three (3) months prior.' That is clearly the event to which he refers. We acknowledge that there are references in the records to this being a 'work-related condition.' However, an examination of the records in their entirety reveals that the work-related condition being referenced was the injury during the June 16 accident."

"In addition, Dr. Dalal testified unequivocally, 'The only history of injury I have is the motor vehicle accident she was involved in.'" …

"The next reason the trial court gave in support of its decision regarding causation was that 'Plaintiff had degenerative conditions in the right shoulder, including some bursitis of the right shoulder, that was not apparent until several months after the subject wreck.' It is not clear from this statement exactly what conclusion the trial court reached as to the presence of bursitis. … [T]here is simply nothing in the record to suggest that the presence of bursitis somehow meant that Ms. Payne's torn rotator cuff was not caused by the June 16 auto accident."…

"The next reason the trial court gave for its decision was that 'Dr. Dalal did not know anything about how the wreck occurred. The Court further finds that Dr. Dalal did not know the exact mechanism of the right shoulder injury.' This finding is at odds with the fact that Dr. Dalal's medical record from the first visit stated, 'She states that she works for a nursing facility and while transporting a patient she was sitting in one of the front rows of the bus when the bus was rear-ended by the sheriff's department car. She tells me that they only have lap seatbelts and she went forward upon collision.' Dr. Dalal also recited this information at the beginning of his deposition. When asked later during his deposition if he knew 'the mechanism of the actual injury' in Ms. Payne's accident, Dr. Dalal responded, 'No. All I know is she was wearing this lap belt and when she got hit she got jerked in front [is] what she told me.' Counsel for Shelby County attempted to 'summarize' the facts for Dr. Dalal, stating that both vehicles were at a complete stop and the sheriff's officer went forward from a stop and hit the vehicle she was in. He asked if, in Dr. Dalal's opinion, a rotator cuff tear can occur under such circumstances, and Dr. Dalal said yes. He explained that the tendon is 'pretty thin' and 'can

easily tear,' even in 'relatively minor low speed accidents.' Thus, the record does not support the trial court's finding that 'Dr. Dalal did not know anything about how the wreck occurred.' And, although Dr. Dalal may not have identified the precise 'mechanism' of the injury, he knew that Ms. Payne was wearing a lap belt and 'got jerked' forward, he testified that such an accident can cause a torn rotator cuff because it is 'pretty thin' and 'can easily tear,' and he opined that this accident did in fact cause Ms. Payne's injury."

"Finally, the trial court found:

> Then the plaintiff's medical records do not show that she reported to the providers anything other than she'd been in a work related accident, that she'd been in a MVA, a motor vehicle accident, but not the nature of her work of what she did. I saw nothing about what she did for a living.

First of all, the record does not support a finding that Ms. Payne's medical records did not show that she reported to providers 'what she did for a living' or 'the nature of her work.' Dr. Dalal's medical record from the first appointment states that Ms. Payne informed him that she 'works for a nursing facility' and was transporting a patient on the day of the accident. Also during Dr. Dalal's deposition, he was asked about the fact that Ms. Payne was 'off work from her job as a CNA' from July 22, the day after their first appointment, through January 13, when she was released, and Dr. Dalal testified that 'it was reasonably necessary for her to be off work' during that time, and in fact, he was the one who 'took her off work during that period of time.'"

"Like Dr. Dalal, we recognize the possibility that Ms. Payne could have suffered some other type of injury to her shoulder aside from the auto accident. However, the clear weight of the evidence suggests otherwise. For the evidence to preponderate against the trial court's finding, it must support another finding 'with greater convincing effect.' *Branch Banking & Tr. Co. v. Hill*, 582 S.W.3d 221, 229 (Tenn. Ct. App. 2019) (quoting *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006)). That is the case here. We conclude that the evidence preponderates against the trial court's finding as to causation and conclude that it supports a finding that Ms. Payne's rotator cuff was torn during the collision."

"… After carefully reviewing the entirety of the evidence presented below, we are compelled to reach a different result. We know that the trial court's decision was based on its erroneous factual findings as to the absence of any complaints of shoulder pain by Ms. Payne in the two weeks following the accident and at physical therapy, and those findings, and any underlying implicit adverse credibility determinations related to whether she reported shoulder pain, are clearly disproved by the medical records, which are in accord with her testimony. So, we conclude that the trial court's related factual finding as to causation is clearly erroneous, even if it was based on an implicit credibility determination."

"We reverse the trial court's determination that the right shoulder injury was unrelated to the accident at issue. On remand, the trial court should determine the amount of damages to be awarded in relation to the shoulder injury."

SCHOOLS

1. Termination of tenured teacher – Teacher did not timely raise a procedural due process claim because she did not raise the issue during the hearing before the hearing officer, so the issue is waived – Teacher was provided with a letter which alerted her of the intention for charges to be brought before the board, and then another letter which listed charges, outlined the behavior supporting those charges, and informed her of her rights as a tenured teacher - She was also able to participate in a full hearing in which she challenged the charges brought against her, called multiple witnesses, testified on her

own behalf, cross-examined SCBE's witnesses, and submitted her own exhibits – Had the teacher brought the issue forth either before or during the hearing, the hearing officer could have assessed the veracity of the claim and ordered any necessary relief– Court upheld hearing officer's finding that teacher was guilty of neglect of duty

LAGINA SCOTT v. SHELBY COUNTY BOARD OF EDUCATION, ET AL.
COURT OF APPEALS No. W2022-00914-COA-R3-CV Filed February 26, 2025

"This appeal arises from the termination of a tenured teacher. The trial court determined that the school district terminated the teacher without legal cause and ordered that she be reinstated with backpay but denied her request for attorney's fees. Finding that the teacher waived any issue pertaining to whether the school board followed the procedural requirements of the Teacher Tenure Act, and that she engaged in conduct which constituted two of the three charges levied, we affirm in part and reverse in part."

"This appeal arises from the termination of a school counselor, Ms. Lagina Scott, the appellee, by the Shelby County Board of Education ('SCBE'), one of the appellants. Her termination was caused by her performance over the course of the 2017-2018 school year. At the end of that year, approximately 14 students were unable to graduate on time due to 'counselor error.'"

"Ms. Scott began working at Southwind High School ('SHS') as a guidance counselor during the 2014-2015 school year and, by the time of the hearing, had been working for SCBE in some capacity for more than 12 years. As a guidance counselor, Ms. Scott was required to monitor students' academic progress to ensure they met the requirements set by the State of Tennessee to graduate and to provide students with social, emotional, and academic support. The counselors at SHS used a system in which they worked with a single class of students during the entire course of that class's high school career. A counselor would be assigned to work with a class of students, usually the freshmen class, then would continue to work with those students as sophomores, juniors, and seniors. Ms. Scott began by counseling the SHS freshmen class in 2014 and worked with that class through their senior year, the 2017-2018 school year."

"The issues leading to Ms. Scott's dismissal appear to have begun during the 2016-17 school year. Ms. Scott took two periods of leave pursuant to the Family and Medical Leave Act ('FMLA') over the course of that year, working a total of only 57 days. In September 2016, Ms. Scott's son suffered a broken arm and Ms. Scott took her first period of leave to provide care to him. Ms. Scott returned from this period of leave on October 31, 2016. While on leave, Ms. Scott was referred to SCBE labor relations due to allegations made by a parent. When she returned to work, she learned the referral was due to allegations that she had contacted the parent, posed as a member of SHS administration, and threatened legal action for that parent's child having caused her son's broken arm. Ms. Scott was required to meet with an employee relations manager in regard to this incident, but no other discipline appears to have been pursued. Ms. Scott began her next period of leave on January 11, 2017. Ms. Scott had been in a car accident during the winter break, and shortly after the new semester began, she was in a second car accident. She stated that these two accidents combined with the stress of the prior referral incident led her to take 'stress leave' beginning on January 11, 2017, and continuing for the remainder of the school year."

"SHS hired a substitute guidance counselor, Ms. Zekaya Good, on February 22, 2017. Over the course of her first week, Ms. Good conducted a transcript audit of the then-junior class. During this audit, Ms. Good found issues, such as students missing records, credits not adding up properly, and certain students having failed classes during the first semester who had not been placed in credit recovery. She reported these issues to SHS administration. After this, Ms. Good created binders which contained a transcript, two transcript audits, a four-year plan, and a course selection sheet for each student. At the end of the 2016-2017 school year, Ms. Good left these binders at the school for whoever was serving as counselor during the next year to use in formulating students' schedules. Ms. Good's role as

substitute counselor concluded in June 2017. However, she was rehired by the school and began working as the virtual school coordinator in September 2017."

"… On September 9, 2017, Mr. Hardiman called a meeting with Ms. Scott, in which he provided her with three directives to complete over the course of the school year. First, she was to conduct a transcript audit for the senior class. Next, she was to meet individually with each member of the senior class to discuss their graduation status, and finally, she was to serve as a member of the senior cohort committee. On October 16, 2017, Mr. Hardiman became the Interim Principal of SHS and the next day, he reiterated the above directives in another meeting. He also instructed Ms. Scott to provide reports in which the senior students were listed in one of three categories, those on track to graduate, those who could graduate if certain conditions were met, and those with no chance to graduate. Mr. Hardiman later sent Ms. Scott a memorandum which directed, among other things, that the transcript audit was to be completed and used to compile this report on student graduation status by October 28, 2017. The memorandum also instructed her to conduct the one-on-one meetings with members of the senior class by December 8, 2017."

"In February 2018, well past the December deadline, Ms. Scott began conducting the one-on-one meetings with members of the senior class. Over the course of these meetings, she became aware of some errors present on students' transcripts and noticed many students had not been enrolled in all the classes necessary to graduate. After this, she contacted at least two teachers and attempted to enroll students in their classes approximately five weeks into the spring semester. This was done without administration's approval. She also delegated some of her one-on-one meetings to Ms. Good, who began meeting with several students."

"After learning of Ms. Scott's errors and of her efforts to rectify them, Mr. Hardiman reassigned her to virtual school, and an internal audit of the senior class was conducted by the other counselors at SHS. An external audit was also conducted by SCBE. These audits showed that many students were in danger of not graduating on time. Administration took various actions and enrolled students in alternative credit programs. While several students were able to finish their requirements using these programs, approximately 14 were unable to graduate on time due solely to 'counselor error.' Administration applied to the board of education for permission for these students to participate in the graduation ceremony so long as they signed contracts to finish their classwork over the summer. Permission was granted, and several students took part in the May 2018 graduation ceremony without having completed all the necessary classwork."

"On March 29, 2018, labor relations delivered a letter to Ms. Scott informing her that she was being placed on administrative leave without pay and that a recommendation for her dismissal was going to be made to SCBE. This letter also instructed her to return any SCBE property in her possession and to contact Mr. Hardiman to schedule a time to collect her personal belongings. At some point, Ms. Scott returned to the school without having contacted SHS administration, and took everything from the office except a computer, furniture, and one of the three binders created by Ms. Good the preceding school year. Many items taken were property of SCBE and contained sensitive student information."

"On May 30, 2018, Mr. Dorsey Hopson, superintendent of the Shelby County School District, sent Ms. Scott a letter which outlined the charges being brought against her (neglect of duty, insubordination, and conduct unbecoming a teacher), described the conduct which supported those charges, informed her of her rights pursuant to the Teacher Tenure Act, and stated that he was recommending that she be dismissed. Ms. Scott then requested a hearing before an impartial hearing officer in accordance with the Teacher Tenure Act. This hearing took place before Hearing Officer Debra Owen over the course of July 24, August 8, and August 9, 2018. Both SCBE and Ms. Scott called several witnesses to testify regarding the events which led to her dismissal."

"Mr. Hardiman testified first. He described the periods during which Ms. Scott was absent for extended periods of school and stated that she took extended leaves of absence during both the 2015-2016 and 2016-2017 school years. He was then asked about the events of August 2017 and the subsequent issues

those events caused at the school. Mr. Hardiman explained that after Ms. Scott failed to timely complete the schedules, issues persisted throughout the entire semester and that students were still being moved into classes in the middle of October despite the add/drop deadline being in September. He stated that he called a meeting on September 9, 2017, in which he gave Ms. Scott the three directives for the first time. He called a subsequent meeting with Ms. Scott on October 17, after he was named principal of SHS. He stated that during this meeting he instructed her to keep him updated with the list of students on track to graduate, those in danger of not graduating, and those who would be unable to graduate by providing an update every Friday. Mr. Hardiman also stated that he contacted Dr. Jeffery Taylor, a counseling manager for SCBE, and requested that he visit SHS sometime in early October. He said that the purpose of this visit was for Dr. Taylor to provide support to Ms. Scott and to train her on how to properly audit transcripts and use the graduation checklist."

"Mr. Hardiman testified that Ms. Scott had not provided the requested report on student graduation statuses by the October 28 deadline, and that such a report was not provided until February. He also stated that Ms. Scott had not completed the student conferences by the December 8 deadline, and that Ms. Scott did not begin conducting the meetings until February 5, 2018. He also testified that there were approximately four senior cohort teetee meetings, but that Ms. Scott had only attended one of them."

"Mr. Hardiman was then asked about Ms. Scott enrolling students in classes during the second semester. He stated that a teacher informed him that Ms. Scott had placed a student in her English class without permission and that Ms. Scott had told her she would 'hook her up' for helping her. He stated that this caused the teacher to be very uncomfortable and the action had been taken without administration's permission. The issue was compounded by the class having started approximately five weeks prior to the student being enrolled. He also testified that another teacher told him that Ms. Scott attempted to place a student in his year-long World History class at about the same time. He also explained that it was later brought to his attention that Ms. Good had begun helping Ms. Scott perform her duties and that when he found out that he 'told her that she should stop the practice.' The issue was also addressed in an email Mr. Hardiman sent to labor relations in which he explained that Ms. Scott had enlisted Ms. Good to help conduct student conferences without 'express oral or written permission from school administration' despite having informed some members of administration that she intended to do so. This letter also explained that Ms. Scott had actually begun the practice a week prior to informing administration of her intentions."

"During Ms. Good's testimony, she explained that she spent her first week of work in February 2017 performing a transcript audit. In that process, she went through each student's transcript and completed two forms. One form contained the overall graduation requirements for the school and the other was a 'box checklist' for each semester. After this, she provided three reports to SHS administration. The first report pertained to students who were failing, the second to students who were missing information on their transcripts, and the third to students who were missing a 'credit cover prevention method.' She explained that many students who had failed classes in the fall semester of the 2016-2017 school year had not been placed in credit recovery and that other students' transcripts contained errors which should have been addressed in previous years. She further explained that some students had missing grades, that some had attended other schools in the past and those schools were not listed, that credits were not adding up properly, and that the largest error was 'the great amount of . . . blank fill-ins in the transcript[s] and people that had failed in the first semester.' She stated that this led her to begin 'panicking' about students not having been placed in credit recovery."

"Ms. Good stated that, prior to finishing her work as the substitute, she performed another transcript audit, conducted individual meetings with students in which she generated a four-year plan and 'register[ed] them for the next year,' and created binders containing the students' information. She stated that for each student the binders contained (1) a transcript, (2) the results of the two audits, (3) the four-year plan completed in April 2017, and (4) a course registration sheet. Ms. Good stated that she left these binders in the counselor's office for whoever was serving as the guidance counselor the

next year. She stated that in addition to this, she left a list of students who participated in summer school that year in order to put 'the returning person on track.' Later, Ms. Scott came back to her upon obtaining 'official approval' from SHS administration, she then went from conducting one-on-ones with two or three students per day to meeting with students during the entirety of several school periods in a day."

"Ms. Good stated that, in April, administration asked her to move into the senior guidance counselor position as Ms. Scott was no longer at the school. Ms. Good explained that she reviewed the audits performed on the senior class by the other counselors and SCBE and that these showed that many students were missing credits due to failed classes. She also stated that a counselor's job would have been to ensure students were placed in the appropriate credit recovery courses but that these students had not been placed in the appropriate intervention. Upon being asked whether Ms. Scott had left any notes or other information in her office to help move the process along, Ms. Good stated that she 'had to start from scratch' as everything had been taken from the office. She stated that two of the three binders she had compiled at the end of the preceding year were missing, but that she found one of those binders by itself in one of the closets. She stated that she was told by other teachers that Ms. Scott had not used the binders due to some sort of personal animus toward her. She also believed that Ms. Scott did not use the binders because she had been asked to find records at the beginning of the year which she recalled having placed in the binders."

"Ms. Scott also testified at the hearing. She first explained that she had been absent from school for most of the 2016-2017 school year, working only 57 days. Ms. Scott also testified that she was present for the majority of each of the years previous, including the 2015-2016 school year. She stated that she returned to work on July 17, 2017."

"Ms. Scott explained that guidance counselors always returned earlier than the other teachers to 'make sure schedules were in place.' She also stated that schedules were ordinarily completed by the end of the preceding school year, but that when she returned her students did not have schedules in the system. Ms. Scott then explained that, upon her return, she did not have access to the PowerSchool system because she had not yet completed the necessary training. She stated that the other counselors had been provided with training on the system the previous semester while she was on leave, and that she was assigned a different form of online training which was challenging and not the 'hands-on' training she was used to. She stated that this training took her over two days to complete, and that Mr. Hardiman's testimony that the training should have only taken a few hours and that the prior systems were similar was inaccurate as the 'system was totally different.' She also claimed that when she sought help from Mr. Hardiman that he responded by telling her to skip the actual training and to merely complete the required quizzes to speed up the process."

"Ms. Scott stated that after she completed the training, she began reviewing the binders Ms. Good had prepared at the end of the preceding semester, but that she was unable to begin entering information into PowerSchool because the system crashed and remained down for two days. She also stated that when she was able to begin, she found errors left by Ms. Good which she was required to spend time correcting before moving onto the scheduling. Ms. Scott acknowledged that she missed the completion date for the student schedules but claimed that she had communicated with administration throughout the process. Ms. Scott stated that later, when the schedules were submitted, more issues than were necessary arose due to the order in which the schedules were uploaded to the master schedule. She indicated that in years past, the schedules of seniors were always uploaded first to ensure that they were placed in classes required for graduation. However, this year the senior schedules were entered last and thus, there were fewer slots available for senior students. She claimed that the only reason that she could think of for this happening would have been due to 'a personal issue with me and not caring about the well-being of the students.' She further claimed that after the schedules were uploaded and all the conflicts became apparent, Mr. Hardiman directed her to place students in any class so long as they had a full schedule and that he did not provide assistance when she informed him that certain students were experiencing issues with their schedules. She stated that, despite these issues, each student had a schedule on the first day unless they were unregistered."

“Ms. Scott disputed several other portions of the previous testimony. She stated that, while she did meet with Dr. Taylor, he did not do any ‘modeling’ or ‘one-on-one training’ with her, but rather merely ordered her to get her students placed in the classes necessary to graduate. Ms. Scott acknowledged that Mr. Hardiman instructed her to be a member of the senior cohort committee. She also acknowledged that he directed her to conduct one-on-one student meetings but claimed that she informed him that she had already started conducting the meetings when the two of them met again on November 5, 2017. She also acknowledged that Mr. Hardiman asked her to compile the list categorizing students, but she claimed that he never asked her to provide a weekly report. She further stated that she was never reminded of the task, and nothing was said when she did not send a report on a weekly basis. She indicated that on November 5 she left him a note with the numbers of students in each category listed and that she compiled a full report on February 14. She stated that the project graduation and virtual school programs would have still been available to students to catch up on work at that time.”

“Ms. Scott also stated that, in a December 18 meeting and evaluation with SHS administrator Dr. Beverly Bacchus, the deadline for the completion of the one-on-one meetings was extended to January 16, 2018. She acknowledged that she missed this extended deadline but stated that it was due to school being dismissed for snow, her attendance at a mandatory counselor meeting, and the Martin Luther King Jr. holiday. She later testified that she began holding the one-on-one counseling sessions on February 5. These sessions led her to discover issues with student schedules which necessitated the placement of students into the project graduation and virtual school programs. She indicated that she requested that the enrollment deadline for virtual school be extended to February 16. She also stated that she spoke to several teachers about enrolling students into their classes, but that she only did so after having spoken to Mr. Hardiman. She denied ever making an offer to ‘hook up’ any teacher who cooperated.”

“Ms. Scott stated that on February 15 all the meetings were completed but that she was called into Mr. Hardiman’s office. He informed her that she was being reassigned to ‘virtual school seminar’ and told her that a group of counselors had been compiled to review her work. She stated she relayed this to another counselor and told her that she believed ‘this ha[d] been a setup the whole time’ and that Mr. Hardiman had ‘been trying [to] throw different things to try to deter or frustrate or get [her] off track.’”

“Ms. Scott later testified about the senior cohort committee and stated that only two meetings occurred and that she had attended one of them. She claimed that she missed the other due to a conflicting meeting and that she had not been informed of the meeting early enough to have made accommodations. She also stated that administration was not as supportive of the senior cohort as they had been in previous years. She claimed that she received no assistance from administration and that when she would ask for assistance that ‘it was almost like they had been informed not to assist.’”

“On cross-examination, Ms. Scott was asked to expand upon the text messages accusing Mr. Hardiman of engaging in a conspiracy. Ms. Scott testified that she believed that Dr. Brown, Mr. Hardiman, Dr. Bacchus, and possibly Dr. Taylor were involved in a conspiracy against her. She stated she was unsure whether Ms. Good or Ms. Barnes were involved. Ms. Scott then claimed that the testimony of SCBE’s witnesses had been untruthful. Ms. Scott was later asked to identify several documents that had been obtained from the SCBE records. The first was a documented incident arising from her time at Carver High School in July 2013 which indicated that she failed to meet a deadline for completing graduation contracts for the senior class. Ms. Scott denied having seen or knowing anything about the document. When asked whether this was another person lying about her, she indicated that it was. Later, Ms. Scott was shown the memorandum which Mr. Hardiman had previously testified was a written version of the directives that he provided to Ms. Scott in the September meeting. Ms. Scott denied having ever seen the document. She further claimed that Mr. Hardiman had not provided any of the deadlines listed in the document and indicated that if a document was unsigned then she had not seen it.”

"Finally, Ms. Scott was asked about the materials missing from her office after she was told to leave the school. She claimed that she was never instructed not to return to the school. She stated that she cleared out her office in April after being dismissed and that she took the binders prepared by Ms. Good and those were currently in her possession. Although she admitted that she was instructed to schedule a time with Mr. Hardiman to collect her things, she never did so. She denied that students failed to graduate due to her errors."

"At the conclusion of the hearing, the parties waived closing arguments and subsequently filed competing proposed findings of fact and conclusions of law. The Hearing Officer then issued written findings of fact and conclusions of law. The Hearing Officer first addressed a late-raised argument regarding the procedural due process requirements of terminating a tenured teacher. Specifically, Ms. Scott claimed in her proposed findings of fact and conclusion of law that SCBE did not follow the proper statutory procedure in bringing the charges. As a basis, she alleged that nothing in the letter informed her that SCBE had found that the charges warranted her dismissal and taken the necessary vote. The Hearing Officer first found that the issue had not been raised in any pre-hearing filing or at the hearing itself. The Hearing Officer determined that Ms. Scott's due process rights were not violated based on the testimony of Ms. Barnes. Ms. Barnes testified that she had delivered a letter to Ms. Scott which stated that a recommendation was going to be made to the board. Ms. Barnes also stated that the letter Ms. Scott later received from Mr. Hopson informed her of the charges and of her duties and rights pursuant to the Teacher Tenure Act and indicated that the recommendation went before SCBE. The Hearing Officer then found that Ms. Scott had engaged in neglect of duty, insubordination, and conduct unbecoming to a member of the teaching profession. Accordingly, Ms. Scott's dismissal was upheld."

"Ms. Scott then sought review before SCBE. A hearing was held on January 9, 2019, in which she claimed that the Hearing Officer did not adequately weigh the extenuating circumstances surrounding the dismissal. SCBE heard arguments from each side and the board members asked several questions. At the conclusion of the hearing, the board voted to sustain the decision. Neither party addressed the due process issue during oral argument before SCBE."

"Ms. Scott next filed a petition for a writ of judicial review in the Chancery Court of Shelby County on March 29, 2022. Ms. Scott claimed that her due process rights had been violated as SCBE did not provide her with notice apprising her of the fact that SCBE had voted to issue charges against her. In addition, she claimed that she did not engage in insubordination, she did not neglect her duty, and that she did not engage in conduct unbecoming to a member of the teaching profession. Ms. Scott also requested attorney's fees based on the violation of her due process rights and asked to be reinstated with backpay covering the time since her initial suspension. SCBE argued that the Hearing Officer ruled correctly as to the charges against Ms. Scott. SCBE also argued that Ms. Scott's due process argument was not properly before the court because it had not been properly raised at the administrative level and, even if it had, that SCBE complied with the statutory due process afforded by the Teacher Tenure Act."

"On June 10, 2022, the trial court entered an order granting Ms. Scott's petition. The trial court found that Ms. Scott did not neglect her duty because she had asked for assistance from administration which she did not receive. The court stated, '[t]his [was] a case of bad management' because 'SCBE did not give [Ms. Scott] the help or support that they should have provided.' The trial court also found that Ms. Scott did not engage in insubordination as 'Ms. Scott could not follow her duties because SCBE did not provide her with adequate training on the PowerSchool program, which was a program necessary to do her job.' The trial court also determined that Ms. Scott's conduct did not amount to conduct unbecoming to a member of the teaching profession." …

"SCBE appealed the matter to this Court on July 7, 2022. We remanded the case to the trial court on February 13, 2023, after determining that the trial court's order did not constitute a final judgment on the matter because the writ included claims for backpay and attorney's fees which were not adjudicated in the order. Accordingly, the trial court entered a post-remand order on March 15, 2023,

in which it awarded Ms. Scott backpay in the amount of $400,596.40 based on her wages at the time of her termination. The trial court denied Ms. Scott's request for attorney's fees."

"A tenured schoolteacher who has been terminated from his or her employment by a school board has 'the right to judicial review of the school board's decision' pursuant to Tennessee Code Annotated section 49-5-513 (2012). *Emory v. Memphis City Sch. Bd. of Educ.*, 514 S.W.3d 129, 139-40 (Tenn. 2017). The teacher may seek this review by filing a 'petition for a writ of certiorari from the chancery court of the county where the teacher is employed.' Tenn. Code Ann. § 49-5-513(a). During such review, a chancery court is permitted 'to address the intrinsic correctness of the school board's decision.' *Emory*, 514 S.W.3d at 141. The chancery court's review of these matters, ''is a de novo review wherein the chancery court does not attach a presumption of correctness to the school board's findings of fact, nor is it confined to deciding whether the evidence preponderates in favor of the school board's determination.'' *Id.* at 141-42 (quoting *Ripley v. Anderson Cnty. Bd. of Educ.*, 293 S.W.3d 154, 156 (Tenn. Ct. App. 2008)). The chancery court's review 'is limited to the record of the school board proceedings.' *Id.* at 142. 'New evidence is only admissible 'to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.'' *Id.* at 142 (quoting Tenn. Code Ann. § 49-5-513(g))."

"If a party is dissatisfied with the decision of the chancery court, they 'may appeal as provided by the Tennessee rules of appellate procedure, where the cause shall be heard on the transcript of the record from the chancery court.' Tenn. Code Ann. § 49-5-513(i). An appellate court's review of the chancery proceedings is conducted pursuant to Rule 13(d) of the Tennessee Rules of Appellate Procedure, 'to determine whether the evidence preponderates in favor of the chancery court's findings of fact.' *Emory*, 514 S.W.3d at 142 (*citing Ripley*, 293 S.W.3d at 156). Issues of law 'are reviewed de novo, with no presumption of correctness in the chancery court's conclusions.' *Id.* (*citing Ripley*, 293 S.W.3d at 156)."

"We begin by addressing Ms. Scott's claim that SCBE violated the procedural due process rights afforded to her by the Teacher Tenure Act by failing to comply with the processes outlined in the statute. Essentially, Ms. Scott argues that the letter sent to her from Superintendent Hopson to inform her of the charges did not include language which specifically stated that SCBE had formally voted to approve the charges resulting in her termination. She argues that failure to enter this proof constituted failure to prove that Ms. Scott had been afforded the notice required by the Teacher Tenure Act. She also claims that termination without proper notice constituted a violation of the Teacher Tenure Act and presumably that this required the charges to be dismissed. Ms. Scott also claims that the violation entitles her to attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988."

"The appellants claim that, because the trial court did not address the issue, Ms. Scott is unable to raise the issue here. The appellants also claim that Ms. Scott failed to raise the issue during the administrative hearing and that, when confronted with the issue at the trial court, they provided sufficient evidence to show that no violation occurred. Ms. Scott responds by asserting that she did raise the argument at the administrative level 'during closing arguments.' As closing arguments were waived, Ms. Scott appears to contend that raising the issue in her post-hearing proposed findings of fact and conclusions of law constituted raising the argument during closing arguments." …

"The Hearing Officer did address the matter in her post-hearing findings of fact and conclusions of law. She stated that, while it was true that the superintendent's letter did not specifically state the charges had been approved by SCBE and no board minutes were entered into the record, some evidence did come in on the subject. The Hearing Officer relied on the testimony of Ms. Barnes, who testified that she prepared and hand-delivered a letter to Ms. Scott which was dated March 29, 2018, and which informed her that charges were being submitted to SCBE. The Hearing Officer determined that the testimony 'suggest[ed] that the recommendation went before the Board' as the superintendent is required to send a notice to the teacher only 'if the Board determines that the charges warrant dismissal.' Thus, as Superintendent Hopson sent Ms. Scott notice, that itself 'suggest[ed] that the

recommendation went before the board.' Notably, the issue was not referenced during the post-hearing review conducted by SCBE."

"Our Supreme Court has previously discussed the procedures a schoolboard is required to follow when assessing a tenured teacher with one of the charges outlined in the Teacher Tenure Act. In *Thompson*, a tenured teacher was terminated after she did not return timely from a period of sick leave. *Thompson v. Memphis City Sch. Bd. of Educ.*, 395 S.W.3d 616, 618-19 (Tenn. 2012). When this happened, a single administrator decided to dismiss the teacher 'and a cascade of noncompliance with the Tenure Act resulted.' *Id.* at 624-25. The Supreme Court determined that no written charges had been presented to the board and accordingly, the board had failed to make the required preliminary determination of whether the charges would have warranted the teacher's dismissal. *Id.* at 625. The *Thompson* Court stated that the procedures outlined in the Teacher Tenure Act were required to be followed prior to a tenured teacher being dismissed. *Id.* at 623. These included written charges being 'presented to the board of education specifically stating an offense that would amount to cause for the teacher's dismissal' and that only after the board of education had determined that the charges warranted dismissal would the teacher be provided with written notice of decision, a copy of the charges levied against the teacher, and a form advising the teacher of his or her legal duties, rights, and recourse pursuant to the statute. *Id.* at 623-24. *See* Tenn. Code Ann. §§ 49-5-511(a)(2)(4)-(5). Accordingly, the Court held that, '[t]he undisputed material facts clearly establish[ed] that Ms. Thompson was a tenured teacher and that the Board violated her rights under the Tenure Act.' *Id.* at 627. Recently, the Court relied heavily on *Thompson* to support the premise that the procedural framework outlined in the Teacher Tenure Act is mandatory for both administration and teachers. *Lemon v. Williamson Cnty. Sch.*, 618 S.W.3d 1, 19-20 (Tenn. 2021) (finding that a tenured teacher did not follow the procedural framework outlined in the Teacher Tenure Act when she brought a constructive discharge claim against the school board and its administrators, rather than exhausting her administrative remedies)."

"Ms. Scott relies heavily on *Thompson* to support her claim that SCBE violated her due process rights by failing to follow the procedural steps outlined by the Teacher Tenure Act. *See* Tenn. Code Ann. section 49-5-511(a)(2)(4)-(5). However, the facts in *Thompson* differ significantly from those here. In *Thompson*, the teacher received a letter signed by a single labor relations administrator which stated that the administrator had determined that discipline was warranted and informed the teacher that she was being terminated. *Thompson*, 395 S.W.3d at 619. The letter failed to identify any specific grounds supporting the termination and did not inform the teacher of her legal duties, rights, and recourse pursuant to the Teacher Tenure Act. *Id.* Conversely, Ms. Barnes delivered a letter to Ms. Scott dated months in advance of her termination letter, which informed her that charges were going to be brought before SCBE. Ms. Scott later received a second letter from Superintendent Hopson informing her of her termination, outlining the charges levied, listing the specific actions supporting those charges, and informing her of her rights as a tenured teacher to appeal the termination."

"Prior to determining whether the differences between this matter and *Thompson* and the evidence submitted lead to a different result, we must first determine whether Ms. Scott properly preserved the issue. Of particular concern was her failure to challenge the procedure followed by SCBE until her post-hearing proposed findings of fact and conclusions of law."

"…[I]n *Emory*, our Supreme Court held that a challenge to the timeliness of a hearing was 'not properly before [it] because [the teacher] failed to raise her timeliness objection either before or during the Board hearing.' *Emory*, 514 S.W.3d at 153. The Court reviewed the record and determined that, '[the teacher] received a full and fair hearing' as it was evident that '[s]he was given ample opportunity to put on proof, present testimony from witnesses on her behalf, testify on her own behalf, cross-examine the Board's witnesses, answer questions from Board members, and argue her view of significant events that were the basis for the charges.' *Id.* at 151. Further, the Court found that had Ms. Emory raised the issue at the hearing, then the Board could have addressed the issue at that time and granted the same relief sought during the appellate proceedings. *Id.* at 152. The Court stated that, '[t]he efficient and fair administration of justice demands that a litigant not be permitted to withhold her objections,

await the outcome, and then complain that she was denied her rights if she does not approve of the resulting decision.' *Id.* (citations omitted)."

"Our Supreme Court has also considered a similar issue in the context of a nontenured teaching assistant. *Bailey v. Blount Cnty. Bd. of Educ.*, 303 S.W.3d 216 (Tenn. 2010). … The Court noted that the teaching assistant could have raised the procedural issue before or during the post-termination hearing and the hearing officer could have considered the issue and ruled on it. *Id.* at 237. The Court also noted that the teaching assistant 'failed to prosecute his appeal to the [board of education] to a conclusion on the merits, thereby depriving the [board of education] of the [opportunity to consider and correct the issue].' *Id.* at 237-38. As the teaching assistant did not explain why he failed to raise the issue with either the hearing authority or the board of education, the Supreme Court found that he did not preserve his claim and thus that he had waived his due process issue. *Id.* at 238."

"In coming to this decision in *Bailey*, the Court relied heavily on its case *McClellan v. Board of Regents of State University*, in which it stated that a party to an administrative proceeding was required 'to raise issues of procedural irregularity' in the same way as 'a party in a judicial proceeding' in order to provide the administrative body with 'the opportunity to correct procedural errors.' 921 S.W.2d 684, 690 (Tenn. 1996). The Court further stated that '[a]llowing parties to acquiesce in the procedures, but to challenge those same procedures on appeal is inefficient and unreasonable.' *Id.* The Court explained that '[o]ne appearing before an administrative tribunal must make timely objections to procedural errors and must raise the errors at the administrative level in order to preserve them for consideration in a petition for judicial review.' *Id.* (*citing In re Billing and Collection Tariffs of South Cent. Bell*, 779 S.W.2d 375, 380 (Tenn. Ct. App. 1989). The *Bailey* court applied the same logic and determined that, because the teaching assistant had the opportunity to raise the issue at the administrative level but failed to do so until he filed a case in circuit court, the issue was waived. *Bailey*, 303 S.W.3d at 237-38."

"Ms. Scott's claim differs from each of these cases as the issue was referenced only in a post-hearing memorandum. It was not raised in either a pre-hearing document or during the hearing itself. In *Finney*, the subject teacher raised the issue in both pre-hearing and post-hearing memoranda. *Finney*, 576 S.W.3d at 682. The teacher in the *Emory* case did not raise the issue at all until the proceedings in the chancery court. *Emory*, 514 S.W.3d at 145-46. Similarly, in *Bailey*, the teaching assistant did not raise the issue at all at the administrative level or during an appeal to the board of education. *Bailey*, 303 S.W.3d at 237-38. In *Bailey*, the employee was an untenured teaching assistant and thus the case was decided based upon teaching assistant's constitutional due process rights rather than rights afforded by the Teacher Tenure Act. *Id.* at 230. We find that this set of circumstances squares more with those of *Emory* and *Bailey* than those of *Finney*."

"Ms. Scott failed to address the issue either before or during the hearing. This prevented the Hearing Officer from hearing arguments and receiving evidence which would have allowed her to make a ruling on the merits of the issue. It is not clear why Ms. Scott waited to present the issue in her post-hearing memorandum after the close of proof. We find that her actions in doing so were fatal to her claim."

"The procedural due process afforded by the Teacher Tenure Act is intended to ensure that schoolboards place the teacher on notice of the charges being brought against them and to enable the teacher to prepare a defense to those charges. *Thompson*, 395 S.W.3d at 624-25 (*citing Potts v. Gibson*, 469 S.W.2d 130, 133 (Tenn. 1971) (stating that 'the first essential' when dismissing a tenured teacher is to provide 'a notice sufficient in substance and form to fairly apprise the teacher of the charge against him and enable him to prepare his defense in advance of the hearing')). Here, Ms. Scott was provided with a letter which alerted her of the intention for charges to be brought before the board, and then another letter which listed charges, outlined the behavior supporting those charges, and informed her of her rights as a tenured teacher. She was also able to participate in a full hearing in which she challenged the charges brought against her, called multiple witnesses, testified on her own behalf, cross-examined SCBE's witnesses, and submitted her own exhibits. Had Ms. Scott brought the issue forth either before or during the hearing, the hearing officer could have assessed the veracity of

the claim and ordered any necessary relief. Ms. Scott also could have sought to have the issue resolved during the review performed by SCBE, but she did not raise the issue."

"In *Emory*, our Supreme Court stated that, '[a]llowing a party to hide an ace up her sleeve for appeal would undermine fair play and finality of judgment' and that 'our reaffirmed insistence upon contemporaneous objections to agency errors should provide incentive for litigants to see that all procedural deficiencies are addressed before the administrative body completes its consideration of a dispute.' 514 S.W.3d at 152. If we allowed Ms. Scott to raise this allegation in her post-hearing memorandum, we would be encouraging litigants to sit on their concerns regarding procedural irregularities during an administrative hearing rather than encouraging them to raise issues promptly, allowing a hearing officer the opportunity to consider the issue after hearing arguments from both sides and receiving evidence on the issue."

"We find that Ms. Scott's failure to raise the issue prior to her post-hearing memorandum constituted waiver of the issue. Ms. Scott also failed to prosecute the issue in her appeal before SCBE. For the same reasons, the issue of whether Ms. Scott was entitled to an award of attorney's fees was also waived. Further, the issue of attorney's fees was not raised in the post-hearing memorandum, but only in the chancery court. As such, that issue was waived regardless. Therefore, we affirm the trial court's denial of Ms. Scott's due process claim."

"Next, we consider whether the trial court erred when it determined that Ms. Scott was 'unlawfully terminated in violation of Tennessee Code Annotated section 49-5-511.'" …

"Tennessee Code Annotated section 49-5-511 states that '[t]he causes for which a teacher may be dismissed or suspended are: incompetence, inefficiency, neglect of duty, unprofessional conduct, and insubordination, as defined in § 49-5-501.' Tenn. Code Ann. § 49-5-511 (West). The letter to Ms. Scott which informed her of the charges against her stated that SCBE's decision to terminate her was '[b]ased on the foregoing Charges, individually and/or collectively.' Therefore, we agree with SCBE's assertion that any of these three charges could be used as a basis for her dismissal."

"Neglect of duty is defined as the 'gross or repeated failure to perform duties and responsibilities that reasonably can be expected of one in such capacity or continued unexcused or unnecessary absence from duty.' Tenn. Code Ann. § 49-5-501(8). The trial court determined that Ms. Scott did not neglect her duty stating that, '[t]his was a case of bad management on the part of SCBE. It is undisputed that Ms. Scott asked for help. SCBE did not give her the help or support that they should have provided.'"

"The trial court did not specify what actions of SCBE constituted bad management other than the purported failure to provide Ms. Scott with the assistance she needed."

"The appellants argue that the trial court erred when it found that Ms. Scott did not neglect her duty. They allege four duties which Ms. Scott failed to perform. First, Ms. Scott failed to complete a transcript audit of the senior class in a timely manner. Second, Ms. Scott failed to conduct one-on-one meetings with members of the senior class in a timely manner. Third, Ms. Scott failed to provide weekly updates categorizing the senior class into those on pace to graduate on time, those who could graduate if certain conditions were met, and those who were not going to graduate. Finally, Ms. Scott failed to timely and properly schedule students for their classes at the beginning of the 2017-2018 school year. The appellants cite the failures of Ms. Scott as the 'counselor error' which prevented approximately 14 seniors from graduating on time."

"Conversely, Ms. Scott claims that she did not neglect her duties. She does not appear to deny SCBE's contention that she failed to perform the duties or responsibilities reasonably expected of her as a guidance counselor, but rather that the following circumstances prevented her from performing those duties: (1) SHS failed to timely replace her while she was on FMLA leave; (2) SHS did not grant Ms. Good PowerSchool access when she was hired as the substitute counselor; (3) SHS became aware of errors and issues with student records and schedules while Ms. Scott was on leave and failed to address

them; (4) SHS did not provide her with the tools, specifically PowerSchool, necessary to perform her job, and (5) SHS did not provide her with assistance when she requested it."

"First, we consider Ms. Scott's contention that she was unable to perform her duties because SHS did not hire a substitute counselor until February 2017. There is disagreement as to the gravity of SHS waiting to hire a substitute until February 2017 largely due to a dispute regarding the amount of time that Ms. Scott was out on extended FMLA leave. Ms. Scott claims that she was out on extended leave during both the 2015-2016 and 2016-2017 school years. Conversely, the appellants claim that Ms. Scott was only on extended leave during the 2016-2017 school year. Obviously, if Ms. Scott took extended leave during two school years, then SHS waiting until February 2017 to hire a substitute could have had a detrimental effect on student management. However, if she was only absent for two periods of leave during the 2016-2017 school year, then hiring a substitute shortly after the second period of leave began would have been reasonable."

"The topic was addressed at oral argument. Counsel for SCBE stated that Ms. Scott took only two periods of leave, one in the fall of 2016 and the other in the spring of 2017. Counsel explained that the confusion came from some testimony provided by Mr. Hardiman in which he stated Ms. Scott took extended leave during both the 2015-2016 and 2016-2017 school years. Counsel indicated that Mr. Hardiman had simply been mistaken when he said this. However, counsel for Ms. Scott, during oral argument, reaffirmed the contention that she was out for two years rather than one. Our review of the record shows that Ms. Scott only testified to taking two periods of FMLA leave and both of those occurred during the 2016-2017 school year. She was later asked specifically whether she was 'there for most of the [2015-2016] school year' to which she answered '[c]orrect.' The trial court made no mention of leave during the 2015-2016 school year in its order. Having reviewed the record, we find the evidence preponderates in favor of a finding that Ms. Scott only took extended leave during the 2016-2017 school year. Therefore, SHS's decision to hire a substitute counselor on February 22, 2017, was reasonable as Ms. Scott's second period of leave began on January 11, 2017. Further, Ms. Scott has not demonstrated that SHS's decision to hire a substitute counselor in February 2017 had any adverse effect on her ability to perform her duties."

"Next, we consider the fact that Ms. Good was not granted access to the PowerSchool system and thus could not upload student schedules at the end of the 2016-2017 school year. The evidence indicated that no counselors were able to upload student schedules at that time as there were issues with the school's master schedule. Further, Mr. Hardiman called a meeting on July 31, 2017, in which he instructed all the SHS counselors to have schedules completed and uploaded by August 4. This indicates that there were possibly other counselors who had not uploaded schedules at that time. Additionally, despite being unable to upload student schedules into PowerSchool, Ms. Good had created binders which contained a transcript, the results of two transcript audits, and a four-year plan. Ms. Good stated that those binders should have allowed a professional counselor to generate a student's schedule. Ms. Scott had access to the binders, which were intended to make generating the schedules easier. Thus, Ms. Good's inability to access PowerSchool did not affect Ms. Scott's ability to perform her duties as she had a similar amount of time as the other counselors to complete student schedules. Further, Ms. Good had performed a good deal of the preliminary work while serving as the substitute."

"Next, Ms. Scott claims that she did not have access to PowerSchool and thus was unable to perform her duties. We understand her argument to mean that she was without PowerSchool access until she completed her training, that this caused her to fall behind on scheduling students, and thus she should be excused for failing to perform her duties. We disagree. Requiring Ms. Scott to complete a training program for two days does not constitute a failure to equip her with the tools necessary to do her job. In fact, it is quite the opposite as the purpose of the training was to make Ms. Scott competent in using PowerSchool so she could perform her duties. Further, nothing in the record suggests that the training itself was inadequate. Ms. Scott only stated that she was required to pay attention to the modules to progress and that it was not the 'hands-on' training she was accustomed to."

"Finally, Ms. Scott claims that she was not granted assistance when she requested it. Conversely, SCBE claims that Ms. Scott did not timely ask for assistance. There is no record of Ms. Scott asking Mr. Hardiman for assistance regarding the student schedules prior to August 5, 2017, which was one day after the deadline." …

"Having carefully reviewed the entire record, we find the evidence preponderates against the trial court's finding that Ms. Scott was prevented from performing her duties as a guidance counselor by 'bad management.' The trial court cited only the failure of SCBE to render Ms. Scott assistance as 'bad management,' but the record indicates that Ms. Scott did not seek assistance in a timely fashion. The record does not indicate that she contacted SHS administration with legitimate concerns about the student scheduling prior to the August 5 deadline. The record also does not support a finding consistent with Ms. Scott's additional examples of bad management because she was not placed in a situation worse than that of the other counselors at SHS and was provided with the resources and tools necessary to perform her job functions."

"Further, the evidence preponderates against the trial court's finding that 'Ms. Scott did not commit the offense of neglect of duty.'" …

"Here, we find that the evidence preponderates in favor of a finding that Ms. Scott grossly failed to perform the duties and responsibilities expected of her as a professional guidance counselor. Most condemning is Ms. Scott's failure to 'aid school staff in the early identification of student problems' as required by the Tennessee State Board of Education Teacher Regulations. Tenn. Comp. R. & Regs. 0520-02-02-.26 (repealed Nov. 2018). Clearly, Ms. Scott neglected this crucial aspect of her role as guidance counselor when she failed to even begin conducting the one-on-one student conferences mandated by SHS administration before the due date. Ms. Scott acknowledged that conducting these conferences is what led her to realize that issues existed with many of the senior students and what spurred her to begin placing students in various credit recovery courses and to begin placing students in classes. Clearly, this constitutes a failure of Ms. Scott to identify major student problems as required by her job description. This failure was also exacerbated by Ms. Scott failing to notice scheduling issues when she purportedly conducted a transcript audit in October 2017. The issues with senior schedules should have been discovered and addressed much earlier. Failure to do so constitutes neglect of duty. This is magnified by the fact that her failure to identify and address those problems led to approximately 14 members of the senior class being unable to graduate on time solely due to 'counselor error.'"

"Based upon the evidence in the record, the ruling of the trial court is reversed, and we find that Ms. Scott was guilty of neglect of duty as defined in Tennessee. Code Annotated section 49-5-501(8). As previously stated, the letter to Ms. Scott which informed her of the charges against her indicated that the 'Charges, individually and/or collectively' would serve as the basis of her termination. We find that Ms. Scott was guilty of the charge of 'neglect of duty,' that it was a sufficient charge to warrant dismissal pursuant to the statute and under the letter of dismissal which she received. Therefore, it is not necessary for us to tax the length of this opinion by addressing the other charges against Ms. Scott. Those issues are pretermitted."

"The trial court awarded Ms. Scott backpay in the amount of $400,596.40. Having determined that Ms. Scott was validly terminated from her employment, she is not entitled to an award of backpay. Accordingly, the trial court's award is reversed."

2. IDEA – School system ordered to provide compensatory education to dyslexic graduate because he failed to be able to read and did not meet any of the Individualized Education Plan (IEP) fluency goals - William's workarounds in reading simply did the work for him - Yet the point of a free and appropriate education under the IDEA is not simply to complete assignments - The school is right to point out that the IDEA does not guarantee any particular outcome, such as learning to read - But when a child is capable of learning to read, and his IEP does not aim to help him overcome his particular obstacles to doing

so, that IEP does not provide him the free appropriate public education to which he is entitled

WILLIAM A., a student, by and through his parents, E.A. and C.A. v. CLARKSVILLE-MONTGOMERY COUNTY SCHOOL SYSTEM
SIXTH CIRCUIT COURT OF APPEALS No. 24-5591 Decided and Filed: February 3, 2025

"William A. is dyslexic and graduated from high school with a 3.4 grade-point average. Yet even then he could not read. The school now challenges an order that it provide him with compensatory education under the Individuals with Disabilities Education Act. We affirm the order."

"The Individuals with Disabilities Education Act (IDEA) offers federal money to states to help them educate children with disabilities. 20 U.S.C. § 1400. As a condition of accepting this money, states agree to provide disabled children with a 'free appropriate public education'—one designed to meet each disabled child's unique needs. *Id.* §§ 1401(29), 1412(a)(1). For each child that the IDEA covers, a 'team'—including teachers, school administrators, parents, and sometimes the child himself—collaborates to develop an individualized education plan (which the Act calls an 'IEP'). *Id.* § 1414. The IEP tailors educational services to the child's 'unique needs,' and includes goals for the child's progress and a plan to achieve them. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982); 20 U.S.C. § 1414(d). At least once a year, the team meets to review the plan and make adjustments as needed. 20 U.S.C. § 1414(d). To encourage consensus, the IDEA provides for a 'preliminary meeting' of team members and for mediation of disputes. *Id.* § 1415(f). But if those processes fail, parents may seek a 'due-process hearing,' over which an impartial adjudicator from a state or local educational agency presides. *Id.* After the adjudicator decides, the losing party may seek redress in state or federal court. *Id.* § 1415(i)(2)."

"In 2016, William A. enrolled in the Clarksville-Montgomery County School System (which we refer to as 'the school') as a fifth grader. Soon afterward, the school determined he had a learning disability that impaired his skills in reading, writing, and math. To address that disability, the school developed an individualized education plan for William. The plan included language therapy with a speech pathologist, as well as six hours per week of one-on-one instruction in reading, writing, and math. William also received several accommodations, such as additional time to take tests. Each year, the school and William's parents reviewed his IEP and made adjustments to it; but throughout middle school his educational plan remained largely the same. So did William's reading skills: in all three years of middle school, as to reading fluency, he tested below the tenth percentile, and he met none of his IEP's fluency goals."

"When William reached high school, a special-education teacher expressed concern that his IEP was not helping him to make progress. The teacher emailed school administrators and said, 'This kid can't read.' William sometimes performed well in school anyway, earning As on some assessments, along with some Fs. But he made no progress toward his IEP's fluency goals. His IEP soon began to include additional accommodations, including the use of technology programs that read aloud printed text and helped him to write. Finally, in eleventh grade, a teacher suggested to William's mother that he might have dyslexia. His mother asked the school to evaluate him, and a school psychologist concluded that William indeed had dyslexia."

"During the winter of his eleventh-grade year, William's parents arranged for him to receive private tutoring from a dyslexia specialist, Dr. Sarah McAfee. Unlike the instruction that William had received in school—which focused on reading fluency—McAfee's tutoring focused on more basic skills, like alphabetic sequencing and syllable recognition. Under her tutelage, William advanced to the second step of a twelve-step program designed to help dyslexic persons learn to read. That February, McAfee recommended that William continue this program as part of his IEP for the coming year. But the school rejected that idea, proposing instead that William continue with his existing plan. Although William's parents signed his IEP, they expressed concern (which the school recorded in the IEP) that William was not 'receiving all of the supports he needs to be successful.'"

"In March 2023, while William was still in eleventh grade, his parents filed an administrative complaint under the IDEA. Their main claim was that the school had denied William the 'free and appropriate public education' to which the IDEA entitled him. They also raised claims under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and 42 U.S.C. § 1983."

"Three months later, an administrative law judge held a due-process hearing. Ten witnesses testified, among them three of William's teachers, three school administrators, and two special-education experts, including Dr. McAfee. One of William's expert witnesses—Kathryn Metcalf, a retired special-education administrator whom the ALJ deemed credible—testified that, at the foundation of a student's ability to read, lie basic skills like decoding and encoding—how letters make sounds, and how sounds make words. And until a student masters these basic skills, Metcalf testified, he cannot develop the advanced skills (like fluency) that were the focus of William's IEPs. The school did not rebut any of that testimony. The ALJ also heard from Dr. McAfee, who testified that—through a program designed to help dyslexic persons learn to read—William had already made progress in developing these basic skills. The ALJ found Dr. McAfee credible also."

"In the end, the ALJ reduced his inquiry to two questions: first, whether William could learn to read; and second, whether doing so required something different from what the school had offered William in his IEPs. 'The answer to both questions,' the ALJ found, 'is a resounding yes.' ALJ Decision, p. 38."
…

"A month later, William's parents brought this action in federal court, seeking an order that the dyslexia tutoring come from Dr. McAfee specifically. The school, for its part, filed a counterclaim seeking reversal of the ALJ's order. Both parties moved for judgment on the administrative record. Based on that record—and applying a 'modified de novo' standard of review, *see L.H. v. Hamilton County Dept. of Ed.*, 900 F.3d 779, 790 (6th Cir. 2018)—the district court made its own factual and legal determinations, while giving some deference to the ALJ's findings and expertise. The court reached the same conclusions the ALJ had: namely, that the school had violated William's rights under the IDEA, and that William was entitled to 888 hours of compensatory education to help him learn to read. Thus, the court itself ordered that same relief, but denied William's request that the dyslexia tutoring come from Dr. McAfee specifically. This appeal followed."

"The school challenges the district court's determination that it failed to provide William with the 'free appropriate public education' that the IDEA requires. We review the district court's factual findings for clear error and its legal conclusions de novo. *Knox County v. M.Q.*, 62 F.4th 978, 990 (6th Cir. 2023)."

"Under the IDEA, a participating school must provide 'specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.' 20 U.S.C. § 1401(29). That means the school must offer an individualized education plan 'reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.' *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 580 U.S. 386, 399 (2017)."

"Here, as described above, the ALJ and the district court alike found that William's IEPs were not tailored to his circumstances—because those plans focused on fluency, while bypassing more foundational skills necessary for him to read. The school does not contest that point directly. Instead, it argues that—because William 'was educated in the general classroom' and 'maintained over a 3.0 grade point average . . . while advancing from grade to grade'—that William in fact received the 'free and appropriate public education' to which he was entitled under the IDEA. But the Supreme Court has never held that 'every handicapped child who is advancing from grade to grade' necessarily receives the free and appropriate education mandated by the IDEA. *Endrew F.*, 580 U.S. at 402 n.2."

"William did not receive that education here. Apart from his dyslexia itself, William's most salient 'circumstance' for our purposes was that—with proper instruction—he can learn to read. *See L.H.*, 900

F.3d at 795-96. The school has not even tried to prove that finding wrong; yet William graduated from high school without being able to read or even to spell his own name. That was because, per the terms of his IEPs, he relied on a host of accommodations that masked his inability to read. To write a paper, for example—as the ALJ described—William would first dictate his topic into a document using speech-to-text software. He then would paste the written words into an AI software like ChatGPT. Next, the AI software would generate a paper on that topic, which William would paste back into his own document. Finally, William would run that paper through another software program like Grammarly, so that it reflected an appropriate writing style. Not all these workarounds were specifically listed in his IEP, but all were enabled by an accommodation that was: 24 extra hours to complete all assignments, which allowed William to complete his assignments at home, using whatever technology tools he could find."

"Thus—unlike in math, where William's accommodations helped him learn the regular curriculum—William's workarounds in reading simply did the work for him. Yet the point of a 'free and appropriate education' under the IDEA is not simply to complete assignments. The school is right to point out that the IDEA does not guarantee any particular outcome, such as learning to read. *Endrew F.*, 580 U.S. at 398. But when a child is capable of learning to read, and his IEP does not aim to help him overcome his particular obstacles to doing so, that IEP does not provide him the 'free appropriate public education' to which he is entitled. *See id.* at 399. Such was the case here."

3. PROFESSIONAL EDUCATORS COLLABORATIVE CONFERENCING ACT OF 2011 (PECCA) – A change to student discipline code was not a working condition under PECCA and was not subject to collective conferencing, even if the change now required teacher to handle certain disciplinary infractions – Working conditions are the subject of collaborative conferencing under PECCA - Although the Tennessee General Assembly largely retained the 2002 definition of working conditions, it included additional language providing that the term is intended to be narrowly defined and does not include any matters not specifically designated under this part – T.C.A. § 49-5-602(13) requires the definition of working conditions contained in PECCA must be construed narrowly and does not include any matters not specifically designated under this part - Neither student discipline nor social and emotional learning support are specifically designated as topics for collaborative conferencing in PECCA - In light of the Tennessee General Assembly's decision to omit student discipline from T.C.A. § 49-5-608(a), as well as the court's duty to interpret the term working conditions' narrowly and without expanding it to include matters not specifically designated, the trial court erred in ruling that the changes to the Student Code of Conduct were subject to collaborative conferencing under PECCA

CLARKSVILLE MONTGOMERY COUNTY EDUCATION ASSOCIATION v. CLARKSVILLE MONTGOMERY COUNTY BOARD OF EDUCATION
COURT OF APPEALS No. M2024-00663-COA-R3-CV Filed June 30, 2025

"In 2020, a local board of education adopted hanges to its student code of conduct requiring, among other things, that teachers participate in a student discipline policy and engage in social and emotional learning support. The local teachers' association filed suit, arguing that the board of education was required to engage in collaborative conferencing with the teachers' association before adopting the changes because they constituted 'working conditions' under the Professional Educators Collaborative Conferencing Act of 2011, Tennessee Code Annotated section 49-5-608(a). The trial court agreed and granted summary judgment in favor of the teachers' association. We reverse."

"This case concerns the interpretation and application of the Professional Educators Collaborative Conferencing Act of 2011 ('PECCA'). PECCA provides that teachers, referred to as 'professional employees,' are entitled to certain rights, including the right to engage in 'collaborative conferencing.' Tenn. Code Ann. § 49-5-608(a). … Local boards of education are required to engage in collaborative conferencing with regard to certain 'terms and conditions of employment' of professional

employees, as specified by Tennessee Code Annotated section 49-5-608(a). Id. (noting that the terms and conditions subject to collaborative conferencing 'include and are limited to' those listed)."

"One area where collaborative conferencing is required is 'working conditions,' except as 'prescribed by federal law, state law, private act, municipal charter or rules and regulations of the state board of education, the department of education or any other department or agency of state or local government[.]' Tenn. Code Ann. § 49-5-608(a)(5). The term 'working conditions' is expressly defined by PECCA:

'Working conditions of professional employees' or 'terms and conditions of professional service' means those fundamental matters that affect a professional employee financially or the employee's employment relationship with the board of education and that are specifically designated as such under this part. The term 'working conditions' or 'terms and conditions of professional service' is intended to be narrowly defined and does not include any matters not specifically designated under this part.

Tenn. Code Ann. § 49-5-602(13). PECCA further provides, however, that

No other terms or conditions of employment shall be the subject of collaborative conferencing between the board of education and the professional employees or their representatives and no collaborative conferencing shall be conducted on the following subjects: . . . (5) All personnel decisions concerning assignment of professional employees, including, but not limited to, filling of vacancies, assignments to specific schools, positions, professional duties, transfers within the system, layoffs, reductions in force, and recall. . . . .

Tenn. Code Ann. § 49-5-608(b)."

"Over the course of the 2019–2020 school year, the teachers represented by Plaintiff/Appellee the Clarksville Montgomery County Education Association ('the Education Association') engaged in collaborative conferencing with Defendant/Appellant the Clarksville Montgomery County Board of Education ('the Board'). The purpose of the collaborative conferencing was to agree to a Memorandum of Understanding ('MOU') to set out the terms and conditions of professional employment under PECCA. 'School Discipline' was a topic included for discussion during a March 9, 2020 collaborative conference session. In particular, collaborative conferencing discussed the 'Vanderbilt Study,' which considered the cost to instruction time when teachers handle disciplinary interruptions."

"At the same time that changes were being contemplated to the MOU, the Board was also contemplating changes to the Montgomery County School System Student Code of Conduct ('Student Code of Conduct'), which sets out 'standards of conduct and behavior that must be met by all pupils as a condition to the right of such pupils to attend schools in this district.' No classroom teachers or representatives of the Education Association were included on the committee that developed the new Student Code of Conduct."

"Culminating in May 2020, the Board adopted changes to the 2020–2021 Student Code of Conduct that revised how student discipline was handled and called for teachers to participate in social and emotional learning support. The disciplinary changes focused on the categorization of student offenses, the use of points, an added emphasis on support and interventions, and changes in wording to align with current or best practices. With regard to the categorization of student offenses, the Student Code of Conduct delineated four 'Categories.' Category 1 offenses were handled by the classroom teacher. Category 2 offenses required 'minor' office referrals. Category 3 offenses called for more serious office referrals. Category 4 offenses would likely result in remandment to alternative school."

"Based on what it deemed the additional duties and responsibilities placed on teachers under the Student Code of Conduct, the Education Association filed a complaint against the Board on July 17, 2020, in the Montgomery County Chancery Court ('the trial court'). In particular, the complaint

asserted that while the 2019–2020 Student Code of Conduct made student discipline primarily the responsibility of the school principal, the new Student Code of Conduct placed significantly more responsibility for student discipline on teachers in the classroom, which in turn limited time for instruction. The Education Association therefore argued that the adoption of these revisions violated PECCA's requirement that the Board engage in collaborative conferencing before making changes that affected teachers' 'working conditions.'"

"The Education Association moved for summary judgment on May 2, 2023." …

"The Board responded by filing its own motion for summary judgment on December 27, 2023. Because the changes to the Student Code of Conduct did not involve the employee's financial matters or employment relationship with the school system, the Board argued that the changes did not constitute 'working conditions' to which the collaborative conferencing process was applicable. The Board submitted the affidavit of Jeanine Johnson, Chief Human Resources Office for the school system, and prior agreed MOUs indicating that 'working conditions' governed by the yearly MOU included extra duty, length of the school day, employee dress code, employee discipline and process, planning time and teaching assignments, and additional duties. In essence, the Board argued that a 'working condition' governs teacher behavior, while a discipline policy governs student behavior. Moreover, the Board argued that section 49-5-608(a)(5) excluded discipline policy from the definition of 'working conditions' because Tennessee Code Annotated section 49-6-4002 requires local school boards to adopt discipline policy without requiring collaborative conferencing. See Tenn. Code Ann. § 49-5-608(a)(5) (excluding from collaborative conferencing 'those working conditions which are prescribed by . . . state law'). Instead, the local board is only required to 'seek recommendations' from teachers, parents, and others in the community. Tenn. Code Ann. § 49-6-4002(c)."

"The trial court heard the competing motions on April 2, 2024. On April 26, 2024, the trial court entered an order in favor of the Education Association." …

"In this case, it is undisputed that the Board made changes to the 2020–2021 Student Code of Conduct without engaging in collaborative conferencing regarding those changes. There is also no dispute that the Board is required by PECCA to engage in collaborative conferencing over 'working conditions' as defined by Tennessee Code Annotated section 49-5-602(13). The primary question in this case, then, is whether the changes to the Student Code of Conduct constitute changes to 'working conditions' as defined by PECCA."

"In addressing this question, we keep the following in mind:

The cardinal canon of statutory construction requires the courts to ascertain and to carry out the General Assembly's intent. A statute's intent is reflected in the statute's words, and, therefore, we must focus initially on the words of the statute. When the words of the statute are clear and unambiguous, we need not look beyond the statute, but rather, we must simply enforce the statute as it is written.

Norma Faye Pyles Lynch Fam. Purpose LLC v. Putnam Cnty., 301 S.W.3d 196, 213 (Tenn. 2009) (citations omitted)." …

"In this case, the parties agree that in order to determine what 'working conditions' are required to be the subject of collaborative conferencing, we look to the express definition provided by Tennessee Code Annotated section 49-5-602(13). Thus, for purposes of this appeal, 'working conditions' are defined as 'those fundamental matters that affect a professional employee financially or the employee's employment relationship with the board of education and that are specifically designated as such under this part.' Tenn. Code Ann. § 49-5-602(13)."

"… [I]n *Blount County Education Association v. Blount County Board of Education*, the question involved whether contract terms concerning voluntary and involuntary transfer protection, layoff and

recall provisions, non discrimination, and the duration of the collective bargaining agreement were 'working conditions' subject to mandatory bargaining under the predecessor to PECCA, the Education Professional Negotiations Act ('EPNA'). 78 S.W.3d 307, 311 (Tenn. Ct. App. 2002). In its analysis, this Court rejected the argument that 'the bargaining history between the parties and whether the parties negotiated in the past over a particular subject impacts whether that particular subject' was the focus of mandatory bargaining. Id. at 319. Instead, we concluded that the legislature had 'specifically decided and identified which subjects are mandatory[,]' and we were bound by that decision. *Id.*"

"Consequently, we relied on the language of the statute, and in particular, the dictionary definition of 'working conditions'—'descriptive of a proper condition for work or a state of being fit for work'—to hold that voluntary and involuntary transfers, layoff, and recall did not involve 'working conditions' as required to be the subject of mandatory bargaining. Id. at 318 (quoting Webster's New Collegiate Dictionary (2d ed.)). Rather, only non-discrimination and the duration of the memorandum of agreement were considered 'working conditions' subject to mandatory bargaining by the Court of Appeals. *Id.*"

"The question of how to define the term 'working conditions' was again raised in *Polk County Board of Education v. Polk County Education Association*, 139 S.W.3d 304 (Tenn. Ct. App. 2004). In that case, the dispute involved whether a teacher dress code constituted a working condition under EPNA. *Id.* at 305." …

"In resolving this dispute, we first noted that there are several schools of thought as to how to separate working conditions, which were subject to mandatory bargaining, from educational policy, which were not. Id. at 307." …

"We did not expressly apply any of the above tests but instead noted that the common theme is that the school board 'must be left with managerial prerogatives in determining policy issues and those issues which impact on the efficient operation of the school system' as balanced against 'the employee's right to negotiate on the terms and conditions of employment.' *Id.* at 307–08 (citations omitted). Moreover, these questions must be resolved on a case-by-case basis. *Id.* at 308."

"Applying this framework to the dispute at hand, we concluded that the dress code fell within the definition of 'working conditions' such that it was subject to mandatory bargaining. While the dress code was 'not so restrictive or egregious as to require teachers to purchase new wardrobes,' the changes could 'very well fundamentally impact on the teacher's employment relationship.' *Id.* Thus, while the decision to implement the dress code could be considered educational policy, 'its enforcement may still be a working condition which must be bargained.' *Id.* (citations omitted)."

"In 2011, EPNA was repealed and replaced with PECCA, which replaced mandatory bargaining with mandatory collaborative conferencing. See generally Tenn. Code Ann. § 49-5-606(a); see also 2011 Tenn. Laws Pub. Ch. 378 (S.B. 113), effective June 1, 2011. As previously discussed, 'working conditions' are now the subject of collaborative conferencing under PECCA. Tenn. Code Ann. § 49-5-608(a)(5). Although the Tennessee General Assembly largely retained the 2002 definition of 'working conditions,' it included additional language providing that the term 'is intended to be narrowly defined and does not include any matters not specifically designated under this part.' Tenn. Code Ann. § 49 5-602(13). And the General Assembly has included the caveat that collaborative conferencing does not apply to 'personnel decisions concerning assignment of professional employees, including, but not limited to, . . . professional duties[.]' Tenn. Code Ann. § 49 5-608(b)(5)."

"For the Education Association's part, it first contends that 'working conditions' as used in PECCA 'remain[s] synonymous' with the definition at issue in *Polk County Board of Education*. The Education Association further argues that the changes at issue here are even more encompassed by the term 'working conditions' than the dress code at issue in *Polk County Board of Education*. Specifically, the changes assign to teachers certain duties in handling student discipline and social and emotional learning. And unlike in *Polk County Board of Education*, the Board admitted that a teacher's failure to

comply with the duties assigned under the Student Code of Conduct could result in discipline to the teacher, i.e., failure to comply with the changes could have an adverse effect on the teacher's employment relationship. Moreover, requiring teachers to take part in the discipline process could result in the loss of instructional time, possibly leading to poor results on standardized tests. This could, in turn, affect a teacher's evaluation results, a factor in 'employment decisions,' such as termination or tenure. Tenn. Code Ann. § 49-1 302(d)(2)(A). So then, the Education Association contends that these changes 'affect . . . the employee's employment relationship with the board of education' and therefore constitute 'working conditions' for purposes of collaborative conferencing."

"Respectfully, we cannot agree with either the trial court's or the Education Association's reasoning. For one, while Tennessee's rules of statutory construction do not require ignorance of practical realities, our foremost consideration in determining the meaning of a statute is the words employed by the legislature, followed closely by the broader statutory context. *Cf. Norma Faye Pyles Lynch Fam. Purpose LLC*, 301 S.W.3d at 213; *Coffee Cnty. Bd. of Educ. v. City of Tullahoma*, 574 S.W.3d 832, 845–46 (Tenn. 2019). To this end, we disagree with the Education Association that the definition of 'working conditions' contained in PECCA is 'synonymous' with the definition at issue in *Polk County Board of Education*. While the base definition may be the same, the definition contained in PECCA must be construed 'narrowly' and 'does not include any matters not specifically designated under this part.' Tenn. Code Ann. § 49-5-602(13). Any conclusion we reach in this case must keep in mind this important distinction."

"Second, in determining whether a specific topic falls within the definition of 'working conditions' we consider each case individually on a case-by-case basis keeping in mind 'the specific policy at issue[.]' *Polk Cnty. Bd. of Educ.*, 139 S.W.3d at 308." …

"We also cannot agree that the Tennessee General Assembly's choice not to expressly exclude student discipline is illustrative of their intention to include that topic among those subject to collaborative conferencing. In fact, we conclude that the opposite is true. Importantly, under EPNA, eight 'conditions of employment' were subject to mandatory bargaining[.] … Tenn Code Ann. § 49-5-611(a) (2002) (emphasis added). The Tennessee General Assembly adopted a nearly identical list of topics subject to collaborative conferencing in PECCA, with one notable exception: the exclusion of student discipline procedures." …

"In determining the meaning of a statute, we may, depending on the circumstances, consider a statute's 'evolution over the course of time[.]' *Coffee Cnty. Bd. of Educ.*, 574 S.W.3d at 846 (citing Powers v. State, 343 S.W.3d 36, 50 n.20 (Tenn. 2011)). 'When the legislature makes a change in the language of a statute, we must assume that it was deliberate.' *State v. Turner*, 193 S.W.3d 522, 527 (Tenn. 2006) (citation omitted). Consequently, 'a change in the language of a prior statute presumably connotes a change in meaning.' Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 256 (2012) (detailing the 'reenactment canon' of statutory construction); *see also Deberry*, 651 S.W.3d 918, 925 (Tenn. 2022) (stating that we determine a statute's meaning through consideration 'of the statutory text, the broader statutory framework, and any relevant canons of statutory construction' (emphasis added)). One example of this canon in action is where 'a statute providing for an award to the prevailing party of 'attorney's fees and expert-witness fees' has been amended to award only 'attorney's fees,' there would be no basis for the argument (sometimes made) that attorney's fees includes reimbursement of the attorney's expenditures for expert witnesses.' Scalia & Garner, *supra*, at 256."

"The same is essentially true here. Under EPNA, both 'working conditions' and student discipline were listed as separate topics subject to mandatory bargaining. When PECCA was enacted, however, the Tennessee General Assembly omitted student discipline from the topics that were subject to collaborative conferencing, while keeping the other seven topics previously listed. We presume that this change was deliberate, and that a change in meaning was intended by our legislature. *Turner*, 193 S.W.3d at 527. Thus, there appears to be 'no basis for the argument' that this legislative silence should be construed as evincing an intent that student discipline fall within the definition of 'working

conditions' under PECCA. Scalia & Garner, *supra*, at 256. Rather, it appears patent that the Tennessee General Assembly intended to exclude student discipline from collaborative conferencing through its deliberate omission. The most reasonable conclusion is therefore that in enacting PECCA, the Tennessee General Assembly intended that student discipline be considered neither a 'working condition' nor a topic subject to collaborative conferencing."

"Consideration of *Polk County Board of Education* and other portions of PECCA lend support to our conclusion. Importantly, our legislature has specifically mandated that the term 'working conditions' 'does not include any matters not specifically designated under this part.' Tenn. Code Ann. § 49-5-602(13). And neither student discipline nor social and emotional learning support are specifically designated as topics for collaborative conferencing in PECCA."

"Of course, the Education Association maintains that student discipline and the directive to participate in social and emotional learning need not be specifically designated so long as it affects the employment relationship with the Board. Still, in determining how this language should be interpreted, we must be mindful of the legislature's mandate that the term be 'narrowly defined.' See id. Keeping that in mind, we must conclude that the changes to the Student Code of Conduct at issue here are more closely connected with managerial and educational policy than a dress code affecting only teachers,5 such that they would not fall within the definition of 'working conditions.' *See Polk Cnty. Bd. of Educ.*, 139 S.W.3d at 307; *see also Penn. Lab. Rels. Bd. v. State Coll. Area Sch. Dist.*, 461 Pa. 494, 507, 337 A.2d 262, 268 (Penn. 1975) (holding that even if a matter 'does affect wages, hours and terms and conditions of employment,' if 'the matter is one of inherent managerial policy,' it is not subject to mandatory bargaining as a 'working condition[]')."

"Indeed, the changes at issue have no 'direct effect' on employment but only the potential to affect employment based on possible contingencies. *Id.* (citing *Sch. Dist. of Drummond*, 352 N.W.2d at 662). … To hold that any policy that could potentially affect a teacher's employment—no matter how closely aligned with the Board's managerial or educational policy or attenuated from the teacher's employment conditions—is a 'working condition' would be to expand the definition of that term beyond the legislature's narrow intention."

"Moreover, a teacher's 'professional duties' are simply not subject to collaborative conferencing. *See* Tenn. Code Ann. § 49-5-608(b) (stating that 'no collaborative conferencing shall be conducted on the following subjects: . . . . [a]ll personnel decisions concerning assignment of professional employees, including, but not limited to, . . . professional duties'). Here, requiring teachers to participate as the first line in a student discipline policy or support social and emotional learning appears to be closely aligned with a teacher's professional duties, at least more than compliance with a teacher dress code. Thus, both the trial court's and the Education Association's focus on the additional duties imposed by the changes to the Student Code of Conduct—and the potential consequences for failing to perform those duties—as evidence that they should be subject to collaborative conferencing is, respectfully, misplaced."

"In sum, particularly in light of the Tennessee General Assembly's decision to omit student discipline from Tennessee Code Annotated section 49-5-608(a), as well as our duty to interpret the term 'working conditions' narrowly and without expanding it to include matters not specifically designated and all of the foregoing, we conclude that trial court erred in ruling that the changes to the Student Code of Conduct were subject to collaborative conferencing under PECCA. The trial court's decision to grant summary judgment to the Education Association is therefore reversed, and summary judgment is instead granted in favor of the Board."

TENNESSEE PUBLIC PARTICIPATION ACT (TPPA)

1. Plaintiff police officer filed a defamation suit – Defendants filed a motion to dismiss pursuant to the TPPA – Trial court dimissed defendants' petition and defendants appealed the denial, which was permitted by the TPPA – After the appeal plaintiff took a nonsuit of

his original action and moved to dismiss the appeal - The trial court lacked subject matter jurisdiction to grant the officer's voluntary nonsuit, and therefore we deny the motion to dismiss this appeal - Whether a party established a prima facie case for purposes of a TPPA petition is a legal issue the appeals court reviews de novo - Likewise, issues of constitutional interpretation are questions of law, which the appeals court reviews de novo without any presumption of correctness given to the legal conclusions of the courts below - The officer's TPPA petition is no longer pending before the trial court - Instead, the officer's petition has been denied by the trial court and timely appealed to the appeals court in accordance with Tennessee Code Annotated § 20-17-106, the section of the TPPA governing appeals - Section 20-17-106 provides, in pertinent part, that a trial court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under [the TPPA] is immediately appealable as a matter of right to the court of appeals - The trial court dismissed the TPPA suit and the defendants appealed the determination, which was immediately appealable - During the pendency of this appeal, the officer attempted to nonsuit the underlying defamation lawsuit and moved to dismiss this appeal as moot, but the trial court lost its authority over the case and the order granting to nonsuit was not valid – The filing of a TPPA petition immediately stays discovery in the pending lawsuit until the court has ruled on the petition - The court may allow specified and limited discovery relevant to the petition upon a showing of good cause - In ruling on a petition, a court may consider 'supporting and opposing sworn affidavits stating admissible evidence and admissible evidence presented by the parties

JEREMY WAYNE LONG v. CANDICE O'BRIEN BEASLEY ET AL.
COURT OF APPEALS No. M2024-00444-COA-R3-CV Filed March 12, 2025

"This is a defamation action filed by a plaintiff police officer against two defendants concerning allegedly defamatory comments the defendants posted on Facebook about the officer. The defendants, citizens of Ashland City, where the plaintiff had served as a police officer for several years, filed a petition to dismiss the defamation action pursuant to the Tennessee Public Participation Act ('TPPA'). The trial court denied the petition, determining that the officer had successfully established a *prima facie* case of defamation against each defendant and that the defendants had not met their burden to establish a valid defense. The defendants appealed the denial, arguing that the officer, a public official, had not met the heightened standard of proof necessary to establish that either of them had acted with actual malice when posting their comments to Facebook. During the pendency of this appeal, the officer attempted to nonsuit the underlying defamation lawsuit and moved to dismiss this appeal as moot. Upon review, we determine that the trial court lacked subject matter jurisdiction to grant the officer's voluntary nonsuit, and therefore we deny the motion to dismiss this appeal. We further determine, upon our *de novo* review of the record, that the trial court should have granted the defendants' TPPA petition and dismissed the defamation lawsuit, pursuant to Tennessee Code Annotated § 17-20-105(b), because the officer failed to establish, by clear and convincing evidence, that either defendant had acted with actual malice when posting the Facebook comments. Accordingly, we reverse the trial court's judgment."

"On June 22, 2021, the plaintiff, Ashland City police officer Jeremy Wayne Long, conducted a traffic stop at a 'Sonic' restaurant, the subject of which was country music singer Ryan Upchurch. As the traffic stop continued, Mr. Upchurch began to record his interaction with Officer Long as a 'livestream' on his Facebook page. During the livestream, numerous individuals commented on Mr. Upchurch's Facebook page in reaction to the livestream video. One such individual was Candice O'Brien Beasley, defendant in the underlying lawsuit and a resident of Ashland City, who posted the following comments during the livestream:

> Long is known for planting drugs.

> The same cop harassed me more than 19 times when [B.B.] and [P.B.] were little now here he is harassing them and searching vehicles claiming to smell weed each time. He broke panels and all kinds of s*** in [B.B.'s] Tahoe.

Chris Beasley, Ms. Beasley's husband, also posted a comment on Mr. Upchurch's Facebook page, stating:

> I know that dirty cop well. He had to leave [Ashland City(?)Police Department] back in the day because he stalked women, and would plant drugs in peoples cars to make busts. He just got hired back and is pulling over everyone to build his quota up.

According to Officer Long, he became aware of these and other comments that had been posted to Mr. Upchurch's Facebook page when, three weeks later, a man approached him and stated: 'You're that cop that is known for planting drugs and stalking women. I don't need to talk to you.'"

"In October 2021, Officer Long filed a verified complaint in the Cheatham County Circuit Court ('trial court') alleging that the Beasleys had published defamatory statements about him on Mr. Upchurch's Facebook page. Officer Long further alleged that Mr. Upchurch's Facebook page 'is followed by more than 561,000 people' and that the Beasleys' statements 'were meant to damage his reputation and cause him harm.' In December 2021, the Beasleys filed a motion to dismiss the complaint pursuant to Tennessee Rule of Civil Procedure 12.02(6), a motion which the trial court denied."

"On February 22, 2023, the Beasleys filed a second motion to dismiss. The motion cited Tennessee Rule of Civil Procedure 12.02(6) and requested 'attorney's fees pursuant to T.C.A. 20-12-119(c)(1).' The Beasleys filed an accompanying 'Memorandum in Support of Motion to Dismiss Pursuant to T.C.A. 20-12-107' ('the Memorandum'). In the Memorandum, the Beasleys argued that their statements appearing on Mr. Upchurch's Facebook page were protected free speech and that Officer Long's complaint should be dismissed pursuant to the TPPA, codified at Tennessee Code Annotated §§ 20-17-101, *et seq.*, because the statements involved a public figure and a public concern."

"On June 29, 2023, Officer Long filed a response to the motion to dismiss, arguing that it should be denied due to several procedural deficiencies.5 Regarding the merits of the motion, Officer Long argued that the Beasleys' statements about him recounted incidents that had never occurred. Hence he asserted that the Beasleys had made 'knowingly false' statements about him or had at least acted with 'reckless indifference to the truth.' Officer Long attached to his response affidavits from several people stating that Officer Long had a good reputation in the community and that the Beasleys' statements had damaged his reputation."

"The Beasleys filed a reply, advancing the position, *inter alia*, that Officer Long had failed to produce evidence that the Beasleys had acted with actual malice, a requirement for a finding of defamation against a public figure. *See Funk v. Scripps Media, Inc.*, 570 S.W.3d 205, 212-13 (Tenn. 2019); *Elsten v. Coker*, No. M2019-00034-COA-R3-CV, 2019 WL 4899759, at *3 (Tenn. Ct. App. Oct. 4, 2019). The Beasleys also filed an answer to Officer Long's complaint in which they admitted to making the alleged statements but averred that (1) Mr. Beasley's comments were made about a different police officer, not Officer Long; (2) Officer Long 'did not have reputation capable of being injured' because his reputation as a police officer was already tarnished throughout the community; and (3) the Beasleys' Facebook posts were protected free speech under the TPPA."

"The trial court treated the Beasleys' second motion to dismiss as a valid TPPA petition to dismiss and entered an order lifting the automatic stay of discovery on August 10, 2023. As part of the limited discovery, the Beasleys were deposed on October 30, 2023. In December 2023, following their depositions, the Beasleys filed a supplemental brief in further support of the motion to dismiss, arguing that their deposition testimony had produced no evidence that either of them had acted with actual malice when posting the comments about Officer Long on Facebook."

"Officer Long filed a supplemental response on December 28, 2023, asserting that he had successfully alleged actual malice to establish his *prima facie* case for defamation against the Beasleys. Regarding Mr. Beasley's posted comment, Officer Long claimed that Mr. Beasley 'took no action to correct his prior statement once he allegedly realized the true identity of the officer.' Officer Long urged that these actions demonstrated that Mr. Beasley acted with reckless disregard for the truth of his statements appearing on Mr. Upchurch's Facebook page. Regarding Ms. Beasley's Facebook posts, Officer Long contended that she knew of the falsity of or had reckless disregard for the truth of her statements as evinced by the many corrections Ms. Beasley had made to those statements during her deposition testimony. Concerning the Beasleys' assertion that Officer Long did not 'possess good standing and reputation for good character to begin with,' Officer Long argued that this was not a valid defense to his defamation claim and referred again to the many affidavits stating that he had a good reputation in the community that had been damaged by the Beasleys' defamatory comments concerning him."

"The trial court heard arguments respecting the TPPA petition on January 3, 2024, and entered an order on February 29, 2024, denying the petition. The trial court undertook an analysis of the burden-shifting framework of the TPPA to find that the Beasleys had 'demonstrated a prima facie case that they were engaging in a protected activity under the TPPA.' Shifting the burden to Officer Long to establish a *prima facie* case of defamation against the Beasleys, the trial court concluded that Officer Long had met that burden as to each of them. The trial court then found that the Beasleys had not established a valid defense against the defamation claims because Officer Long had produced affidavits attesting to his good character. Accordingly, the trial court denied the Beasleys' TPPA petition to dismiss. The Beasleys timely appealed."

"After the Beasleys appealed, Officer Long submitted to this Court a motion to dismiss the appeal and attached to the motion an order signed by the trial court granting his voluntary nonsuit of the underlying action, without prejudice, pursuant to Tennessee Rule of Civil Procedure 41. In his motion to dismiss before this Court, Officer Long relies on our Supreme Court's recent decision in *Flade v. City of Shelbyville*, 699 S.W.3d 272 (Tenn. 2024) to argue that a plaintiff can voluntarily nonsuit an action before a court (whether trial or appellate) adjudicates the merits of a TPPA petition."

"The Beasleys filed a response to the motion to dismiss the appeal, arguing that (1) an appeal can only be dismissed by the appellant or by an agreement of the parties; (2) Officer Long is attempting to dismiss this appeal to avoid paying court costs, attorney's fees, and possible sanctions; (3) the Beasleys have a 'vested right' to an adjudication of their TPPA petition; and (4) Officer Long's counsel participated in 'inappropriate *ex parte* communication with the trial court' to obtain the order of dismissal from the trial court. The Beasleys further argue that this Court's holding in *Flade* is inapposite because in *Flade*, the defendant's TPPA petition was still 'pending' when the plaintiff filed for voluntary nonsuit, *see Flade*, 699 S.W.3d at 295, whereas, in the case at bar, the trial court had heard and adjudicated the Beasleys' TPPA petition, and the Beasleys had appealed the trial court's decision to this Court."

"The Beasleys request that this Court review the trial court's denial of their motion to dismiss, which the trial court treated as a petition filed pursuant to the TPPA. Inasmuch as our analysis involves general issues of statutory construction and interpretation, we adhere to the following longstanding principles:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn.

> 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but 'should be construed, if practicable, so that its component parts are consistent and reasonable.' *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that 'would render one section of the act repugnant to another' should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

In re Estate of Tanner, 295 S.W.3d 610, 613-14 (Tenn. 2009). 'Moreover, when an issue on appeal requires statutory interpretation, we review the trial court's decision de novo with no presumption of correctness.' *Nationwide Mut. Fire Ins. Co. v. Memphis Light, Gas & Water*, 578 S.W.3d 26, 30 (Tenn. Ct. App. 2018)."

"In the specific context of a TPPA petition, this Court has further explained our standard of review as follows:

> Whether a party established a prima facie case for purposes of a TPPA petition is a legal issue we review de novo. *See Charles v. McQueen*, 693 S.W.3d 262, 272-73 (Tenn. 2024). Likewise, '[i]ssues 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.' *J.A.C. by & through Carter v. Methodist Healthcare Memphis Hosps.*, 542 S.W.3d 502, 510 (Tenn. Ct. App. 2016) (quoting *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009)).

SmileDirectClub, Inc. v. NBCUniversal Media, LLC, M2024-01491-COA-R3-CV, ___ S.W.3d__, 2024 WL 4233949, at *7 (Tenn. Ct. App. Sep. 19, 2024)."

"Before reaching the substantive issues raised by the parties, we must address Officer Long's motion to dismiss this appeal. In the motion, Officer Long states that he has taken and been granted a voluntary nonsuit of the underlying action pursuant to Tennessee Rule of Civil Procedure 41.01. Officer Long has attached to his motion an Order of Voluntary Dismissal, signed by the trial court and entered on October 21, 2024. Officer Long contends that his voluntary dismissal of the underlying lawsuit renders this appeal moot."

"Tennessee Rule of Civil Procedure 41.01(1) provides in pertinent part:

> Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties . . . . If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.

'A plaintiff's right to voluntary dismissal without prejudice is subject to the exceptions expressly stated in Rule 41.01(1) as well as to an implied exception which prohibits nonsuit when it would deprive the defendant of some vested right.' *Lacy v. Cox*, 152 S.W.3d 480, 484 (Tenn. 2004) (citing *Anderson v. Smith*, 521 S.W.2d 787, 790 (Tenn. 1975)) (footnotes omitted). Interpretation of the Tennessee Rules of Civil Procedure is a question of law that we review 'de novo on appeal with no presumption of

correctness.' *See id.* at 483 (citing *S. Constructors, Inc. v. Loudon Cnty. Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001))."

"Officer Long argues that a filed TPPA petition does not constitute one of the recognized exceptions that would 'curtail [his] right to take a voluntary nonsuit' pursuant to Rule 41. Officer Long relies heavily on our Supreme Court's holding in *Flade*, 699 S.W.3d at 272. In *Flade*, a property owner had sued several defendants for what he alleged to be 'disparaging remarks that were made on social media.' *Id.* at 276. Two of the defendants had filed petitions to dismiss the complaint pursuant to the TPPA, and the petitions had been fully briefed and set for hearing. *Id.* However, before the trial court heard oral arguments or rendered any decision on the TPPA petitions, the property owner, Mr. Flade, had voluntarily nonsuited his complaint, and the trial court accordingly dismissed the case without prejudice. *Id.*"

"Despite the dismissal, two of the *Flade* defendants sought to have their TPPA petitions adjudicated, but the trial court declined to do so, determining that Mr. Flade's nonsuit had 'concluded the matter.' *Id.* at 277. The defendants appealed the trial court's decision declining to consider the TPPA petitions, and this Court affirmed. *Id.* (citing *Flade v. City of Shelbyville*, No. M2022-00553-COA-R3-CV, 2023 WL 2200729, at *1 (Tenn. Ct. App. Feb. 24, 2023)). The Tennessee Supreme Court affirmed, determining that 'although the right to take a voluntary nonsuit is subject to certain limitations, the mere filing of a TPPA petition is not among them.' *Flade*, 699 S.W.3d at 277." …

"In the instant appeal, Officer Long focuses his motion to dismiss on the second portion of the *Flade* holding, in which the *Flade* court determined that there is 'no vested right to adjudication of a TPPA petition pending at the time of a voluntary nonsuit.' *See id.* Officer Long asserts that just as the defendants in *Flade* did not keep a vested right to adjudication of their TPPA petitions before the trial court following the plaintiff's voluntary nonsuit, the Beasleys do not maintain a 'vested right to adjudication' of their TPPA petition before this Court following Officer Long's voluntary nonsuit. However, upon review, we determine Officer Long's reliance on *Flade* to be misplaced."

"As Officer Long acknowledges in his motion to dismiss this appeal, the procedural posture of *Flade* differs significantly from that of this case. In *Flade*, the defendants' TPPA petitions had not yet been 'argued and submitted to the trial court for determination' at the time that Mr. Flade nonsuited his complaint. *Id.* at 292. By contrast, in the instant case, the Beasleys' TPPA petition had been fully argued, adjudicated by the trial court, and appealed to this Court before Officer Long voluntarily nonsuited his complaint. Officer Long contends that 'the *Flade* Court's reasoning comfortably extends to the case at bar because it produces the same result: the [voluntary] nonsuit of the underlying claim renders the TPPA petition moot[.]' We disagree."

"The *Flade* Court expressly determined that the fact that the TPPA petitions remained pending at the time Mr. Flade filed the nonsuit was relevant to its consideration of whether the defendants had a 'vested right' to adjudication of the TPPA petitions. *See id.* at 292 ('The relevant procedural posture was simply that the Petitioners' TPPA petitions had been filed but were awaiting argument and submission to the trial court for determination. Thus, the relevant question remains whether, at the time of the Plaintiff's voluntary nonsuit, the Petitioners had a vested right to the adjudication of their pending TPPA petitions.') (emphasis added). Significantly, the *Flade* Court expressly declined to extend its holding beyond the specific procedural posture before it, which involved a voluntary nonsuit filed while a TPPA petition remained pending before the trial court. *See Flade*, 699 S.W.3d at 296 n.28 ('We reiterate that at the time of the voluntary nonsuit in this case, the TPPA petitions had not been argued or submitted to the trial court for decision. We do not decide if the result we reach today would be the same were those circumstances different.')."

"Here, the Beasleys' TPPA petition is no longer pending before the trial court. Instead, the Beasleys' petition has been denied by the trial court and timely appealed to this Court in accordance with Tennessee Code Annotated § 20-17-106, the section of the TPPA governing appeals. Section 20-17-106 provides, in pertinent part, that a trial court's 'order dismissing or refusing to dismiss a legal action

pursuant to a petition filed under [the TPPA] is immediately appealable as a matter of right to the court of appeals.' (Emphasis added.) The section further provides that the 'Tennessee Rules of Appellate Procedure applicable to appeals as a matter of right' govern such appeals. *See id*."

"Tennessee Rule of Appellate Procedure 3 is the applicable rule governing appeals 'as of right' and provides that 'every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right.' *See* Tenn. R. App. P. 3(a). 'This subdivision states the general rule that in civil actions an appeal as of right may be taken only after entry of a final judgment.' *See* Tenn. R. App. P. 3(a) advisory cmt. We interpret the provision in § 20-17-106, stating that a trial court's order granting or denying a TPPA petition is 'immediately appealable as of right,' to mean that an order granting or denying a TPPA petition is to be treated procedurally as a 'final judgment' for the purpose of determining which court maintains jurisdiction over the matter on appeal. We therefore determine that to avoid injustice, it is proper to recognize in this particular instance that the Beasleys maintain a vested right to appellate review of the trial court's denial of their TPPA claim. *See Flade*, 699 S.W.3d at 292 ('We have stated generally that a vested right is one which it is proper for the state to recognize and protect and of which [an] individual could not be deprived arbitrarily without injustice.') (internal quotation marks omitted); *see, e.g.*, *Solomon v. Solomon*, No. M2021-00958-COA-R3-CV, 2023 WL 3730597, at *3 (Tenn. Ct. App. May 31, 2023) (recognizing a defendant's 'vested right of appellate review' following a trial court's grant of a new trial) (internal citations omitted)."

"… [I]n addition to our determination that the Beasleys maintain a vested right to this appeal pursuant to Tennessee Rule of Appellate Procedure 3, we determine that this Court maintains mandatory and exclusive jurisdiction over the Beasleys' appeal from the trial court's denial of their TPPA petition. *See Nandigam*, 639 S.W.3d at 667."

"In the case at bar, the trial court entered its order denying the Beasleys' TPPA petition on February 29, 2024. Pursuant to Tennessee Rule of Appellate Procedure 3 and Tennessee Code Annotated § 20-17-106, the Beasleys filed a timely notice of appeal 'as of right' on March 25, 2024, in which they indicated that a cost bond had been filed with the trial court, thus perfecting their appeal. *See First Am.*, 59 S.W.3d at 141 n.7. Once the Beasleys perfected their appeal, the trial court effectively lost its authority 'to act in the case without leave of the appellate court,' and jurisdiction vested in this Court. *See id.* at 141. The trial court therefore did not have the authority to enter the order of voluntary dismissal on October 21, 2024, without leave from this Court. *See id.* We reiterate that this Court's subject matter jurisdiction over this TPPA appeal is mandatory and exclusive. *See Nandigam*, 693 S.W.3d at 666-67."

"Because the trial court did not maintain the authority to act in the underlying lawsuit during the pendency of this appeal without leave of this Court, *see First Am.*, 59 S.W.3d at 141, we hereby vacate the trial court's order of voluntary dismissal entered on October 21, 2024." …

"We now turn to the substantive issues raised on appeal. The Beasleys argue that the trial court should have dismissed Officer Long's defamation case against them following the hearing on their TPPA petition because Officer Long failed to present a *prima facie* case of defamation against either of them and therefore failed to carry his burden under the burden-shifting framework of the TPPA." …

"The TPPA provides a burden-shifting framework for courts to determine whether the lawsuit should go forward after the TPPA petition is filed:

> (a) The petitioning party has the burden of making a prima facie case that a legal action against the petitioning party is based on, relates to, or is in response to that party's exercise of the right to free speech, right to petition, or right of association.
> (b) If the petitioning party meets this burden, the court shall dismiss the legal action unless the responding party establishes a prima facie case for each essential element of the claim in the legal action.

> (c) Notwithstanding subsection (b), the court shall dismiss the legal action if the petitioning party establishes a valid defense to the claims in the legal action.

Tenn. Code Ann. § 20-17-105 (West July 1, 2019, to current)."

"Concerning the procedure to be followed after a TPPA petition is filed, our Supreme Court has instructed:

> The filing of a TPPA petition immediately stays discovery in the pending lawsuit until the court has ruled on the petition. *Id.* § 20-17-104(d). But '[t]he court may allow specified and limited discovery relevant to the petition upon a showing of good cause.' *Id.* In ruling on a petition, a court may consider 'supporting and opposing sworn affidavits stating admissible evidence' and 'admissible evidence presented by the parties.' *Id.* § 20-17-105(d). A court's ruling on a TPPA petition is immediately appealable. *Id.* § 20-17-106.

McQueen, 693 S.W.3d at 268. To establish a *prima facie* case for any claim analyzed under the TPPA, 'a party must present enough evidence to allow a jury to rule in his favor on that issue.' *See id.* at 281."

"Here, the parties do not dispute that Officer Long is a public official or that the Beasleys, as the petitioning parties under the TPPA, met their burden to show that Officer Long's defamation action against them 'relates to, or is in response to [the Beasleys'] exercise of the right to free speech, right to petition, or right of association.' *See* Tenn. Code Ann. § 20-17-105(a). However, the Beasleys postulate that once the burden shifted to Officer Long to present a *prima facie* case for each essential element of his defamation claim against them pursuant to § 20-17-105(b), he was unable to do so under the heightened standard for a finding of defamation against a public official."

"This Court has outlined the heightened, 'actual malice' standard of proof required to establish the elements of a claim of defamation against a public official as follows:

> Generally, in a defamation action, the plaintiff must prove the defendant published a false, defamatory statement about the plaintiff with knowledge of its falsity, with reckless disregard for its truth, or with negligence in failing to ascertain its truth. *Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, 389 S.W.3d 313, 317 (Tenn. Ct. App. 2012) (quoting *Hibdon v. Grabowski*, 195 S.W.3d 48, 58 (Tenn. Ct. App. 2005)). However, the standard is different and more stringent when the plaintiff is a public figure. *Id.* …
>
> In the seminal case, *New York Times Company v. Sullivan*, the U.S. Supreme Court recognized that to compel the critic of a public official 'to guarantee the truth of all his factual assertions . . . on pain of libel judgments' would 'lead[ ] to a comparable 'self-censorship.'' 376 U.S. at 279. The Court held that errors resulting from negligence are insufficient to recover on a defamation action brought by a public figure. *Id.* at 279-80. Instead, when the plaintiff is a public figure, he or she must prove by clear and convincing evidence that the defendant made the defamatory statements with knowledge the statements were false or with reckless disregard to their truth, a standard known as 'actual malice.' *Id.*; *Lewis*, 238 S.W.3d at 283. Reckless disregard to the truth means the defendant had a 'high degree of awareness of . . . probable falsity.' *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). In other words, reckless disregard is 'the purposeful avoidance of the truth.' *Id.* at 692.

Elsten, 2019 WL 4899759, at *3; *see Funk*, 570 S.W.3d at 212-13."

"The Beasleys acknowledge that Officer Long met his burden to establish the first element of his defamation case against them: that they each published a statement on Facebook. They also do not dispute that Ms. Beasley intentionally published hernstatements about Officer Long. However, the Beasleys contend that Officer Long failed to establish that they posted the statements with 'actual malice,' that is, with knowledge thatnthe statements were false or with reckless disregard for their truth. *See Elsten*, 2019 WL 4899759, at *3. As our Supreme Court has clarified regarding the 'actual malice' standard:

> The evidence must indicate that the defendant 'entertained serious doubts' about the truth of her publication. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968)). A speaker's failure to thoroughly investigate a claim, without more, does not establish actual malice. *Trigg v. Lakeway Publishers, Inc.*, 720 S.W.2d 69, 74-75 (Tenn. Ct. App. 1986). But evidence the speaker purposefully avoided learning whether her allegations were true is evidence of actual malice. *Harte-Hanks*, 491 U.S. at 692, 109 S. Ct. 2678. Actual malice can also be established by showing that the statement was 'so inherently improbable that only a reckless [individual] would have put [it] in circulation.' *St. Amant*, 390 U.S. at 732, 88 S. Ct. 1323.

McQueen, 693 S.W.3d at 281. 'Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' *St. Amant v. Thompson*, 88 S. Ct. 1323, 1326 (1968)."

"'Unlike the other elements of a public-figure defamation claim, 'actual malice' must be proved by clear and convincing evidence.' *SmileDirectClub, Inc.*, 2024 WL 4233949, at *11 (citing *McQueen*, 693 S.W.3d at 280). 'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.' *Id.* (quoting *McQueen*, 693 S.W.3d at 281-82). The requirement to establish clear and convincing evidence 'is a demanding burden. The evidence must produce a firm belief or conviction in the fact finder's mind about the truth of the facts to be established.' *See McQueen*, 693 S.W. 3d at 282 (citations and quotation marks omitted). Appellate review of the trial court's finding of actual malice is *de novo*. *See id.* at 273 (citing *Tomlinson v. Kelley*, 969 S.W.2d 402, 405 (Tenn. Ct. App. 1997)."

"We find no reason to interpret *McQueen* as setting forth a separate and distinct standard of evidentiary proof necessary for a finding of actual malice in the context of a TPPA petition. Indeed, in *SmileDirectClub*, which was an appeal involving a TPPA action, this Court interpreted *McQueen* as providing that '[u]nlike the other elements of a publicfigure defamation claim, 'actual malice' must be proved by clear and convincing evidence.' *See SmileDirectClub*, 2024 WL 4233959, at *11 (citing *McQueen*, 693 S.W.3d at 280-81 and determining that the plaintiff 'had to provide evidence from which a rational jury could conclude that [it had] established actual malice 'by clear and convincing evidence.'')."

"Therefore, to avoid dismissal of his claims under the TPPA, Officer Long was required to establish his *prima facie* defamation claim by providing clear and convincing evidence that the Beasleys had acted with actual malice when posting the comments about him on Facebook. *See id.* Accordingly, the trial court should have applied the 'clear and convincing' standard to the actual malice inquiry, and we will apply that standard in our *de novo* review on appeal."

"The evidence in the instant case includes recorded video and written transcripts of depositions of Mr. and Ms. Beasley, screenshots of comments made by the Beasleys and other citizens about Officer Long on some of Mr. Upchurch's social media pages, screenshots of excerpts from the Ashland City Police Department Facebook page with comments from the public, Officer Long's answer to the Beasleys' first set of interrogatories, statements and affidavits of various individuals attesting to Officer Long's good reputation in the Ashland City community, unsworn statements of Mr. and Ms. Beasley, and copies of

subpoenas for production of records served by Officer Long upon the Cheatham County Sheriff's Office and the Ashland City Police Department."

"As noted above, Mr. Beasley published the following statement on Mr. Upchurch's Facebook live feed:

> I know that dirty cop well. He had to leave [Ashland City Police Department] back in the day because he stalked women, and would plant drugs in peoples cars to make busts. He just got hired back and is pulling over everyone to build his quota up.

The Beasleys argue that although this statement 'standing alone or uncontroverted is certainly defaming,' Officer Long failed to prove that the statement was 'about him' or that Mr. Beasley made the statement with the intention of stating a falsehood or with reckless disregard for its truth. The Beasleys contend that throughout the proceedings before the trial court, Mr. Beasley 'consistently maintained that he mistook [Officer Long] for someone else when he made the post on social media.' Specifically, the Beasleys aver that Mr. Beasley mistook Officer Long, as he appeared in Mr. Upchurch's video, for another officer who looks 'very similar' to Officer Long. They further aver that Mr. Beasley was viewing Mr. Upchurch's live feed 'on his phone when it was about halfway through' and that Mr. Beasley has 'astigmatism and wears contacts and could not see very well on his little phone screen.' They assert that because Mr. Beasley has poor eyesight and was viewing the video on a small phone screen, he mistook Officer Long in Mr. Upchurch's live video for the other officer and wrote the above comment relative to that other officer."

"The trial court did not include any factual findings from the record that would support a finding that Mr. Beasley acted with actual malice in making the statement on Mr. Upchurch's Facebook page. Instead, the trial court referred only to the proof that Mr. Beasley believed Officer Long was a different police officer and meant his written comments to refer to that officer. However, this evidence appears to undermine, rather than support, a finding that Mr. Beasley wrote his comment with actual malice. Furthermore, based upon our independent review of the record, we find no evidence to suggest that Mr. Beasley either knew that his comment was false or entertained serious doubts about its truth at the time he made it. *See McQueen*, 693 S.W.3d at 281; *St. Amant*, 88 S. Ct. at 1326."

"Officer Long propounds that there is good reason to doubt Mr. Beasley's sincerity in claiming that he thought Officer Long was another officer because Mr. Beasley 'took no action to correct his prior statement once he allegedly realized the true identity of the officer.' However, Officer Long cites no authority—and we can find none—to support his contention that a speaker who later learns that his alleged defamatory statement was false is required to rescind the statement to avoid liability for defamation. Rather, the standard for a finding of 'actual malice' is a 'subjective one.' *See Harte-Hanks*, 491 U.S. at 688 (stating that to find actual malice 'there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'' (quoting *Garrison v. Louisiana*, 379 U.S.. 64, 74 (1964)))."

"Officer Long next contends that Mr. Beasley admitted in deposition that once he learned that the officer on Mr. Upchurch's Facebook page was indeed Officer Long, he made 'a subsequent comment which did in fact refer' to Officer Long. This subsequent post was as follows:

> [Officer Long] stays riding by your place and ours. He pulled [P.B.] over in our driveway to search his car because he has tinted windows, [Officer Long] had a slight panic attack when [Ms. Beasley] and I came out because he figured out he was our son.

During Mr. Beasley's deposition, Officer Long's attorney read the above statement to Mr. Beasley and the following exchange ensued:

> Attorney: Did you make that post?
> Mr. Beasley: Yes, I did.

> Attorney: You are referring to Jeremy Long there?
> Mr. Beasley: I am referring to Jeremy Long in that one. I had went back and watched the video, and I had seen the very beginning when he came up and said, I'm Officer Jeremy Long with Ashland City Police Department. So then I knew it was Jeremy Long. Before, I did not know.

As Officer Long correctly states, Mr. Beasley admitted in deposition that he knowingly published this subsequent statement on Mr. Upchurch's page about Officer Long. However, there is nothing in the deposition testimony or elsewhere in the record that demonstrates that Mr. Beasley believed this statement to be false or that he had reckless disregard for its truth. On the contrary, Mr. Beasley stated in his unsworn statement that Officer Long had once pulled over his son, P.B., 'claiming his window tint was too dark.' This supports a conclusion that Mr. Beasley believed his second Facebook post to be true."

"Upon careful review, we find nothing in the record to support a finding that Mr. Beasley communicated the two statements on Mr. Upchurch's Facebook page with actual malice. Therefore, Officer Long has failed to demonstrate with clear and convincing evidence that Mr. Beasley posted the statements at issue with knowledge of the statements' falsehood or reckless disregard for their truth. *See Elsten*, 2019 WL 4899759, at *3. Accordingly, Officer Long did not meet his burden to present a *prima facie* case of defamation against Mr. Beasley. Ergo, pursuant to the plain language of the TPPA, Officer Long's defamation claim against Mr. Beasley must be dismissed. *See* Tenn. Code Ann. § 20-17-105(b)."

"Officer Long alleges that Ms. Beasley defamed him when she posted the following comments on Mr. Upchurch's Facebook page about him:

> Long is known for planting drugs.
>
> The same cop harassed me more than 19 times when [B.B.] and [P.B.] were little now here he is harassing them and searching vehicles claiming to smell weed each time. He broke panels and all kinds of s*** in [B.B.'s] Tahoe." …

"The Beasleys do not dispute that Ms. Beasley intentionally published the statements regarding Officer Long on Mr. Upchurch's Facebook page, thus satisfying the first element of Officer Long's *prima facie* case of defamation against her. However, they contend that the trial court erred by finding that Officer Long had successfully established the remaining elements of his *prima facie* case relative to these statements because 'there was no clear and convincing evidence that [Ms. Beasley] acted with actual malice.' Officer Long responds that Ms. Beasley's comments about him were largely 'incorrect' or 'exaggerated' such that a reasonable jury could conclude that Ms. Beasley had a 'high degree of awareness of their probable falsity' if not actual knowledge that they were false. Officer Long points to Ms. Beasley's deposition testimony, in which she 'made several corrections' to the statements posted online, as proof that she knew the statements were false or probably false."

"In the context of a TPPA burden-shifting analysis, courts are constrained to 'view the evidence in the light most favorable to the party seeking to establish the prima facie case and disregard countervailing evidence.' *McQueen*, 693 S.W.3d at 281; *SmileDirectClub*, 2024 WL 4233949, at *9. Thus, we are mindful that we must view the evidence concerning Ms. Beasley's comments in the light most favorable to Officer Long. However, the sole evidence before us concerning Ms. Beasley's belief as to the truth of her alleged defamatory statement, 'Long is known for planting drugs,' is Ms. Beasley's deposition testimony and the Beasleys' unsworn statements. Officer Long did not provide any statement or other evidence recounting his version of the traffic stop involving Ms. Beasley and the pill bottle."

"In her deposition, Ms. Beasley stated that she thought Officer Long had planted a pill bottle in her car during the traffic stop. She further articulated that at the time the incident occurred, she believed other officers knew that this had happened yet said nothing. In their unsworn statements, Mr. and Ms.

Beasley each stated that they believed Officer Long had planted the pill bottle in Ms. Beasley's car. This scant evidence, even when viewed in the light most favorable to Officer Long, is not sufficient to establish the falsity of Ms. Beasley's version of events or that Ms. Beasley believed her version to be false. Accordingly, Officer Long has not provided clear and convincing evidence to establish that Ms. Beasley acted with actual malice when posting the statement, 'Long is known for planting drugs.'"

"We recognize that Officer Long has presented affidavits from numerous individuals stating that he maintained a good reputation as a police officer and citizen in the Ashland City community, and we do not doubt or dismiss their veracity. However, the affidavits do not alter our analysis regarding Ms. Beasley's subjective belief in the truth of her own statement. *See Harte-Hanks*, 491 U.S. at 688. Moreover, the evidence is also insufficient to permit the conclusion that Ms. Beasley 'entertained serious doubts as to the truth' of her statement. *See id.* (quoting *St. Amant*, 390 U.S. at 731). For these reasons, and viewing the evidence in the light most favorable to Officer Long, we must conclude that Officer Long has failed to present clear and convincing evidence that Ms. Beasley posted the Facebook comment, 'Long is known for planting drugs,' with knowledge that the statement was false or with reckless disregard for its truth. Accordingly, Officer Long has failed to establish a *prima facie* case of defamation against Ms. Beasley relative to the statement, 'Long is known for planting drugs.'"

"Upon reviewing Ms. Beasley's Facebook post stating, 'now here he is harassing [P.B. and B.B.] and searching vehicles claiming to smell weed each time,' we determine that the potentially defaming 'sting' of the statement lies not with which of her sons had encountered Officer Long but rather with Ms. Beasley's assertion that Officer Long had been 'harassing' them by 'searching vehicles' and 'claiming to smell weed each time.' Therefore, despite the inaccuracy contained within Ms. Beasley's Facebook post and her conflicting testimony regarding Officer Long's potential encounters with her son, B.B., we determine the evidence regarding the discrepancy to be 'incapable of proving *material* falsity.' *See id.* at *14. We find the question of whether Officer Long 'harassed' P.B. through multiple traffic stops, or whether he harassed both P.B. and B.B through multiple traffic stops, to be immaterial to the question of what effect Ms. Beasley's post would have on the reader. *See id.* at *12. In other words, we conclude that the reader would not be mindful of which son had encountered Officer Long but instead would be concerned with Officer Long's alleged harassing behavior. Thus, although Ms. Beasley misspoke regarding Officer Long's purported encounter with B.B., the discrepancy does not, without more, rise to the level of actual malice. Therefore, even reviewing the evidence in the light most favorable to Officer Long, we determine that Officer Long failed to present clear and convincing evidence that Ms. Beasley made the statement with actual malice."

"Furthermore, concerning Officer Long's alleged encounter with B.B., it appears that Ms. Beasley may have been genuinely confused regarding which officer had pulled over B.B. She testified that B.B. had been stopped around the same time as P.B. had been pulled over by Officer Long. However, when asked directly if B.B. had been pulled over by Officer Long, she responded, 'I don't believe so.' Ms. Beasley then explained that the traffic stops had happened 'back-to-back' 'within a few weeks of each other.' For these reasons, Officer Long has not established, by clear and convincing evidence, that Ms. Beasley made the above statement with knowledge of its falsity or reckless disregard for the truth."

"The same analysis applies to the final alleged defamatory statement posted by Ms. Beasley on Mr. Upchurch's Facebook page: He broke panels and all kinds of s*** in [B.B.'s] Tahoe."

"As Officer Long correctly avers, and as discussed above, Ms. Beasley admitted that it was not B.B.'s Tahoe, as she had inaccurately posted on Mr. Upchurch's Facebook page, but rather it was P.B.'s Escalade that she believed had been damaged by Officer Long. Thus, taking the deposition testimony in the light most favorable to Officer Long, we "conclude that Ms. Beasley posted her comment about the wrong son and the wrong vehicle at least with reckless disregard for the truth of those details."

"However, as with the above-reviewed discrepancy regarding whether Officer Long had conducted a traffic stop or interacted with B.B., we determine that although Ms. Beasley posted the statement including the wrong son's name and the wrong type of vehicle, the statement was not defamatory

because the statement's effect on the reader would have remained the same had she correctly posted that it was P.B.'s Escalade, not B.B.'s Tahoe, that Officer Long had damaged." …

"Upon our *de novo* review, we determine that the record contains no evidence indicating that Ms. Beasley did not believe that Officer Long had damaged her son's vehicle. Accordingly, Officer Long has not presented sufficient proof in the record to establish, by clear and convincing evidence, that Ms. Beasley made the statement with actual malice relative to the alleged defamatory portions of the statement."

TENNESSEE RECREATIONAL USE STATUTE (TRUS)

1. The TRUS provides an affirmative defense to a landowner when a person is injured while engaging in a recreational activity on the landowner's property - Since golf is comparable to at least four of the recreational activities listed under Section 102, the court held that golf is an unenumerated recreational activity covered by the TRUS – The Tennessee Supreme Court articulated the following test for determining whether a recreational use defense applies: (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 - Importantly, the Supreme Court stated that the list of activities under Section 102 is neither exclusive nor exhaustive, so there is no bright line test - An activity need not be listed in Section 102 for the section to apply, but it must be comparable to those listed – It did not matter that the plaintiff paid to pay

ROBERT BATES, ET AL. v. CITY OF CHATTANOOGA, ET AL.
COURT OF APPEALS No. E2024-00857-COA-R3-CV Filed June 4, 2025

"This appeal involves statutory construction. Robert Bates and Laurel Diane Bates (Mr. Bates' and 'Ms. Bates,' 'Plaintiffs' collectively) sued the City of Chattanooga, Individually and d/b/a the Brainerd Golf Course ('Defendant') in the Circuit Court for Hamilton County ('the Trial Court'), alleging personal injuries, loss of services, and loss of consortium stemming from Mr. Bates' fall on Defendant's golf course. Defendant filed a motion for summary judgment relying on the Tennessee Recreational Use Statute ('the TRUS'), Tenn. Code Ann. § 70-7-101, *et seq.*, which provides immunity to landowners who open their property to recreational use. The Trial Court held that Defendant, the landowner, was immune under the TRUS because Mr. Bates was on Defendant's property to play golf, and golf is comparable to the non-exclusive list of recreational activities found at Tenn. Code Ann. § 70-7-102. No exception to the TRUS was found to apply. Plaintiffs appeal, arguing that golf is not an activity like those listed at Section 102 of the TRUS. Plaintiffs argue further that the fact Mr. Bates paid to play on Defendant's golf course means Defendant is not entitled to immunity. We hold, *inter alia*, that golf is sufficiently comparable to Section 102 enumerated activities, particularly hiking, sightseeing, and target shooting, such that Defendant is entitled to immunity under the TRUS. In addition, the fact that Mr. Bates paid to play on Defendant's golf course is not dispositive because the TRUS has no applicable consideration exception. We affirm."

"On September 23, 2022, Mr. Bates was a paying patron at Brainerd Golf Course, a golf course owned by the City of Chattanooga. While patronizing the golf course, Mr. Bates fell down some steps. In January 2023, Plaintiffs sued Defendant in the Trial Court. Plaintiffs alleged that Mr. Bates suffered personal injuries because of Defendant's negligence in upkeep and maintenance of the course. Plaintiffs also alleged loss of services and loss of consortium with respect to Ms. Bates. Defendant filed an answer in opposition asserting the TRUS, Tenn. Code Ann. § 70-7-101, *et seq.* 'The TRUS provides an affirmative defense to a landowner when a person is injured while engaging in a recreational activity on the landowner's property. *Beckham v. City of Waynesboro*, No. M2023-00654-COA-R3-CV, 2024 WL 2153536, at *3 (Tenn. Ct. App. May 14, 2024), *perm. app. denied Sept. 12, 2024*. In April 2024, Defendant filed a motion for summary judgment, again arguing it was entitled to immunity under the

TRUS. Defendant cited Section 102 of the TRUS, which provides as relevant:

> (a) The landowner, lessee, occupant, or any person in control of land or premises owes no duty of care to keep such land or premises safe for entry or use by others for such recreational activities as hunting, 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, nor shall such landowner be required to give any warning of hazardous conditions, uses of, structures, or activities on such land or premises to any person entering on such land or premises for such purposes, except as provided in § 70-7-104.

Tenn. Code Ann. § 70-7-102(a) (West eff. April 6, 2015). Golf is not a listed activity. Nevertheless, it was and remains Defendant's position that golf is comparable to the nonexclusive list of activities contained in Section 102. In June 2024, following a hearing, the Trial Court entered an order granting summary judgment to Defendant." …

"We first address whether the Trial Court erred in determining that golf is an unenumerated recreational activity covered by the TRUS under Section 102. In *Parent v. State*, 991 S.W.2d 240 (Tenn. 1999), our Supreme Court articulated the following test for determining whether a recreational use defense applies: '(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.' *Id.* at 243. In *Parent*, the Tennessee Supreme Court determined that '[b]icycling is by its very nature a recreational activity and is comparable to the activities enumerated in § 102.' *Id.* Importantly, the Supreme Court stated that the list of activities under Section 102 is 'neither exclusive nor exhaustive.' *Id.* Thus, there is no bright line test. An activity need not be listed in Section 102 for the section to apply, but it must be comparable to those listed."

"Over the years, courts have grappled with which recreational activities are comparable to those listed under Section 102 and which are not. In a 2022 opinion by this Court, *Costner v. Maryville-Alcoa-Blount Cnty. Parks & Recreation Comm'n*, No. E2021-00189-COA-R3-CV, 2022 WL 3092906 (Tenn. Ct. App. Aug. 3, 2022), *no appl. perm. appeal filed*, we found that 'attending a concert at a park is similar to sightseeing, bird watching, and nature and historical studies and research. *See* Tenn. Code Ann. § 70-7-102(a). The primary purpose and common thread in all these activities is that they are leisure activities.' *Id.* at *9." …

"… We have found no case by the Tennessee Supreme Court or this Court addressing whether golf is an activity comparable to those listed at Section 102 of the TRUS."

"Plaintiffs emphasize the nature-oriented character of the Section 102 listed activities, like hunting and fishing, to argue that golf does not belong in the same category. … Defendant analogizes golf to target shooting. Defendant states: 'Under [Plaintiffs'] proposed interpretation of TRUS, had Mr. Bates walked up to the tee box and used a rifle to shoot a target several hundred yards away, the City would be immune, but his use of a club and ball render the City liable."

"We find Defendant's reasoning sound. While a rifle is used for target shooting and a club is used for golf, the basic goal of both activities is the same. In both golf and target shooting, the recreational user attempts to hit a target. In the case of golf, the target is the hole. In addition, golf typically involves significant walking over a large landscape, or up to a tee box as in this case. This fairly implicates hiking, a Section 102 listed activity. Golf carts may also be used, in which case the recreational user engages in off-road vehicle riding, another Section 102 listed activity. Thus, golf bears key similarities to Section 102 listed activities target shooting, hiking, sightseeing, and off-road vehicle riding. Furthermore, golf is a leisure activity in a similar vein to swimming in a pool, bicycling, or

watching a concert in a park."

"… Since golf is comparable to at least four of the recreational activities listed under Section 102, we hold that golf is an unenumerated recreational activity covered by the TRUS."

"We next address whether the Trial Court erred in ruling that Section 105 of the TRUS does not provide an exception to the general rule regarding a landowner's duty of care even if the landowner opened its land or premises for consideration. Plaintiffs argue that, even if golf is a recreational activity covered by Section 102, Section 105 provides an exception to landowner immunity. Section 105 states as relevant: 'Any person eighteen (18) years of age or older entering the land of another for the purpose of . . . [activities] . . . for such person's use for a consideration may waive, in writing, the landowner's duty of care to such person for injuries that arise from. . . [activities] . . . if such waiver does not limit liability for gross negligence, or willful or wanton conduct, or for a failure to guard or warn against a dangerous condition, use, structure or activity." Tenn. Code Ann. § 70-7-105 (West eff. April 6, 2015). Here, Mr. Bates paid to use Defendant's land. Concerning Section 105, with its provision allowing for a waiver of a landowner's duty of care if the patron pays consideration, Plaintiffs argue in their reply brief: 'That is the exact same duty of care that a landowner already does not owe pursuant to Section 102. Therefore, the only way Section 105 has any purpose is if TRUS has an exception for a landowner opening his or her land for consideration.' (Footnote omitted)."

"Initially, we observe that Section 105 contains no language like that in Section 102 reflecting that its list of covered activities is non-exhaustive. Whereas Section 102 precedes its list of activities with 'for such recreational activities as,' there is no similar language in Section 105. Thus, the list of activities found in Section 105 is exhaustive. Notably, golf is not one of the activities listed in Section 105. Therefore, Section 105 is inapplicable because golf is not included in the statute's exhaustive list of activities. Even still, Plaintiffs assert that Section 105 implies a consideration exception in the TRUS."

"… Before a 2004 legislative amendment, the TRUS expressly had the very sort of exception Plaintiffs say it has now. In 2004, the General Assembly amended Tenn. Code Ann. § 70-7-104 to remove subsection (2), which provided an exception to landowner immunity if the landowner received consideration for the use of the land. *See Mathews v. State*, No. W2005-01042-COA-R3-CV, 2005 WL 3479318, at *2 (Tenn. Ct. App. Dec. 19, 2005), *no appl. perm. appeal filed* ('[E]xceptions to this limitation may exist where the dangerous condition is attributable to the gross negligence of the landowner, or when the landowner receives consideration in exchange for permitting the recreational use of the land. T.C.A. §§ 70-7-104(1), -104(2) (2001) (subsection (2) repealed by a 2004 amendment)."); 2004 Tenn. Pub. Acts, Ch. 622, § 9. Undaunted, Plaintiffs argue that '[t]he legislature most likely removed the language in Section 104 because Section 105 made it unnecessary.'"

"Respectfully, that is a stretch. At most, Plaintiffs can argue that Section 105 implies a consideration exception in the TRUS. However, in 2004, the General Assembly repealed the language in Section 104 of the TRUS expressly providing a consideration exception. Why would the General Assembly, if it wanted to keep a consideration exception in the TRUS, repeal the express language providing one? The more logical interpretation is that the General Assembly intended to eliminate the general consideration exception. We may not revive statutory language that the General Assembly has repealed. What the General Assembly's repeal of the consideration exception in Section 104 of the TRUS means for Section 105 and whether its waiver has any remaining purpose is unnecessary to decide here. It is enough for our analysis that there is no consideration exception in the TRUS to negate Defendant's immunity under Section 102. That Mr. Bates paid to play golf on Defendant's course is of no moment."

ATTORNEY GENERAL OPINIONS

Opinion No. 25-003
January 17, 2025

Correction of Property Tax Assessments under Tenn. Code Ann. § 67-5-509

Question 1
Can a property tax assessor correct an erroneous classification of taxed property?

Opinion 1
Yes. The assessor must correct classification errors, and the trustee or municipal collector must collect additional taxes, if necessary, based on timely corrections.

Question 2
If a classification error results from the assessor's lack of an up-to-date certificate of occupancy, can the assessor initiate a correction upon receipt of such an up-to-date certificate?

Opinion 2
Yes. The assessor must initiate the correction and prorate the assessment appropriately.

Question 3
If the correction of an error in a property's square footage increases the property's assessed value, can additional taxes be collected on account of that increase in value?

Opinion 3
Yes. If the assessor timely corrects an error, the trustee must collect taxes accordingly. 2

Opinion No. 25-004
January 27, 2025

Annexation of noncontiguous territory outside urban growth boundary

Question
May a municipality annex noncontiguous territory that lies outside the municipality's urban growth boundary?

Opinion
No.

Opinion No. 25-007
March 4, 2025

Reassessment of property between reappraisal years under Tenn. Code Ann. § 67-5-603(b)(1) and § 67-5-1601(a)(3)

Question 1
Under Tenn. Code Ann. § 67-5-603(b)(1) or § 67-5-1601(a)(3), can a property assessor conclude that the contributory value of miscellaneous construction—like remodeling, replacing a roof, or upgrading an HVAC—to an existing structure requires a reappraisal of the property as a whole between reappraisal years, and conduct a reassessment based on that conclusion?

Opinion 1
Tennessee Code Annotated § 67-5-1601 does not authorize reappraisals of property as a whole outside the statutorily prescribed appraisal schedule. Under Tenn. Code Ann. § 67-5-603(b)(1), however, if an improvement or new building is completed between January 1 and September 1 of any tax year, the property assessor should make a new assessment or issue a corrected assessment based on the value of the improvement at the time of its completion. In doing so, the assessor should value the improvement as similar improvements were valued during the last revaluation period for the assessor's county as required by Tenn. Code Ann. § 67-5-1601(a)(3).

Question 2
Does a reappraisal of an existing structure with miscellaneous construction completed between reappraisal years, as described in Question 1, violate the Equal Protection Clause of Article 11, Section 8, or the Equal and Uniform Clause of Article 2, Section 28, of the Tennessee Constitution, or another provision of the Tennessee or United States Constitutions?

Opinion 2
No, the issuance of a new or corrected assessment under Tenn. Code Ann. § 67-5-603(b)(1) does not violate equal protection or uniformity protections. The assessor is required by Tenn. Code Ann. § 67-5-1601(a)(3) to value new improvements as similar improvements would have been valued during the last revaluation year.

Question 3
In such a reappraisal, is there legal authority to support a property assessor's professional opinion that the cost of modifying an existing improvement, standing alone, is insufficient to determine a value change as required by Tenn. Code Ann. 67-5-603(b)(1)?

Opinion 3
Not all modifications will constitute improvements to real property requiring a value change. What matters is the nature of the changes, not the cost. For example, mere repairs or replacements to a structure generally will not constitute improvements triggering a new or corrected assessment.

Opinion No. 25-008
March 7, 2025

Issues Impacting a Public School System's Discretion Over the Enrollment and Education of Students that Live Outside the District

Question
In Tenn. Att'y Gen. Op. 06-102 (June 21, 2006) ("the 2006 opinion"), the Office of the Attorney General concluded that no state law requires a county school system to enroll students who are residents of a municipality with a separate school system. The Office also concluded that, "as a general rule," a county school system would not have to continue providing services for students who are enrolled in municipal school systems. Is that opinion still valid?

Opinion

Op. 06-102 requires supplementation. Local public school systems generally retain discretion over the enrollment of students that live outside of their districts. But in some circumstances, a public school system cannot deny services to a student simply because the student lives in an area served by another system.

Opinion No. 25-009
March 28, 2025

Obligations under the Age-Appropriate Materials Act of 2022

Question 1
What are the proper procedures and applicable standards under Tenn. Code Ann. § 49-6-3801 *et seq.*, Tenn. Code Ann. § 49-6-3803(b)(1), and Tenn. Code Ann. § 39-17-901 for school library books and materials to be challenged for removal or removed?

Opinion 1
The referenced statutes require local boards of education and public charter school governing bodies ("local school bodies") to adopt procedures to maintain school libraries that are age-appropriate for K-12 students and consistent with schools' educational missions. The statutes grant those local school bodies broad discretion to develop and implement the details of those procedures. And while the statutes specify standards for removing materials that are unsuitable for K-12 students' age or maturity, they allow local school bodies to determine what materials serve a school's educational purpose.

Question 2
Do the above statutes provide multiple or alternative methods for school library materials to be challenged and/or removed?

Opinion 2
The referenced statutes generally provide local school bodies with the flexibility to develop procedures for facilitating challenges to, and removal of, school library materials. But the statutes require local school bodies to determine whether a material is age-appropriate and suitable within sixty days of a student's, parent's, or employee's request for review. If the local school body fails to make a timely determination, the student, parent, or employee may ask the State Textbook and Instructional Materials Quality Commission to evaluate the material. Local school bodies must also maintain school library collections consistent with Tenn. Code Ann. § 49-6-3803(b)(1) and (2) by: (a) adopting procedures to develop collections that are age-appropriate and suitable for, and consistent with, the educational mission of a particular school, and (b) periodically reviewing the appropriateness

and suitability of materials in those collections. But local school bodies have discretion in how to implement those procedures, as well as to adopt removal procedures beyond those the statutes specify.

Question 3
What is the proper procedure for determining whether a school library book or material should be removed under Tenn. Code Ann. § 49-6-3803(b)(1) and who makes that determination?

Opinion 3
See response to Question 2.

Question 4
Does Tenn. Code Ann. § 49-6-3803(b)(1) require the removal of books or materials on subjects of biology, science, anatomy, mythology, and/or art which contain nudity, as defined in Tenn. Code Ann. § 39-17-901, when the statutorily referenced body parts lack opaque coverings?

Opinion 4
When a local school body determines that material falls within Tenn. Code Ann. § 49-6-3803(b)(1), it must be removed.

Question 5
Does the language of Tenn. Code Ann. § 49-6-3803(b)(1) require the removal of educational books containing nudity such as biology, anatomy and art? Or does the language of Tenn. Code Ann. § 49-6-3803(b)(1) only encompass sexually explicit depictions of nudity, referenced in Tenn. Code Ann. § 49-6-3803(b)(1) as sexual excitement, sexual conduct, excess violence, or sadomasochistic abuse?

Opinion 5
Tenn. Code Ann. § 49-6-3803(b)(1)'s obligation to remove books containing nudity does not turn on whether they also contain descriptions or depictions of sexual excitement, sexual conduct, excess violence, or sadomasochistic abuse.

Question 6
If books or materials must be removed from school libraries under Tenn. Code Ann. § 49-6-3803(b)(1), does state law allow those same books to be utilized in classroom instruction?

Opinion 6
Yes, subject to other conditions.

Question 7
If books or materials are required to be removed from school libraries under Tenn. Code Ann. § 49-6-3803(b)(1), does state law allow those same books to be utilized in classroom instruction if the book is part of the state approved curriculum standard?

Opinion 7
Yes, subject to other conditions