The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Jeffrey M. Ward

Office Address: 230 West Depot St.
(including county) Greeneville, TN 37743

Office Phone: (423) 639-6811 Facsimile: (423) 639-0278

Email Address: [redacted]

Home Address: [redacted]
(including county) Greeneville (Greene County), TN 37743

Home Phone: [redacted] Cellular Phone: [redacted]

INTRODUCTION

The State of Tennessee Executive Order No. 54 hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Milligan & Coleman PLLP - Partner

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1993; BPR #016329

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee, #016329; October 26, 1993; Currently active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Milligan & Coleman PLLP, 230 W. Depot St., Greeneville, TN 37743; Partner; January,1996 to present

State of Tennessee*, 511 Union St., Suite 511, Nashville, TN 37219; Board Member; January 2014 to present

State of Tennessee*, 511 Union St., Suite 511, Nashville, TN 37219; Assistant; June 2002 to March 2010

(*Tennessee Board of Law Examiners)

Milligan & Coleman, 109 S. Main St.., Greeneville, TN 37743; Associate; October 1993 to December 1995

I have not been engaged in any other occupation, business or profession since completing my legal education.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not Applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I practice law primarily in the area of civil litigation with my main focus areas being healthcare liability defense (medical malpractice) and governmental defense/civil rights. Approximately, 70 percent of my time is spent practicing law in the area of civil litigation. Of that time, approximately 60 percent of that time is spent in the area of governmental defense/civil rights, and 35 percent is spent in the area of healthcare liability. The remaining five percent is spent in other areas including general torts (auto accidents, premises liability, product liability, etc.).

In addition to my civil litigation practice, I currently serve as a mediator. I have been listed as a Rule 31 mediator by the Tennessee Supreme Court since 2013. Approximately, fifteen percent of my time is currently spent as a mediator.

I am also appointed by the Tennessee Supreme Court to be a Board Member on the Tennessee Board of Law Examiners. As a Board Member of the Tennessee Board of Law Examiners, I am a part-time employee of the State of Tennessee. Approximately fifteen percent of my time is spent on matters relating to my service as a Board Member.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work

background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

From the beginning of my legal career, I have practiced primarily in the area of civil litigation with my main focus being healthcare liability defense (medical malpractice) and governmental defense/civil rights. My typical clients have been medical providers (physicians, nurses, pharmacists, CRNAs, hospitals, etc.), governmental entities (counties, cities, etc.) or their officials and law enforcement officers. My civil rights litigation experience involves handling 42 U.S.C. § 1983 cases on a wide range of issues including Fourth Amendment claims based upon alleged excessive force (shooting cases, use of tasers, etc.) and alleged illegal stop, seizure, or arrest; Eighth Amendment claims based upon alleged cruel and unusual punishment (including alleged deliberate indifference to serious medical needs); First Amendment free speech issues and patronage protection cases; Fourteenth Amendment due process claims (substantive and procedural); and other actions. I have also represented governmental entities in litigation involving alleged age, race, or sex discrimination as well as in pre-litigation claims before the Equal Employment Opportunity Commission and/or the Tennessee Human Rights Commission. In addition, I have represented clients in legal malpractice cases, FMLA cases, worker's compensation cases, insurance coverage cases, auto accident cases, products liability cases and premises liability cases.

I have handled numerous cases in Tennessee state and federal court. My state court practice has involved handling cases regularly throughout east Tennessee. I have tried jury cases as the first chair attorney in both state and federal court. I have tried non-jury cases in state court in Tennessee. With the exception of a couple of minor criminal matters that I handled in state court, my experience has been in the area of civil litigation, but I have some limited knowledge of criminal practice and procedure as a result of handling numerous civil rights cases.

With respect to appellate experience, I have written briefs and argued in the Tennessee Supreme Court, the Tennessee Court of Appeals and the Sixth Circuit Court of Appeals.

In 2002, I was appointed by the Tennessee Supreme Court to be an assistant to the Tennessee Board of Law Examiners and my primary responsibilities in that role involved writing and grading questions for the essay portion of the Tennessee Bar Examination.

In 2014, I was appointed by the Tennessee Supreme Court to be a Board Member on the Tennessee Board of Law Examiners. I have multiple responsibilities in that role, including evaluating applicants to the Tennessee Bar, interacting with the law schools in Tennessee and their Deans, and conducting show cause hearings to assess character and fitness issues and other admission related matters.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Below are several cases that have been significant in my legal experience in trial courts:

(1) *Frye v. Wellmont Health System, et. al.,* USDC Eastern District No. 2:11-cv-129. I was the lead counsel for the physician defendant. This was a medical malpractice action tried to a jury for seven days before District Judge Ronnie Greer that resulted in a defense verdict.

(2) *Peppers v. Washington County, TN, et. al.,* USDC Eastern District No 2:13-cv-180. I was the lead counsel for defendants in this complex civil rights case involving a jail death. The case was dismissed the day prior to trial on summary judgment and affirmed by the Sixth Circuit on appeal. *See Peppers v. Washington County, Tennessee*, 686 Fed. Appx. 328 (6th Cir. 2017).

(3) *Melton v. Wellmont Hawkins County Memorial Hospital, Inc., et. al.,* USDC Eastern District No. 2:09-cv-154. I was the lead counsel for the physician defendant. This medical malpractice action that was tried to a jury for four days before Judge Ronnie Greer and resulted in a defense verdict.

(4) *Mercer v. Vincent, et. al.*, Greene County Circuit Court No. 07CV011(TJW); I was the lead counsel for the hospital defendant in this medical malpractice jury trial before Judge Tom Wright. The case was voluntarily dismissed on the third day of trial.

(5) *Chapman v. Lewis, et. al.*; Sullivan County Circuit Court No. C36405(L). I was lead counsel for one of the physician defendants. This was a medical malpractice action tried to a jury before Judge E.G. Moody. The case resulted in a defense verdict. The trial court granted a new trial, but that decision was reversed, and the defense verdict was reinstated on appeal by the Tennessee Court of Appeals. *See Chapman v. Lewis*, 2010 WL 2943266 (Tenn. Ct. App. 2010).

I served as counsel in the following reported cases:

(1) *Sensabaugh v. Halliburton*, 937 F.3d 621 (6th Cir. 2019) (a Petition for Writ of Certiorari has been filed by the plaintiff with the United States Supreme Court and is currently pending);
(2) *Smallwood v. Cocke County, Tennessee*, 290 F.Supp.3d 775 (E.D. Tenn. 2018) *aff'd on appeal* 754 Fed. Appx. 310 (6th Cir. 2018);
(3) *Peterson v. Dean*, 777 F.3d 334 (6th. Cir. 2015);
(4) *White v. Washington County, Tennessee*, 85 F.Supp.3d 955 (E.D. Tenn. 2015);
(5) *Sneed v. City of Redbank*, 497 S.W.3d 17 (Tenn. 2014) (argued in support of amicus curie position);
(6) *Alsip v. Johnson City Medical Center, Inc.*, 197 S.W.3d 722 (Tenn. 2006);
(7) *Slone v. Mitchell*, 205 S.W.3d 469 (Tenn. Ct. App. 2005) *perm. app. denied* (Tenn. 2006);
(8) *Peters v. Fair*, 427 F.3d 1035 (6th Cir. 2005);
(9) *Walker v. Town of Greeneville*, 347 F.Supp.2d 566 (E.D. Tenn. 2004);
(10) *Bailey v. Tasker*, 146 S.W.3d 580 (Tenn. Ct. App. 2004) *perm. app. denied* (Tenn. 2004);
(11) *McCullough v. Johnson City Emergency Physicians, P.C.*, 106 S.W.3d 36 (Tenn. Ct. App. 2002) *perm. app. denied* (Tenn. 2003);
(12) *McCurry ex rel. Turner v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586 (6th Cir. 2002);
(13) *Faulks v. Crowder*, 99 S.W.3d 116 (Tenn. Ct. App. 2002) *perm. app. denied* (Tenn. 2003); and,
(14) *Frontier Health Inc. v. Shalala*, 113 F.Supp.2d 1192 (E.D. Tenn. 2000).

I have appeared as counsel in over 30 cases in either Tennessee or Federal appellate courts.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I have served as a mediator for civil cases since 2013 as a Rule 31 listed Tennessee Civil Mediator. I am also a certified mediator for the Federal Mediation Program in the Eastern District of Tennessee. I have mediated close to 100 cases with the majority of those mediations occurring in the past two years. Those mediations have included the following types of cases: automobile accidents, healthcare liability, premises liability, breach of contract, construction disputes, governmental tort liability, products liability and professional liability.

I have also served in a quasi-judicial role as a Board Member for the Tennessee Board of Law Examiners since 2014. In that position, I have participated in approximately 300 hearings to assess character and fitness issues and eligibility issues dealing with applicants seeking admission to practice law in Tennessee. I presided over 149 of the hearings as the President of the Board of Law Examiners from 2016 through 2018,

From 2003 through 2009, I served in a quasi-judicial role as a hearing committee member for the Tennessee Board of Professional Responsibility and evaluated disciplinary issues relating to lawyers practicing in the State of Tennessee.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

None

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

In 2018, I was appointed by the Tennessee Supreme Court to serve as the Chair for the Tennessee Law Course Committee to evaluate and provide recommendation to the Court relating to the potential need for and feasibility of implementing testing or a course of study specific to Tennessee law in conjunction with the Court's adoption of the Uniform Bar Examination. Following that Committee's recommendation, the Tennessee Supreme Court adopted a mandatory Tennessee Law Course that all attorney must now complete prior to being admitted to practice law in the State of Tennessee. As Chair of the Committee and a Board Member, I participated in the formulation of the course outlines and was selected by the Tennessee Supreme Court to be the presenter in the on-line portion of the course relating to the Rules of Civil

Procedure, Rules of Evidence and Appellate Rules.

In 2018, I was asked to serve as a member of the Bridge the Gap Task Force which was formed by the Tennessee Commission on Continuing Legal Education at the request of the Tennessee Supreme Court. The Task Force was formed to evaluate the potential need for a Bridge the Gap program to assist new lawyers in the transition from their legal studies to an active practice of law. The Task Force met on multiple occasions, evaluated similar prior proposals and programs from other jurisdictions and ultimately made recommendation to the Tennessee Supreme Court.

In September of 2019, I was appointed by the Chair of the National Conference of Bar Examiners to serve on the Multistate Essay Examination/Multistate Performance Test Committee, and I am currently serving on that Committee. The Committee serves to evaluate satisfaction of the participating jurisdictions with the Multistate Essay Examination and Multistate Performance Test components offered by the National Conference of Bar Examiners and serves to continuously review test progress and improvement issues as well as provide for peer review on draft questions for those test components.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied for the position of United States Magistrate Judge for the Eastern District of Tennessee in March of 2019. I was interviewed by the Magistrate Selection Committee on May 6, 2019. My name was submitted by the Committee to the Judges for the Eastern District of Tennessee for consideration, and I was interviewed on June 11, 2019. Magistrate Judge Cynthia Wyrick was the person selected for that position.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

University of Tennessee, College of Law, 1990-1993, Doctorate of Jurisprudence with highest honors (summa cum laude); Order of the Coif; Tennessee Law Review, Student Materials Editor; American Jurisprudence Awards in Commercial Law, Criminal Procedure, and Conflicts of Law; Certificates of Academic Excellence in Commercial Finance Seminar, Criminal Advocacy, Intellectual Property and Social Legislation; John W. Green Scholarship; and, Phi Kappa Phi.

University of Tennessee, 1986-1990, Bachelor of Science in Electrical Engineering with honors (cum laude); Dean's List, Eta Kappa Nu (Electrical Engineering Honor Society),

PERSONAL INFORMATION

15. State your age and date of birth.

I am 51 years old and my date of birth is [redacted] 1968.

16. How long have you lived continuously in the State of Tennessee?

51 years

17. How long have you lived continuously in the county where you are now living?

I have lived in Greene County, Tennessee my entire life except for the time that I spent in college and law school from 1986 through 1993.

18. State the county in which you are registered to vote.

Greene County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes. I was named as a defendant along with the other members of the Tennessee Board of Law examiners in the lawsuit ***Morgan v. Barker, et. al.***, United States District Court for the Eastern District No. 3:19-cv-22. Mr. Morgan filed suit *pro se* against the members of the Tennessee Board of Law Examiners alleging that his civil rights were violated based upon the Board's denial of his application to practice law in the State of Tennessee. That federal case was dismissed by the District Judge on January 17, 2020.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

First Christian Church - Trustee (2016-present); Deacon (former); Children's ministry volunteer

Catalyst Outreach Ministries – Board of Directors (2013- present)

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Federal Bar Association, 2012- present; Board Member of Northeast Chapter since 2012;

Tennessee Bar Association; 1994- present

Greene County Bar Association; 1994 - present

United States Supreme Court Historical Society, 2017 - present

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Fellow of American College of Trial Lawyers

Fellow of Tennessee Bar Foundation

President, Tennessee Board of Law Examiners, 2016-2018

Vice-President, Tennessee Board of Law Examiners, 2020

Martindale-Hubbell® Peer Review Rating - AV

30. List the citations of any legal articles or books you have published.

Ward, J. & Perlen, L., (2019, Fall). The Tennessee Law Course, *The Bar Examiner*.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Ward, J., (2020, January 7; 2019, October 8; 2019, August 13; and 2019, June 18). *How to Survive a Medical Deposition*. Quillen College of Medicine, Doctoring III Class.

Ward, J. (2019, December 9). *Mediation Practices*. TTLA Johnson City Annual Review & Ethics Seminar (Dec. 6, 2019).

Ward, J. (2018, June 6). *Issues for Admission.* Duncan School of Law, Bar Preparation Class.

Ward, J. (2017, November 17). Tennessee Board of Law Examiners Dean's Summit, Moderator.

Ward, J. (2017, August 28). Tennessee Board of Law Examiners: UBE Workshop, Moderator.

Ward, J. (2016, November 18). Tennessee Board of Law Examiners Dean's Summit, Moderator.

Ward, J. (2016, January 15). *Medical Malpractice: The Deposition.* Quillen College of Medicine, Grand Rounds Presentation.

Ward, J. (2013, November 22). *Federal Civil Jury Trials (Closing Arguments).* Civil/Criminal Practice Seminar (Northeast Tennessee Chapter of FBA).

Ward, J. (2013, May 24). *Anatomy of a Lawsuit.* Quillen College of Medicine, Grand Rounds Presentation.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

None

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

(1) *Whitehead v. Washington County, Tennessee*, United States District Court, E.D. Tenn. No. 2:17-cv-00153-CLC-MCLC; Memorandum Brief in Support of Motion for Summary Judgment [Doc. 19] and Reply Brief [Doc.37]. I was the primary author on these trial court briefs with assistance and editing provided by Thomas J. Garland, Jr.

(2) *Wilson v. Blankenship*, United States Court of Appeals, Sixth Circuit No. 16-6377. I was the primary author on the attached brief with assistance and editing provided by Thomas J. Garland, Jr.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I became interested in serving in a judicial position primarily as a result of my service on the Tennessee Board of Law Examiners. I have highly enjoyed my experience on that Board in evaluating the issues relating to applicants and participating in or conducting show cause hearings. I am thankful for my opportunity to serve the State of Tennessee in that role and would like to continue to serve the public by obtaining a full-time judicial position. I am currently at a point in my career where I have gained substantial knowledge and experience to bring to a judicial position while still hopefully having a considerable amount of practice time ahead of me to allow me to serve as a judicial officer for many years.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

Please see my prior answer to question number 12.

In addition, I have participated as a volunteer in several events focused on promoting the law or providing equal justice under the law as listed below:

The SCALES (Supreme Court Advancing Legal Education for Students) Project; attorney volunteer (Jan. 7, 2015).

Wills for Heroes, attorney volunteer (May 6, 2017).

Tennessee Immigration and Refugee Rights Coalition, attorney volunteer (March 22, 2018).

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am applying for the opening on the Tennessee Court of Appeals, Eastern Section. The Tennessee Court of Appeals is composed of twelve judges with four judges from each division that hear and decide all civil appeals (except those matters that are appealable directly to the Tennessee Supreme Court). I believe that my skills in the areas of legal analysis and writing as well as my dedication and work ethic would make me a valuable addition to the Court of Appeals. I also believe that I will work well with the current Court of Appeals judges to reach well-reasoned decisions while maintaining the collegiality of the Court even on matters where the judges may have differing opinions on the applicability of the law to a case.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have been active over the years in serving my community through my church memberships and through service on several non-profit boards. I currently serve as a Trustee for my church and serve as a volunteer in my church's children' ministry. I also volunteer at Appalachian Helping Hands in Greene County which provides clothing, household goods and other materials for those in need. I hope to continue serving in those roles.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I am the third and youngest son of retired teachers who worked for the Greeneville City School System for years and then worked at Tusculum College. I was taught to have a strong work ethic early in my life, and I had jobs delivering newspapers, providing janitorial services for a drugstore, working as a salesperson in a clothing store and working as a lifeguard while I was in middle school and high school.

I married my high school sweetheart, Christie, before starting law school, and we will have our 30th anniversary this coming June. We have twin daughters that are currently age thirteen.

I have been practicing law for 26 years with the same law firm. My law partners have been supportive of my decision to seek a judicial position even though it will create hardships for them.

I think my life experiences demonstrate that I am a reliable person that can be trusted to fulfil my obligations, and I am hopeful that those who know me would report that I do so with joy. Based upon my Christian upbringing and religious beliefs, I attempt to treat everyone as important and provide each person with dignity and respect. I believe that these traits would serve the public well if I am selected to serve on the Court of Appeals.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. If I am appointed to the Court of Appeals, I will apply the law to the facts presented to the best of my ability without regard to my own personal beliefs. In my own experience, I have had occasions where I had to counsel clients on the applicable laws and instruct them in their obligations to follow the law even where I personally disagreed with the applicable law. In one case, I represented a county that permitted the posting of the Ten Commandments in a public forum and then was sued for not permitting an individual to post other information suggesting an alternative religious viewpoint. Based upon the appliable law, I had to advise the county commissioners to settle the lawsuit and allow the person to post the other information in that same public forum even though such information was contrary to my own Christian beliefs.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Justice Sharon Lee, Tennessee Supreme Court; [redacted] Knoxville, TN 37902; phone: [redacted]
B. Jimmie C. Miller, Attorney, Hunter, Smith & Davis, [redacted] Kingsport, TN 37664; phone [redacted]; email: [redacted]
C. Thomas J. Garland, Jr., Attorney, [redacted] Greeneville, TN 37743; phone: [redacted]
D. Brenda Downes, Circuit Court Clerk for Washington County, Tennessee, [redacted] Jonesborough, TN 37659; phone: [redacted]
E. Sandy Nienaber, Catalyst Coffee Co. General Manger, [redacted] Greeneville, TN 37743; phone [redacted]

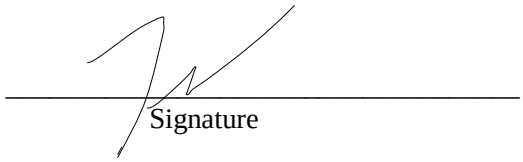
AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: February 2, 2020.



Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Jeffrey M. Ward
Type or Print Name

Signature

February 2, 2020
Date

016329
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

TATIA DOVIE WHITEHEAD and ERIC GRANT WHITEHEAD,	]	
Plaintiffs,	]	
v.	]	No. 2:17-cv-00153-CLC-MCLC
	]	JURY DEMAND
WASHINGTON COUNTY, ET AL,	]	
Defendants.	]	

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF WASHINGTON COUNTY, TENNESSEE

Introduction

The plaintiffs filed suit against Washington County asserting claims under federal law pursuant to 42 U.S.C. § 1983 that the Fourth and Fourteenth Amendment rights of Larry Whitehead were violated by the alleged use of excessive force by deputy sheriffs employed by Washington County, Tennessee. The plaintiffs also allege that Washington County should be liable for the death of Larry Whitehead under Tennessee state law pursuant to the Tennessee Governmental Tort Liability Act and pursuant to the provisions of Tennessee Code Annotated § 8-8-302.

Washington County asserts that it is entitled to summary judgment with respect to both the federal and state law claims and asserts that the Complaint against it should be dismissed.

Factual Background[1]

[1] In this section of the Brief, Washington County has included some facts which are not "material" for the purposes of the Court's ruling, but which should be of assistance to the Court in understanding the overall nature of the case.

1. The plaintiffs, Tatia Dovie Whitehead and Eric Grant Whitehead (hereinafter "EW"), are the adult children of the decedent, Larry Whitehead (hereinafter "LW"). [Doc. 17, PageID #: 70]

2. Larry Whitehead was seventy years old when he was shot and killed by Washington County deputies on September 6, 2016. *Id*.

3. On September 6, 2016 at approximately 6:36 p.m., Anna A. Wynn, the girlfriend of EW, called 911 and reported that her father-in-law was drunk and was waving a shotgun around. She advised the 911 operator that LW had been drinking and arguing with his son and accusing his son of taking his alcohol. She also reported that LW stated "if you want to kill me then come on and kill me." *Declaration of Greg Matherly* (hereinafter "Matherly Dec."), Ex. A (18:36:51).

4. In response to this call, the 911 dispatcher dispatched deputies to the scene and advised them that LW was outside in the yard, that the caller saw a shotgun, that he was saying "if you want to kill me come on and kill me", that he was arguing with his son, and that he was accusing his son of taking his alcohol. *Id*. at Ex. A (18:42:14).

5. Deputy Timothy Moore (hereinafter "Deputy Moore") was the first officer to arrive on the scene. *Declaration of Timothy Moore* (hereinafter "Moore Dec."), ¶ 9.

6. This event occurred near the time of the shift change for the Washington County Sheriff's Department, and Deputy Moore was finishing up his shift when this call occurred. In addition to having a body camera and a camera in his vehicle, Deputy Moore also had a pair of glasses with a camera that he utilized. However, because it was the end of his shift, his glasses camera battery died in the middle of the events at issue. *Id*. at ¶¶ 5, 10. Manually, filed with his Declaration are copies of the videos from his glasses (Ex. A), body camera (Ex. B), and cruiser (Ex. C). *Id*. at ¶¶ 10, 11, 12.

7. After arriving on the scene, Deputy Moore spoke briefly with EW and Anna Wynn to determine where LW was and whether he still had the shotgun. EW advised Deputy Moore "Last time I seen him, he was in the side yard." *Id*. at ¶ 13, Ex. A (1:13).

8. Deputy Moore parked his cruiser, examined the area around the residence, and walked to the driveway. The trees and bushes around the driveway were thick making it impossible to see the residence from the roadway. *Id*. at ¶ 14.

9. After Deputy Moore examined the surroundings and the driveway area, he determined that he could not safely approach the residence by himself. He advised other officers that he was going to wait until their arrival to attempt any approach to the residence. *Id*. at ¶ 15, Ex. A (2:33).

10. Shortly after that, Deputy Lonnie Ratliff (hereinafter "Deputy Ratliff") arrived in his patrol vehicle. *Id*. at ¶ 16, Ex. A (2:48).

11. After Deputy Ratliff arrived, the officers attempted to make contact with LW. They advised him that they were with the Sheriff's Office and yelled his name several times and asked him to come out. *Id*. at ¶ 16, Ex. A (3:50); *Declaration of Lonnie Ratliff* (hereinafter "Ratliff Dec."), ¶ 9.

12. LW made no response to the officers. *Moore Dec.* ¶ 9; *Ratliff Dec.* ¶ 9.

13. Around 6:50 p.m., Deputy Moore and Deputy Ratliff began to move up the driveway toward LW's house. *Moore Dec.* ¶ 17 and Ex. A (6:06); *Ratliff Dec.* ¶ 10.

14. When they approached the house, no one was visible in the area outside the house, and the officers saw no sign of anyone in the yard or outskirts around the house. *Moore Dec.* ¶ 18; *Ratliff Dec.* ¶ 11.

15. They took position behind vehicles that were in the driveway and again attempted to make contact with LW. *Moore Dec.* ¶ 19 and Ex. A (6:43); *Ratliff Dec.* ¶ 12.

16. The officers observed that the door to the house was open, and they observed a spiral staircase inside the house. They made another attempt to make contact with LW. *Moore Dec.* ¶ 20 and Ex. A (7:08)[2]; *Ratliff Dec.* ¶ 13.

17. The deputies decided not to try to enter the residence. Deputy Moore advised his supervisor that they were probably going to need more units and advised that LW was not responding to commands and could be in the residence with a shotgun. *Moore Dec.* ¶ 21, Ex. B (3:57; 5:02).

18. The deputies made another attempt to make contact with LW, shouting "Hey Larry! Come out here and talk to us for a minute. Hey Larry!" *Id*., Ex. B (6:00).

19. Because they received no response from LW, they attempted to determine whether he had a cell phone and asked the dispatcher to try to make that determination and to make contact with LW by cell phone. *Moore Dec.*, Ex. B (7:13); *Ratliff Dec.* ¶ 15.

20. Sergeant John Foister arrived shortly after that, and he proceeded to move up the driveway and join Deputies Moore and Ratliff outside the house. *Declaration of John Foister* (hereinafter "Foister Dec."), ¶¶ 7, 8.

21. Deputy Moore briefed Sergeant Foister on the situation and advised him that they had attempted to make contact with LW several times. *Moore Dec.* ¶ 24 and Ex. B (08:14); *Foister Dec.* ¶ 9.

22. Deputy Ratliff called out for LW again. *Moore Dec.*, Ex. B (09:13).

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[2] Shortly after that, the battery on Deputy Moore's glasses camera died.

23. A couple of minutes later, Deputy Moore saw a person's head bobbing in the vegetation and saw the person carrying something which he then identified as a gun. *Id*. at ¶ 25.

24. Deputy Moore raised his rifle and yelled "Whoa, whoa, whoa, whoa, whoa! Put it down! Put it down! Right now!" (Another officer yelled "Put it down! Put it down!" in the background.) *Id*. at ¶ 25 and Ex. B (10:10).

25. Deputy Moore yelled "Put it down!" again, but LW pointed the shotgun in the direction of the officers, and all three deputies opened fire. *Moore Dec.* ¶ 26, Ex. B (10:16); *Foister Dec.* ¶ 14; *Ratliff Dec.* ¶ 19.

26. The deputies ceased firing when LW fell to the ground, and the officers began approaching his location. *Moore Dec.* ¶ 27; *Foister Dec.* ¶ 16; *Ratliff Dec.* ¶ 20.

27. Upon approaching LW, Deputy Moore saw that LW was naked, that the shotgun was still in his hands, and that his finger was on the trigger. *Moore Dec.* ¶ 29 and Ex. B (11:03).

28. Deputy Moore approached LW and removed the shotgun from him. *Id*. at ¶ 30 and Ex. B (11:19).

29. After the weapon was secured, the officers requested medical treatment for LW. *Id*. at ¶ 31; *Foister Dec*. ¶ 18.

30. Sergeant Foister, Deputy Moore, and Deputy Ratliff were the three officers who fired their weapons at LW. None of those officers had previously been involved in a situation where they had to fire their weapons at a person. *Moore Dec.* ¶ 4; *Foister Dec.* ¶ 4; *Ratliff Dec.* ¶ 4.

31. When they fired their weapons at LW, they believed that their lives and the lives of their fellow officers were in immediate danger. *Moore Dec.* ¶¶ 27, 32; *Foister Dec.* ¶ 19; *Ratliff Dec.* ¶ 23.

32. Prior to this event, Sergeant Foister, Deputy Moore, and Deputy Ratliff had all received the necessary training required by the State of Tennessee and had received training on the Sheriff's Department's General Order 1.3 relating to "Use of Force". *Moore Dec.* ¶ 3; *Foister Dec.* ¶ 3; *Ratliff Dec.* ¶ 3; *Declaration of Ed Graybeal, Jr.* (hereinafter "Graybeal Dec."), ¶ 4.

Argument

I. Constitutional Claims

A. Standard of Review

In *Hugo v. Millennium Laboratories, Inc.*, 993 F.Supp.2d 812, 821 (E.D. Tenn. 2014), this Court set forth the standard of review applicable to a motion for summary judgment filed under Federal Rule of Civil Procedure 56:

> Defendant's motion is brought pursuant to Federal Rule of Civil Procedure 56, which governs summary judgment. Rule 56(a) sets forth the standard for summary judgment and provides in pertinent part: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The procedure set out in Rule 56(c) requires that "a party asserting that a fact cannot be or is genuinely disputed must support the assertion." This can be done by citation to materials in the record, which include depositions, documents, affidavits, stipulations, and electronically stored information. Fed.R.Civ.P. 56(c)(1)(A). Rule 56(c)(1)(B) allows a party to "show that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support a fact."
>
> After the moving party has carried its initial burden of showing that there are no genuine issues of material fact in dispute, the burden shifts to the non-moving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The "mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 582 (6th Cir.1992). In order to defeat the motion for summary judgment, the nonmoving party must present probative evidence that supports its complaint. *Anderson v. Liberty Lobby, Inc.,* 477

> U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The non-moving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor. *Id.* at 255, 106 S.Ct. 2505. The court determines whether the evidence requires submission to a jury or whether one party must prevail as a matter of law because the issue is so one-sided. *Id.* at 251-52, 106 S.Ct. 2505. There must be some probative evidence from which the jury could reasonably find for the nonmoving party. If the court concludes a fair-minded jury could not return a verdict in favor of the non-moving party based on the evidence presented, it may enter a summary judgment. *Id.*

B. No underlying constitutional violation

To hold a governmental entity liable under 42 U.S.C. § 1983, a plaintiff must prove that the execution of a policy or custom of the governmental entity caused a constitutional violation. By necessity, this means that a plaintiff must first be able to prove that there was an underlying constitutional violation.

i. Law requiring underlying constitutional violation

In *Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001), the Sixth Circuit held that the City of Battle Creek could not be held liable for failure to properly train the individual defendants where the conduct of the individual defendants did not result in any constitutional violation. This general principle of 42 U.S.C. § 1983 law is based on the United States Supreme Court case of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). *See also Smith v. Thornburg*, 136 F.3d 1070, 1078 (6th Cir. 1998) at footnote 12:

> In view of our disposition of plaintiff's case against the individual defendants, we need not address the liability of the City of Knoxville. *See City of Los Angeles v. Heller* . . . (a claim against a municipality for inadequate training and supervision under § 1983 cannot be maintained where there has been no constitutional violation by the persons supervised).

Therefore, to proceed on a claim against Washington County, the plaintiff must first prove that LW's constitutional rights were violated.

ii. Law on use of deadly force

The plaintiffs claim that LW's constitutional rights were violated by the deputies use of deadly force.

> The Fourth Amendment guarantees the right to be free from unreasonable seizures. This includes the right to be free from excessive force. *Graham v. O'Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The Fourth Amendment's "objective reasonableness" standard governs whether an officer's force was excessive. *See id.* Deadly force is objectively reasonable when an officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).
>
> We analyze an officer's decision to use force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396, 109 S.Ct. 1865. We do so mindful that police officers face "tense, uncertain, and rapidly evolving" situations that require "split-second judgments." Id. at 397, 109 S.Ct. 1865. The Fourth Amendment only requires officers to act reasonably on the information they have; it does not require them to perceive a situation accurately. Cf. id. at 396, 109 S.Ct. 1865 ("The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested[.]") (citation omitted).
>
> In this circuit, we consider the officer's reasonableness under the circumstances he faced at the time he decided to use force. See *Livermore v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (describing the so-called "segmented analysis" this circuit uses to analyze use-of-force claims). **We do not scrutinize whether it was reasonable for the officer "to create the circumstances."** Id. (quotation marks and citations omitted). **Even if an officer approaches a scene recklessly, this will not necessarily render a later decision to protect himself unreasonable.** See *Chappell v. City Of Cleveland*, 585 F.3d 901, 915–16 (6th Cir. 2009).

Thomas v. City of Columbus, Ohio, 854 F.3d 361, 365 (6th Cir. 2017) (emphasis added).

iii. Application to the facts

In this case, it is undisputed that the deputies were responding to a domestic situation involving an adult male who was reported to be threatening his family members with a shotgun while under the influence of alcohol. *Moore Dec.* ¶¶ 7,8. The deputies announced themselves before

entering onto LW's land and attempted to make contact with him multiple times without any response from LW. *Moore Dec.* ¶¶ 16, 22, 24 and Exs. A, B; *Ratliff Dec.* ¶¶ 9, 13, 15. When LW appeared suddenly out of the bushes and approached the deputies with a shotgun, he posed an imminent threat of death or serious injury to the officers and that threat was escalated when he disregarded their commands to drop the shotgun and instead began pointing it at the officers. *Moore Dec.* ¶¶ 25, 26, 27 and Ex. B; *Foister Dec.* ¶¶ 11-14, 19; *Ratliff Dec.* ¶¶ 17-19, 23.

Under these undisputed facts, it is clear that the officers' use of deadly force was objectively reasonable. This is not even a close question.

In *Thomas, supra,* the Sixth Circuit found that the use of deadly force was objectively reasonable even though the officer shot a burglary victim where the victim appeared suddenly and ran toward the officer with a gun. *Thomas,* 854 F.3d at 365-66. In analyzing that situation, the Sixth Circuit noted that the suspect could have raised and fired the gun with "little or no time for the officer to react" and that "a reasonable officer would perceive a significant threat to his life in that moment" even though the suspect never pointed his gun at the officer. *Id.* at 366. *See also Wilkerson v. City of Akron, Ohio,* 906 F.3d 477, 482-83 (6th Cir. 2018)(use of deadly force was reasonable even where the suspect was running away with a gun and had not pointed it at the officer); *Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 403-04 (6th Cir. 2017)(use of deadly force was reasonable where suspect was dangerous and officers believed that he had a gun); *Simmonds v. Genesee County*, 682 F3d 438, 445 (6th Cir. 2016)(use of deadly force reasonable where suspect said he had a gun and pointed a silver object at the officers).

Under these circumstances and clear precedent, Washington County submits that its deputies did not violate LW's constitutional rights when they shot him. Since there was no underlying

constitutional violation, Washington County is entitled to have the plaintiffs' 42 U.S.C. § 1983 claims dismissed.

C. No policy or custom causing a constitutional violation

Only if the plaintiff can introduce sufficient facts to establish a constitutional violation, does the Court have to look further to see if the plaintiffs could prove that the constitutional violation was caused by a policy or custom on the part of the County.

i. Law on policy or custom

In *Baynes v. Cleland*, 799 F.3d 600 (6th Cir. 2015), the Sixth Circuit explained that municipal liability requires proof of a policy or practice/custom:

> It is well established that a municipal entity may not be sued for injuries inflicted solely by its employees or agents under § 1983. *Monell v. Dep't of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A plaintiff may only hold a municipal entity liable under § 1983 for the entity's own wrongdoing. *Gregory v. City of Louisville,* 444 F.3d 725, 752 (6th Cir.2006) ("Section 1983 does not permit a plaintiff to sue a local government entity on the theory of *respondeat superior.*" (citing *Monell,* 436 U.S. at 692-94, 98 S.Ct. 2018)). Stated otherwise, for a municipal entity to be liable for a violation of § 1983, a plaintiff must show: (1) a deprivation of a constitutional right; and (2) that the municipal entity is responsible for that deprivation. *Doe v. Claiborne Cnty., Tenn. By & Through 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, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992)). Moreover:
>
> > [a] local government entity violates § 1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. A city's custom or policy can be unconstitutional in two ways:
> >
> > > 1) facially unconstitutional as written or articulated, or 2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers. *Id.* Where the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its

> known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Bd. of County Comm'rs v. Brown,* 520 U.S. 397, 407, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (quoting [*City of Canton, Ohio v.*] *Harris,* 489 U.S. at 388, 109 S.Ct. 1197[, 103 L.Ed.2d 412] (1989)). "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown,* 520 U.S. at 410, 117 S.Ct. 1382. In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be "plainly obvious." *Id.* at 412, 117 S.Ct. 1382; *see also Stemler v. City of Florence,* 126 F.3d 856, 865 (6th Cir.1997).

Gregory, 444 F.3d at 752-53.

> **A plaintiff must show a "direct causal link between the custom and the constitutional deprivation; that is, she must show that the particular injury was incurred *because* of the execution of that policy."** *Doe,* 103 F.3d at 508 (internal quotation marks omitted); *see also Fair v. Franklin Cnty., Ohio,* 215 F.3d 1325 (6th Cir.2000) (table decision) ("*Monell* requires that a plaintiff identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.")(internal quotation marks omitted).

Id. at 620-21 (italics in original, bold added).

With respect to defining the term "policy," this means an official policy adopted by the governmental entity, which in this case means Washington County. With respect to defining the term "practice" or "custom" in the Section 1983 sense, this refers to a practice or custom that is so widespread as to constitute the standard operating procedure of the governmental entity. *See Board of County Com'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 404 (1997); *Highfill v. City of Memphis*, 425 Fed. Appx. 470, 2011 WL 2175604, *5 (6th Cir. 2011).

ii. Law regarding municipal liability for failure to train

With respect to the specific context of municipal liability regarding training, in *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989) the United States Supreme Court held that: "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." In *Cherrington v. Skeeter*, 344 F.3d 631, 646 (6th Cir. 2003), the Sixth Circuit further explained:

> We have read *City of Canton* as recognizing at least two situations in which inadequate training could be found to be the result of deliberate indifference. 'One is failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction,' as would be the case, for example, if a municipality failed to instruct its officers in the use of deadly force. *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999). 'A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers.' *Brown*, 172 F.3d at 931.

In *Miller v. Calhoun County*, 408 F.3d 803, 815 (6th Cir. 2005), the Sixth Circuit explained the test for determining whether a governmental entity has been deliberately indifferent:

> "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). This in turn typically requires proof that the municipality was aware of prior unconstitutional actions by its employees and failed to take corrective measures. *Stemler v. City of Florence*, 126 F.3d 856, 865 (6th Cir. 1997). Additionally, a § 1983 plaintiff must prove that the municipal policies and practices directly caused the constitutional violation. *Gray ex rel. Estate of Gray v. City of Detroit*, 399 F.3d 612, 617 (6th Cir. 2005).

iii. Analysis - No evidence

In this case, there is simply no evidence that Washington County had a policy or custom that caused a violation of LW's constitutional rights. Contrary to the ridiculous allegations of the plaintiffs [Doc. 17, PageID #: 79, ¶ 31], the County did not have a policy or practice of attempting

to surprise citizens on their own property in order to shoot them. To the contrary, the County had a detailed policy addressing the appropriate use of force by officers which states in part:

> Officers may use deadly force only when the officer reasonably believes that the action is in defense of life, including the officer's own life, or in the defense of any person in imminent danger of serious physical injury.

Graybeal Dec., ¶ 7, Ex. p. 4.

Furthermore, there is no evidence that the officers were inadequately trained - especially not to the extent that such lack of training would rise to the level of deliberate indifference to the rights of persons the officers would encounter. To the contrary, the officers were P.O.S.T. certified and had received all the training required by the state of Tennessee including training on use of deadly force. *Moore Dec.* ¶ 3; *Foister Dec.* ¶ 3; *Ratliff Dec.* ¶ 3; *Graybeal Dec.*, ¶ 4. Both Tennessee district courts and the Tennessee Court of Appeals have previously determined that such training is sufficient to pass constitutional scrutiny. In *Parker v. Henderson County, Tennessee*, 450 F.Supp.2d 842, 851-52 (W.D. Tenn. 2006), the District Court held:

> "Inadequate training constitutes a municipal policy only if 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the municipality can reasonably be said to have been deliberately indifferent to the need.' " *Id.* (quoting *Canton*, 489 U.S. at 390, 109 S.Ct. 1197, 103 L.Ed.2d 412). "It is not sufficient merely to show that a particular officer [or officers] acted improperly or that better training would have enabled an officer to avoid the particular conduct causing injury." *Id.* at 1078 (citing *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1059–70 (3d Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992)).
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> The Defendants have attached to their motion Loftin's affidavit, in which he avers that the City "requires its officers to receive training at a law enforcement training academy, receive forty (40) hours of annual in-service training, and to be certified by the POST Commission. The in-service training must be approved by the Peace Officer Standards and Training Commission ("POST")." (Aff. of Chief Roger Loftin ("Loftin Aff.") at ¶ 3) He further states that Middleton, Marcum and Stanhope are "POST certified, graduates of the Tennessee Law Enforcement Training Academy,

> and maintain their annual in-service training requirements." (Loftin Aff. at ¶ 4) The Plaintiff has presented nothing whatever to contravene the Defendants' proof that the Defendant officers were not adequately trained. Nor has he made any showing that the need for more or different training was so obvious as to constitute deliberate indifference.

See also Glassburn v. Weakley County, 2013 WL 4039047, *6 (W.D. Tenn. 2013); *Willis v. Parks*, 2007 WL 646360, *3 (E.D. Tenn. 2007). In *Erwin v. Rose,* 980 S.W.2d 203, 207 (Tenn. Ct. App. 1998) *perm. app. denied* (Tenn. 1998), the Tennessee Court of Appeal's rejected an expert's opinion that a POST certified deputy's training was so inadequate as to create municipal liability stating:

> In this case, the appellants assert that the county's failure to train Deputy Rose amounts to a deliberate indifference to the rights of the public. *See Sanford v. Metropolitan Government*, No. 01A01–9606–CV–00251, 1997 WL 24863 (filed in Nashville, Jan. 24, 1997, perm. to appeal granted Oct. 6, 1997, settled while on appeal). We do not agree. Even if Sanford's "deliberate indifference" standard is correct, the record shows that Deputy Rose was trained at the Tennessee Law Enforcement Training Academy and that he received the same amount of training as any other police officer in the state. He had been furnished a copy of the pursuit policy developed and used by the Metropolitan Government of Nashville.
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> To establish their inadequate training claim, the appellants offered the testimony of an expert who looked at Deputy Rose's training and classified it as broad and vague, leaving too much to the discretion or judgment of the individual officer. He testified that the "judgmental" policy adopted by Maury County was not a bad policy but required much more training to teach an officer how to react to a pursuit situation.
>
> While a finding of negligence might be based on the expert's testimony, we cannot accept his conclusion that the Maury County training regimen amounted to a deliberate indifference to the rights of the public. Deputy Rose was trained at the academy that trains most of the officers in Tennessee. His training might have fallen short of the ideal, but the county did not deliberately and knowingly put an untrained officer on the streets.

Erwin v. Rose, 980 S.W.2d 203, 207 (Tenn. Ct. App. 1998).

Furthermore, Cesar Gracia, a highly qualified expert who has served as an Academy Instructor, Academy Coordinator, and Academy Director for Walter State Community College Law

Enforcement Training Academy (among his many qualifications), has reviewed the training of the involved officers and concluded that "the training provided to them was within the accepted standards and consistent with best practices for law enforcement." *Declaration of Cesar Gracia*, p. 10.

Under circumstances where the deputies received all training required by the State of Tennessee and where an individual who formerly provided use of force training for officers has determined that the training was appropriate, the plaintiffs certainly cannot establish that Washington County was providing training that was inadequate – much less so inadequate that it rose to the level of deliberate indifference.

Since there is no evidence that a policy or custom of Washington County caused a constitutional violation, Washington County is entitled to have the plaintiffs' 42 U.S.C. § 1983 claims dismissed.

II. State Law Claims

A. Tennessee Code Annotated 8-8-302

Under Tennessee state law, the plaintiffs assert that Washington County should be held vicariously liable for the intentional tort of assault under Tennessee Code Annotated § 8-8-302.

i. *Summary of relevant law*

Tennessee Code Annotated § 8-8-302 states as follows:

> Anyone incurring any wrong, injury, loss, damage or expense resulting from any act or failure to act on the part of any deputy appointed by the sheriff may bring suit against the county in which the sheriff serves; provided, that the deputy is, at the time of such occurrence, acting by virtue of or under color of the office (italics supplied).

That section has been interpreted to allow a county to be held vicariously liable for the conduct of deputies that exceeds negligence. *See Jenkins v. Loudon County*, 736 S.W.2d 603, 610 (Tenn. 1987) *abrogated on other grounds by Limbaugh v. Coffee Medical Center* 59 S.W.3d 73 (Tenn. 2001).

ii. Analysis - No underlying tort

In this case, there is no basis for Washington County to be held vicariously liable under Tennessee Code Annotated § 8-8-302. Under the undisputed facts, the deputies' use of deadly force was objectively reasonable and they did not commit the tort of assault. If all three deputies would be entitled to immunity on this issue, then there can be no vicarious liability as to Washington County. *See Luna v. White County*, 2015 WL 4119766, *6, fn. 10 (Tenn. Ct. App. June 29, 2015) ("The trial court held that since Sheriff Shoupe and Deputy Page were entitled to qualified immunity there was no liability to be imputed to the County pursuant to Tenn. Code Ann. § 8-8-302; we concur with this ruling.").

B. Negligence

With respect to the plaintiffs' state law negligence claims, Washington County can only be sued under the Tennessee Governmental Tort Liability Act (hereinafter "GTLA") if sovereign immunity has been removed by the Act. Although immunity would typically be lifted for the negligent conduct of employees of a governmental entity, the immunity of Washington County has not been removed because the plaintiffs' claims arise out of alleged "civil rights" violations.

i. Summary of relevant law

Tennessee Code Annotated § 29-20-205 states 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:
>
> . . . . .
>
> (2) . . . civil rights;

In the recent case of *Cochran v. Town of Jonesborough*, 2019 WL 1399514 (Tenn. Ct. App. March 27, 2019), the Tennessee Court of Appeals analyzed the "civil rights" exception in detail and evaluated prior Tennessee state court decisions and federal court decisions (including several from this Court) applying Tennessee Code Annotated § 29-20-205(2). In that case, the plaintiff originally filed suit in federal court asserting claims based upon alleged violations of his constitutional rights pursuant to 42 U.S.C. § 1983 (including claims based upon excessive force) as well as claims based upon negligence. The claims all arose out of the same factual scenario. The district court dismissed the constitutional claims but declined supplemental jurisdiction over the state law claims, and the plaintiff refiled his state law claims in state court. The trial court dismissed those claims finding that the governmental entity retained sovereign immunity pursuant to the civil rights exception in Tennessee Code Annotated § 29-20-205(2). The Court of Appeals affirmed that dismissal holding:

> [W]e conclude that the trial court was correct in finding that section 29-20-205(2) was applicable to Appellant's suit and preserved governmental immunity as to Appellee. Although Appellant chose to file his second complaint under "the guise of negligence, this strategy fails." *Jackson*, 2011 WL 1049804, at *7 (citing *Campbell*, 695 F.Supp.2d at 778). Importantly, our holding today is in keeping with the well-established principle that "statutes permitting suits against the State must be strictly construed." *Moreno v. City of Clarksville*, 479 S.W.3d 795, 809–10 (Tenn. 2015); *see also Limbaugh*, 59 S.W.3d at 83 ("[A]s the legislature created [the GTLA] in derogation of the common law ... the Act must be strictly construed.") (citing *Lockhart ex rel. Lockhart v. Jackson-Madison Cty. Gen. Hosp.*, 793 S.W.2d 943 (Tenn. Ct. App. 1990)); *Hughes v. Metro. Gov't of Nashville and Davidson Cty.*, 340 S.W.3d 352, 361 (Tenn. 2011) (quoting *Doyle v. Frost*, 49 S.W. 3d 853, 858 (Tenn. 2001)) ("The GTLA's waiver of immunity is 'narrowly confined in its scope.' ").

> Keeping in mind that a strict construction approach to the GTLA "has been expressly incorporated into the Act[,]" we think it prudent, under these circumstances, to follow the greater weight of authority and embrace the application of section 29-20-205(2) that preserves immunity. *Hughes*, 340 S.W.3d at 361 (citing *Ezell v. Cockrell*, 902 S.W.2d 394, 399 (Tenn. 1995)). The present case arose based upon the allegations that Officer Peace was unlawfully aggressive in arresting Appellant, and that Appellee should be held responsible. As such, the "underlying act" of purported negligence at issue here, aggressive handcuffing, is clearly "predicated on intentional tortious conduct involving the violation of [Appellant's] civil rights by [an employee]" of Appellee. *Id*. Accordingly, based on the facts and circumstances in this particular case, this Court "sees no reason why the [Appellee] should not have immunity from suit under the 'civil rights' exception in Tenn. Code Ann. § 29-20-205(2)." *Id.*

Id. at *8.

ii. Analysis - Washington County retains immunity

In the case at bar, the plaintiffs allege that Washington County violated LW's federal constitutional rights as a result of its deputies using deadly force. The plaintiffs then rely on the same set of facts to assert that Washington County is liable for negligence and wrongful death under the GTLA. Based upon *Cochran, supra*, and the prior rulings of this Court interpreting Tennessee Code Annotated § 29-20-205(2), Washington County retains sovereign immunity and is entitled to dismissal of those state law claims.

Conclusion

Based upon the foregoing, Washington County submits that it is entitled to summary judgment and that all of the claims against it should be dismissed with prejudice.

Respectfully submitted,

s/ Jeffrey M. Ward

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

TATIA DOVIE WHITEHEAD and ERIC GRANT WHITEHEAD,	]	
Plaintiffs,	]	
v.	]	No. 2:17-cv-00153-CLC-MCLC
	]	JURY DEMAND
WASHINGTON COUNTY, ET AL,	]	
Defendants.	]	

REPLY BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT ON
BEHALF OF WASHINGTON COUNTY, TENNESSEE

Washington County has moved for summary judgment and asserted that both the federal and state law claims against it should be dismissed. Washington County submits this Reply Brief and relies upon its previous filings as well as the Declaration of Steven Lee Cross and the Declaration of Jacilyn Monicer that are filed with this Reply.

I. *No Underlying Constitutional Violation*

In addressing this issue, it is first necessary to address why the plaintiffs' Response is confusing. For purposes of determining whether Washington County can be liable under a Section 1983 failure to train theory, the initial issue is whether there was an underlying constitutional violation by the officers because if there was no constitutional violation by the officers, then any alleged failure to train did not cause a constitutional violation. *Watkins v. City of Battle Creek*, 273 F.3d 682, 687 (6th Cir. 2001).

Therefore, the first question is whether the officers violated the Fourth Amendment rights of Larry Whitehead ("LW") when they shot him. In making this determination, the Sixth Circuit

focuses primarily on whether the use of force was reasonable at the time the force was used - not on the events leading up to that situation. *Thomas v. City of Columbus, Ohio*, 854 F.3d 361, 365 (6th Cir. 2017). In their Response, the plaintiffs concede that this is the law. [Doc. 29, PageID #: 206-07] Notwithstanding that concession – and this is what is confusing – the plaintiffs go ahead and criticize the events leading up to the shooting (with the excuse that they are only citing those events as purported evidence of failure to train); and what is even more confusing, the plaintiffs argue that certain conduct was negligent – which has nothing to do with the constitutional analysis at all.

In other words, the plaintiffs seek to throw everything into the pot and hope for the best - thereby confusing the issues for the Court. This Reply attempts to sort out that confusion.

On this first issue, Washington County will make two arguments in the alternative. First, that even under the facts alleged in the Affidavit of Eric Whitehead ("EW"), the officers did not use excessive force. Second, under *Scott v. Harris*, *infra*, EW's Affidavit cannot be considered because his testimony is "blatantly contradicted" by the audio and video recordings.

A. No Fourth Amendment violation under EW's facts

If one culls out the plaintiffs' criticisms about the officers' approach to the situation and focuses on the events at the time the force was used, the plaintiffs argue that the use of force was not reasonable because:

1. LW was not intentionally ignoring the officers' commands but was hard of hearing or drunk.

2. LW was walking "calmly" and "slowly" toward the officers.

3. LW never pointed the gun at any officer.

As to the first two points, those facts do not matter. The undisputed facts are that it was daylight (meaning LW could see the officers), the officers were in uniform, the officers had their rifles pointed at LW, the officers were yelling at him, and he continued to walk toward them. It does not matter that LW was drunk. It does not matter whether LW could not understand what they were saying because he was hard of hearing. What is important is that he was not "hard of seeing," and yet he continued to walk towards the uniformed officers with their rifles pointed at him and while yelling (something) at him. That was the information the officers had and even if one assumes *arguendo* that they did not perceive the situation correctly, the Fourth Amendment "**does not require them to perceive a situation accurately**." *Thomas*, 854 F.3d at 365 (emphasis added).

The Court must analyze an officer's decision to use force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and must be mindful that police officers face "tense, uncertain, and rapidly evolving" situations that require "split-second judgments." *Graham v. O'Connor*, 490 U.S. 386, 396-97(1989). The reason LW failed to follow the officers' commands is ultimately irrelevant because reasonable officers could have easily perceived him to be an imminent threat to their safety when he continued walking towards them with his rifle while they had their rifles pointed at him.

On the plaintiffs' third point, the Sixth Circuit has previously determined that an issue of fact as whether a suspect pointed a gun at the officer does not preclude summary judgment. In *Thomas, supra*, an officer responded to a burglary call and, when two people came running out of the building toward him, he shot the person running toward him with a gun - who turned out to be the homeowner. *Thomas*, 854 F.3d at 363. The plaintiff argued that the district court erred in granting summary judgment because a material issue of fact existed as to whether the victim pointed a gun

at the officer and even the defendant officer had agreed that the only thing making his firing reasonable was the victim pointing his gun at the officer. *Id.* at 364.

In assessing this issue, the Sixth Circuit stated:

> To be clear, we do not hold that an officer may shoot a suspect merely because he has a gun in his hand. Whether a suspect has a weapon constitutes just one consideration in assessing the totality of the circumstances. See *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016) ("Where the weapon was, what type of weapon it was, and what was happening with the weapon are all inquiries crucial to the reasonableness determination."). Sometimes, the time or space available to an officer may mean that the reasonable thing to do is to monitor the suspect, issue a warning, or take cover. See, e.g., *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996); *Brandenburg v. Cureton*, 882 F.2d 211, 213 (6th Cir. 1989). But Officer Kaufman acted objectively reasonably when he used deadly force here—even if facts beyond his knowledge meant that he actually faced no threat.

Id. at 366–67.

The Sixth Circuit concluded that no constitutional violation occurred even if the victim did not raise his gun toward the officer. *Id.* at 366. The Court rejected the plaintiff's contrary arguments stating:

> Mr. Thomas's arguments to the contrary underplay the danger that Officer Kaufman faced. And they rely on the hindsight bias that we guard against. Consider three propositions that Mr. Thomas advances. First, that Officer Kaufman should have warned Destin and then waited to see if he complied. Second, that Officer Kaufman should have reflected on the situation and then pieced together that Destin was the victim because he was shirtless. Third, that Officer Kaufman should have waited to see if the person running towards him with a gun would point it at him. If Officer Kaufman had followed Mr. Thomas's advice, tragedy may have been avoided here. But if Destin had been an actual criminal with a loaded gun, an officer who followed this advice could well be dead.

Id.

Thus, despite the fact that the defendant officer agreed that the use of force was only reasonable because the victim had pointed his gun at him and despite the opinions of the plaintiff's

use of force expert, the Sixth Circuit concluded that the suspect could have raised and fired the gun with "little or no time for the officer to react" and that "a reasonable officer would perceive a significant threat to his life in that moment" even if the suspect never pointed his gun at the officer. *Id.* at 366. As discussed in the defendant's opening brief, the Sixth Circuit has reached this same conclusion in other cases. *See Wilkerson v. City of Akron, Ohio,* 906 F.3d 477, 482-83 (6th Cir. 2018)(use of deadly force was reasonable even where the suspect was running away with a gun and had not pointed it at the officer); *Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 403-04 (6th Cir. 2017)(use of deadly force was reasonable where suspect was dangerous and officers believed that he had a gun); *Simmonds v. Genesee County*, 682 F3d 438, 445 (6th Cir. 2016)(use of deadly force was reasonable where suspect said he had a gun and pointed a silver object at the officers).

In this case, it is undisputed that the officers were facing a man (1) who had been drinking, (2) who appeared suddenly out of the overgrown vegetation, (3) who was carrying a shotgun, (4) who did not obey commands from uniformed officers to drop the shotgun, and (5) who continued walking toward the officers with the shotgun despite the uniformed officers yelling and pointing rifles at him. LW could have raised and fired the shotgun at any point with very little time for the officers to react. *See Thomas*, 854 F.3d at 366. Under those circumstances, any reasonable officer would have perceived a serious threat to his safety or that of the other officers. Thus, the use of deadly force was not a constitutional violation - regardless of whether LW actually pointed the shotgun at the officers.

B. EW's Affidavit cannot be considered

Even if the Court believes that the outcome of this motion hinges on whether LW pointed his weapon at the officers, the defendant submits that the plaintiffs have failed to introduce any

evidence that should be considered by the Court on this issue. The plaintiffs seek to rely upon testimony from the plaintiff EW to try to establish this factual issue. However, EW's testimony is patently untrue and should not be considered by the Court because it is contradicted by the audio and video evidence. The Supreme Court has held:

> When opposing parties tell two different versions of the story, one of which is blatantly contradicted by the record, so that no reasonable juror could believe it, a court should not adopt that version of the facts for the purposes of ruling on a motion for summary judgment.

Scott v. Harris, 550 U.S. 372, 380 (2007).

In *Scott*, the plaintiff was involved in a police chase. In attempting to avoid summary judgment, the plaintiff asserted that he was not driving in a manner that endangered human life. However, the video evidence from the chase demonstrated otherwise. Therefore, the Supreme Court held that the plaintiff failed to create a genuine issue of material fact. The Supreme Court stated "[t]he Court of Appeals should not have relied upon such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id.*

In this case, EW claims that he followed Deputy Foister up the driveway [Doc. 31, PageID #: 245, ¶ 29] and that he positioned himself approximately 10 feet behind Deputy Moore where he watched the events unfold. *Id*. at ¶ 31. He claims that from that vantage point he saw his father appear from the overgrown grass and walk slowly and calmly toward the officers without speaking and responding to the officers. *Id*. at ¶¶ 32-36. EW also claims that LW was holding the weapon across his body and that LW never raised it or pointed it at the officers when the officers shot him. *Id*. at ¶¶ 33, 38.

However, these statements are blatantly untrue. Apparently unbeknownest to EW, his location and actions were recorded by the in-car cameras of Deputy Moore [Doc. 18-1, Ex. C] and Deputy Foister [Doc. 18-2, Ex. A]. Those videos clearly refute EW's affidavit testimony because his entire premise is that he followed Deputy Foister up the driveway because Deputy Foister was the third officer go up the driveway with an assault rifle and it appeared to him that "the deputies intended to shoot first and ask questions later." [Doc. 31, PageID #: 245, ¶¶ 28, 29] The videos and Declaration of Deputy Foister do confirm that he arrived on the scene and then walked up the driveway with his assault rifle. [Doc. 18-1, Ex. C, 18:54:57 - 18:55:29]; [Doc. 18-2, PageID #: 97, ¶¶ 7,8 and Ex. A, 17:54:52-17:55:34] However, EW's testimony is then "blatantly contradicted" because EW remained at the road, across the street from the driveway of the residence. [Doc. 18-1, Ex. C, 18:55:29 - 18:57:52]; [Doc. 18-2, Ex. A, 17:55:34-17:57:57].

Additionally, those videos as well as the body and glasses camera video of Deputy Moore can be correlated to prove that EW did not even start up the driveway toward the residence until after the shooting had occurred. Deputy Moore's body camera provides an audio recording of the shots fired. Likewise, the in-car cameras of Deputies Moore and Foister provide video recordings of EW up to and after the shooting. The times shown on the three recordings are not in sync. Therefore, to conclusively show that EW was not at the house when the shooting occurred, it is first necessary to "sync" the times on the recordings.

The process of syncing all recordings follows logical steps. The first thing to be done is to sync the time on the body camera with Deputy Moore's in-car camera. To do this, an earlier moment in time was found that is clear on the following recordings: (1) Deputy Moore's body camera, (2) Deputy Moore's glasses camera, and (3) Deputy Moore's in-car camera. The freeze frame

synchronization moment will be when Deputy Ratliff turns his head after Deputy Moore has told two kids on bikes to go home.

Syncing body camera and Deputy Moore's in-car camera

Step 1: Watch the body camera recording and listen for Deputy Moore to tell the kids to go home. That time will be 12:52:09:

Step 2: Watch the glasses camera recording and listen for Deputy Moore to give the same instruction at 05:43. Importantly, see Deputy Ratliff turn his head toward the kids at that exact moment:

Step 3: Watch the video recording from Deputy Moore's in-car camera. Look for the instant where the kids are riding their bikes and Deputy Ratliff turns his head towards the kids. The time is 18:49:29. That freeze frame moment will look like this:

Based on these steps, when Deputy Moore tells the kids to go home and Deputy Ratliff turns his head, the body camera shows 12:52:09 and Deputy Moore's in-car camera shows 18:49:29. This is a difference of 5:57:20. Therefore, one can take the time from the body camera, add 5:57:20, and then see what was occurring on Deputy Moore's in-car camera at that same moment in time:

Event	Body Camera	Deputy Moore in-car camera	Difference
Moore gives command to kids and Ratliff turns his head	12:52:09	18:49:29	+ 5:57:20

Syncing Deputy Moore's in-car camera and Deputy Foister's in-car camera

The next task is to sync the in-car cameras of Deputies Moore and Foister. The best freeze frame moment for synchronization is when Deputy Foister's cruiser pulls up and comes to a stop.

Step 1: Watch Deputy Moore's in-car camera up to the moment that Deputy Foister's cruiser pulls up and comes to a stop. The time is 18:54:47. That freeze frame moment will look like this:

Step 2: Watch Deputy Foister's in-car camera up to the moment that his cruiser pulls up and comes to a stop. The time is 17:54:52. That freeze frame moment will look like this:

Based on these steps, one now knows that when Deputy Moore's in-car camera shows 18:54:47 that Deputy Foister's in-car camera shows 17:54:52 – a difference of - 00:59:55. The one hour difference is due to Deputy Foister's in-car camera not being adjusted for Daylight Savings Time. Otherwise, the cameras are only off by approximately 5 seconds.

In summary, the syncing process establishes the following:

Body Camera time	Deputy Moore's in-car camera sync differential with body camera:	Deputy Foister's in-car camera sync differential with body camera:
"X"	"X" + 5:57:20	"X" + 4:57:25 (based on Foister's camera time being 00:59:55 less than Moore's camera time)

In other words, these in-car camera differentials can be added to the body camera time to show what was occurring on the in-car cameras of Deputies Moore and Foister at the same moment as any event occurring on the body camera.

Application of this evidence to the events leading up to the shooting

1. Deputy Foister goes up the driveway and EW is still across the street (shown on both in-car cameras)[1]:

BC 12:58:09	TM In-car 18:55:29	JF In-car 17:55:34

[1]"BC" = Deputy Moore's body camera; "TM In-car" = Deputy Moore's in-car camera; and "JF In-car" = Deputy Foister's in-car camera.

2. EW is still across the street (shown on Foister's in-car camera):

BC 13:00:09	TM In-car 18:57:29	JF In-car 17:57:34


3. Deputy Moore can be heard on the body camera yelling "Whoa!" and EW is still across the street (EW shown on Foister's in-car camera):

BC 13:00:12	TM In-car 18:57:32	JF In-car 17:57:37


4. Shots are fired and EW is still across the street (EW shown on both in-car cameras):

BC 13:00:19	TM In-car 18:57:39	JF In-car 17:57:44

5. Lt. Cross heads up the driveway as the shooting stops (Lt. Cross and EW shown on both in-car cameras):

BC 13:00:22	TM In-car 18:57:42	JF In-car 17:57:47

6. EW runs up the driveway (after turning around to retrieve his phone) – which is thirteen seconds after shots are first fired and ten seconds after shooting is over (EW shown on both in-car cameras):

BC 13:00:32	TM In-car 18:57:52	JF In-car 17:57:57

7. Anna Wynn runs up the driveway with dog (shown on both in-car cameras). <u>Note</u>: EW can first be heard on BC around this time with officers telling him to stay back:

BC 13:00:41	TM In-car 18:58:01	JF In-car 17:58:06

From this audio/video evidence, it is clear that EW's testimony is false because he did not even start up the driveway until after the shooting had completely stopped. When the yelling and shooting occur, the video from Deputy Foister's in-car camera shows Lt. Cross and EW react. [Doc. 18-2, Ex. A, 17:57:37 - 17:57:47:] That video also shows a neighbor (at the first house) run to the street to see what is occurring. *Id.* Lt. Cross then went up the driveway. [Doc. 18-2, Ex. A, 17:57:42]

Interestingly, EW started to follow Lt. Cross up the driveway but then apparently returned to the yard to get his cell phone before running up the driveway after Lt. Cross. *Id*. at 17: 57:47 to

17:57:57 ; *see also* [Doc. 18-1, Ex. C, 18:57:42 to 18:57:52]. Thus, the videos from the in-car cameras shows that EW went up the driveway more than ten seconds after the shooting had occurred. *Id.*

Additionally, Lt. Cross has confirmed what the video shows in his declaration - that he did not start toward the house until hearing the officers shouting and he did not go up the driveway until the shooting occurred. *Declaration of Lee Cross,* ¶¶ 7-10. Further, the written statement of Anna Wynn (which was provided to Deputy Moncier on the same day as the shooting) confirms that EW did not go up to the house until after the shooting and states:

> The next thing I remember I was standing in the grass holding my dog. I heard a male officer yell "Put it down," and I started hearing several gunshots. Eric looked at me and said, "They killed him, they killed my dad." Eric ran up the driveway to where the officers were."

Declaration of Jaclyn Moncier, Ex. A.

Thus, the defendant asserts that, pursuant to *Scott v. Harris*, the Affidavit of Eric Whitehead should be disregarded since no reasonable juror could believe his testimony that his father never pointed the shotgun at the officers.

Other than EW's testimony, the plaintiffs have no proof to establish that LW did not point his shotgun at the officers. The plaintiffs try to suggest that Deputy Burton Ellis stated that LW never pointed his weapon at the officers. But, this is a mischaracterization of his TBI recorded interview. Deputy Ellis did testify that LW appeared to have the gun on his shoulder pointed up and away from the officers [Doc. 32, 12:30] when Deputy Ellis first saw him appear. However, Deputy Ellis acknowledged in his interview that he did not see what LW did immediately before the other officers fired because he was looking at his dog. [Doc. 32, 15:00] Additionally, when Deputy Ellis

approached LW on the ground after the shooting, he saw that LW was holding the gun pointing in the direction of the officers. [Doc. 32, 28:12]

All three involved officers, although each perceiving the situation slightly differently as is typical with multiple witnesses, saw LW point his shotgun at them and used deadly force because they were in fear for their own lives and the lives of their fellow officers. [Doc. 18-1, PageID #:94-95, ¶¶ 26, 27, 32]; [Doc. 18-2, PageID #: 96-97, ¶¶ 14, 19]; and, [Doc. 18-3, PageID #: 101, ¶¶ 18, 23] Thus, the use of deadly force was objectively reasonable and no constitutional violation occurred.

C. Two final points

Based on the foregoing discussion, Washington County is entitled to summary judgment because there was no underlying constitutional violation – regardless of whether the affidavit of EW is considered. But before leaving this issue, Washington County needs to briefly address two other arguments made in the plaintiffs' Response.

"Leaving cover"

The first point is the plaintiffs' Response repeatedly asserts that the officers "left cover" when they encountered LW. [Doc. 29, PageID #: 207, 211, 212, 213, 219, 220, 221, 223, 224, 225, 226] In making this argument, the plaintiffs acknowledge that the "cover" that the officers had was behind the vehicles of LW that were parked in the driveway. [Doc. 29, PageID #: 210]

To begin with, the officers did not leave cover. LW's cars provided cover vis-a-vis the house, but LW appeared from the side yard. This is demonstrated by the video from Deputy Moore's glasses camera [Doc. 18-1, Ex. A, 06:45-06:50]:


Moreover, this is not a situation where officers left cover and began shooting the suspect. Repeated instructions to put down the weapon can be heard before shots were fired; and importantly, this is not a situation where the only persons in possible danger were these three officers. Other officers and private citizens were in the vicinity. These officers made a split-second decision to fan out and instruct LW to put down his weapon. Therefore, the plaintiffs' argument that these officers "left cover" is factually incorrect, and it is an attempt to engage in the 20/20 hindsight analysis that is not permitted by *Graham*, *supra*.

Experts

The second point is that the plaintiffs repeatedly take issue with the opinions of the defendant's expert, Cesar Gracia, and attempt to rebut those opinions with the Declaration of Melvin Brown. Initially, Mr. Brown's opinions on the reasonableness of the use of force are flawed because they rely upon the testimony of EW. Nonetheless, for the purposes of the Court's analysis of the reasonableness of the use of force, the experts' differing opinions do not create any issue of fact. Instead, the determination of whether a reasonable officer would fear for his safety under the circumstances is this Court's determination - not the experts. In *Thomas*, *supra*, the Court stated:

> Similarly, Mr. Thomas cannot avoid summary judgment by citing his use-of-force expert's legal conclusions. *See DeMerrell v. City of Cheboygan*, 206 Fed.Appx. 418, 426 (6th Cir. 2006) (holding that the district court did not err in ignoring expert's legal conclusions on objective reasonableness). Mostly, that expert worked from the same faulty legal premise as Mr. Thomas—he focused on Officer Kaufman's reasonableness in approaching the scene. When pressed about whether an officer has probable cause to believe someone running at him with a gun poses a significant risk of death, the expert adopted Mr. Thomas's categorical rule that force can only be reasonable if a suspect raises his gun. That conclusion, however, is ours to make. And we reiterate that the circumstances here would give an officer reason to fear someone running towards him with a gun and leave him with little to no time to react if the suspect raised it.

Thomas, 854 F.3d at 366. Like *Thomas*, in this case it is clear that the circumstances would give an officer reason to fear for his own safety, and the use of deadly force was justified regardless of plaintiffs' expert's contentions.

Therefore, as to these additional points, neither the "take cover" argument nor the testimony of the plaintiffs' expert changes the analysis of whether there was an underlying constitutional violation.

II. *No policy or custom causing a constitutional violation*

The plaintiffs appear to have abandoned their claim that Washington County had some policy of attempting to surprise citizens on their own property in order to shoot them, and they do not dispute that the County had an appropriate policy on the use of deadly force. Instead, the plaintiffs now limit their claim to an inadequate training claim. If the Court agrees that no constitutional violation occurred, then the Court does not have to look at the training issue. However, if the Court concludes there is an issue of fact as to whether the use of force was reasonable, then the Court must determine whether Washington County was deliberately indifferent to the rights of citizens by failing to train its officers.

In *Cherrington v. Skeeter*, 344 F.3d 631, 646 (6th Cir. 2003), the Sixth Circuit explained:

> We have read *City of Canton* as recognizing at least two situations in which inadequate training could be found to be the result of deliberate indifference. 'One is failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction,' as would be the case, for example, if a municipality failed to instruct its officers in the use of deadly force. *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir.1999). 'A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers.' *Brown*, 172 F.3d at 931.

In their Response, the plaintiffs do not introduce any evidence of repeated complaints of constitutional violations by the officers that would require additional training. Nonetheless, the plaintiffs repeatedly assert on practically every page of the response that the officers were inadequately trained apparently in the hope that the Court will believe that assertion if they say it often enough. In making those assertions, the plaintiffs ignore the cases the defendant cited to the Court: *Parker v. Henderson County, Tennessee*, 450 F.Supp.2d 842, 851-52 (W.D. Tenn. 2006); *Glassburn v. Weakley County*, 2013 WL 4039047, *6 (W.D. Tenn. 2013); *Willis v. Parks*, 2007 WL 646360, *3 (E.D. Tenn. 2007); and *Erwin v. Rose*, 980 S.W.2d 203, 207 (Tenn. Ct. App. 1998) *perm. app. denied* (Tenn. 1998). The plaintiffs fail to refer to any case law that would support the proposition that Washington County could be deliberately indifferent under circumstances where the officers received all the training required by the State of Tennessee and where the officers had not been involved in any prior similar situations where their training had been deemed inadequate.

The plaintiffs have simply failed to explain to the Court how Washington County could be held to have violated the high deliberate indifference standard under these circumstances. Thus, the plaintiffs have failed to establish sufficient facts from which a jury could find that a policy or custom

of Washington County caused a constitutional violation, and Washington County is entitled to have the plaintiffs' 42 U.S.C. § 1983 claims dismissed.

III. *State Law Claims*

A. Tennessee Code Annotated § 8-8-302

As previously established, under the undisputed facts, the deputies' use of deadly force was objectively reasonable and they did not commit the tort of assault. Thus, Washington County relies upon the above arguments and the arguments raised in its opening brief on this issue.

B. Negligence

With respect to the plaintiffs' state law negligence claims, Washington County is not arguing that there is no issue of fact relating to negligence. Instead, based upon the prior rulings of this Court and the cases cited to the Court, the defendant asserts that Washington County retains immunity pursuant to the "civil rights" in Tennessee Code Annotated § 29-20-205(2). The plaintiffs' alternative pleading theory has previously been considered and rejected by the courts, and this issue does not appear to need further argument in this Reply.

Conclusion

Based upon the foregoing, Washington County submits that it is entitled to summary judgment and that all of the claims against it should be dismissed with prejudice.

Respectfully submitted,

s/ Jeffrey M. Ward

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No. 16-6377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES WILSON,

Plaintiff - Appellant

v.

JOHNNY BLANKENSHIP and
JANET SMITH,

Defendants - Appellees

On appeal from the United States District Court for the Eastern District of Tennessee at Greeneville, Case No. 2:16-cv-00129-JRG-MCLC

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 16-6377 Case Name: Wilson v. Blankenship, et al

Name of counsel: Jeffrey M. Ward

Pursuant to 6th Cir. R. 26.1, Johnny Blankenship and Janet Smith
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 16, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jeffrey M. Ward
Milligan & Coleman PLLP, 230 W. Depot St., Greeneville, TN 37743

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF THE CASE

On April 12, 2016, the Appellant, James Wilson ("Mr. Wilson"), filed this lawsuit in the Circuit Court for Carter County, Tennessee against Johnny Blankenship, Janet Smith, Janet Hardin, and Carter County, Tennessee. [Complaint, RE 1-2, PageID #: 5-17] In his Complaint, Mr. Wilson asserted claims under 42 U.S.C. § 1983 as well as state law claims arising out of the issuance of a bench warrant for his arrest on the charges of identity theft and theft in the amount of $500 or less even though the grand jury returned a finding of no true bill on those charges. [Complaint, RE 1-2, PageID #: 7-8]

Janet Smith is a Deputy Clerk in the Circuit Court Clerk's Office in Carter County, and she was sued because she executed the bench warrant. [Complaint, RE 1-2, PageID #: 5, 7-10] Johnny Blankenship is the Circuit Court Clerk for Carter County, Tennessee and he was sued by Mr. Wilson on the theory that he was responsible for the training and supervision of Ms. Smith relating to the issuance of the bench warrant. [Complaint, RE 1-2, PageID #: 6, 10] Janet Hardin was sued as a Deputy Attorney General for the First Judicial District at Carter County, Tennessee, but Mr. Wilson voluntarily dismissed his claims against her on May 13, 2016. [Order dismissing Harden, RE 1-1, PageID #: 4]

On May 18, 2016, the defendants, Johnny Blankenship, Janet Smith, and

Carter County, Tennessee, removed this action to federal court. [Notice of Removal, RE 1, PageID #: 1] On the same date, a Motion to Dismiss was filed on behalf of Johnny Blankenship, Janet Smith, and Carter County, Tennessee. [Motion to Dismiss, RE 4, PageID #: 36]

On May 25, 2016, the parties filed a Stipulation of Voluntary Dismissal dismissing all claims against Carter County, Tennessee. [Stipulation of Voluntary Dismissal, RE 7, PageID #: 46] On that same date, Mr. Wilson filed an Amended Complaint against Johnny Blankenship and Janet Smith. [Amended Complaint, RE 8, PageID #: 47][1]

On June 24, 2016, Mr. Blankenship and Ms. Smith filed a Motion to Dismiss and/or for Summary Judgment as to the Amended Complaint asserting that the claims against them should be dismissed based upon absolute immunity. [MTD/MSJ, RE 11, PageID #: 65] That Motion asserted that the Amended Complaint should be dismissed based upon allegations asserted by Mr. Wilson in the Amended Complaint, and asserted in the alternative that Mr. Blankenship and Ms. Smith were entitled to summary judgment based upon the undisputed facts set forth in the filed Declaration of Janet Smith. [Declaration of Janet Smith, RE 20,

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1 Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), Mr. Wilson was entitled to amend his Complaint as a matter of course since it was amended within 21 days after service of the defendants' Rule 12(b) Motion to Dismiss.

PageID #: 107] The Declaration of Janet Smith established that: (a) Ms. Smith provided the presentment relating to Mr. Wilson along with other presentments/indictments to Criminal Court Judge Lisa Rice on September 8, 2015; (b) Judge Rice wrote her order on the presentment stating: "Bond set at $10,000."; (c) Ms. Smith later retrieved that paperwork, and pursuant to their standard practice, issued a bench warrant for the arrest of Mr. Wilson with his bond set at $10,000. [Declaration of Janet Smith, RE 20, PageID #: 107-08]

On June 25, 2016, Mr. Wilson filed a Motion asking for permission to take discovery before responding to the Motion to Dismiss and/or for Summary Judgment. [Motion to take discovery, RE 16, PageID #: 94][2]

On July 8, 2016, Mr. Blankenship and Ms. Smith filed a Response to Mr. Wilson's Motion to take discovery. [Response to motion to take discovery, RE 23, PageID #: 118]

On July 13, 2016, Mr. Wilson filed his Response to the Motion to Dismiss and/or for Summary Judgment. [Response to MTD/MSJ, RE 24, PageID #: 123]

On July 15, 2016, the district court entered an Order directing Mr. Wilson to

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2 Mr. Wilson also filed a Motion to Strike the Motion to Dismiss and/or for Summary Judgment on June 25, 2016, but then filed a Motion to Withdraw that Motion on June 26, 2016 [RE 15, PageID #: 91, and RE 17, PageID #: 97] On June 27, 2016, the Magistrate Judge entered an Order terminating the Motion to

file a reply to the defendants' Response relating to his Motion to take discovery on or before July 22, 2016. [Order, RE 27, PageID #: 134] In compliance with that Order, Mr. Wilson filed his Reply in support of his Motion to take discovery on July 17, 2016. [Reply, RE 28, PageID #: 136]

On July 28, 2016, the Magistrate Judge entered an Order denying Mr. Wilson's Motion to be permitted to take discovery on the basis that the asserted need for discovery in the face of the absolute immunity defense was "simply too vague for the Court to Order discovery." [Order, RE 29, PageID #: 141] Thereafter, on August 15, 2016, the District Judge entered a Memorandum Opinion and Order granting the Motion to Dismiss and/or for Summary Judgment holding that the defendants were entitled to absolute quasi-judicial immunity since "the issuance of a bench warrant for the arrest of the plaintiff was a 'judicial act.'" [Memorandum Opinion, RE 30, PageID #: 150] On the same day, the District Judge entered Judgment for Mr. Blankenship and Ms. Smith. [Judgment, RE 31, PageID #: 152]

On September 2, 2016, Mr. Wilson timely filed a Notice of Appeal appealing from the Judgment, the Memorandum Opinion and Order, and the Order denying the Motion to take discovery. [Notice of Appeal, RE 32, PageID #: 153]

Strike. [RE 18, PageID #: 98]

SUMMARY OF ARGUMENT

The district court properly dismissed this case on the basis of absolute quasi-judicial immunity. The appellant's claims are against the Circuit Court Clerk and Deputy Clerk for Carter County, Tennessee and relate solely to their actions in carrying out their duties that are judicial in nature. The Sixth Circuit has repeatedly ruled that absolute quasi-judicial immunity applies to court clerks who are performing tasks integral to the judicial process. The district court correctly concluded that the issuance of a bench warrant was a judicial act "integral to and intertwined with the judicial process." [Memorandum Opinion, RE 30, PageID #: 151] Thus, Ms. Smith and Mr. Blankenship were entitled to quasi-judicial immunity.

Additionally, the district court appropriately denied discovery prior to ruling on the issue of absolute immunity. The appellant failed to make a sufficient showing as to why discovery should be permitted once immunity was raised.

The district court did not err in dismissing this case based upon absolute immunity.

ARGUMENT

I. STANDARD OF REVIEW

The appellees agree that the standard for review is de novo in relation to the district court's grant of a motion to dismiss or a motion for summary judgment. However, the district court's decision to deny discovery should be reviewed on an abuse of discretion standard.

> Federal Rule of Civil Procedure 56(d) states, "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court *may:* (1) defer considering the motion or deny it; (2) allow time ... to take discovery; or (3) issue any other appropriate order." Fed.R.Civ.P. 56(d) (emphasis added). Due to this discretionary language, appellate courts "review a district court's decision as to the scope of discovery, including the denial of additional time for discovery, under an abuse of discretion standard." *Jordan v. City of Detroit,* No. 12–2296, 557 Fed.Appx. 450, 455 (6th Cir. Feb. 21, 2014). *See also Audi AG v. D'Amato,* 469 F.3d 534, 541 (6th Cir.2006). "An abuse of discretion occurs when the reviewing court is left with the definite and firm conviction that the trial court committed a clear error of judgment." *United States v. Hunt,* 521 F.3d 636, 648 (6th Cir.2008) (internal quotation marks omitted). Therefore, this Court may only reverse the district court's conclusion as to Defendants' motion if it finds that the ruling was arbitrary, unjustifiable, or clearly unreasonable.

F.T.C. v. E.M.A. Nationwide, Inc., 767 F.3d 611, 623 (6th Cir. 2014). Thus, the second issue raised by Mr. Wilson should be evaluated under the abuse of discretion standard and should be reversed only if this Court determines that the district court committed a clear error of judgment.

II. MR. BLANKENSHIP AND MS. SMITH ARE ENTITLED TO ABSOLUTE IMMUNITY

The United States Supreme Court has long held that judges are entitled to absolute immunity from claims brought under 42 U.S.C. § 1983 for actions performed within the course of their judicial functions. *Pierson v. Ray*, 386 U.S. 547, 553-554 (1967). Additionally, that immunity has been extended to "those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune." *Bush v. Rauch*, 38 F.3d 842, 848 (6th Cir. 1994)(Court administrator executing the court's orders was entitled to quasi-judicial absolute immunity.)

With respect to court clerks, the Sixth Circuit has long held that a court clerk is entitled to immunity for acts performed by the clerk within the scope of her quasi-judicial duties. *Denman v. Leedy*, 469 F.2d 1097, 1098 (6th Cir. 1973). In *Foster v. Walsh*, 864 F.2d 416 (6th Cir. 1988), the Sixth Circuit applied this principle specifically to a situation in which a municipal court clerk erroneously issued a bench warrant even though the fine upon which the warrant was based had been paid. In analyzing that situation, the court stated:

> It is well established that judges and other court officers enjoy absolute immunity from suit on claims arising out of the performance of judicial or quasi-judicial functions. *Pierson v. Ray*, 386 U.S. 547, 553-54, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967) (judges);

> *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973) (municipal court clerk). It is equally clear that judges and other court officers are not absolutely immune from suits based upon performance of non-judicial functions. *Forester v. White*, 484 U.S. 219, ___, 108 S.Ct. 538, 544-545, 98 L.Ed.2d 555, 566 (1988). The question presented here, therefore, is whether the issuance of a warrant for Mr. Foster's arrest was a judicial function or a non-judicial function.
>
> Most courts that have addressed this issue have held that a clerk who issues a warrant at the discretion of a judge is performing a function to which absolute immunity attaches. *Rogers v. Bruntrager*, 841 F.2d 853, 856 (8th Cir. 1988); *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980). The mere fact that an error is made in carrying out the judge's instruction is immaterial.
>
> Whether an act is judicial in character does not depend on whether it is discretionary. The appropriate inquiry is "whether the function in question is a 'truly judicial act[ ]' or an 'act[ ] that simply happen[s] to have been done by judges.'" *Sparks v. Character and Fitness Committee of Kentucky*, 859 F.2d 428 (6th Cir. 1988), quoting *Forester*, 484 U.S. at __, 108 S.Ct. at 544, 98 L.Ed.2d at 565. We have no difficulty concluding that the issuance of the warrant for Mr. Foster's arrest, even though non-discretionary, was a "truly judicial act." Because Clerk Walsh enjoyed absolute immunity from suit in connection with the issuance of the arrest warrant, he was entitled to the dismissal he sought.

Foster, 864 F.2d at 417-18.

After the Sixth Circuit's decision in *Foster*, the United States Supreme Court assessed whether court reporters were entitled to quasi-judicial immunity with respect to the preparation of court transcripts. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429 (1993). In making that analysis, the Supreme Court first looked at the historical common law tradition related to court reporters and determined that

court reporters were not among the class of persons protected by judicial immunity in the 19th Century. *Id.* at 433. Next, the Court looked at whether the actions of court reporters were akin to those carried out by the judge and noted that the early judicial note takers made notes for their own purposes that were "never entered into the public record." *Id.* at 434. The U.S. Supreme Court went on to reassert the functional approach to immunity and in applying that approach to the task of court reporters stated:

> Court reporters are required by statute to "recor[d] verbatim" court proceedings in their entirety. 28 U.S.C. § 753(b). They are afforded no discretion in carrying out this duty; they are to record, as accurately as possible what transpires in court.

Id. at 436. Thus, the Court concluded: "In short, court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity. *Id.* at 437. The Supreme Court went on to find that strong policy reasons did not exist to extend absolute immunity to court reporters with respect to their duty to provide a verbatim transcript. *Id.* at 437.

Nowhere in *Antoine* did the Supreme Court hold that non-discretionary acts were per se non-judicial. Nor did the Court overrule *Foster* or other cases that had previously extended quasi-judicial immunity to court clerks. Thus, the Supreme Court's holding in *Antoine* cannot be applied as broadly as Mr. Wilson urges. If it were applied in that manner, judges themselves would not be entitled to immunity if

their actions were deemed ministerial or non-discretionary. Although Mr. Wilson does not argue that Judge Rice would not be entitled to judicial immunity if she had executed the bench warrant, Mr. Wilson's application of *Antoine,* if applied as he suggests, would result in Judge Rice not having immunity because she did not have the discretion to issue a warrant for Mr. Wilson or set a bond for him under circumstances where the grand jury returned a "no true bill".

Thus, Mr. Wilson's application of *Antoine* simply makes no sense. Instead, the discretionary function analysis should come into play only after a court determines that it is unclear whether an act is related to a judicial function – as the Supreme Court did in the specific context of court reporters providing transcripts. The Seventh Circuit previously recognized that the Supreme Court's holding should be applied in this manner and stated:

> *Antoine* stands for the proposition that ministerial acts unrelated to the function immunity is intended to protect are not covered by absolute immunity. *Antoine* and *Forrester* do not support the proposition that judicial acts that are part of the judicial function are excluded from absolute immunity because they could be characterized as nondiscretionary or even ministerial.

Wilson v. Kelkhoff, 86 F.3d 1438, 1444 (7th Cir. 1996).

Although the Sixth Circuit has not explicitly adopted this same reasoning, the Sixth Circuit after *Antoine* has continued to apply judicial immunity and quasi-judicial immunity to truly judicial acts even if the acts are non-discretionary

or ministerial. The year following the Supreme Court's decision in *Antoine*, the Sixth Circuit reiterated the principle that "absolute judicial immunity has been extended to non-judicial officers who perform 'quasi-judicial' duties." *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994) (citations omitted). In that case, the Sixth Circuit was assessing whether a court administrator was entitled to quasi-judicial immunity in carrying out the orders of a juvenile referee. In determining that the administrator was entitled to quasi-judicial immunity, the Court stated:

> As other circuits have held, enforcing or executing a court order is intrinsically associated with a judicial proceeding. …
>
> Moreover, officials must be permitted to rely upon a judge's findings and determinations to preserve the integrity of the court's authority and ability to function. *It does not seem logical to grant immunity to a judge in making a judicial determination and then hold the official enforcing or relying upon that determination liable for failing to question the judge's findings*. This would result in the officials second-guessing the judge who is primarily responsible for interpreting and applying the law.

Id. at 847-848 (emphasis added).

Since that time, the Sixth Circuit has repeatedly found that court clerks are entitled to quasi-judicial immunity when carrying out the orders and instructions of the judge or performing other quasi-judicial acts. *See Huffer v. Bogen*, 503 Fed. Appx. 455, 461 (6th Cir. 2012) ("The court clerk merely implemented Judge Bogen's order as instructed. In doing so, the court clerk was carrying out a judicial

act to which absolute immunity attached. … The fact that the court clerk's action did not require discretion or judgment on her part does not change its judicial character.") (citations omitted); *Coleman v. Governor of Michigan*, 413 Fed. Appx. 866, 873-74 (6th Cir. 2011) (Clerks and administrators were entitled to quasi-judicial immunity in carrying out a judge's order.); *Johns v. Bonnyman*, 109 Fed. Appx. 19, 21-22 (6th Cir. 2004) (A clerk was found to be absolutely immune with respect to enforcing an order of the Chancery Court or refusing to impede the execution of that order.); *Carlton v. Baird*, 72 Fed. Appx. 367, 368-69 (6th Cir. 2003); *Chavis v. Fuerst*, 62 Fed. Appx. 116 (6th Cir. 2003) (Court employees were entitled to quasi-judicial immunity.); *Cochran v. Municipal Court of the City of Barberton, Summit County*, 91 Fed. Appx. 365, 367 (6th Cir. 2003) (The court clerk was entitled to quasi-judicial immunity.); *Gallagher v. Lane*, 75 Fed. Appx. 440, 441 (6th Cir. 2003) (Court clerk was entitled to quasi-judicial immunity.); *Lyle v. Jackson*, 49 Fed. Appx. 492, 494 (6th Cir. 2002) (The plaintiff "sought monetary damages from two court clerks whom he alleged failed to provide him with requested copies of previous filings and transcripts. The complaint was properly dismissed as to these defendants on the basis of quasi-judicial immunity."); *Riser v. Schnieder*, 37 F. Appx. 763, 764 (6th Cir. 2002) (Clerk was acting in a quasi-judicial capacity and was immune from suit for monetary damages regardless

of whether errors were committed in handling the plaintiff's small claims case.); *Fields v. Lapeer County Circuit Court*, 3 Fed. Appx. 377, 378 (6th Cir. 2001) (A court clerk was found to be entitled to quasi-judicial immunity.); *Smith v. Shelby County, Tennessee*, 3 Fed. Appx. 436, 437-38 (6th Cir. 2001) (County court clerk was protected by quasi-judicial immunity.); *Burton v. Mortimer*, 221 F.3d 1333 (6th Cir. 2000) (Court executive and clerks were entitled to quasi-judicial immunity with respect to plaintiff's claims for delays in forwarding the record to the state court of appeals and for refusing to provide free copies.); *Ortman v. State of Michigan*, 16 F.3d 1220, *1 (6th Cir. 1994) (Court clerks were entitled to quasi-judicial immunity.)

Additionally, in *Wojnicz v. Davis*, 80 Fed. Appx. 382 (6th Cir. 2003), the Sixth Circuit considered whether justices of the state supreme court of Michigan and the clerk of that court were entitled to immunity. The court stated:

> Judicial employees are immune from damages for performance of quasi-judicial duties. *Bush v. Rauch*, 38 F.3d 842, 847-848 (6th Cir. 1994) (Court administrator executing court order.); *Foster v. Walsh*, 864 F.2d 416, 417-18 (6th Cir. 1988) (Court clerk issued erroneous warrant on judge's order.) Accepting all of his allegations as true, Wojnicz's allegations against the defendants involve actions taken while performing their judicial and quasi-judicial duties processing the state court habeas corpus petition. Whether or not they committed any errors in handling Wojnicz's habeas petition, they are immune from suit for monetary damages.

Id. at 383-384. The Sixth Circuit was once again applying the principles set forth

in *Foster* and *Bush* which the appellant claims were abrogated by *Antoine*. Nonetheless, the United States Supreme Court declined Mr. Wojnicz's petition for writ of certiorari to review these issues. *See Wojnicz v. Davis*, 540 U.S. 1152 (2004).

The District Court for the Middle District of Tennessee analyzed this same issue in detail and referenced most of the above referenced cases as well as numerous cases from the district courts in the Sixth Circuit and found that "[t]he great weight of cases confirms that *Foster* and its progeny remain the controlling authority in the Sixth Circuit for considering judicial officers' claims for quasi-judicial immunity." *Teats v. Johnson*, 2012 WL 4481436, *5 (M.D. Tenn. 2012).

Thus, unless the Court reverses *Foster* and its progeny, the analysis in this case as to whether Ms. Smith and Mr. Blankenship are entitled to quasi-judicial immunity is straightforward. The execution of a bench warrant is clearly judicial in nature. Thus, just as if Judge Rice had personally filled out the bench warrant, Ms. Smith should be entitled to quasi-judicial immunity in carrying out this judicial function.

That immunity should apply regardless of whether Judge Rice explicitly ordered execution of the bench warrant. Nonetheless, even if the clerk had to be

acting pursuant to a judge's order for quasi-judicial immunity to attach, the undisputed facts establish that she was. Ms. Smith's Declaration established that Judge Rice wrote on the presentment that bond should be set at $10,000 and, pursuant to the court's practice, that was an order to issue a bench warrant setting bail at that amount. [Declaration of Janet Smith, RE 20, PageID #: 107-08] Mr. Wilson's assertion to the contrary does not create a disputed material fact because he does not have personal knowledge of the procedure used by Judge Rice in causing bench warrants to issue. Thus, the proof is undisputed that Ms. Smith was acting pursuant to an order from Judge Rice to execute the bench warrant.[3] Ms. Smith and Mr. Blankenship were entitled to quasi-judicial immunity as to the plaintiff's claims brought pursuant to 42 U.S.C. § 1983 for carrying out a judicial function.

Mr. Wilson has not argued that the district court erred in dismissing the state law claims or addressed the district court's determination that Ms. Smith and Mr.

[3] Mr. Wilson also argues that Ms. Smith was not acting pursuant to the Judge's order but pursuant to the requirements of Rule 9 of the Tennessee Rules of Criminal Procedure. However, even if that were correct, Rule 9 directs a clerk to issue a capias *or* a summons upon receipt of a grand jury presentment unless specifically directed by a judge or the district attorney general to issue a criminal summons. Thus, that Rule provides the clerk with discretion in her actions if she is not acting pursuant to the Judge's orders and would indicate that the clerk's actions would be protected by quasi-judicial immunity even if the Court employed the "discretionary" analysis as urged by Mr. Wilson.

Blankenship were entitled to immunity under Tennessee law. Therefore, the appellees will not address the dismissal of those state law claims. If Mr. Wilson intended to challenge the dismissal of those state law claims, he has now waived that issue by failing to address it in his appellant's brief. *Ewolski v. City of Brunswick*, 287 F.3d 492, 516-17 (6th Cir. 2002); *Hanner v. City of Dearborn Heights*, 450 Fed. Appx. 440, 444 (6th Cir. 2011)("Generally, where an appellant fails to address an issue in an opening brief, the appellant waives any objection to that issue.")

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING DISCOVERY

Mr. Wilson asserts that the district court erred by denying his motion for discovery after the defendants asserted that they were entitled to summary judgment based upon absolute immunity.

Initially, this issue is moot unless this Court holds that Ms. Smith and Mr. Blankenship were only entitled to quasi-judicial immunity if Ms. Smith was acting pursuant to the order of Judge Rice. Thus, if the Court agrees that the issuance of the bench warrant was a judicial act regardless of whether it was specifically ordered then the Court does not need to address this issue.

However, if the Court determines that quasi-judicial immunity only attached

because Ms. Smith was carrying out the Judge's order, then the Court must determine if the district court abused its discretion by refusing to permit discovery. The Sixth Circuit has previously recognized that the defense of absolute immunity is a threshold question that makes it incumbent on the plaintiff to demonstrate why discovery is necessary. *Rogers v. O'Donnell*, 737 F.3d 1026, 1033 (6th Cir. 2013).

In *Saucier v. Katz*, *supra*, the U.S. Supreme Court discussed qualified immunity and, comparing it to absolute immunity, stated:

> The privilege is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Ibid.* As a result, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*).

Saucier v. Katz, 533 U.S. 194, 200-01 (2001).

In *Summers v. Leis*, 368 F.3d 881, 886-87 (6th Cir. 2004), the Sixth Circuit, discussing qualified immunity, explained:

> The purpose of a qualified immunity defense is not only protection from civil damages but protection from the rigors of litigation itself, including the potential disruptiveness of discovery. *See Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Harlow v. Fitzgerald,* 457 U.S. 800, 816, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) . . .
>
> This Court has held on multiple prior occasions that, when faced with a motion based on qualified immunity, a district court can not

> avoid ruling on the issue. See e.g., *Skousen v. Brighton High School,* 305 F.3d 520 (6th Cir.2002). In the case of *Skousen v. Brighton High School,* we concluded that a district court committed legal error in dismissing a motion for summary judgement based on qualified immunity solely because discovery was not complete. See *Skousen,* 305 F.3d 520 (6th Cir.2002). We held that, because the defense of qualified immunity is a threshold question, if the defense is properly raised prior to discovery, the district court has a duty to address it. *Id.*

Thus, to delay a ruling on absolute immunity, Mr. Wilson had to make a strong showing pursuant to Rule 56(d) of the Federal Rules of Civil Procedure to establish why "for specified reasons, [he] cannot present facts essential to justify its opposition."

> Bare allegations or vague assertions of the need for discovery are not enough. *United States v. Cantrell,* 92 F.Supp.2d 704, 717 (S.D.Ohio 2000) (citing *Lewis v. ACB Business Serv., Inc.,* 135 F.3d 389, 409 (6th Cir.1998)). In order to fulfill the requirements of Fed.R.Civ.P. 56(f), Summers must state with "some precision the materials he hopes to obtain with further discovery, and exactly how he expects those materials would help him in opposing summary judgment." *Simmons Oil Corp. v. Tesoro Petroleum Corp.,* 86 F.3d 1138, 1144 (Fed.Cir.1996).

Summers v. Leis, 368 F.3d 881, 887 (6th Cir. 2004) (considering the prior version of 56(d) which was 56(f)).

In this case, Mr. Wilson's attorney submitted a declaration asserting that he needed to depose Janet Smith and Judge Lisa Rice prior to responding to the motion to dismiss and/or for summary judgment. [Declaration of Keith Edmiston, RE 16-1, PageID #: 96] However, the declaration provided the Court with no information as

to what he hoped to glean through such depositions or how he could use their testimony to oppose the motion.

As to Janet Smith, it appeared that Mr. Wilson's attorney merely wanted to cross-examine her on her declaration in the hopes of creating some issue of fact. As to Judge Lisa Rice, there was no reason given as to the need to depose her. She was not a party to the litigation, and Mr. Wilson's counsel could have interviewed her about the warrant and presented a declaration from her if he believed her testimony would create a material issue of fact.

In similar circumstances, the Sixth Circuit has determined that discovery was properly denied. In *Rogers*, *supra*, the Sixth Circuit stated:

> Plaintiffs' counsel filed an affidavit under Fed.R.Civ.P. 56(d), expressing his desire to depose persons present at the December 21 meeting to determine whether the Smith defendants were acting as advocates. Yet, such a vague assertion is insufficient to meet the requirement to identify with "some precision" the materials hoped for and their relevance to the absolute immunity issue. *Id.*
>
> . . . .
>
> Accordingly, we find no error in the district court's refusal to permit further discovery before ruling on the absolute immunity defense.

Rogers, 737 F.3d at1033.

The district court found the declaration of Mr. Wilson's counsel to be similar to the affidavit assessed in *Rogers* and stated "[i]t is simply too vague for the Court

to order discovery." [Order, RE 29, PageID #: 141]

The ruling by the district court was not "arbitrary, unjustifiable or clearly unreasonable" as required to find an abuse of discretion. *F.T.C. v. E.M.A. Nationwide, Inc.*, 767 F.3d at 623. Thus, Mr. Blankenship and Ms. Smith submit that the district court properly denied discovery and that this Court should affirm that decision.

CONCLUSION

The issuance of a bench warrant by Ms. Smith was an action that was integral to and intertwined with the judicial process. As a result, Ms. Smith and Mr. Blankenship were entitled to quasi-judicial immunity. The district court properly dismissed this case on that basis, and the appellees respectfully submit that this Court should affirm that dismissal.

Respectfully submitted this 16th day of November, 2016.

/s/ Jeffrey M. Ward
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/s/ Jeffrey M. Ward
JEFFREY M. WARD

Attorney for Appellees

November 16, 2016
Date

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I hereby certify that on November 16, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system:

Keith L. Edmiston
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P.O. Box 30782
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Dated this 16th day of November, 2016.

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ADDENDUM:

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

The Defendants/Appellees, Johnny Blankenship and Janet Smith, provide a designation of the relevant district court documents:

Description of Entry	Date Filed	Record Entry No.	Page ID# Range
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