IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANIEL RENTERIA-VILLEGAS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 3:11-cv-218
	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*,	)	Judge Kevin H. Sharp
	)	Magistrate Judge Joe B. Brown
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.01, Plaintiffs Daniel Renteria-Villegas, David Gutierrez-Turcios, and Rosa Landaverde submit this Memorandum of Law in support of their Motion for Partial Summary Judgment. Plaintiffs move for summary judgment that Defendant Metropolitan Government of Nashville and Davidson County, by and through the Davidson County Sheriff's Office ("Metro" or "DCSO") violated Sections 8.202, 16.05 and 2.01(36) of the Metropolitan Charter of Nashville and Davidson County ("Metro Charter") by entering into and performing services under its 2009 Memorandum of Agreement ("MOA") with Defendant Immigration and Customs Enforcement ("ICE"). Plaintiffs also move for summary judgment that ICE violated the plain language of 8 U.S.C. § 1357(g), and thus violated Section 706(2)(C) of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, by entering into a 287(g) agreement that is inconsistent with State and local law.

In October of 2009, Defendants Metro and ICE entered into a Memorandum of Agreement regarding the investigation and enforcement of federal immigration law in Nashville

and Davidson County. (SUMF ¶ 1).[1] This MOA provides for the designation and training of DCSO Jail Enforcement Officers who will engage in the enforcement of federal immigration law and investigation of violations thereof. (SUMF ¶¶ 2-12 15–20). Through the MOA, ICE delegated broad authority to investigate, assess and charge violations of federal immigration law to these designated DCSO officers. This delegation to DCSO includes the power and authority to: administer oaths; interrogate; take and consider evidence; prepare charging documents relating to immigration offenses; serve warrants of arrest for immigration violations; and issue detainers effecting custodial holds on individuals suspected of violating federal immigration laws. (SUMF ¶¶ 8-12). DCSO regularly investigates, processes and charges foreign-born inmates with respect to federal immigration offenses unrelated to the criminal charge upon which they are jailed. (SUMF ¶¶ 11-12, 26-36, 40-44). Indeed, Plaintiffs Renteria and Gutierrez have been subjected to immigration enforcement activities DCSO officers performed pursuant to the MOA. (SUMF ¶¶ 45-64, 68-78). Plaintiff Landaverde's son was subjected to immigration enforcement activities DCSO officers performed pursuant to the MOA. (SUMF ¶ 84).

Since at least 1964, Tennessee law has indisputably established that any law enforcement functions legitimately performed by the DCSO must be "necessary and incidental" to the Sheriff's role under the Metro Charter as jail-keeper and civil process server. *Metro. Gov't of Nashville & Davidson Cnty. v. Poe*, 383 S.W.2d 265, 275 (Tenn. 1964) (interpreting Metro Charter). By delegating the investigation of federal immigration offenses to DCSO officers, the 2009 MOA between Defendants Metro and ICE violates this established limitation on the law enforcement activities the DCSO may perform. Because there is no genuine dispute as to any material fact, and Plaintiffs are entitled to judgment as a matter of law, the Court should enter

[1] Pursuant to LR 56.01(b), a Statement of Undisputed Material Facts ("SUMF") is filed

summary judgment for the Plaintiffs regarding Counts I and II of their Third Amended Complaint, and issue the requested declaratory and injunctive relief.

ARGUMENT

I. LEGAL STANDARD.

Plaintiffs, as a claiming party, may move "for summary judgment on all or part of a claim." Fed. R. Civ. P. 56(a). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute of fact is material only if it might affect the outcome of the suit under the governing law. *Id* at 248. Furthermore, a dispute of material fact must be "genuine", or sufficient to permit a reasonable jury to return a verdict for the nonmoving party, if it is to preclude entry of summary judgment. *Id* .Summary judgment is particularly appropriate where, as here, the issue presented is a pure question of law. *See, e.g., Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996) (questions of qualified immunity); *Bowling Green & Warren County Airport Bd. v. Martin Land Dev. Co.*, 561 F.3d 556, 558 (6th Cir. 2009) (statutory construction). Plaintiffs' motion turns on the construction of the MOA against the pertinent legal backdrop of the Metro Charter, as interpreted by the Tennessee Supreme Court, and 8 U.S.C. § 1357(g)(1) which purportedly authorized ICE's execution of the same. No disputed facts can possibly be material to the question of whether the execution of the MOA was *ultra vires*. *Jean v. Gonzales*, 452 F.3d 392, 396 (5th Cir. 2006); *Noriega-Lopez v.*

Ashcroft, 335 F.3d 874, 881 (9th Cir. 2003) (stating that an ultra vires claim is "purely one of statutory construction"). As such, summary disposition is proper.

II. METRO VIOLATED THE METRO CHARTER BY AUTHORIZING LAW ENFORCEMENT FUNCTIONS UNDER THE 287(g) AGREEMENT THAT ARE NOT NECESSARY AND INCIDENTAL TO THE SHERIFF'S DUTIES.

The Tennessee Supreme Court has held that the plain intent of the Metro Charter was to "take away from the Sheriff the responsibility for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights except as may be necessary and incidental to his general duties," *Poe*, 383 S.W.2d at 275, which the Charter defines as "custody and control of the metropolitan jail." (Docket No. 30-2 (Metro Charter) § 16.05).

A. Actions by Metro Government that Violate the Metro Charter are *Ultra Vires* and Void *Ab Initio*.

The Metro Charter "is the organic law of the municipality to which all [Metro Government's] actions are subordinate." *Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988). Provisions in the Metro Charter "are mandatory, and must be obeyed by [Metro Government] and its agents," including the Metro Council, Sheriff Hall, and the DCSO. *Id.* Because these provisions are "mandatory[,] [t]hey must be strictly[,] not just substantially complied with." *Poe*, 383 S.W.2d at 271, (quoting *State of Tennessee ex rel. Atkin v. City of Knoxville*, 315 S.W.2d 115, 116 (Tenn. 1958)). Any action by Metro Government that fails to comply with the Metro Charter is therefore *ultra vires* and consequently void. *Baird*, 756 S.W.2d at 241.

B. The Metro Charter Prohibits the DSCO from Conducting Law Enforcement Activities That Are Not Necessary and Incidental to the Sheriff's Duties.

The Metro Charter only permits the Davidson County Sheriff to exercise law enforcement power within the jail – including "prevention and detection of crime, [and]

apprehension of criminals" – if doing so is necessary to his duty to keep charge and custody of the jail, and only if the law enforcement function the sheriff exercises is incidental to this duty. *Poe*, 383 S.W.2d at 275. The Charter stripped the Sheriff of his traditional, constitutional role as principal conservator of the peace. Metro Charter §§ 16.05, 8.202; *see also Poe*, 383 S.W.2d. at 276. Section 16.05 of the Charter made the Sheriff an officer of Metro government and specifies that:

> [h]e shall have such duties as are prescribed by the Tennessee Code Annotated, section 8-8-201, or by other provisions of general law; except, that within the area of the metropolitan government the sheriff shall not be the principal conservator of the peace.

Section 16.05 then states: "The function as principal conservator of the peace is hereby transferred and assigned to the metropolitan chief of police, provided for by article 8, chapter 2 of this Chapter." Article 8, chapter 2 of the Charter describes the specific law enforcement powers of the Metropolitan Chief of Police:

> The department of the metropolitan police shall be responsible within the area of the metropolitan government for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights, and *enforcement of laws of the State of Tennessee and ordinances of metropolitan government*.

Charter § 8.202 (1963) (emphasis added). Even assuming arguendo that these two mandatory provisions leave ambiguity about the Charter's allocation of law enforcement power within the Metro Government, the Charter's rule of construction describing the powers of the Metro Government resolves it. Section 2.01 ("Specific Powers") clarifies that "when any power is vested by this Charter in a specific officer, board, commission or other agency, the same shall be deemed to have *exclusive jurisdiction* within the particular field." Metro Charter § 2.01(36) (emphasis added). (*See also* Docket No. 3-13 (Metro Legal Opinion No. 2004-04)).

Soon after the Metro Charter took effect, the Tennessee Supreme Court interpreted the Metro Charter in a suit brought by then-Davidson County Sheriff Robert R. Poe. *Poe*, 383 S.W.2d 265. The Court phrased Sheriff Poe's challenge to the Charter's removal of his law enforcement powers as follows: "Are the criminal law enforcement powers and authority in the area of the Metropolitan Government vested in the Metropolitan Chief of Police exclusively?" *Id.* at 267. The Court answered unanimously: "The duties of the Sheriff of Davidson County in regard to criminal law enforcement have been taken away from him by the Charter[.]" *Id.* at 276.

According to the Court, it was "plain" from the Charter's text,

> that it is the purpose and intent of the Charter to take away from the Sheriff the responsibility for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights except as may be *necessary and incidental* to his general duties as outlined in T.C.A. § 8-8-110 and to transfer such duties to the Department of the Police of the Metropolitan Government.

Id. at 275 (emphasis added).[2] One commentator observed shortly after *Poe* that "[t]he court upheld provisions of the charter which transferred to the metropolitan chief of police the powers of the sheriff as principal conservator of the peace and law enforcement officer of the county, leaving him his powers as custodian of the jail[.]" James C. Kirby, Jr., *Constitutional Law—1964 Tennessee Survey*, 18 Vand. L. Rev. 1103, 1112 (1965).

Poe remains binding precedent on the Davidson County Sheriff and Metro Government. The Tennessee Supreme Court and other Tennessee courts have confirmed the continuing validity of the *Poe* decision as to the powers of the Sheriff under the Charter. *See, e.g., Banks v. Jenkins*, 449 S.W.2d 712, 716 (Tenn. 1969) (noting the *Poe* Court "saw no constitutional

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[2] The Sherriff's general duties, which were formerly in Tenn. Code. Ann. § 8-8-110, are now listed in Tenn. Code Ann. § 8-8-201. They include, in pertinent part, the duty to "[t]ake charge and custody of the jail of the sheriff's county, and of the prisoners therein; receive those lawfully committed, and keep them personally, or by deputies or jailer, until discharged by law…." Tenn. Code Ann. § 8-8-201(a)(3).

interdiction to removal of the duty of preservation of peace from the Sheriff."); *Bailey v. County of Shelby*, No. W2005-01508, 2005 Tenn. App. Lexis 725, *27 (Tenn. Ct. App. 2005) ("In [Poe], the court upheld a charter provision transferring some duties of the county sheriff to the Nashville Chief of Police.") (*rev'd on other grounds, Bailey v. County of Shelby*, 2006 Tenn. Lexis 208 (Tenn. 2006)). The Metro Law Department has also acknowledged the continuing validity of *Poe*'s holding regarding the constraints on the Sheriff's power: "According to *Poe*, section 16.05 of the Charter makes . . . an exclusive vesting of criminal law enforcement duties in the Metropolitan Chief of Police. *Poe*, 383 S.W.2d at 275." (*See* Docket No. 3-13 (Metro Legal Opinion No. 2004-04)). The Law Department prepared this opinion at the request of Sheriff Hall.

The Sheriff has no residual or other authority beyond what he derives from the Charter. Poe, 383 S.W.2d at 268 ("no officer or agency of said county or of said municipal corporation shall retain any right, power, duty or obligation unless [Tenn. Code Ann. § 6-3702] or the charter of the metropolitan government shall expressly so provide"). The Sheriff similarly has no statutory authority beyond what is delegated through the Charter, which states that the metropolitan police force "shall be vested with all the power and authority belonging to the office of constable by the common law and also with all the power, authority and duties which by statute may now or hereafter be provided for police and law enforcement officers of counties and cities." (Docket No. 30-2 (Charter) § 8.202).

Thus, according to the Metro Charter and nearly half a century of well-settled Tennessee Supreme Court precedent, the DCSO has no legal authority to perform law enforcement functions that involve "preservation of the public peace, prevention and detection of crime, apprehension of criminals, and protection of personal property rights" unless performance of

those functions is "necessary and incidental" to the Sheriff's role as custodian of Metro's jails and civil process-server. *Poe*, 383 S.W.2d at 275. The DCSO functions authorized by MOA at issue in this case constitute law enforcement activities and are not "necessary and incidental" to the Sheriff's role.

C. DCSO 287(g) Officers Perform Law Enforcement Functions When They Conduct Interrogations and Take and Consider Evidence.

The MOA authorizes DSCO 287(g) officers to conduct interrogations and collect evidence. These functions are quintessential law enforcement functions. A formal and a functional analysis of the MOA and of the federal law governing the powers it delegates to DCSO demonstrate conclusively that DCSO performs law enforcement functions the Charter and *Poe* prohibit. (SUMF ¶¶ 2-13, 15-64, 67-77, 79-81, 84-86).

The text of the MOA is replete with explicit statements that DCSO deputies will be performing law enforcement functions. (SUMF ¶¶ 3-13). Jail Enforcement Officers perform law enforcement functions when they conduct interrogations under the 287(g) Agreement. The MOA expressly grants DCSO's Jail Enforcement Officers the "power and authority to interrogate any person believed to be an alien as to his right to be or remain in the United States (Immigration and Nationality Act (INA) § 287(a)(1), 8 U.S.C. § 1357(a)(1), 8 C.F.R. § 287.5(a)(1))." (SUMF ¶¶ 8); *see also* MOA at 19. The United States Supreme Court analyzed this power to interrogate and concluded that immigration officers who conduct interrogations pursuant to 8 U.S.C. § 1357(a)(1) and 8 C.F.R. § 287.5 are acting in a capacity that is "precisely the same as that of a policeman, constable, sheriff, or [FBI] agent" conducting a criminal law enforcement investigation. *United States v. Minker*, 350 U.S. 179, 191 (1956) (Black, J., *concurring*).

Sheriff Hall has expressed a nearly identical understanding of what his Jail Enforcement Officers do under the MOA:

> Well, the way I understand it, it's just like a Police Department . . . taking their charges to a district attorney, for example; here's what we believe happened, here are the facts surrounding this case; and then it's determined whether to pursue charges. Charges, in my analogy, is that the federal agent then takes that case to a federal judge. Very similar to that. We're doing the grunt work of the case and we're turning in what we have on the individual[.]

(*See* SUMF ¶ 15; Excerpt of Deposition of Daron Hall (235:19 – 236:7).

The power to take and consider evidence pursuant to INA § 287(b) is another law enforcement function delegated to DCSO by the MOA. (SUMF ¶ 9); 8 U.S.C. § 1357(b), 8 C.F.R. § 287.5(a)(2). Officers exercising this power may "take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of [the Immigration and Nationality] Act and the administration of [DHS]." 8 U.S.C. § 1357(b). The plain language of the statute thus marries the DCSO Jail Enforcement Officer's taking and consideration of evidence to the express purpose of enforcing federal immigration law. *See also* 8 C.F.R. § 287.5(a)(2).

Interrogation and taking and considering evidence are law enforcement activities which are conducted by the DCSO. The Metro Charter expressly and exclusively vested in the Metro Police Department these law enforcement functions, which the MOA purports to delegate DCSO. (Docket No. 30-2 (Metro Charter) § 2.01(36); § 8.202).

D. The DCSO's Law Enforcement Activities under the 287(g) Contract Are Not Necessary and Incidental to the Sheriff's Duties Prescribed by the Charter.

The interrogation and evidence collection functions DCSO's Jail Enforcement Officers perform are not necessary and incidental to the Sheriff's duty to maintain custody and control of Metro's jails. Neither the Metro Charter nor the Tennessee Constitution imposes a duty on the Davidson County Sheriff to enforce federal immigration law. (*See* Charter; *Cf.* SUMF ¶ 32).

Interrogation and evidence collection under the MOA are not necessary and incidental to the Sheriff's Charter duties.

a. The Tennessee Supreme Court Construed "Necessary and Incidental" Narrowly in *Poe*.

Significantly, in the context of the Davidson County Sheriff's functions under the Metro Charter, the Tennessee Supreme Court has already construed the terms "necessary" and "incidental" narrowly. *See Poe*, 383 S.W.2d at 275. For example, the *Poe* Court implied that existence of the sheriff's office might not be "necessary" to "perform the consolidated functions" of the consolidated city and county, but would continue to exist because it was expressly required by the state constitution. *Id.* at 268. The court also noted that the added duty newly assigned to the Sheriff to be custodian of the urban jail in addition to the metropolitan jail was "merely an extension of the general duties of the Sheriff as outlined by statute and case law of this State." *Id.* at 273. The court also stated that the sheriff has to "show the necessity" for any deputies and assistants he appoints because he was statutorily only authorized to appoint those who were "actually necessary to the proper conducting of his office," *id.* at 274, and that he could only appoint personnel "necessary in the proper operation of the consolidated jail." *Id.* at 277.

b. Historically, DCSO Has Exercised Its "Necessary and Incidental" Law Enforcement Authority Only in Limited Circumstances.

Prior to entering the 287(g) MOA, Metro's prior interpretations and actions evidence only limited instances where performing a law enforcement function was "necessary and incidental" to the Sheriff's duties. For example, the Sheriff may engage in fresh pursuit of an escapee. (*See* Docket No. 3-13 (Metro Legal Opinion 2004-04) ("Incident to exercising [custody and control over the jail], the Sheriff retains the common law duty and authority to pursue and apprehend inmates attempting to escape.")). In *State v. Bohanan*, the Sheriff conducted these

activities following an inmate's escape from a DCSO facility. However, the court described the DCSO's investigation of the jailbreak as limited to a "perimeter check." After that, a Metro Police Department officer was assigned to the case. No. M2006-00360, 2007 Tenn. Crim. App. Lexis 203, at *2–3 (Tenn. Crim. App. Mar. 2, 2007).

The DCSO's recent policies and procedures, with exception of the 287(g) MOA, further illustrate the sorts of law enforcement activity that are necessary and incidental to carrying out the Sheriff's duties. Policy Number 1-3.142, for instance, lists the specific events which call for DCSO personnel to secure evidence and conduct investigations. (*See* Docket No. 3-15 (DCSO Policy No. 1-3.142)). Among the triggers are: escape, discharge of a firearm, rioting, sabotage resulting in prolonged disruption of operations, hostage situations, discovery of contraband, or inmate suicide. (*Id.*). All of the events listed in the policy – all of which by definition take place in or around the jail and imminently threaten the safety and security of inmates and DCSO personnel – are clearly distinct from any of the functions DCSO officers perform under the MOA. Unlike the events listed in the policy, the MOA authorizes DCSO officers to interrogate inmates about immigration status and immigration law violations (which pertain to federal, not state law), and have absolutely no causal link to the safety and security of Metro's jails. *See Villegas v. Metro. Gov't of Davidson Cnty./Nashville Davidson Cnty. Sheriff's Office*, No. 3:09-00219, 2011 U.S. Dist. Lexis 45792, *58–59 n.8 (M.D. Tenn. Apr. 27, 2011) (citing empirical studies in rejecting DCSO's argument that immigration status correlates to an inmate's flight risk or likelihood to "endanger the public safety"). Similarly, the DCSO's policy regarding inmate admission prior to entering the MOA focused on basic safety and administration, such as medical and suicide screenings, searches, and an explanation of jail policies to inmates; it did not require

pursuit of new charges, immigration-related or otherwise, as a typical aspect of receiving new inmates. (*See* Docket No. 3-3 (DCSO Policy No. 1-4.100) (effective date Jan. 22, 2008)).

c. Courts Have Construed the Phrase "Necessary and Incidental" Consistent With Its Accepted Definition: Essential, Unavoidable, and Inherent.

Something "necessary and incidental" to a core function must be, under the words' plain meanings, unavoidably occurring as a consequence of the core function. In interpreting the term "necessary and incidental," this Court must look to the plain and ordinary meaning of the term. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("[W]e must give words their 'ordinary or natural' meaning"); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (quoting Black's Law Dictionary to find a "word's ordinary meaning"); *Nye v. Bayer Cropscience, Inc.*, No. E2008-01596, 2011 Tenn. LEXIS 486, at *18 (Tenn. June 7, 2011) (where a statutory term is unambiguous, the court looks to the plain and ordinary meaning and cites dictionary definitions). The plain meaning of "necessary and incidental" encompasses only those duties truly inherent and requisite. "Necessary" means:

1.(a) of an inevitable nature, inescapable;

(b) (1) logically unavoidable, (2) that cannot be denied without contradiction;

(c) determined or produced by the previous condition of things;

(d) compulsory;

2. absolutely needed, required.

Merriam Webster's Dictionary, *available at* http://www.merriam-webster.com/dictionary/necessary?show=0&t=1313534171. Black's Law Dictionary defines a "necessary inference" as "[a] conclusion that is unavoidable if the premise on which it is based is taken to be true." Black's Law Dictionary 1058 (8th ed. 2004). Incidental means "being likely to ensue as a chance

or minor consequence, minor, or occurring merely by change or without intention or calculation," Merriam Webster's, or "[s]ubordinate to something of greater i*mpo*rtance; having a minor role." Black's Law Dictionary 777.

Tennessee courts**,** the Sixth Circuit, the Tennessee legislature, and Metro's own prior policy implementation all support this definition of "necessary and incidental." For example, the court in *Tramell v. Tramell*, 162 Tenn. 1, 14–15 (Tenn. 1930) held that a trust document setting forth the trustees' duty of paying property taxes for "necessary and incidental expenses in protecting and maintaining" had to separately authorize the trustees with the power to "make leases of lands . . .not already under lease, and to sell timber on certain tracts, and to invest the proceeds." If leasing land, selling its timber, and investing proceeds are not "necessary and incidental" to a trustee's duty to protect and maintain a property, investigating violations of federal immigration law distinct from any crimes occurring inside the jail is not necessary and incidental to maintaining control over a jail.

Where the Sixth Circuit has used the phrase "necessary and incidental," it has similarly applied a narrow definition. *See, e.g., Appoloni v. United States*, 450 F.3d 185, 193 (6th Cir. 2006) (describing relinquishment of tenure rights to continued future employment as "simply a necessary and incidental part of accepting the buyout" proposed to a group of teachers, because "in order to offer the teachers a buyout, the school districts had to ask that they give up their right to future employment-the same as with any severance package"); *Ne-Bo-Shone Assn., Inc. v. Hogarth*, 81 F.2d 70, 71 (6th Cir. 1936) (describing the limitations on a public easement on a stream for the purpose of floating logs as including "no rights other than those necessary and incidental to such log movement" and not rights for "transportation of goods and passengers by vessels" or to fish in the stream).

Furthermore, the Tennessee legislature uses the terms "necessary" and "incidental" only when the activity is closely and inherently related to the central function at issue. For example, "[a]ttorney's compensation" and "court costs" are the only two enumerated examples of "necessary incidental" expenses in connection with the provision of defense counsel for state employees. Tenn. Code Ann. § 8-42-103(a)(3); *see also* § 8-42-104(a); § 43-6-301(IV)(j); § 59-8-403(3); § 68-14-303(2).

The Metro Legal Department similarly has advised the Sheriff that his deputies cannot perform criminal law enforcement beyond what is imminently necessary in exigent circumstances: "We find no authority for the sheriff's arresting a prisoner for a crime not committed in his presence, or in fresh pursuit, where there is sufficient time to get a warrant, even after he has escaped from jail." (Docket No. 3-13 (Metro Legal Opinion 2004-04) at 6 (quoting *State v. Endsley*, 126 S.W. 103, 103 (Tenn. 1910))). The MOA requires the Sheriff to do much the same thing that the Metro Legal Department found forbidden; DCSO's enforcement of federal immigration law is strikingly similar to the arrest for a crime *not* committed in the Sherriff's presence, which was prohibited in *Endsley*. *See id.*

A recent case that garnered media attention exemplifies the type of situation in which the Sheriff's performance of law enforcement functions is both necessary and incidental to maintaining the jail. An inmate was arrested and brought to the Criminal Justice Center after making an appearance in night court, according to media reports. *See* William Williams, "Sheriff's Office Discovers Loaded Gun with Arrested Woman", *Nashville City Paper*, (Dec. 13, 2010) (attached hereto as Exhibit I). A deputy in the booking area later discovered that the inmate had a loaded pistol with two .25-caliber rounds in her purse. The inmate was charged with possession of a contraband in a penal institution in violation of Tenn. Code Ann. § 39-16-

201. *See* Criminal Complaint Number 2010-989919 (Exhibit J). The arrest warrant stated that the pistol "was turned over to police custody, where it was inventoried and placed into the property and evidence section of the department." (*Id.*). As illustrated here, the power to search an incoming inmate's possessions for contraband and bring charges when it is found is without question both necessary and incidental to the Sheriff's duty as jail-keeper.

d. Immigration Law Enforcement Activities Are Not Necessary and Incidental to the DCSO's Authorized Duties Because They Are Not Essential, Unavoidable, or Inherent Thereto.

No pertinent authority defines "necessary and incidental" expansively enough to suggest that investigating and bringing new charges against inmates for immigration violations is necessary and incidental to controlling the county jail. Indeed, neither Defendant has argued or can argue that it is an unavoidable or inevitable necessity for DCSO officers to perform investigatory, evidence gathering, and charging duties in order to bring new, federal immigration charges against individuals booked into the jails. *See* Black's Law Dictionary 777, 1058. While DCSO's actions are limited by the Charter to those both necessary *and* incidental to its work as custodian of the jail, the duties imposed by the MOA are neither necessary nor incidental to those Charter duties. DCSO can, and did, for many years, maintain custody over prisoners in the jails without investigating inmates for potential violations of federal immigration law.[3]

Indeed, the fact that 287(g) investigations are only conducted pursuant to a federal MOA that requires significant training and supervision, and do not inevitably ensue from operating the jail without conscious direction and substantial effort, means that such work is not incidental to the Sheriff's duties. DCSO's investigation of federal immigration offenses is much further

[3] Such law enforcement and interrogation activity was never considered "necessary and incidental" to operating the jail during the 45 years since *Poe* in which DCSO ran the jail without doing so.

removed from its core function as jailer, than was the perimeter check in *Bohanan*. 2007 Tenn. Crim. App. Lexis 203, at *2–3. Metro acknowledges no other authority for it to engage in the immigration enforcement functions challenged here. (*See* Docket No. 3-13 (Metro Legal Opinion 2004-04) at 6 (quoting *State v. Endsley*, 126 S.W. 103, 103 (Tenn. 1910))).[4]

Finally, even Sheriff Hall and the DCSO have not attempted to justify the 287(g) Program as "necessary and incidental" to operating Metro's Jails. Instead, Defendants have always justified the program exclusively on public safety grounds. The DCSO's Two-Year Review of the 287(g) Program stated: "The 287(g) initiative is designed to multiply the forces of U.S. Immigration and Customs Enforcement (ICE) through enhanced cooperation and communication with state and local law enforcement." (Docket No. 3-7, DCSO 287(g) Two-Year Review at 5).

In sum, the record in this case supports a finding that the 287(g) contract violates mandatory provisions of the Metro Charter by allowing DCSO deputies to perform law enforcement functions that are not necessary and incidental to the Sheriff's duties as jail-keeper. Metro Government therefore acted *ultra vires* by approving this contract. The contract is consequently void *ab initio*.

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[4] Several decisions from Tennessee's criminal courts further illustrate the sharp distinction between 287(g) investigations and the performance of legitimate law enforcement functions that are necessary and incidental to maintain the Sheriff's custody and control of Metro's jails. One line of cases reveals that DCSO "Investigators" are tasked with listening to and keeping track of inmate phone calls, but that this activity is done under for the purpose of keeping "business records" for inspection by "law enforcement." In *State v. Baker*, for instance, the court described the deposition of Michelle Knight, "an investigator with the Davidson County Sheriff's Office" who "had recorded a telephone conversation." 2006 Tenn. Crim. App Lexis 707, *8 (Tenn. Crim. App. 2006). It was not Knight, but a Metro Police Detective who had to obtain a warrant and seek charges against the inmate. Similarly, in *State v. Hakoda*, "Investigator Kevin Carroll with the Davidson County Sheriff's Department testified that every phone call made by jail inmates was recorded in the normal course of business." 2006 Crim. App. Lexis 774 *2 (Tenn. Crim. App. 2006). *See also United States v. Medlin*, 2010 U.S. Dist. Lexis 18089 *2 (M.D. Tenn. Mar. 1, 2010).

III. ICE VIOLATED THE APA AND 8 U.S.C. § 1357(g) BY ENTERING INTO A 287(g) AGREEMENT THAT IS NOT CONSISTENT WITH STATE AND LOCAL LAW.

The Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, provides for judicial review of agency action that exceeds statutory authority or is short of statutory right. 5 U.S.C. § 706(2)(C). The Supreme Court has declared agencies' duty to remain faithful to the limits on their statutory authority. *See Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007) (affirming Environmental Protection Agency's statutory authority to regulate substances that contribute climate change); *see also FCC v. Fox TV Stations, Inc.*, 129 S. Ct. 1800, 1823 (2009) (agencies are not permitted "unbridled discretion" and "must follow" the "boundaries of [the] delegated authority" Congress enacts) (internal citations omitted).

Here, ICE's action of entering into a MOA with Defendant Metro exceeded statutory authority because the agreement is not "consistent with State and local law" as required by the statute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S. 102, 108 (1980) ("The starting point for interpreting a statute is the language of the statute itself").

The statute provides:

> [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and *to the extent consistent with State and local law.*

8 U.S.C. § 1357(g)(1) (emphasis added).[5] By entering, authorizing, participating in, implementing, and supervising a 287(g) MOA that violates State and local law, ICE has exceeded the statutory authority granted by § 1357(g)(1).

The APA is violated where a federal agency exceeds its grant of statutory authority. *See, e.g., NLRB v. Brown*, 380 U.S. 278, 291–92 (1965). Because 8 U.S.C. § 1357(g)(1) grants the executive branch its authority to enter 287(g) MOAs, the statute's enumerations and restrictions of the scope of action to be taken limit the agency's authority.[6] As explained in Section II *supra*, the DCSO violates the Metro Charter when it engages in immigration law enforcement pursuant to the MOA it operates under ICE's authority and supervision. The functions it performs under

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[5] The Department of Homeland Security Act of 2002 abolished the Immigration and Naturalization Service ("INS") and transferred its functions to the newly created Department of Homeland Security ("DHS"). Pub. L. No. 107-296, 116 Stat. 2135 at 2142 (2002). Legacy INS's immigration enforcement functions now vested in U.S. Immigration and Customs Enforcement, statutory references to the "Attorney General" are understood to refer to the "Secretary" of Homeland Security. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

[6] Section 287(g)(1) of the INA imposes a clear limitation on ICE's authority to enter and implement 287(g) MOAs only to the "extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). In other statutes limiting a federal agency's actions to "the extent consistent with" a particular consideration, courts have not found those agencies free to ignore these provisions. The Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act permitted the Commissioner of Food and Drugs to allow, "on an interim basis for a reasonable period, through provisional listings, the use of commercially established color additives *to the extent consistent with the public health*, pending the completion of the scientific investigations needed . . . ." *Certified Color Mfrs. Assoc. v. Mathews*, 543 F.2d 284, 288 n.9 (D.C. Cir. 1976) (emphasis added). The limitation on the Commissioner's provisional listing of color additives for sale pending investigation "to the extent consistent with the public health" was discussed as a significant principle guiding the Commissioner's actions which he was not free to ignore. *See id.* at 288. The Tongass Timber Reform Act similarly required the Secretary of Agriculture "*to the extent consistent with* providing for the multiple use and sustained yield of all renewable forest resources, [to] seek to provide a supply of timber from the Tongass National Forest which (1) meets the annual market demand for timber from such forest and (2) meets the market demand from such forest for each planning cycle." *Se. Conf. v. Vilsack*, 684 F. Supp. 2d 135, 138 (D.D.C. 2010) (emphasis added). This statute was read to require the Secretary of Agriculture to consider all of the enumerated factors, including the multiple use and sustained yield; he was not authorized to ignore Congress's guiding statutory principles. *Id.*

the MOA constitute police duties the Charter forbids. (*See* SUMF ¶¶ 2-13, 15-64, 67-77, 79-81, 84-86; *See also*, Docket No. 55 at 17 (conceding that DCSO performs federal law enforcement investigations pursuant to the MOA)). ICE not only ratified the MOA, it also actively participates in and supervises DCSO's ongoing implementation of the MOA. (SUMF ¶¶ 1-7, 16-24, 31-44, 55-57, 73, 84).

ICE has exceeded its statutory authority under § 1357(g)(1) by entering, authorizing, participating in, implementing, and supervising a 287(g) MOA with Defendant Metro. This excess of statutory authority violates 5 U.S.C. § 706(2)(C).

CONCLUSION

The authority delegated by the Metro Charter is clear, and ICE and Metro do not dispute the nature of their law enforcement activity under the MOA. Because there is no genuine dispute as to any material fact and the Plaintiffs are entitled to judgment as a matter of law, this Court should enter summary judgment for Plaintiff on Counts I and II of their Third Amended Complaint (Docket No. 45) and grant the declaratory and injunctive relief sought therein.

Respectfully submitted this 19th day of August, 2011,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served by electronic means via the U.S. District Court's electronic filing system on August 19, 2011 on:

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WALTER BAILEY, ET AL. v. COUNTY OF SHELBY, ET AL.

No. W2005-01508-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT JACKSON

2005 Tenn. App. LEXIS 725

September 20, 2005, Session
November 22, 2005, Filed

SUBSEQUENT HISTORY: Appeal granted by *Bailey v. County of Shelby, 2006 Tenn. LEXIS 141 (Tenn., Feb. 21, 2006)*
Reversed by *Bailey v. County of Shelby, 2006 Tenn. LEXIS 208 (Tenn., Mar. 29, 2006)*

PRIOR HISTORY: [*1] *Tenn. R. App. P. 3* Appeal as of Right; Judgment of the Chancery Court Vacated; and Remanded. Direct Appeal from the Chancery Court for Shelby County. No. CH-04-0550-3. D.J. Alissandratos, Chancellor.

DISPOSITION: Judgment of the Chancery Court Vacated; and Remanded.

COUNSEL: Allan J. Wade, Lori Hackleman Patterson and Brandy S. Parrish, Memphis, Tennessee, for the appellants, Walter Bailey, Julian Bolton and Cleo Kirk.

Leo Bearman, Jr., Jason A. Strain, Memphis, Tennessee, for the appellees, County of Shelby, Shelby County Election Commission, Gregory M. Duckett, Richard L. Holden, Nancye E. Hines, O. C. Pleasant, Jr., and Maura Black Sullivan.

Paul G. Summers, Attorney General and Reporter, Michael E. Moore, Solicitor General, and Ann Louise Vix, Senior Counsel, for the Intervenor, State of Tennessee.

JUDGES: DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J., joined. W. FRANK CRAWFORD, P.J., W.S., filed a dissenting opinion.

OPINION BY: DAVID R. FARMER

OPINION

This appeal from a declaratory judgment action requires us to determine whether term limits imposed on Shelby County Commissioners by the 1994 amendments to the Shelby County Charter, Article II, section [*2] 2.03(G), are permissible under *Tennessee Code Annotated § 5-1-210* and, if so, whether *§ 5-1-210* is unconstitutional under the *Tennessee Constitution, Article VII, Section 1*. We hold that term limits are permitted as "qualifications" under *Tennessee Code Annotated § 5-1-210(4)*. We further hold that *Tennessee Code Annotated § 5-1-210(4)*, insofar as it permits county charters to prescribe the qualifications of members of the county legislative body, is void as unconstitutional under *Article VII, Section 1, of the Tennessee Constitution*. We accordingly vacate the judgment of the trial court, award summary judgment to Plaintiffs/Appellants, and enjoin enforcement of section 2.03(G) of the Shelby County Charter.

OPINION

The facts in this case are undisputed and the issues raised are issues of law. Walter Bailey, Julian Bolton,

and Cleo Kirk (collectively, "Appellants") are elected members of the Shelby County Board of Commissioners ("the Board of Commissioners"). They also are candidates, as defined by *Tennessee Code Annotated 2-10-102(3)*, [1] for the Board of Commissioners [*3] in the election scheduled to be held in August 2006. Under Article II, section 2.03(G) of the Shelby County Charter ("the Charter"), they will be ineligible to be elected to or to hold the office of Commissioner when their current terms expire.

1 *Tennessee Code Annotated § 2-10-102(3)* provides:

> "Candidate" means an individual who has made a formal announcement of candidacy or who is qualified under the law of this state to seek nomination for election or elections to public office, or has received contributions or made expenditures except for incidental expenditures to determine if one shall be a candidate, or has given consent for a campaign committee to receive contributions or make expenditures with a view to bringing about the individual's nomination for election or election to state public office[.]

Tenn. Code Ann. § 2-10-102(3)(2003 & Supp 2004).

On March 22, 2004, Appellants filed a declaratory judgment action against the County [*4] of Shelby, the Shelby County Election Commission, Gregory M. Duckett, Richard L. Holden, Nancye E. Hines, O.C. Pleasant, Jr., and Maura Black Sullivan (collectively, "the County") in the Shelby County Chancery Court. In their complaint, Appellants sought a declaration that Article II, section 2.03(G) of the Charter, which imposes a limit of two consecutive four-year terms on the Shelby County Mayor and Board of Commissioners, is unlawful under Tennessee Code Annotated *§ 5-1-201et. seq.*, and void as unconstitutional under *Article VII, Section 1, of the Tennessee Constitution*. They further sought an injunction enjoining the County from enforcing the Charter provision. The parties stipulated to the facts, filed cross-motions for summary judgment, and stipulated that the summary judgment hearing could be treated as a non-jury trial on the merits.

The trial court determined that, because having served two consecutive four-year terms renders a prospective candidate ineligible for office, term limits relate to the qualifications for holding office. It held, therefore, that the Charter's imposition of term limits is permissible under *Tennessee Code Annotated § 5-1-210(4)* [*5] . It also determined that *Tennessee Code Annotated § 5-1-210(4)* is not invalid under *Article VII, Section 1, of the Tennessee Constitution*. Accordingly, the trial court denied injunctive relief and awarded summary judgment to the County on June 23, 2005.

Appellants filed a timely notice of appeal to this Court on June 23, 2005. On June 28, 2005, Appellants filed a motion in the Tennessee Supreme Court pursuant to *Tennessee Code Annotated § 16-3-201(d)*, [2] requesting that the supreme court assume jurisdiction of the appeal on the grounds that it is a case of unusual public importance involving constitutional issues. They further moved the court to grant an expedited appeal in order to assure that the issues would be decided in advance of the February 16, 2006, filing and qualifying deadlines for the next election. The supreme court denied Appellants' motion on July 13, 2005. On July 28, 2005, Appellants filed a motion for an expedited appeal in this Court. The County consented to the motion, and this Court granted Appellants' motion on August 3, 2005.

2 *Tennessee Code Annotated § 16-3-201(d)* provides:

> (d)(1) The supreme court may, upon the motion of any party, assume jurisdiction over an undecided case in which a notice of appeal or an application for interlocutory or extraordinary appeal is filed before any intermediate state appellate court after June 22, 1992.
>
> (2) The provisions of subdivision (d)(1) apply only to cases of unusual public importance in which there is a special need for expedited decision and which involve:
>
> (A) State taxes;
>
> (B) The right to hold or retain public office; or
>
> © Issues of constitutional law.

Tenn. Code Ann. § 16-3-201(d)(Supp. 2004).

[*6] This Court heard oral argument of the matter on September 20, 2005. We vacate the award of summary judgment to the County and award summary judgment to Appellants. We additionally enjoin the County from enforcing section 2.03(G) of the Charter.

ISSUES PRESENTED

The issue raised for our review, as presented by Appellants is:

> Whether Shelby County Charter, Article II, § 2.03(G), which provides that no County Mayor or County Commissioner is eligible to be elected to or to hold their offices for more than two consecutive four-year terms, is illegal and void because it contravenes *Tennessee Constitution, Article VII, Section 1*.

STANDARD OF REVIEW

This issue presented for our review is an issue of law. Our review of a trial court's conclusions on matters of law is *de novo*, with no presumption of correctness. *Taylor v. Fezell, 158 S.W.3d 352, 357 (Tenn. 2005)*. We likewise review the trial court's application of the law to the facts *de novo*, with no presumption of correctness. *State v. Thacker, 164 S.W.3d 208, 248 (Tenn. 2005)*.

ANALYSIS

The issue raised for our review, as we perceive it, requires a two-part analysis. [*7] First, we must determine whether Article II, section 2.03(G) ("section 2.03(G)") of the Charter is permissible under *Tennessee Code Annotated § 5-1-210*. This determination turns on whether term limits are a constitutionally impermissible restriction of the four-year terms to which constitutional officers are elected, or are an element of qualifications which may be prescribed by the legislature. Second, if term limits relate to the qualification of a candidate, section 2.03(G) does not does not contravene the express provisions of *§ 5-1-210(4)* of the Code, and we must determine whether *§ 5-1-210(4)* violates *Article VII, Section 1, of the Tennessee Constitution*.

We begin our analysis by noting that, although Appellants rely on various portions of the Charter in support of their argument, the record does not contain a copy of the Shelby County Charter. We further note, however, that the parties do not dispute that Shelby County has a charter form of government, or that in 1994 the Shelby County Charter was amended by referendum of the voters of Shelby County to include section 2.03(G). The parties also do not dispute that section 2.03(G) provides:

> No [*8] County Mayor nor any member of the Board of County Commissioners shall be eligible to be elected to or hold the office of County Mayor or County Commissioner for more than two consecutive four-year terms. Provided, however, if an individual is appointed to fill an unfilled term either for Mayor or County Commissioner, this term shall not be counted as part of the two consecutive elected terms.

Accordingly, we take judicial notice that Shelby County utilizes a charter form of government as authorized by *Tennessee Code Annotated § 5-1-201, et. seq.*, pursuant to the *Tennessee Constitution, Article VII, Section 1* ("Article VII"); that its Charter became effective on September 1, 1986; and that the Charter was amended in 1994 to include, *inter alia*, section 2.03(G). Because it is a governmental document whose existence is neither in doubt nor disputed and whose contents may be readily known by all, we additionally can and do take judicial notice of the Shelby County Charter in its entirety. [3]

> 3 *Brannon v. County of Shelby, 900 S.W.2d 30, 33 n.6 (Tenn. Ct. App. 1994)*(taking judicial notice of the Shelby County Charter); *See City of Memphis v. Int'l Bhd. of Elec. Workers Union, Local 1288, 545 S.W.2d 98, 101 (Tenn. 1976)*(taking judicial notice of private acts of the General Assembly authorizing joint city-county agencies in Shelby County).

[*9] **Validity of section 2.03(G) under the Tennessee Code**

Article VII, Section 1, of the Tennessee Constitution as amended in 1978 provides:

> The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property. Their qualifications and duties shall be prescribed by the General Assembly. Any officer shall be removed for malfeasance or neglect of duty as prescribed by the General Assembly.

> The legislative body shall be composed of representatives from districts in the county as drawn by the county legislative body pursuant to statutes enacted by the General Assembly. Districts shall be reapportioned at least every ten years based upon the most recent federal census. The legislative body shall not exceed twenty-five members, and no more than three representatives shall be elected from a district. Any county organized under the consolidated government provisions of Article XI, Section 9, of this Constitution shall be exempt from having a county executive and a county legislative body as described in this paragraph.
>
> The General Assembly may provide alternate [*10] forms of county government including the right to charter and the manner by which a referendum may be called. The new form of government shall replace the existing form if approved by a majority of the voters in the referendum.
>
> No officeholder's current term shall be diminished by the ratification of this article.

Tenn. Const. art. VII, § 1.

Under the Tennessee Constitution, the establishment of a county charter form of government is permissible only insofar as provided by the General Assembly. *County of Shelby v. McWherter, 936 S.W.2d 923, 934 (Tenn. Ct. App. 1996) perm. app. denied* (Tenn. Oct. 28, 1996). The General Assembly has provided for the right of counties to charter as an alternative form of government in Tennessee Code Annotated *§ 5-1-201, et. seq*. *Tennessee Code Annotated § 5-1-210* prescribes the contents of a county charter and provides:

> The proposed county charter shall provide:
>
> (1) For the creation of an alternative form of county government vested with any and all powers which counties are, or may hereafter be, authorized or required to exercise under the Constitution and [*11] general laws of the state of Tennessee, and any and all powers and duties of such county which are required or authorized by private acts effective on the date of ratification of such charter, as fully and completely as though the powers were specifically enumerated therein;
>
> (2) That such chartered county government shall be a public corporation, with perpetual succession, capable of suing and being sued, and capable of purchasing, receiving and holding property, real and personal, and of selling, leasing or disposing of the same to the extent as other counties;
>
> (3) For a county legislative body, which shall be the legislative body of the county and shall be given all the authority and functions of the legislative body of the county being chartered, with such exceptions and with such additional authority as may be specified elsewhere in this part;
>
> (4) For the size, method of election, qualification for holding office, method of removal, and procedures of the county legislative body with such other provisions with respect to such body as are normally related to the organization, powers and duties of governing bodies in counties;
>
> (5) For the assignment of administrative and executive [*12] functions to officers of the county government, which officers may be given, subject to such limitations as may be deemed appropriate or necessary, all or any part of the administrative and executive functions possessed by the county being chartered and such additional powers and duties, not inconsistent with general law or the Constitution of Tennessee;
>
> (6) For the names or titles of the administrative and executive officers of the county government, their qualifications, compensation, method of selection, tenure, removal, replacement and such other provisions with respect to such officers, not inconsistent with general law, as may be deemed necessary or appropriate for the county government;
>
> (7) For such administrative departments, agencies, boards and commissions as may be necessary and appropriate to perform the functions of county government in an efficient and coordinated manner and for this purpose for the alteration or abolition of existing county offices, departments, boards, commissions, agencies and functions, except where oth-

erwise provided in this part or prohibited by the Constitution of Tennessee;

(8) For the maintenance and administration of an effective civil service [*13] system and of county employees' retirement and pension systems and the regulation of such systems; provided, that nothing in this part or in a charter adopted pursuant to this part shall impair or diminish the rights and privileges of the existing employees under civil service or in the existing county employees' retirement and pension systems. Nothing in this subdivision shall be construed to require any county to establish a civil service system or to establish and maintain its own retirement and pension system in the adoption of a charter form of county government;

(9) For the method and procedure by which such charter may subsequently be amended; provided, that no such amendment shall be effective until submitted to the qualified voters of the county and approved by a majority of those voters voting thereon;

(10) For such procedures, methods and steps as are determined to be necessary or appropriate to effectuate a transition from the existing county government to the chartered form of county government;

(11) Such terms and provisions as are contained in any private act with respect to any county owned utility supported by its own revenues and operated, administered and managed [*14] pursuant to such private act; provided, that such terms and provisions of the charter may subsequently be amended pursuant to subdivision (9); and

(12) That the duties of the constitutional county officers as prescribed by the general assembly shall not be diminished under a county charter form of government; provided, that such officers may be given additional duties under such charters.

Tenn. Code Ann. § 5-1-210(1998).

The Tennessee Code mandates that a county charter must provide for a legislative branch. *Tenn. Code Ann. § 5-1-210(3)*. Section 2.03(A) of the Charter provides that the Board of County Commissioners shall be the legislative branch of Shelby County. The Code also provides that a county charter shall provide for the "qualification for holding office . . . of the county legislative body . . . [.]" *Tenn. Code Ann. § 5-1-210(4)*. The trial court determined that the imposition of term limits is within the purview of "qualification" and that, accordingly, section 2.03(G) of the Charter did not violate or expand upon the express authority granted by the Code.

Appellants submit that [*15] the Code does not authorize the imposition of term limits. At oral argument, Appellants particularly emphasized their position that term limits are not a "qualification" as anticipated by the *§ 5-1-210(4)*, but rather are an inherent part of the "terms" of constitutional officers prescribed by Article VII. They further submit that Article VII expressly rejects limitations on the number of terms a constitutional officer may serve. Appellants contend that, because Article VII provides that county legislative bodies shall be elected for "terms of four years," any limitation on the number of consecutive terms is constitutionally invalid. We disagree.

Article VII mandates that the enumerated constitutional officers shall be elected by the qualified voters of each county, and that they shall be elected to four-year terms. Contrary to Appellants' argument, the plural "terms" does not mandate that each officer shall be entitled to be elected to more than one term. Rather, the duration of each term to which each officer is elected shall be four years. A limitation on the number of terms an officer may serve consecutively does not alter the duration of the term for which s/he is elected.

[*16] A term is "[a] fixed and definite period of time[.]" Black's Law Dictionary 1470 (6th ed. 1990). A term of office is "the period during which elected officer or appointee is entitled to hold office, perform its functions, and enjoy its privileges and emoluments." *Id.* at 1471. Once elected, a constitutional officer is entitled to serve one term of four years and may be removed only "for malfeasance or neglect of duty as prescribed by the General Assembly." *Tenn. Const. art. VII, § 1*.

A qualification, on the other hand, is the possession by an individual of the qualities, properties, or circumstances, natural or adventitious, which are inherently or legally necessary to render him eligible to fill an office or to perform a public duty or function." Black's Law Dictionary 1241 (6th ed. 1990). Section 2.03(G) of the Charter provides that a person shall not be eligible to stand for election or to hold the office of County Mayor or County Commissioner for more than two consecutive

four-year terms. Thus, an individual who has been elected to two consecutive four-year terms possess an adventitious quality or circumstance which renders him/her ineligible to stand for a third consecutive [*17] term.

We agree with the trial court that term limits fall squarely within "qualification" as used in *§ 5-1-210(4)* of the Code. Under section 2.03(G), a mayor or member of the Board of Commissioners who has served two consecutive four-year terms is ineligible, or disqualified, from holding office for an additional consecutive term. Whether s/he will be entitled to serve even a second consecutive four-year term is determined by the will of the people; there is no entitlement to additional terms.

Tennessee Code Annotated § 5-1-210(4) expressly stipulates that the charter of a county operating under a charter form of government shall prescribe the qualifications for holding office in the legislative body. Although *§ 5-1-210* does not expressly authorize that charters may alter the qualifications prescribed by the General Assembly for traditional Article VII forms of government, such authority is implied by a plain reading and liberal construction of the provision. *See Southern Constructors, Inc. v. Loudon County Bd. of Educ., 58 S.W.3d 706, 710-713 (Tenn. 2001)*(holding: the General Assembly's grant to a local authority of comprehensive governmental [*18] power that neither enumerates the powers nor expressly limits the scope of authority, such as the comprehensive grant of power seen in the charter provisions contained in *Tennessee Code Annotated § 5-1-201, et. seq*., will be liberally construed.) Accordingly, section 2.03(G) of the Charter does not violate *Tennessee Code Annotated § 5-1-210*.

CONSTITUTIONALITY OF *TENNESSEE CODE ANNOTATED § 5-1-210(4)*

We next turn to whether term limits as prescribed by section 2.03(G) and authorized by the express provisions of *Tennessee Code Annotated § 5-1-210(4)* are constitutionally invalid. Appellants contend that section 2.03(G) violates Article VII for two reasons. First, they contend that the members of the Board of Commissioners are constitutional officers and that because term limits are an element of "terms" as utilized in the first sentence of Article VII, Article VII provides a blanket prohibition on term limits. Accordingly, they assert that even the General Assembly may not impose term limits on constitutional officers. Second, Appellants contend that, assuming term limits [*19] fall within the purview of "qualification" and are not constitutionally invalid *per se*, under the first paragraph of Article VII, only the General Assembly may prescribe the qualifications of constitutional officers. They contend, therefore, that *§ 5-1-210(4)* unconstitutionally delegates the authority to prescribe the qualifications of constitutionally mandated officers.

The County, on the other hand, asserts that the Charter may limit the terms of the County Commissioners because the Commissioners are not the constitutional officers enumerated in the first paragraph of Article VII. The County argues that, because the third paragraph of Article VII provides for the creation of alternate forms of county government, county governments operating under such alternate forms are not bound by the provisions and limitations of the preceding portions of Article VII. The County submits that under the broad authority given to the General Assembly to provide for alternate forms of county government, the General Assembly may delegate the power to prescribe the qualifications for member of the county legislative body to the alternate county governments.

The County's argument, in summation, [*20] is that paragraph three of Article VII is a stand-alone provision. The County accordingly asserts that the preceding paragraphs of Article VII are inapplicable where a county government operates under an "alternate form" of government pursuant to a statute of the General Assembly. The County alternatively submits that, even if the members of the Shelby County Board of Commissioners are constitutional officers under Article VII, section 2.03(G) of the Charter is not invalid because it does not reduce the term of any constitutional officer.

As noted above, we reject Appellants' assertion that term limits are antithetical to the constitutional mandate that constitutional officers must be elected to four-year terms, or that this mandate requires eligibility to an unlimited number of terms. The imposition of term limits renders some otherwise qualified candidates ineligible, or unqualified.

Appellants also devote considerable attention to the Journal of the Debates of the Constitutional Convention of 1977 and to opinions of the Attorney General in support of their contention that, under Article VII, term limits, however categorized, are unconstitutional *per se*. However, whether Article [*21] VII provides a blanket prohibition against term limits, including term limits which might be imposed by the General Assembly acting within its constitutional authority to prescribe the qualifications of constitutional officers, is not properly before this Court.

It is well settled that "a justiciable controversy . . . between persons with adverse interests" must exist to maintain a declaratory judgment action. *Parks v. Alexander, 608 S.W.2d 881, 891-92 (Tenn. Ct. App. 1980) perm. app. denied* (Tenn. Dec. 1, 1980). No justiciable controversy exists where only a theoretical question is raised or where the existence of a controversy depends

upon future, hypothetical facts. *Id. at 892*. The courts have no jurisdiction to render advisory opinions based on events which may occur in the future. *Id.* Thus, whether the General Assembly may impose term limits on constitutional officers is not an issue properly before this Court in this case.

In light of our holding that term limits are an element of qualifications, two questions remain. First, whether paragraph three of Article VII can be construed as a stand-alone paragraph, such that the provisions [*22] of the preceding paragraphs are inapplicable to alternate forms of county government. Second, if paragraph three is not a stand-alone provision and if alternate forms of county government must include the officers enumerated in the first paragraph of Article VII, whether *Tennessee Code Annotated § 5-1-210(4)* impermissibly delegates authority to the Charter to prescribe the qualifications of the Shelby County Commissioners.

We accordingly turn to whether the members of the Shelby County Board of Commissioners are constitutional officers under *Article VII, Section 1, of the Tennessee Constitution*. The County relies on *Leech v. Wayne County, 588 S.W.2d 270 (Tenn. 1979)*, and *Tennessee ex rel. Maner v. Leech, 588 S.W.2d 534 (Tenn. 1979)*, for the proposition that the members of legislative bodies in counties operating under an alternate form of government are not the constitutional officers discussed in paragraph one of Article VII, officers whose qualifications shall be prescribed by the General Assembly. We agree with the County's argument that *Leech v. Wayne County* and *Maner v. Leech* affirm that various forms of county [*23] government are constitutionally permitted under Article VII. The Supreme Court has noted:

> It is evident that, in broad form, our Constitution now provides for three types of county government:
>
> a. Article VII government wherein the basic units of government are the county executive and the county legislative body.
>
> b. A consolidated form of government commonly known as Metropolitan or "Metro." See *Article XI, Section 9*, last paragraph. Any county having such a government is exempt from Article VII government.
>
> c. An alternate form of government either chartered or unchartered created by the General Assembly. Under this proviso the legislature is specifically authorized to create diverse forms of county government without regard to the general type established in Article VII.
>
> When the legislature authorizes any deviation from Article VII government its action must be ratified by the people in a referendum called for that purpose.

Tennessee ex rel. Maner v. Leech, 588 S.W.2d at 537 (footnote omitted). We disagree with the County, however, that *Maner v. Leech* stands for the proposition the members of the Board of Commissioners are [*24] not members of the legislative body discussed in Article VII, paragraph one, and that paragraph three must be read as a stand-alone provision. To so conclude would be tantamount to concluding the alternate forms of county government envisioned by paragraph three, forms which are neither defined nor limited in number, may eliminate the constitutional officers mandated by paragraph one of Article VII. [4]

> 4 The County asserts that the Charter could not eliminate the Board of Commissioners because *Tennessee Code Annotated § 5-1-210(3)* expressly mandates that a county charter shall provide for a county legislative body. This is true. However, we note that *§ 5-1-210* does not likewise provide for the other constitutional officers listed in Article VII. If, as the County asserts, paragraph three of Article VII is a stand-alone provision and alternate forms of county governments are not constitutionally required to include the officers listed in paragraph one, then, under the County's logic, charter county governments could dispense with, for example, the office of Sheriff, which is not expressly provided for in *§ 5-1-210*. We find such a result untenable.

[*25] That at least three forms of government are constitutionally permitted does not necessitate a conclusion that some of the forms may dispense with the constitutional officers mandated in the first sentence of Article VII. The third paragraph of Article VII, as amended in 1978, grants the General Assembly "very broad powers and discretion with respect to the *structure* of local governments[.]" *Leech v. Wayne County, 588 S.W.2d at 272* (emphasis added). Accordingly, "the constitution does not mandate a uniform *structure* of county governments across the state. It specifically authorizes legislation creating different forms of local *organization*." *Id.*(emphasis added).

Form, moreover, is the "antithesis of 'substance.'" Black's Law Dictionary 651 (6th ed. 1990). Form relates to the "legal or technical manner or order to be ob-

served." *Id.* Although the third paragraph of Article VII grants the General Assembly broad authority to provide for alternate forms or structures of county government, it does not eradicate the substantive requirements provided in the preceding portions of Article VII. The assertion that alternate forms of county government anticipates [*26] that these governmental structures may not include the constitutional officers named in the first sentence of the article is not supported by the language of Article VII or the case law.

The plain language of Article VII provides for at least three distinct county governmental structures. As the supreme court observed in *Maner v. Leech* and *Leech v. Wayne County*, Article VII provides for: traditional Article VII county governments; *Article XI, Section 9*, consolidated governments; and Article VII "alternate forms" of government, including charter governments. An examination of Article VII's treatment of the second form of government, which is distinctly and separately provided for in *Article XI, Section 9, of the Tennessee Constitution*, illustrates that, unless expressly excepted, each of the three forms of government must substantively include the constitutional officers designated in paragraph one.

The second paragraph of Article VII expressly exempts counties operating under an *Article XI, Section 9* home-rule consolidated form of government from having a county executive and county legislative body, two of the constitutional officers mandated in paragraph one. This express [*27] exemption necessarily implies that, unless otherwise provided in Article XI, the remaining constitutional officers must be included in an Article XI, home-rule form of county government. Any contrary construction would render the express exemption superfluous. The third paragraph of Article VII, however, contains no like exemption for counties operating under an alternate or charter form of government.

The proposition that county governments operating under a form of government other than the traditional form may eliminate the constitutional officers also is unsupported by the case law. In *Metropolitan Government of Nashville and Davidson County v. Poe, 215 Tenn. 53, 383 S.W.2d 265 (Tenn. 1964)*, the Tennessee Supreme Court considered this proposition in the context of the consolidated government of Nashville and Davidson County, which operates as a consolidated home-rule government under a metropolitan charter pursuant to *Article XI, Section 9 of the Tennessee Constitution*. In that case, the court upheld a charter provision transferring some duties of the county sheriff to the Nashville chief of police. *Metro. Gov't of Nashville and Davidson County, 383 S.W.2d at 273.* [*28] In so holding, the court noted that although the office of sheriff is a constitutional one, the duties of the sheriff are prescribed by the General Assembly by statute. *Id.* The court opined that, in light of the purpose of the consolidated form of government to "eliminate duplication and overlapping of duties and services by which economic savings to taxpayers will be realized," there was no "constitutional infirmity against" transferring a duty from the sheriff to the chief of police. *Id. at 276-77*.

The supreme court expressly rejected, however, the proposition that a charter government organized pursuant to *Article XI, Section 9*, could eliminate the constitutional office of sheriff. The court stated:

> *Article 7, Section 1 of the Constitution of Tennessee* provides that 'There shall be elected in each County, by the qualified voters therein, one Sheriff, one Trustee, one Register;' etc. In the *Constitution of 1796, Article 6, Section 1*, it was provided that 'There shall be appointed in each county, by the county Court, one sheriff, one coroner, one trustee', etc.
>
> In the Constitution of 1834, by *Article VII, Section 1*, it was provided that 'There shall be elected [*29] in each County, by the qualified voters therein, one Sheriff, one Trustee, one Register', etc.
>
> It is obvious that express provisions have been made in all three Constitutions adopted by the voters of Tennessee for the office of Sheriff, and any language that may have been employed in any prior decisions of this Court, and particularly in *Robinson v. Briley, supra, [374 S.W.2d 382, 213 Tenn. 418 (Tenn. 1963)]* from which it might be remotely concluded that we held the office of Sheriff or any other constitutional office could be or was abolished by the Charter was a mere inadvertence and not meant to be a holding of this Court.
>
> The only method by which the Constitution may be amended is set out in Article 11, *Section 3* of the Constitution itself.

Id. at 268.

Metropolitan Government of Nashville and Davidson County concerned the charter of a county operating under the second type of county government, the type recognized in paragraph two of *Article VII, Section 1* and organized pursuant to *Article XI, Section 9*. However, the

reasoning of the supreme court in that case is equally applicable here. Although it permits alternate forms of county governments other than and in [*30] addition to the traditional form and that formed pursuant to *Article XI, Section 9*, Article VII continues to expressly provide for certain constitutional officers. The pertinent part of Article VII currently provides: "The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property." *Tenn. Const. art. VII, § 1*. There is nothing in the case law to support the contention that an alternate structure of county government could eliminate the constitutional officers substantively required by *Article VII, Section 1 of the Tennessee Constitution*.

We also observe that *Tennessee Code Annotated § 5-1-210(12)* implicitly recognizes that paragraph three of Article VII is not a stand-alone provision, and that the constitutional officers named in paragraph one of Article VII may not be eliminated from county government. When the language of a statute is clear, we must utilize the plain, accepted meaning of the words used by the legislature to ascertain the statute's purpose and application. If the wording is ambiguous, we must look to the entire [*31] statutory scheme and at the legislative history to ascertain the Legislature's intent and purpose. We must construe statutes in their entirety, neither constricting nor expanding the legislature's intent. In so doing, we assume that the legislature chose the words of the statute purposely, and that the words chosen "convey some intent and have a meaning and a purpose" when considered within the context of the entire statute. *Eastman Chemical Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004)*(citations omitted).

Section 5-1-210(12) of the Tennessee Code mandates that a county charter must provide "that the duties of the constitutional county officers as prescribed by the general assembly shall not be diminished under a county charter form of government; provided, that such officers may be given additional duties under such charters." *Tenn. Code Ann. § 5-1-210(12)*(1998). A plain reading of this subsection compels a conclusion that county governments must include the *constitutional* officers whose statutorily defined duties may not be diminished by the charter. These constitutional officers are those prescribed by [*32] Article VII.

Finally, although we are neither persuaded by nor rely on it for our determination here, we note that Shelby County itself has recognized that its charter form of government represents a structural organization, and that its elected county officers include constitutional officers. The Introduction to the Charter states:

> The Charter contains a strong prohibitionary section which, among other things, prevents its use in any way to . . . diminish the duties of the elected *constitutional* officers of Shelby County. (Emphasis added.)
>
> . . . .
>
> It is appropriate that, after over 180 years of existence, the County replace the present *structure* of County Government, as it has evolved, with a totally responsive, responsible and modern *structure*. (Emphasis added.)

Additionally, section 2.02 of the Charter provides: "The Legislative Branch is vested with all other powers of the county not specifically, or by necessary implication, vested in some other official of the County by the Constitution or by statute not inconsistent with this Charter." Section 6.04, furthermore, provides: "The duties of the *constitutional* County officers as prescribed by the general [*33] assembly shall not be diminished under this Charter[.] (Emphasis added.)

There is nothing in the language of paragraph three of Article VII to indicate that it should be read as a stand-alone paragraph such that the provisions of the preceding paragraphs are inapplicable to alternate forms of government. Article VII contains neither an express nor implied provision that alternate forms of county government, forms which, unlike *Article XI, Section 9* consolidated home-rule governments, are entirely undefined, are exempt from having the constitutional county officers which have been prescribed by every Tennessee Constitution since 1796. Although the courts have not previously addressed whether the third type of county government, Article VII alternate-form government, must include the officers constitutionally mandated for traditional Article VII/type one and Article XI/type two forms of county government, that it may not is unsupported by a plain reading of Article VII and the reasoning of the supreme court in *Metropolitan Government of Nashville and Davidson County*. In the absence of an express exemption like that provided in paragraph two of Article VII for *Article XI, Section* [*34] *9* consolidated governments, this Court is loathe to disturb a historical Tennessee constitutional mandate.

Having concluded that alternate forms of county government must include the constitutional officers named in Article VII, we next turn to whether *Tennessee Code Annotated § 5-1-210(4)* unconstitutionally delegates the authority to prescribe the qualifications of constitutional officers. Appellants assert that it does. The

County, on the other hand, relies on *Southern Constructors, Inc. v. Loudon County Board of Education, 58 S.W.3d 706 (Tenn. 2001),* for the proposition that it does not. The County also asserts that, because paragraph three of Article VII is a stand-alone provision which does not vest the authority to prescribe the qualifications of elected officials of alternate forms of government in any particular entity, the General Assembly may delegate this authority to the alternate government.

As discussed above, we reject the County's argument that paragraph three of Article VII is a stand-alone paragraph. Accordingly, we reject the County's argument that, because paragraph three does not expressly state who shall prescribe [*35] the qualifications of the county officers in an alternate form of government, the General Assembly may delegate this authority to the Charter. We also reject the County's assertion that, assuming alternate forms of county government must include the officers named in paragraph one of Article VII, section 2.03(G) of the Charter is not unconstitutional because it does not diminish the duties of any constitutional officer. This assertion is irrelevant to whether the General Assembly constitutionally may delegate its Article VII authority to prescribe the qualifications of members of county legislative bodies.

We begin our analysis by noting that when considering the constitutionality of a statute, we start with the presumption that acts by the General Assembly are constitutional. *Osborn v. Marr, 127 S.W.3d 737, 741 (Tenn. 2004).* As the County asserts, and as we have noted above, *Southern Constructors* recognized that a general provision granting "comprehensive governmental power to the local authority without either enumerating the powers or expressly limiting the scope of authority . . . [will] be *liberally* construed." *Southern Constructors, 58 S.W.3d at 713* [*36] (citations omitted; emphasis in the original). As the *Southern Constructors* court further noted, *Article VII, Section 1* and *Tennessee Code Annotated §§ 5-1-201 to 5-1-214* are examples of a comprehensive grant of power. Thus, counties operating under a charter form of government are not "strictly limited to those powers otherwise granted by the General Assembly, and they possess broad authority for the regulation of their own local affairs." *Id.* We do not find this particularly helpful, however, where in *§ 5-1-210(4)* the General Assembly has *expressly* granted the authority to prescribe the qualifications of the members of the county legislative bodies to the local government. No liberal construction of the comprehensive grant contained in *§ 5-1-201, et. seq.,* is necessary.

Additionally, although paragraph three of Article VII vests broad authority in the General Assembly to structure county governments, we do not believe the supreme court's reasoning in *Southern Constructors* stands for the proposition the General Assembly may delegate its authority to prescribe the qualifications of the constitutional county officers. In *Southern Constructors* [*37] , the supreme court addressed whether a county school board had the authority to arbitrate a dispute with a contractor. The *Southern Constructors* court engaged in a lengthy analysis of the Dillon Rule, a judicially created rule of statutory construction under which courts construe statutes granting authority to local governments strictly and narrowly. *Id. at 710*. The court "retained Dillon's Rule, subject to its exceptions, as a rule of construction to determine the scope of local governmental authority." *Southern Constructors, Inc. v. Loudon County Bd. of Educ., 58 S.W.3d 706, 714 (Tenn. 2001)*. As noted above, the court recognized an exception where the General Assembly grants comprehensive power, such as that granted by *Tennessee Code Annotated §§ 5-1-201 to 5-1-214*, to a local authority. *Id. at 713*. Finding no "expressed intention by the General Assembly to confer general powers upon county boards of education or to have the expressed powers broadly construed," the court applied the Dillon Rule in *Southern Constructors*. *Id. at 715*. Nevertheless, the court concluded that the power [*38] of the school board to arbitrate its dispute with Southern Constructors was fairly implied by the express powers to contract provided by *Tennessee Code Annotated § 49-2-203*. *Id. at 716*.

In examining the circumstances under which Dillon's Rule may not apply, the *Southern Constructors* court addressed the authority of the General Assembly to delegate its powers to other entities. The court noted that the General Assembly may delegate its authority under two circumstances: "when the Constitution itself authorizes the delegation and when the delegation is 'sanctioned by immemorial usage originating anterior to the Constitution and continuing unquestioned thereunder.'" *Id. at 712 n.3* (quoting *Kee v. Parks, 153 Tenn. 306, 283 S.W. 751, 753 (1926)*(quoting *Wright v. Cunningham, 115 Tenn. 445, 91 S.W. 293, 297-98)*). In the case now before us, there can be no argument that the General Assembly's delegation of authority to charter county governments found in *Tennessee Code Annotated 5-1-210(4)* is sanctioned by "immemorial usage." Thus, we turn to whether the constitution [*39] itself authorizes the General Assembly to delegate its authority to prescribe the qualifications of the constitutional officers to the Charter.

Article VII provides, "their qualifications and duties *shall* be prescribed by the General Assembly." *Tenn. Const. art. VII, § 1* (emphasis added). The General Assembly has prescribed the qualifications for the members of county legislative bodies in *Tennessee Code Annotated § 5-5-102*. When used in the constitution, the word "shall" generally is construed as being mandatory rather

than directive. *West Tenn. Motor Exp., Inc. v. Tennessee Pub. Serv. Comm'n, 514 S.W.2d 742, 746 (Tenn. 1974)*. In order to be valid, legislation must comply with mandatory provisions of the constitution. *State v. Hailey, 505 S.W.2d 712, 714 (Tenn. 1974)*. We find nothing in the language of Article VII that would support the proposition that the General Assembly's duty to prescribe the qualifications of constitutional officers is directive or permissive and not mandatory, or that the General Assembly may delegate this authority.

The supreme court's analysis of the General Assembly's authority to delegate [*40] its *Tennessee Constitution Article II, Section 3* legislative authority is applicable here. The supreme court has opined that, although the General Assembly may delegate to an administrative agency the power to implement the policies expressed by a particular statute, it may not delegate authority that is "purely legislative." *Gallaher v. Elam, 104 S.W.3d 455, 464 (Tenn. 2003)*(citations omitted). In delegating the power to implement law, moreover, the General Assembly must do so in a statute that "contains sufficient standards or guidelines to enable both the agency and the courts to determine if the agency is carrying out the legislature's intent." *Id.* (quoting *Bean v. McWherter, 953 S.W.2d 197, 199 (Tenn. 1997)*). Thus, the General Assembly may not delegate its Article II constitutional authority to make law, but only the sufficiently defined power to facilitate implementation of the law as intended. The Attorney General of Tennessee, moreover, also has opined that the General Assembly may not delegate its duty to prescribe the qualifications of constitutional officers. Tenn. Op. Atty. Gen. No. 02-037, 2002 WL 531163 (Tenn. A.G.). [*41] There is simply no support in either the Tennessee Constitution or the case law for the proposition that the General Assembly may delegate its Article VII authority to prescribe the qualifications of members of a county legislative body.

Insofar as it permits the qualifications of the constitutional officers to be prescribed by a county charter, *Tennessee Code Annotated § 5-1-210(4)* is unconstitutional. In accordance with *Tennessee Code Annotated § 1-3-110*, [5] we may elide unconstitutional portions of a statute and leave the remainder intact where we conclude that the General Assembly would have enacted the statute with the unconstitutional provision omitted. *Tennessee Baptist Children's Homes, Inc. v. Swanson (In re Swanson), 2 S.W.3d 180, 189 (Tenn. 1999)*. Accordingly, we elide the phrase "qualifications for holding office" from *Tennessee Code Annotated 5-1-210(4)*.

5 *Tennessee Code Annotated § 1-3-110* provides:

> It is hereby declared that the sections, clauses, sentences and parts of the Tennessee Code are severable, are not matters of mutual essential inducement, and any of them shall be exscinded if the code would otherwise be unconstitutional or ineffective. If any one (1) or more sections, clauses, sentences or parts shall for any reason be questioned in any court, and shall be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part in any one (1) or more instances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance.
>
> *Tenn. Code Ann. § 1-3-110* (2003).

[*42] **CONCLUSION**

The power to alter or amend the Constitution of Tennessee belongs not to the General Assembly, but to the people. *Illustration Design Group, Inc. v. McCanless, 224 Tenn. 284, 454 S.W.2d 115, 118 (Tenn. 1970)*. The judicial branch of government, moreover, has a duty to determine the substantive constitutionality of statutes, ordinances, and like measures. *City of Memphis v. Shelby County Election Com'n, 146 S.W.3d 531, 536 (Tenn. 2004)*. In so doing, it may not amend the constitution. The Tennessee Constitution may be amended only as provided in *Article XI, Section 3* of the constitution itself. "A change effected in any other way is revolutionary, and lies wholly outside the domain of law." *Derryberry v. State Bd. of Election Commissioners, 150 Tenn. 525, 266 S.W. 102, 105 (Tenn. 1924)*(citations omitted).

Article VII, Section 1 of the Tennessee Constitution stipulates that "the qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property." Although in 1978 the people of Tennessee amended the constitution [*43] and authorized the General Assembly to provide for alternate forms of county government, the people did not authorize the substantive elimination of the traditional

constitutional officers from county government. Paragraph three of *Article VII, Section 1*, as amended, therefore, cannot be read as a stand-alone provision in the absence of language which excepts it from the remainder of the section. In the absence of language which excerpts it from the remainder of the Article, to construe paragraph three of *Article VII, Section 1* as a stand-alone provision is inconsistent with the wording of the Article in its entirety. Thus, the members of Shelby County's legislative body, the Shelby County Board of Commissioners, like the Sheriff and the other Article VII officers, are constitutional officers.

The dissent asserts that this conclusion is "somewhat ludicrous" because it "says that the County can have a new form of government but it is controlled by the old form of government that the new form replaces." We respectfully disagree with the dissent that our holding compels such a reading of *Article VII, Section 1*. As noted above, paragraph three permits the General Assembly to provide for [*44] an unlimited number of "forms" of county government upon approval by a majority of the voters in a referendum, and it permits the General Assembly to provide for the manner by which such a referendum may be called. There is noting in the wording of paragraph three, however, that indicates that this new "form" may be so distinct as to eliminate the constitutional officers specifically mandated by paragraph one, and there is nothing in the language of paragraph one to indicate that paragraph one does not apply to the remainder of *Section 1*. That the constitution requires the inclusion of a legislative body, a county executive, a sheriff, a trustee, a register, a county clerk, and an assessor of property does not stand for the proposition that an alternate form of government is "controlled" by the old form. It simply requires that the new form include a legislative body of some type and six specific officers. We cannot agree with the dissent that this requirement "controls" the form that an alternate government might take. Indeed, the duties and qualifications of these officers within the alternate form, and the remainder of the officers and employees, structure, operation, and method [*45] of amendment of an alternate form are entirely uncontrolled by the very limited mandate of paragraph one.

As the dissent agrees, the imposition of term limits by the Shelby County Charter falls within the penumbra of "qualifications" as utilized in *Article VII, Section 1 of the Tennessee Constitution* and *Tennessee Code Annotated § 5-1-210(4)*. Without opining on whether the General Assembly may impose term limits on members of the Shelby County Board of Commissioners, we hold that *Tennessee Code Annotated § 5-1-210(4)* expressly but unconstitutionally delegates the General Assembly's *Article VII, Section 1* authority to prescribe the qualifications of members of the county legislative body to counties operating under a charter form of government. We accordingly elide the phrase "qualifications for holding office" from *Tennessee Code Annotated 5-1-210(4)*.

HOLDING

In light of the foregoing, the judgment of the trial court awarding summary judgment to Shelby County is vacated. We award summary judgment to Plaintiffs/Appellants. Accordingly, Shelby County is enjoined from enforcing section 2.03(G) of [*46] the Shelby County Charter. Costs of this Appeal are taxed to the Appellees, County of Shelby, Shelby County Election Commission, Gregory M. Duckett, Richard L. Holden, Nancye E. Hines, O.C. Pleasant, Jr., and Maura Black Sullivan.

DAVID R. FARMER, JUDGE

DISSENT BY: W. FRANK CRAWFORD

DISSENT

DISSENT

CRAWFORD, P.J., W.S.

I must respectfully dissent from the majority Opinion. The issue presented for review, as stated by the Appellants is:

> Whether the Chancery Court correctly held that County Charter, Article II, § 2.03(g)(the "Charter" and the "Amendment"), which provides that no County Mayor or County Commissioner is eligible to be elected to or to hold office for more than two consecutive four-year terms, is valid in accordance with the third paragraph of *Tennessee Constitution, Article VII, Section 1* and *Tenn. Code Ann. §§ 5-1-201, et seq.*

The majority correctly determines that the term limits provided for in the Shelby County Charter relate to the qualifications of the candidate. It is undisputed that Shelby County uses a charter-form of government as authorized by *T.C.A. § 5-1-201 et seq.*, which, in [*47] turn, is authorized by the *Tenn. Const. art. VII, § 1*. The crux of the dispute is whether the enabling legislation, in particular *T.C.A. § 5-1-210 (4)*, is unconstitutional by virtue of *Tenn. Const. art. VII, § 1*, as amended in 1978, which provides:

> **Sec. 1. County government - Elected officers - Legislative body - Alternate forms of government. -** The qualified voters of each county shall elect for terms of four years a legislative body, a county executive, a Sheriff, a Trustee, a Register, a County Clerk and an Assessor of Property. Their qualifications and duties shall be prescribed by the General Assembly. Any officer shall be removed for malfeasance or neglect of duty as prescribed by the General Assembly.
>
> The legislative body shall be composed of representatives from districts in the county as drawn by the county legislative body pursuant to statutes enacted by the General Assembly. Districts shall be reapportioned at least every ten years based upon the most recent federal census. The legislative body shall not exceed twenty-five members, and no more than three representatives shall be elected from a district. Any county organized under [*48] the consolidated government provisions of Article XI, Section 9, of this Constitution shall be exempt from having a county executive and a county legislative body as described in this paragraph.
>
> The General Assembly may provide alternate forms of county government including the right to charter and the manner by which a referendum may be called. The new form of government shall replace the existing form if approved by a majority of the voters in the referendum.

The majority determined that although the third paragraph of the constitutional provision allows the legislature to provide alternate forms of County government, any such alternate form of County government must conform to the requirements of the first paragraph of *Tenn. Const. art. VII, § 1*. The majority holds that the provision of the enabling statute permitting the County charter to determine qualifications of the legislative body is unconstitutional. I do not so interpret the constitutional provision and the legislative enactment.

In dealing with questions of constitutionality of a statute enacted by a legislature, we must be ever mindful of the presumption of constitutionality, which has been embedded in our law [*49] from time immemorial. In ***State ex rel., Maner v. Leech,*** *588 S.W.2d 534 (Tenn. 1979)*, the Court said:

> It is the duty of this constitutional court of last resort to resolve every reasonable doubt in favor of the constitutionality of a legislative enactment, ***Blankenship v. Old Republic Insurance Co.***, *539 S.W.2d 23 (Tenn. 1976)*; indeed there is a strong presumption in favor of their constitutionality. ***Bozeman v. Barker***, *571 S.W.2d 279 (Tenn. 1978)*. This thrusts upon those who attack a statute a heavy burden. ***West v. Tennessee Housing Agency***, *512 S.W.2d 275 (Tenn. 1974)*.
>
> It has been said that statutes must be construed "with the saving grace of common sense." Our courts have repeatedly held that absurdities should be avoided, ***Roberts v. Cahill Forge & Foundry Co.***, *181 Tenn. 688, 184 S.W.2d 29 (1944)*; that the courts should not place upon a statute a construction which would work to the prejudice of the public interest, ***Burns v. Duncan***, *23 Tenn. App. 374, 133 S.W.2d 1000 (1939)*, and a construction which impairs, frustrates or defeats the object of [*50] a statute should be avoided, ***First National Bank v. McCanless***, *186 Tenn. 1, 207 S.W.2d 1007 (1948)*. These holdings are analogous to the instant case.

Id. *at 540*.

The ***Maner*** Court also acknowledged the significant change that the 1978 amendment to the Constitution made as it relates to local government. The Court said:

> It is evident that, in broad form, our Constitution now provides for three types of county government:
>
> a. Article VII government wherein the basic units of government are the county executive and the county legislative body.
>
> b. A consolidated form of government commonly known as Metropolitan or "Metro." *See Article XI, Section 9*, last paragraph. Any county having such a government is exempt from Article VII government.

> c. An alternate form of government - either chartered or unchartered - created by the General Assembly. Under this proviso the legislature is specifically authorized to create diverse forms of county government without regard to the general type established in Article VII.
>
> When the legislature authorizes any deviation from Article VII government its action must be ratified [*51] by the people in a referendum called for that purpose.

Id. *at 537.*

Our Supreme Court also noted, in ***Leech v. Wayne County****, 588 S.W.2d 270 (Tenn. 1979)*, the sweeping change that was made by the Constitutional amendment concerning local government. The Court said:

> The General Assembly has very broad powers and discretion with respect to the structure of local governments, including some special authority which was added in Article VII of the state constitution, as revised in 1978. That Article, in part, provides:
>
> > "The General Assembly *may provide alternate forms of county government* including the right to charter and the manner by which a referendum may be called. The new form of government shall replace the existing form if approved by a majority of the voters in the referendum."

Id. *at 272* (emphasis in original).

The Constitution quite explicitly authorizes, in the third paragraph of *Tenn. Const. art. VII, § 1*, the establishment of an alternate form of government which "shall replace the existing form if approved by a majority of voters in the referendum." ***Id.***

"Alternate" is defined [*52] as "a choice between two or among more than two objects or courses." "Alternative" is also defined as "offering a choice of two or more things; offering for choice a second thing or proposition or other things or propositions." *Webster's Third New International Dictionary*, p. 63 (Merriam-Webster, Inc. 1993).

The Constitutional provision is quite clear that the alternate form of County government as chosen shall replace the existing form of government, if it is so approved by the voters, and there can be little argument that "replaces" means to put in place of or to substitute for what was in existence.

The legislature enacted *T.C.A. § 5-1-201 et seq.* with full knowledge of the constitutional provision in *Tenn. Const. art. VII, § 1*. *T.C.A. § 5-1-203* provides:

> **Authority to adopt charter form**. - (a) Each county in this state may adopt a charter form of government as provided in this part.
>
> (b) Such charter when complete shall result in the creation and establishment of an alternate form of county government to perform all the governmental and corporate functions previously performed by the county.
>
> (c) Such [*53] charter form of government shall replace the existing form if approved by a majority of the voters in a referendum.

The legislature then, in great detail, provided for the charter commission and the submission of a charter to referendum of the electorate. *T.C.A. 5-1-210* provides for the charter content and states in pertinent part:

> **Charter contents**. - The proposed county charter shall provide: (1) For the creation of an alternative form of county government vested with any and all powers that counties are, or may hereafter be, authorized or required to exercise under the Constitution and general laws of the state of Tennessee, and any and all powers and duties of such county that are required or authorized by private acts effective on the date of ratification of such charter, as fully and completely as though

> the powers were specifically enumerated therein;
>
> (2) That such chartered county government shall be a public corporation, with perpetual succession, capable of suing and being sued, and capable of purchasing, receiving and holding property, real and personal, and of selling, leasing or disposing of the same to the extent as other [*54] counties;
>
> (3) For a county legislative body, which shall be the legislative body of the county and shall be given all the authority and functions of the legislative body of the county being chartered, with such exceptions and with such additional authority as may be specified elsewhere in this part;
>
> (4) For the size, method of election, qualification for holding office, method of removal, and procedures of the county legislative body with such other provisions with respect to such body as are normally related to the organization, powers and duties of governing bodies in counties; . . .

The majority states that there is nothing in the language of paragraph three of Tenn. Const. art. VII to indicate that paragraph three should be read as a stand-alone paragraph. I must disagree with such a reading of the provisions. Paragraph three specifically provides that any new form of government to replace the existing form must be approved by a majority of voters by referendum. The third paragraph of *Tenn. Const. art. VII, § 1* means what it says when it provides for a new form of government when replaced by a majority of the voters. It is somewhat ludicrous to say that the County [*55] can have a new form of government, but it is controlled by the old form of government that the new form replaces. We should not overlook the fact that the constitutional provision is quite explicit that there must be approval by a majority of the voters and this, in turn, is referenced by *Tenn. Const. art. I, § 1*, which provides:

> **All power inherent in the people - Government under their control. -** That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper.

Our Supreme Court recognized that significant change could be made under the third paragraph of *Tenn. Const. art. VII, § 1*. In ***Southern Contractors, Inc. v. Loudon Cnty. Bd. of Education***, *58 S.W.3d 706 (Tenn. 2001)*, the Court was commenting about the theory of "Dillon's Rule," which viewed local governments as having narrowly defined powers under the state constitution. In so doing, our Supreme Court stated:

> As [*56] an important corollary to this principle, where the General Assembly grants comprehensive governmental power to the local authority without either enumerating the powers or expressly limiting the scope of the authority, that "general provision [will] be ***liberally*** construed." *See* ***Linck***, *80 Tenn. (12 Lea) 499 at 508* (emphasis in original). One example of a comprehensive grant of power may be seen in the charter government provisions for counties authorized by *Article VII, section 1 of the Tennessee Constitution* and *Tennessee Code Annotated sections 5-1-201 to 5-1-214*. Under a charter form of government, counties are authorized to "pass ordinances relating to purely county affairs," subject only to the exceptions that these ordinances "shall not be opposed to the general laws and shall not interfere with the local affairs of any municipality within the limit of such county." Counties organized under charter government, therefore, are not strictly limited to those powers otherwise granted by the General Assembly, and they possess broad authority for the regulation of their own local affairs. Consequently, when the issue concerns [*57] the scope of a general grant of power such as this, Dillon's Rule cannot be applied to narrowly limit the exercise of that power by a local authority.

Id. *at 713*.

Significantly, the third paragraph of *Tenn. Const. art. VII, § 1* does not contain any prohibition on the County being authorized to set the qualification for the legislative body. To the contrary, *Tenn. Const. art. VII, §*

1 grants a broad and sweeping power to the County to replace the existing government in favor of an alternate form of government, in which the new government can set the qualifications of its legislative body. This interpretation is especially true in light of the fact that the constitutional provision requires the affirmative vote of the people for such replacement government. This is in keeping with *Tenn. Const. art. I, § 1* providing that "all power is inherent in the people." I feel that the majority has overlooked the duty of this Court in failing to reconcile and give meaning to the provisions of the Constitution and the statute enacted by the legislature in furtherance thereof. I would find that *T.C.A. § 5-1-210(4)* is not unconstitutional.

Under the [*58] constitutional provision in question and the statute enacted by the legislature in furtherance of the constitutional provision, I believe the trial court correctly ruled that summary judgment should be granted for the County, and I would affirm the chancery court.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.

EVELYN NYE v. BAYER CROPSCIENCE, INC., ET AL.

No. E2008-01596-SC-R11-CV

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

2011 Tenn. LEXIS 486

September 2, 2010, Session
June 7, 2011, Filed

SUBSEQUENT HISTORY: As Corrected June 15, 2011.

PRIOR HISTORY: [*1]

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Affirmed; Case Remanded. Appeal by Permission from the Court of Appeals, Eastern Section. Circuit Court for Hamilton County. No. 06C760. W. Neil Thomas, III, Judge.

Nye v. Bayer Cropscience, Inc., 2009 Tenn. App. LEXIS 697 (Tenn. Ct. App., Oct. 14, 2009)

DISPOSITION: Judgment of the Court of Appeals Affirmed; Case Remanded.

CORE TERMS: manufacturer, intermediary, seller, service of process, warning, asbestos, asbestos-containing, consumer, user, strict liability, failure to warn, exposure, automatic stay, mesothelioma, sophisticated, naptha, summary judgment, duty to warn, patient, distributors', purchaser's, confirmed, jury instructions, sole cause, plan of reorganization, pharmaceutical, commencement, confirmation, insolvent, exposed

COUNSEL: Hugh B. Bright, Jr., Michael J. King, and Latisha J. Stubblefield, Knoxville, Tennessee, for the appellant, National Service Industries, Inc. f/k/a/ North Brothers, Inc.

Jimmy F. Rodgers, Jr., Chattanooga, Tennessee, and John E. ("Rett") Guerry, III, and Benjamin D. Cunningham, Mt. Pleasant, South Carolina, for the appellee, Evelyn Nye.

JUDGES: SHARON G. LEE, J., delivered the opinion of the Court, in which CORNELIA A. CLARK, C.J., and GARY R. WADE, J., joined. JANICE M. HOLDER, J., filed a separate opinion, concurring in part and dissenting in part, in which WILLIAM C. KOCH, JR., J. joined.

OPINION BY: SHARON G. LEE

OPINION

In this products liability case, a widow sought compensation for the death of her husband from mesothelioma allegedly caused by exposure to asbestos at his workplace. She sued the company that sold products containing asbestos to her husband's employer. She based her claim on strict liability and alleged [*2] that the seller sold defective products and failed to warn her husband of the products' health risks. The jury found that the seller was at fault, but that her husband's employer was the sole cause of his injury and awarded her nothing. The widow appealed. The Court of Appeals reversed and remanded for a new trial based on erroneous jury instructions that more probably than not affected the judgment of the jury. On review, we hold that the seller was subject to suit in strict liability, pursuant to Tennessee Code Annotated section 29-28-106(b) (2000), because none of the products' manufacturers were subject to service of process. Further, we hold that the trial court erred by instructing the jury that the seller could not be held liable for failure to warn if the jury found that the consumer, identified as the employer, was already aware

of any danger in connection with the use of the products or if the employer had been given adequate warnings. This jury instruction was erroneous for two reasons. First, it applied the learned intermediary doctrine, which the courts of this state have limited to medical products and pharmaceuticals. Second, the jury instruction misidentified the consumer [*3] as the employer, when the consumer who was required to be warned was the employee, Mr. Nye. Because the error more probably than not affected the judgment of the jury, the judgment of the trial court is reversed and the cause is remanded for a new trial.

OPINION

Background

Hugh Todd Nye was diagnosed with malignant pleural mesothelioma in September of 2005. [1] He died from this disease on August 1, 2006. Mr. Nye's mesothelioma was allegedly caused by exposure to asbestos during the time he worked for DuPont at its Chattanooga, Tennessee, facility from 1948 to 1985. As an operator on DuPont's continuous polymerization line, and during the course of his employment, Mr. Nye was often exposed to dust arising from the removal of asbestos insulation from pipes in the areas where he worked.

> 1 Mesothelioma is a relatively rare cancer of the thin membranes lining the chest and abdomen. It is frequently observed among asbestos workers. Asbestos has been classified as a known human carcinogen by the U.S. Department of Health and Human Services, the Environmental Protection Agency, and the International Agency for Research on Cancer. Agency for Toxic Substances and Disease Registry, U.S. Dep't of Health [*4] & Human Servs., Toxicological Profile for Asbestos (2001), available at http://www.atsdr.cdc.gov/toxprofiles/tp6 1-p.pdf.

In May of 2006, Mr. Nye and his wife sued a number of defendants, including National Service Industries, Inc., a successor in interest to North Brothers, Inc. ("North Brothers"), seeking compensatory damages for injuries allegedly caused by Mr. Nye's exposure to asbestos-containing products at the DuPont facility. The Nyes asserted claims sounding in negligence, strict liability, and breach of warranty against numerous named manufacturers, sellers, and distributors of the asbestos-containing products.

In February of 2007, Mrs. Nye amended the complaint to allege Mr. Nye's death from mesothelioma on August 1, 2006. In addition to seeking damages for his death, she asserted that North Brothers [2] sold asbestos-containing products to DuPont that had been manufactured by Owens Corning Fiberglas Corporation ("Owens Corning"), Pittsburgh Corning Corporation ("Pittsburgh Corning"), Raybestos-Manhattan, Inc. ("Raybestos"), and Johns Manville Corporation ("Johns Manville"). In additional amended complaints, Mrs. Nye alleged that these manufacturers had been judicially declared [*5] insolvent and were not amenable to service of process.

> 2 Mrs. Nye also sued and made similar allegations as to Breeding Insulation Company, Inc. An order of settlement and compromise was later entered as to Breeding Insulation Company, Inc.

North Brothers filed a Tennessee Rule of Civil Procedure 56 motion for summary judgment. First, relying on Tennessee Code Annotated section 29-28-106(b), [3] North Brothers asserted that, as a non-manufacturing seller, it did not have a duty to warn with regard to the products it sold. Second, it asserted that Mr. Nye's employer, DuPont, was a "sophisticated purchaser," [4] and, as such, knew about the danger of the asbestos-containing products. North Brothers' failure to warn, therefore, was not the proximate cause of Mr. Nye's injuries. Next, North Brothers asserted that Mrs. Nye's strict liability claims failed as a matter of law because the manufacturers of the products that North Brothers sold to DuPont had not been judicially declared insolvent, as required by Tennessee Code Annotated section 29-28-106(b). Finally, North Brothers argued that Mrs. Nye's claims were barred by the four-year statute of repose under Tennessee Code Annotated section 28-3-202 [*6] (2000) and that her breach of warranty claim was barred by the statute of limitations under Tennessee Code Annotated section 47-2-725 (2001).

> 3 Tennessee Code Annotated section 29-28-106(b) provides as follows:
>
> > (b) No "product liability action," as defined in § 29-28-102(6), when based on the doctrine of strict liability in tort, shall be

> commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer unless the seller is also the manufacturer of the product or the manufacturer of the part thereof claimed to be defective, or unless the manufacturer of the product or part in question shall not be subject to service of process in the state of Tennessee or service cannot be secured by the long-arm statutes of Tennessee or unless such manufacturer has been judicially declared insolvent.

4 In its motion for summary judgment, North Brothers used the term "sophisticated user." In its brief to this Court, North Brothers noted that in its trial court pleadings, it used the term "sophisticated user" as synonymous with "learned intermediary" or "sophisticated purchaser." The sophisticated user [*7] doctrine focuses on the ultimate user or consumer of the product, whereas the learned intermediary or sophisticated purchaser doctrine focuses on the knowledgeable intermediary who intercedes between the supplier or manufacturer and the ultimate user. See 63A Am. Jur. 2d Products Liability § 1091 (2010). For clarity, we refer to the sophisticated purchaser doctrine in light of North Brothers' statement that it intended to assert that DuPont was a learned intermediary or sophisticated purchaser rather than a sophisticated user. The sophisticated user doctrine is not at issue in this appeal.

The trial court granted summary judgment to North Brothers on the breach of warranty claims based on the statute of limitations. The trial court granted a partial summary judgment to North Brothers based on the statute of repose for any sales occurring before June 30, 1969. The trial court determined there were disputed genuine issues of material fact as to the other grounds, and denied summary judgment. The trial court did not rule on whether a claim in strict liability could be asserted against North Brothers pursuant to Tennessee Code Annotated section 29-28-106(b).

Thereafter, both parties by motion [*8] [5] requested the trial court to decide the issue of whether North Brothers was subject to a strict liability suit based on Tennessee Code Annotated section 29-28-106(b) as a result of the pending Chapter 11 bankruptcies of Owens Corning, Pittsburgh Corning, Raybestos, and Johns Manville. The trial court ruled that the manufacturers were not amenable to service of process within the meaning of Tennessee Code Annotated section 29-28-106(b), and therefore, North Brothers was subject to suit as a non-manufacturing seller.

5 North Brothers filed a motion for reconsideration of its summary judgment motion requesting the trial court to address the question of whether North Brothers was subject to a strict liability suit, and Mrs. Nye filed motions in limine requesting the trial court to declare that these manufacturers were not amenable to service of process.

At the time of trial, all the named defendants had been dismissed except North Brothers, and the strict liability claims for sale of defective products and failure to warn were the only surviving claims. The trial court's jury charge included the following instructions:

> A manufacturer or a seller cannot be held liable for failure to warn [*9] if you find that the consumer, DuPont, was already aware of any danger in connection with the use of asbestos-containing products, or if you find that adequate warnings were given by manufacturers or sellers to DuPont.
>
> . . . .
>
> In addition, if you find that DuPont failed to provide a safe workplace for Hugh Todd Nye and that this failure was the sole cause of damage to him, then you have found DuPont was the sole cause of his injury, and you may not consider the fault of North Brothers or any other company supplying asbestos- containing materials to DuPont.

The jury found North Brothers was at fault, but that DuPont was the sole cause of Mrs. Nye's damages and

awarded her nothing. The trial court denied Mrs. Nye's motion for new trial, and she appealed. The Court of Appeals held that North Brothers could be held strictly liable as a non-manufacturing seller because the manufacturers whose products North Brothers sold were not amenable to service of process due to their bankruptcy proceedings. The Court of Appeals further ruled that the trial court committed harmful error in its instructions to the jury and reversed the jury's verdict and remanded for a new trial.

We granted North Brothers' [*10] application for permission to appeal and address two issues: 1) whether North Brothers, as a non-manufacturing seller, is subject to suit in strict liability pursuant to Tennessee Code Annotated section 29-28-106(b) and 2) whether the trial court committed harmful error in its instructions to the jury.

Analysis

North Brothers' Liability as a Seller

We begin our analysis of whether North Brothers, as a non-manufacturing seller, is subject to suit in strict liability pursuant to Tennessee Code Annotated section 29-28-106(b), with a brief recitation of the facts and a general discussion of the basis for the strict liability claims in this case.

Mr. Nye began working for DuPont at its Chattanooga plant in 1948 and, except for a brief period of military service, he worked there continuously until he retired in 1985. During this period, Mr. Nye worked on the plant's continuous polymerization line ("CP line"), a section of the plant involved in DuPont's production of yarn. As part of his job duties, Mr. Nye was required to conduct routine inspections of equipment located along the CP line. Often, when he was conducting these inspections, maintenance crews were in the same areas cutting and removing [*11] asbestos-containing insulation from pipes. Evidence was presented that this was an anticipated use of the insulation. In addition to inspecting equipment, Mr. Nye's job duties required him to sweep the floor and pick up insulation debris left after the maintenance crews had completed their work. Mr. Nye was frequently exposed to visible dust arising from the removal of the asbestos-containing insulation by work crews and from his own clean-up work. North Brothers sold asbestos-containing insulation products used in the CP line to DuPont. These products included products manufactured by Owens Corning, Pittsburgh Corning, Raybestos, and Johns Manville. There is no proof that either DuPont or North Brothers warned Mr. Nye of the health risks associated with exposure to the asbestos-containing products. North Brothers did not prepare any written warning for DuPont or any other customers regarding the health risks associated with the asbestos-containing products it sold, did not include any kind of warning to accompany those products describing such dangers to ultimate users of the products like Mr. Nye, and did not inquire as to whether DuPont was warning its employees of the products' [*12] dangers. Both DuPont and North Brothers had been aware of the health risks of asbestos since the 1960s. Expert evidence was presented that Mr. Nye's exposure to the asbestos-containing products sold by North Brothers was a contributing cause of his death from mesothelioma.

Mrs. Nye's suit named numerous defendant manufacturers and sellers, including North Brothers, and asserted negligence, strict liability, and breach of warranty claims against these defendants. By the time of trial, North Brothers was the sole remaining defendant, and only the claims in strict liability, based on the sale of allegedly defective products and failure to warn, were presented to the jury.

A commercial seller, such as North Brothers, may be liable in strict liability for physical harm caused to a consumer by a defective product. Restatement (Second) of Torts § 402A (1965). [6] Further, a product liability action [7] may be brought against a manufacturer or seller on strict liability grounds, with no proof of negligence, if the product causing injury to person or property "is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller." Tenn. Code Ann. § 29-28-105(a) [*13] (2000); accord Owens v. Truckstops of Am., 915 S.W.2d 420, 431 (Tenn. 1996). Mrs. Nye alleges that the asbestos-containing products sold by North Brothers were "unsafe for normal or anticipatable handling and consumption," pursuant to Tennessee Code Annotated section 29-28-102(2), at the time of their manufacture, sale, and delivery and at the time of Mr. Nye's exposure. Mrs. Nye contends that the asbestos-containing products manufactured by Owens Corning, Pittsburgh Corning, Raybestos, and Johns Manville, and sold by North Brothers, possessed latent defects at the time of their manufacture, sale, and delivery and at the time of Mr. Nye's exposure.

6 Restatement (Second) of Torts section 402A provides as follows:

> Special Liability of Seller of Product for Physical Harm to User or Consumer
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition [*14] in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

7 Tennessee Code Annotated section 29-28-102(6) (2000) defines "product liability action" as

> all actions brought for on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. "Product liability action" includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other substantive legal theory in tort or contract whatsoever.

The other theory on which Mrs. Nye bases her strict liability claim is failure to warn. We noted in Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 541 (Tenn. 2008) [*15] that "Tennessee courts have long held that a manufacturer may be held strictly liable for failing to warn consumers of the dangers of a particular product at the time of sale" and, citing Tennessee Code Annotated section 29-28-102(6), that "[t]he General Assembly has also acknowledged that a failure to warn claim is a valid basis for a product liability action." Mrs. Nye argues that the defendants failed to warn Mr. Nye that the asbestos-containing products were harmful to his health, despite the fact that each defendant knew that the asbestos-containing products were dangerous and would be used without inspection for defects.

North Brothers contends that, as a seller, it cannot be held strictly liable. North Brothers relies on Tennessee Code Annotated section 29-28-106(b) and asserts that although the four manufacturers whose products it sold have sought protection under Chapter 11 of the United States Bankruptcy Code, this fact alone does not prove their insolvency. Further, North Brothers asserts none of the manufacturers have been judicially declared insolvent and all are subject to service of process in Tennessee. Accordingly, North Brothers argues, none of the statutory prerequisites [*16] to suit in strict liability have been satisfied.

As to the matter of insolvency, a debtor need not be insolvent to qualify for protection under Chapter 11 of the Bankruptcy Code. In re Mount Carbon Metro. Dist., 242 B.R. 18, 32 (Bankr. D. Colo. 1999); In re Johns-Manville Corp., 36 B.R. 727, 732 (Bankr. S.D.N.Y. 1984). Because there is no proof that any of the four manufacturers has been judicially declared insolvent, the insolvency statutory prerequisite has not been met.

We next consider whether Owens Corning, Pittsburgh Corning, Raybestos, or Johns Manville were "not subject to service of process" so as to trigger the provisions of section 29-28-106(b). Our interpretation of this statute is a question of law and as such, is reviewed de novo with no presumption of correctness. Chattanooga-Hamilton Cnty. Hosp. Auth. v. Bradley Cnty., 249 S.W.3d 361, 365 (Tenn. 2008).

The primary rule governing our construction of any statute is to ascertain and give effect to the legislature's intent. Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 309 (Tenn. 2008). To that end, we begin by examining the language of the statute. Curtis v. G.E. Capital Modular Space, 155 S.W.3d 877, 881 (Tenn. 2005). [*17] In our examination of statutory language, we must presume that the legislature intended that each word be given full effect. Lanier v. Rains, 229 S.W.3d 656, 661 (Tenn. 2007). When the language of a statute is ambiguous in that it is subject to varied interpretations producing contrary results, Walker, 249 S.W.3d at 309, we construe the statute's meaning by examining "the broader statutory scheme, the history of the legislation, or other sources." State v. Sherman, 266 S.W.3d 395, 401 (Tenn. 2008). However, when the import of a statute is unambiguous, we discern legislative intent "from the natural and ordinary meaning of the statutory language within the context of the entire statute without any forced or subtle construction that would extend or limit the statute's meaning." State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000); see also In re Adoption of A.M.H., 215 S.W.3d 793, 808 (Tenn. 2007) ("Where the statutory language is not ambiguous . . . the plain and ordinary meaning of the statute must be given effect."). We "presume that the legislature says in a statute what it means and means in a statute what it says there." Gleaves v. Checker Cab Transit Corp., 15 S.W.3d 799, 803 (Tenn. 2000) [*18] (quoting BellSouth Telecomms., Inc. v. Greer, 972 S.W.2d 663, 673 (Tenn. Ct. App. 1997)).

The statutory phrase "not subject to service of process" is unambiguous; therefore, we look to the plain and ordinary meaning of the statute. The phrase "subject to" is defined as "liable to receive; exposed (with to)." Webster's New World Dictionary of the English Language 1452 (1966). The word "service" is defined as "[t]he formal delivery of a writ, summons, or other legal process" and is "[a]lso termed *service of process*." Black's Law Dictionary 1372 (7th ed. 1999) (emphasis in original). Correspondingly, "process" is defined as "[a] summons or writ, esp. to appear or respond in court <service of process>." Id. at 1222. "Service of process," therefore, necessarily presumes the existence of an underlying lawsuit for which a summons or writ was issued. The plain and ordinary meaning of the phrase "not subject to service of process" means not exposed to or liable to receive a summons to appear in court on a underlying lawsuit. See Stafford v. Briggs, 444 U.S. 527, 553 n.5, 100 S. Ct. 774, 63 L. Ed. 2d 1 (1980) ("[A]s a [*19] general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant."); Griffin v. Roberts, No. M2002-01898-COA-R3-CV, 2003 Tenn. App. LEXIS 556, 2003 WL 21805299, at *2 (Tenn. Ct. App. Aug. 7, 2003). With this definition in mind, we look to see whether any of the manufacturers were subject to being served with a summons to appear in a pending lawsuit.

All of the manufacturers filed a petition under Chapter 11 of the federal Bankruptcy Code, codified at 11 U.S.C. §§ 101-1532 (2006 & Supp. 2010). [8] Upon the filing of the Chapter 11 petition, the automatic stay provision applied, 11 U.S.C. § 362(a), and each manufacturer was allowed to maintain its business operations while restructuring its debt obligations pursuant to a submitted plan of reorganization. See 11 U.S.C. §§ 1101-1174. The automatic stay provision, in pertinent part, provides that a petition operates as a stay of

> (1) *the commencement* or continuation, *including the issuance or employment of process, of a judicial*, administrative, or other *action or proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, *or to recover a claim against the debtor* [*20] that arose before the commencement of the case under this title.

11 U.S.C. § 362(a) (2006).

8 Owens Corning filed its bankruptcy petition on October 5, 2000; Pittsburgh Corning on April 16, 2000; Johns Manville on August 26, 1982; and Raybestos on March 10, 1989.

With narrowly defined exceptions, section 362 stays any action against the debtor or property belonging to the

debtor or the bankruptcy estate. In re Winpar Hospitality Chattanooga, LLC, 401 B.R. 289, 291 (Bankr. E.D. Tenn. 2009). The automatic stay, which "is one of the fundamental debtor protections provided by the bankruptcy laws," Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197 (6th Cir. 1983), serves "'to provide the debtor a 'breathing spell' from collection efforts and to shield individual creditors from the effects of a 'race to the courthouse,' thereby promoting the equal treatment of creditors.'" In re Webb Mtn, LLC, 414 B.R. 308, 335 (Bankr. E.D. Tenn. 2009) (quoting In re Printup, 264 B.R. 169, 173 (Bankr. E.D. Tenn. 2001)). "It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." Lynch, 710 F.2d at 1197. Consistent [*21] with its goal of insulating the debtor to provide financial stability, "[t]he automatic stay is designed to protect the debtor from judgments and the consequences thereof, such as the attachment of a judgment lien to the debtor's property." Kliefoth v. Fields, 828 S.W.2d 714, 716 (Mo. Ct. App. 1992).

The stay applies to the commencement of an action to recover a claim against a debtor that "arose *before* the commencement of the [bankruptcy] case." 11 U.S.C. § 362(a)(1) (2006) (emphasis added). Accordingly, we must determine when Mrs. Nye's claims arose relative to the filing of the four manufacturers' bankruptcy petitions.

A "claim" is defined by the Bankruptcy Code to include a "*right to payment*, whether or not such right is reduced to judgment . . . ." 11 U.S.C. § 101(5) (2006) (emphasis added). The phrase "right to payment" is not defined in the Bankruptcy Code, and courts have devised various tests to determine when right to payment arises with respect to a claim in bankruptcy. The bankruptcy court has exclusive jurisdiction to determine the nature of the claims and the extent of the automatic stay. Cf. Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 63 (6th Cir. 1983) (holding [*22] that the bankruptcy court has exclusive authority to grant relief from stay).

Owens Corning filed its bankruptcy petition in the District of Delaware on October 5, 2000. See In re Owens Corning, 419 F.3d 195, 202 (3d Cir. 2005). Pittsburgh Corning filed its bankruptcy petition in the Western District of Pennsylvania on April 16, 2000. See In re Pittsburgh Corning Corp., 417 B.R. 289, 295 (Bankr. W.D. Pa. 2006). When Mrs. Nye filed her complaint in 2006, the applicable test in the Third Circuit, which includes Delaware and Pennsylvania, was the test set forth in Avellino & Bienes v. M. Frenville Co., 744 F.2d 332 (3d Cir. 1984). This test provided that a claim arises when the cause of action accrues under state law. In "creeping disease" cases, such as asbestos-related injuries, Tennessee law provides that the cause of action accrues with diagnosis of the disease. See Wyatt v. ACandS, Inc.., 910 S.W.2d 851, 856-57 (Tenn. 1995). Therefore, under the Frenville test, Mrs. Nye's claim arose in 2005 *after* Owens Corning and Pittsburgh Corning filed for bankruptcy and therefore these manufacturers would not have been subject to the automatic stay. However, the Frenville test was overturned by [*23] the Third Circuit in Jeld-Wen, Inc. v. Van Brunt (In re Grossman's, Inc.), 607 F.3d 114 (3d Cir. 2010), which held that "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a 'right to payment' under the Bankruptcy Code." Id. at 125. The Third Circuit's decision to overrule Frenville was made in the face of what the court deemed to be well-reasoned "universal disapproval" of that decision, based on its apparent conflict with the Bankruptcy Code's expansive treatment of the term "claim." Id. at 121. [9] The plaintiff in Grossman's, who contracted mesothelioma allegedly due to exposure to an asbestos-containing product, asserted a claim against the product's seller. Her exposure to the asbestos-containing product occurred in 1977, years before the seller filed its Chapter 11 petition. The plaintiff's manifestation of symptoms, diagnosis of mesothelioma, and lawsuit occurred after the seller's plan of reorganization had been confirmed by the bankruptcy court. Under this newly adopted test, the plaintiff's claim in Grossman's was considered to have arisen before the petition and therefore was subject to the automatic [*24] stay.

9 Frenville has been "universally rejected," In re Andrews, 239 F.3d 708, 710, n.7 (5th Cir. 2001), and has been described by one court as "one of the most criticized and least followed precedents decided under the current Bankruptcy Code." In re Firearms Imp. and Exp. Corp., 131 B.R. 1009, 1015 (Bankr. S.D. Fla. 1991). In Grossman's, the Third Circuit noted that a liberal treatment of the term "claim" is dictated by Congressional intent, as evidenced by House Reports stating that the definition of "claim" at section 101(5) is the "'broadest possible definition [and it] contemplates that all legal obligations of the

> debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case . . . [and] permits the broadest possible relief in the bankruptcy court.'" Grossman's, 607 F.3d at 121 (quoting H.R.Rep. No. 95-595, at 309 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6266); see also Lawrence R. Ahern, III, & Darlene T. Marsh, Environmental Obligations in Bankruptcy, § 3:24 (2011).

Mrs. Nye's claim was pending and thus in the "pipeline" when the Grossman's test was adopted. The Grossman's test has been applied retroactively to pending cases. Wright v. Owens Corning, No. 09-1567, 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673 (W.D. Pa. March 21, 2011) [*25] [10] ; see also In re Rodriguez, 629 F.3d 136, 139 (3d Cir. 2010). Therefore, the pre-petition relationship test adopted in Grossman's is determinative as to when Mrs. Nye's claims arose against Owens Corning and Pittsburgh Corning. Applying the pre-petition relationship test to Mrs. Nye's claim, we conclude that her claim arose when her husband was exposed to the asbestos-containing products. Therefore, these manufacturers were not subject to service of process in Tennessee because Mrs. Nye's claims against these manufacturers arose before the filing of their bankruptcy cases.

> 10 In Wright, the plaintiff filed a putative class action by suing Owens Corning on November 24, 2009. The defendant argued that under the Frenville test, the claim was discharged in Owens Corning's bankruptcy. The federal district court noted that the Third Circuit had overturned Frenville and established in Grossman's a new test to determine when a claim exists for purposes of a bankruptcy proceeding. Even though the plaintiff's claim against Owens Corning was filed when the Frenville test was applicable law, the district court applied the Grossman's test retroactively, relying on the conclusion of the United [*26] States Supreme Court in Harper v. Virginia Dep't of Taxation., 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993), that "'a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law,' . . . and extended 'to other litigants whose cases were not final at the time of the [first] decision.'" Wright, 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673, at *9 (quoting Harper, 509 U.S. at 96). Even without the authority of Wright, we would have applied the Grossman's test retroactively for two primary reasons. First, the Frenville test was not sound law; its reasoning was flawed, and it was universally rejected by other courts. We see no reason to perpetuate bad law. While we have a strong commitment to stare decisis, "mindless obedience to the precept can confound the truth." Dupuis v. Hand, 814 S.W.2d 340, 346 (Tenn. 1991). The Grossman's test has a sound foundation and is a proper application of bankruptcy principles. Second, the rule of retroactivity stated by the U.S. Supreme Court in Harper clearly supports the application of Grossman's rather than Frenville in the instant matter.

We now shift our analysis to the other two manufacturers -- Raybestos and Johns [*27] Manville. The plans of reorganization for Raybestos and Johns Manville had been confirmed by the Bankruptcy Court before Mrs. Nye filed her complaint. [11] As a general matter, confirmation of the plan of reorganization ends the automatic stay, re-vests the property of the estate in the debtor, and, pursuant to 11 U.S.C. § 1141(d), [12] simultaneously discharges the debtor. In re Draggoo Elec. Co., 57 B.R. 916, 919 (Bankr. N.D. Ind. 1986). Once this occurs, the automatic stay provision is no longer effective and service of process against the debtor is not prohibited by section 362. Nevertheless, these manufacturers were still shielded from service of process in Tennessee courts under the terms of specific injunctions set forth in their confirmed plans of reorganization.

> 11 Johns Manville's plan was confirmed in December of 1986; and Raybestos' plan was confirmed in August of 2000.
>
> 12 Section 1141 under Chapter 11 of the Bankruptcy Code provides in pertinent part that "[e]xcept as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan . . . discharges the debtor from any debt that arose before the date of such confirmation. . . ." [*28] 11 U.S.C. § 1141(d)(1)(A) (2006 & Supp. 2010).

Johns Manville was the first of the two manufacturers to have its plan confirmed. Johns Manville's bankruptcy was precipitated, not by that

company's inability to meet its present debts, but by its anticipation of future asbestos-related tort causes of action by parties who had been exposed to Johns Manville's asbestos-containing products before it filed bankruptcy but who would not manifest symptoms of asbestos-related disease during the pendency of the bankruptcy proceedings. [13] Kane v. Johns-Manville Corp., 843 F.2d 636, 639 (2d Cir. 1988). Confirmation [*29] of a plan of reorganization generally discharges the debtor from pre-confirmation debts, 11 U.S.C. § 1141(d)(1), but discharge of a claim may be precluded on due process grounds if the claimant has not been given adequate notice that he or she has a claim in bankruptcy. See Grossman's, 607 F.3d at 125-26. This would apply to claimants whose injuries were not manifested as of the time of confirmation. Anticipating this due process problem, Johns Manville addressed it in its reorganization plan. Kane, 843 F.2d at 640. In an effort to satisfy the claims of all present and future asbestos exposure victims and allow Johns Manville to maximize its value as it continued its business operations, the confirmed plan of reorganization provided for the creation of a trust against which all such claimants could proceed to satisfy their claims through either settlement, mediation, arbitration, or tort litigation. Id. To ensure Johns Manville's protection from future massive personal injury lawsuits that could prevent its successful reorganization, the bankruptcy court issued a "channeling injunction" as a pre-condition to confirmation of the plan. Id. This channeling injunction provided that present [*30] and future asbestos claimants were prohibited from suing Johns Manville and could only proceed against the asbestos claims trust. Id.

> 13 In the years following Johns Manville's bankruptcy, there was a steady increase in the number of actual and potential claimants. As of January 31, 1996, approximately 285,600 claims had been filed with estimates of the total projected number of claims that would eventually be filed as high as 600,000 and with estimates for total claims liability in excess of 22 billion dollars. Frank J. Macchiarola, The Manville Personal Injury Settlement Trust: Lessons for the Future, 17 Cardozo L. Rev. 583, 598 (1996). A Rand Corporation report published last year reflects that as of September 30, 2009, 817,264 claims had been filed. Lloyd Dixon, Geoffrey McGovern & Amy Coombe, Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts, 128 n. 6 (2010). http://www.rand.org/publications.html.

Congress, inspired by the strategy employed by the architects of Johns Manville's reorganization, enacted section 524(g) of the Bankruptcy Code as part of the Bankruptcy Reform Act of 1994 to address the asbestos claims problem [*31] on a national basis. See Grossman's, 607 F.3d at 126. Section 524(g) provides that if the following pre-conditions have been met, the bankruptcy court may issue an injunction to supplement the injunctive effect of discharge:

> 1) a trust is established which assumes the present and future asbestos personal injury and property damage liabilities of the debtor;
> 2) the trust is funded in whole or part by securities of the debtor and obligations of the debtor to make future payments, including dividends;
> 3) the trust will own, or by exercise of rights granted under the plan will be entitled to own, a majority of the voting stock of the debtor, parent or subsidiary, if specified contingencies occur;
> 4) the trust will pay the present and future asbestos claims against the debtor;
> 5) the present and future claims will all be valued and paid in substantially the same manner;
> 6) the plan is approved by at least 75 percent of all asbestos claimants who vote; and
> 7) a futures representative is appointed.

11 U.S.C. § 524(g)(2)(B) (2006). If issued, the channeling injunction would enjoin entities from taking legal action for the purposes of directly or indirectly collecting, recovering, or receiving payment [*32] or recovery with respect to any asbestos-related claim or demand that, under the confirmed plan of reorganization, is to be paid in whole or in part by the asbestos personal injury trust established as a pre-condition to the injunction.

The confirmed Chapter 11 plans of reorganization of Johns Manville and Raybestos contained channeling injunctions. Therefore, suit by Mrs. Nye against these manufacturers was prohibited and for that reason, neither

of them was subject to service of process in the courts of this state at the time the Nye complaint was filed. [14]

> 14 Tennessee Code Annotated section 29-28-106(b) was enacted in 1978 -- eight years before the creation of the first channeling trust by Johns Manville. The legislature could not have had channeling trusts in mind when the statute was enacted, thus, the statute does not contemplate how a claim against a seller should be handled when a channeling trust is involved. North Brothers argues that allowing Mrs. Nye's strict liability suit under the statute could result in double recovery given the availability of funds in the manufacturers' trusts. However, Mrs. Nye will not be fully compensated under any of the trusts. North Brothers attached [*33] documentation as an exhibit to a response in opposition to a motion in limine indicating that Mrs. Nye collected $26,250 from the Johns Manville trust in 2006 and that Mrs. Nye has filed a claim against the Owens Corning trust. The Rand Corporation reports a current payout rate of 7.5% for the scheduled value of a claim allowed under the Johns Manville trust and a 10% payout rate for the scheduled value of a claim allowed under the Owens Corning trust, which will result in a payout of just $21,500 on a Owens Corning mesothelioma claim. Lloyd Dixon, Geoffrey McGovern & Amy Coombe, Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts, 128, 146 (2010). http://www.rand.org/publications.html. Similarly, while there is no evidence in the record as to whether Mrs. Nye has filed a claim against the Raybestos trust, Claims Processing Facility, Inc., reports a mere 2% payout rate for an established claim accepted under the Raybestos trust, resulting in an actual dollar amount of only $2,500 for a mesothelioma claim. Claims Processing Facility, Inc., http://www.cpf-inc.com/raytech-trust/raytech-trust-faqs/ (last visited April 20, [*34] 2001). In any event, to the extent that implementation of the statute results in any double recovery, that is a matter for legislative action and not properly addressed by the judiciary.

In summary, we conclude that Mrs. Nye has presented proof establishing the first element under Tennessee Code Annotated section 29-28-106(b), that Owens Corning, Pittsburgh Corning, Raybestos, and Johns Manville are not subject to service of process in the state of Tennessee. Therefore, Mrs. Nye can pursue a strict liability action against North Brothers as to injuries allegedly sustained as the result of her husband's exposure to products of those manufacturers that North Brothers sold to Dupont.

Jury Instructions

Learned Intermediary Instruction

Next, we review a portion of the trial court's instructions to the jury. Whether a jury instruction is erroneous is a question of law and is therefore subject to de novo review with no presumption of correctness. Solomon v. First Am. Bank of Nashville, 774 S.W.2d 935, 940 (Tenn. Ct. App. 1989). The legitimacy of a jury's verdict is dependent on the accuracy of the trial court's instructions, which are the sole source of the legal principles required for the jury's [*35] deliberations. Therefore, a trial court is under a duty to impart "substantially accurate instructions concerning the law applicable to the matters at issue." Hensley v. CSX Transp., Inc., 310 S.W.3d 824, 833 (Tenn. Ct. App. 2009) (quoting Bara v. Clarksville Mem'l Health Sys., Inc., 104 S.W.3d 1, 3-4 (Tenn. Ct. App. 2002)). When considering whether a trial court committed prejudicial error in a jury instruction, it is our duty to review the charge in its entirety and consider it as a whole, and the instruction will not be invalidated if it "fairly defines the legal issues involved in the case and does not mislead the jury." Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn. 1992). The judgment of a trial court will not be set aside based on an erroneous jury instruction unless it appears that the erroneous instruction more probably than not affected the judgment of the jury. Tenn. R. App. P. 36(b); Gorman v. Earhart, 876 S.W.2d 832, 836 (Tenn. 1994).

The trial court's instructions to the jury at issue are as follows:

> A manufacturer or a seller cannot be held liable for failure to warn if you find that the consumer, DuPont, was already aware of any danger in connection [*36] with the use of asbestos-containing

> products, or if you find that adequate warnings were given by manufacturers or sellers to DuPont.
>
> . . .
>
> In addition, if you find that DuPont failed to provide a safe workplace for Hugh Todd Nye and that this failure was the sole cause of damage to him, then you have found DuPont was the sole cause of his injury, and you may not consider the fault of North Brothers or any other company supplying asbestos-containing materials to DuPont.

The jury's spokesperson sought clarification of the charges as follows:

> Well, if we find that the product was defective and because of it being defective and everyone knew about it being defective and it was still manufactured and sold as a defective product, that's where we have trouble with this paragraph as far as the manufacturer or the seller cannot be liable for failure to warn if they find the consumer, DuPont, was already aware of any danger. So, you know, there's enough evidence that showed that DuPont knew of all the danger but so did everyone else.
>
> I guess where we are kind of stuck at the point that we are stuck at is that I think we all feel the product was defective because of the danger of the product itself. [*37] So because of that and because of this paragraph here as far as the manufacturer and seller cannot be held liable for failure to warn, they kind of to us kind of contradicts each other.

Subsequently, the trial court sent a note to the jury, stating as follows:

> Let me preface this note by reminding you to consider all of the charge and not single out some and ignore the others. Let me say that all parts of the charge are equally important.
>
> In determining whether DuPont was the sole cause of Mr. Nye's injury you should consider what DuPont knew compared with the knowledge of all others.
>
> In determining whether there was a failure to warn you should consider what DuPont knew compared with the knowledge of all others.

Specifically, Mrs. Nye contends this instruction is erroneous because it is based on the "learned intermediary" doctrine [15] which has not been adopted in Tennessee for products liability cases, except cases involving pharmaceuticals and medical products. Mrs. Nye argues that this instruction allows the jury to absolve North Brothers of liability merely upon a finding that DuPont knew about the risks of the asbestos-containing products purchased from North Brothers.

> 15 The learned [*38] intermediary doctrine is sometimes referred to as "the sophisticated purchaser doctrine."
>
> > Although there may be shades of difference between ['the learned intermediary rule' and 'the sophisticated purchaser rule'] as they are applied by courts, the fundamental tenet is that a manufacturer should be allowed to rely upon certain knowledgeable individuals to whom it sells a product to convey to the ultimate users warnings regarding any dangers associated with the product.
>
> In re TMJ Implants Prods. Liab. Litig., 872 F. Supp. 1019, 1029 (D. Minn. 1995).

This issue requires us to review the propriety of the learned intermediary doctrine. This doctrine, which allows a seller in a failure to warn case to rely on an intermediary to convey warnings about a dangerous product, derives from section 388 of the Restatement (Second) of Torts (1965). [16] Comment *n* to section 388

provides that when a seller sells a product to an intermediary, the seller may rely on the intermediary to provide warnings to the user of the product if such reliance is reasonable under the circumstances. Although section 388 addresses a supplier's duty to warn under the law of negligence, courts also apply its principles to [*39] the duty to warn in strict liability. See, e.g., Ackermann v. Wyeth Pharms.., 526 F.3d 203, 208 n.5 (5th Cir. 2008); Smith v. Walter C. Best, Inc., 927 F.2d 736, 741-42 (3d Cir. 1990); Bradco Oil & Gas Co. v. Youngstown Sheet & Tube Co., 532 F.2d 501, 504 (5th Cir. 1976); Ebel v. Eli Lilly & Co., 536 F.Supp.2d 767, 773 (S.D. Tex. 2008); Higgins v. E.I. DuPont de Nemours & Co., 671 F. Supp. 1055, 1059-60 (D. Md. 1987).

16 Restatement (Second) of Torts § 388 provides as follows:

> **Chattel Known to be Dangerous for Intended Use**. One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous [*40] condition or of the facts which make it likely to be dangerous.

Traditionally, the learned intermediary doctrine has been applied to warnings related to prescription drugs. See Victor E. Schwartz & Christopher E. Appel, Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials, 73 Mo. L. Rev. 1, 22 (2008). The doctrine constitutes a defense by pharmaceutical manufacturers in cases where a plaintiff has suffered injury from a medication prescribed by a doctor. Physicians, who play a pivotal role in the distribution of prescription drugs, are the intermediaries relied on by manufacturers to give warnings to patients. A majority of jurisdictions, including Tennessee, recognize that a pharmaceutical manufacturer can discharge its duty to warn by providing the physician with adequate warnings of the drug's risks. Pittman v. Upjohn Co., 890 S.W.2d 425, 429 (Tenn. 1994). In Tennessee, the learned intermediary doctrine is applicable in failure to warn suits where a physician is the intermediary between a defendant pharmaceutical or other medical product manufacturer and an injured patient. See id.; King v. Danek Med., Inc., 37 S.W.3d 429, 452-53 (Tenn. Ct. App. 2000); [*41] Harden v. Danek Med., Inc., 985 S.W.2d 449, 451 (Tenn. Ct. App. 1998).

North Brothers, relying on Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (Tenn. 1946) and Whitehead v. Dycho Co., 775 S.W.2d 593 (Tenn. 1989), argues that the learned intermediary doctrine applies not just to pharmaceutical or other medical product cases, but to other product liability cases. North Brothers' reliance, however, is misplaced because this Court has not expanded the application of the learned intermediary doctrine beyond the pharmaceutical or medical arena.

In Wagoner, a particular model of one of Ford's automobiles was marketed with a defective hood latch such that when the car was subjected to a severe jolt, the hood would spring up and obscure the driver's vision. 192 S.W.2d at 841. When Ford discovered the defect, it distributed an auxiliary catch to all of its dealers with instructions to install the catch to remedy the defect. Id. The car in question was sold by one agency to another and then by the second agency to one of its salesmen. Id. The catches were received by the second agency while the salesman owned the car, and he was informed about and offered one of the precautionary catches. Id. at 841-42. [*42] He regarded the catch as unnecessary and rejected it. Id. at 842. Subsequently, the salesman sold the

car to another party, whose guest, the plaintiff, was injured while driving the car when the hood sprang up and caused an accident. Id. Ford argued that the salesman's independent and intervening act in failing to make use of the catch and in neglecting to advise his vendee about the catch broke the causal chain and was the proximate cause of the accident, not Ford's negligence. Id. The determinative issue, as noted by this Court, was whether the evidence established that the salesman, as an intermediary vendor, was put on such notice of the defect and the remedy "as to bring into play the rule which fastens the charge of *conscious* intervening negligence upon an intermediate vendor and relieves the manufacturer of liability." Id. at 842 (emphasis in original). This Court stated that under this rule the continuing liability of a manufacturer such as Ford to successive purchasers is "subject to be[ing] destroyed . . . by the intervening act of an agency which is (1) independent, (2) efficient, (3) conscious and (4) not reasonably to have been anticipated." Id. at 844. This Court did [*43] not adopt the learned intermediary doctrine in Wagoner, but rather applied the intervening cause doctrine. These are two separate and distinct doctrines; the application of the former does not indicate an adoption of the latter.

The learned intermediary doctrine was likewise not adopted in Whitehead, 775 S.W.2d 593. In Whitehead, Magnavox purchased naphtha, a combustible solvent used for cleaning purposes, from two distributors. Naptha was distributed to Magnavox by transport truck or in 55-gallon drums. Id. The trucks and drums displayed warnings that naptha was either flammable or combustible, and Magnavox was aware that naptha was highly flammable and should not be exposed to heat or sparks due to the possibility of explosion or fire. Id. Magnavox transferred naptha from the drums that carried the distributors' warning labels to smaller, pump-type containers without warnings and provided these containers to its employees for use in cleaning glue from their work aprons. Id. The plaintiff, an employee of Magnavox, had not been advised of naptha's dangerous propensities. Id. at 596. Unaware of naptha's dangerous propensities, the plaintiff took a can of it home to clean her apron as [*44] she was allowed to do by Magnavox. Id. When she attempted to use the naptha in her washing machine, an explosion resulted, and she was severely injured. Id. The plaintiff sued the distributers of naptha in strict liability and alleged that the product was defective, unreasonably dangerous, and sold without sufficient warnings of its dangerous qualities. Id. at 594.

The trial court granted summary judgment to the distributors, in part upon the ground that Magnavox was a learned intermediary and therefore the distributors could reasonably rely on Magnavox to warn its employees about naptha's danger and instruct them in its use. Id. at 596. The court of appeals reversed the grant of summary judgment, noting that "[t]he majority view and the view that this Court deems to be the better one is that the manufacturer's duty to warn extends to the employee-user as well as the employer- purchaser." Whitehead v. Dycho Co., No. 6935, 1987 Tenn. App. LEXIS 3107, 1987 WL 27044 at *8 (Tenn. Ct. App. Dec. 11, 1987) (citations omitted). Neither rejecting nor adopting the learned intermediary doctrine in the employer-employee context, the intermediate court determined that the plaintiff was entitled to a jury trial as to the adequacy [*45] of warnings given and whether the distributors' duty to give warnings extended to her. We reversed the intermediate court in Whitehead and affirmed the trial court's grant of summary judgment. Whitehead, 775 S.W.2d at 598. We noted that one of the reasons relied on by the trial court for its grant of summary judgment was a finding that "*Magnavox was a learned intermediary and the defendants could reasonably rely upon Magnavox to warn its employees of the dangers of naptha and to instruct them in its use*." Id. (emphasis added). In affirming the trial court's grant of summary judgment, we carefully noted that the reason for our decision was different from the reasons underlying the trial court's opinion. Id. at 598. Our ruling was based on a finding that "the causal connection was broken by the independent intervening acts of Magnavox in failing to place warnings on containers for use by its employees and in failing to warn Plaintiff of the dangerous propensities of naptha." Id. at 599. We concluded that the plaintiff had failed to present evidence that she would not have sustained her injuries had the distributors provided proper warnings, noting that the plaintiff never saw the drums [*46] in which the distributors transported naptha to Magnavox and had there been inadequate warnings on the drums, that would not have been the proximate cause of the accident. Id. We further observed that Magnavox "was the only party in a position to issue an effective warning to the Plaintiff," stating that the distributors "had no reasonable access to the Plaintiff." Id. at 600. While Whitehead digressed into a discussion of the reasonableness of the distributors' reliance on Magnavox to convey warnings, it is clear that as in Wagoner, the

holding was based on the intervening cause doctrine, not the learned intermediary doctrine. This Court was presented with an opportunity to affirm the trial court by specifically applying the learned intermediary doctrine, but did not do so.

Tennessee courts have not previously applied the learned intermediary doctrine to product liability actions arising in the workplace, and we do not find it appropriate to do so now. [17] The rationale for the doctrine limits its application to the unique circumstances of the medical arena where a physician seeks to find the optimal treatment for a particular patient, as indicated in the following discussion of that [*47] rationale as it pertains to prescription drugs:

> We cannot quarrel with the general proposition that where *prescription* drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use. This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn foreseeable ultimate users of dangers inherent in his products. Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, and individualized medical judgment bottomed on a knowledge of both patient and palliative.

Dooley v. Everett, 805 S.W.2d 380, 386 (Tenn. Ct. App. 1990) (quoting Stone v. Smith, Kline & French Labs., 731 F.2d 1575, 1579-80 (11th Cir. 1984)) (emphasis in original) (citations omitted). In Hall v. Ashland Oil Co., 625 F.Supp. 1515 (D. Conn. 1986), [*48] the district court of Connecticut set forth various distinctions between an industrial employer utilizing a hazardous substance, such as benzene, and a doctor prescribing medication:

> First, unlike the doctor, whose primary purpose in selecting a drug is to promote the well-being of the ultimate user, the industrial purchaser's basic interest in selecting a chemical solvent is the overall utility of that solvent in its manufacturing processes. While avoiding health risks to its employees is a consideration that goes into choosing one chemical over another, it is not the employer's sole concern, or even its primary focus. Second, there is no guarantee that the ordinary industrial employer is an expert on health risks. A chemical company may be in a position to act as an expert concerning the industrial uses and disadvantages of a chemical and yet not have the capacity to serve adequately as a learned intermediary concerning medical risks associated with the chemical. Third, the marketing system for industrial chemicals differs from that of prescription drugs -- benzene and other chemicals are not subject to the strict limitations on availability that apply to drugs. . . . Fourth, the relationship [*49] of doctor and patient is a one-on-one relationship where the doctor assesses the individual needs of each patient. . . . Even an employer who is aware of direct effects of the chemical may be unaware of more subtle or diffuse risks. Finally, the prescription drug cases, in relieving manufacturers of the duty to warn drug users, shift that duty on to a party who can be held legally liable to the patient for failing to fulfill it. This powerful incentive is limited by the exclusive remedy provisions of the workman's compensation statutes.

Id. at 1519-20.

17 In support of its argument that this state has adopted the learned intermediary doctrine with respect to non-medical cases, North Brothers cites a Sixth Circuit case, Jacobs v. E.I. DuPont De Nemours & Co., 67 F.3d 1219, 1244-45 (6th Cir. 1995) and three Tennessee federal district court cases, Davis v. Komatsu Am. Indus. Corp., 46 F.Supp.2d 745, 754 (W.D. Tenn. 1999); Byrd v. Brush Wellman, Inc., 753 F. Supp. 1403 (E.D.

> Tenn. 1990); and Travelers Indem. Co. v. Indus. Paper & Packaging Corp., No. 3:02-CV-491, 2006 U.S. Dist. LEXIS 49318, 2006 WL 2050686 (E.D. Tenn. July 19, 2006). To the extent that these cases conclude that this Court has adopted the learned intermediary [*50] doctrine outside of the medical arena, they are incorrect. Our refusal to adopt the learned intermediary doctrine in Whitehead was properly recognized by the United States District Court for the District of Minnesota in TMJ Implants Products Liability Litigation, 872 F.Supp. 1019, 1031 (D. Minn. 1995) ("The Supreme Court of Tennessee specifically declined to either accept or reject the . . . learned intermediary doctrine[ ] in Whitehead.").

Comment *n* of section 388 of the Restatement acknowledges that the duty to warn of hazards associated with the use of a product increases with the amount of danger involved. It is established that asbestos is an extremely dangerous substance and that unprotected exposure to respirable asbestos fibers over a period of time may well result in death. Given the highly hazardous nature of asbestos, the dire consequences to the unwarned consumer, and the important distinctions between the use of asbestos by an employer in industry and the use of pharmaceuticals and medical devices by a doctor in treating his or her patient, we find good reason not to extend the learned intermediary doctrine to products liability cases where an employee claims damages for [*51] injuries from a product containing asbestos or some other highly toxic substance purchased by the employer and used by the employee during the course of his or her employment.

Causation

Finally, North Brothers argues that even if the learned intermediary doctrine is not extended to this case, the trial court's instruction was still correct because it accurately reflects the law of causation in Tennessee and properly allowed the jury to find that DuPont was the sole cause in fact of Mr. Nye's injuries.

Causation, an essential element of any products liability action, refers to both "proximate cause" and "cause in fact." This Court has noted the distinction between these two terms as follows:

> Cause in fact refers to the cause and effect relationship between the defendant's tortious conduct and the plaintiff's injury or loss. Thus, cause in fact deals with the "but for" consequences of an act. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct. In contrast, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. Proximate or legal cause is a policy [*52] decision made by the legislature or the courts to deny liability for otherwise actionable conduct based on considerations of logic, common sense, policy, precedent and "our more or less inadequately expressed ideas of what justice demands or of what is administratively possible and convenient."

Snyder v. LTG Lufttechnische GmbH, 955 S.W.2d 252, 256 n. 6 (Tenn. 1997) (citations omitted). To enable a jury to determine whether an employer's actions may have been the cause in fact of the plaintiff's injury, evidence showing what happened to the product leading up to the plaintiff's injury must be permitted. Otherwise, the manufacturer or seller will be effectively precluded from the defense that the product was not defective when it left the manufacturer's or seller's control. Snyder, 955 S.W.2d at 256. As we also noted in Snyder, if the rule were different, "the defendant[] would be restricted from presenting evidence that the plaintiff's employer altered, changed, or improperly maintained the [product]." Id. n. 7.

It was proper for the jury to consider the actions of DuPont in determining whether DuPont was the cause in fact of Mr. Nye's injuries. However, it does not follow that it was [*53] also proper to instruct the jury that if DuPont was aware of any dangers in connection with the use of the products it purchased from North Brothers, North Brothers could not be held liable for failure to warn. In support of its argument that DuPont's knowledge of the products' dangers absolves North Brothers of liability, North Brothers quotes the following language from Harden, relied on by the trial court in formulating the instruction at issue:

> [A] manufacturer will be absolved of liability for failure to warn for lack of *causation* where the consumer was already

> aware of the danger, because the failure to warn cannot be the proximate cause of the user's injury if the user had actual knowledge of the hazards in question.

Harden, 985 S.W.2d at 451(quoting 63A Am.Jur.2d Products Liability, § 1162 (1984)) (emphasis added). In relying on Harden, North Brothers mistakenly, as did the trial court in its jury instruction, identifies DuPont, rather than Mr. Nye, as the consumer in the instant matter. The Harden court indicated that, for purposes of the learned intermediary doctrine, the physician stands in the place that the consumer would otherwise occupy as the party to whom a duty to warn [*54] is owed:

> Under [the learned intermediary doctrine], physicians are the "consumers" who must be warned. Thus, it is generally held that the learned intermediary doctrine may shield a manufacturer from liability when the physician was independently aware of the risks involved.

Id. We construe the court's language applying the term "consumer" to the intermediary physician to mean that the physician, in effect, *replaces* the party to whom the duty to warn is owed. This is not to say that the physician *is* the consumer in the strict sense. The patient remains the consumer or user. It is still the patient, not the doctor, who is ingesting the pharmaceutical or into whose body the medical device is implanted.

The learned intermediary doctrine does not apply in this case, and Mr. Nye, not DuPont, was the consumer. This conclusion is supported by the language of the Tennessee Products Liability Act, which distinguishes the employee/consumer from the employer by defining "[e]mployer" to mean "any person exercising legal supervisory control or guidance of users or consumers of products." Tenn. Code Ann. § 29-28-102 (3). It is also supported by comment *l* to § 402A of the Restatement (Second) of Torts [*55] (1965) stating that

> 'User' includes those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purposes of doing work upon it, as in the case of *an employee of the ultimate buyer* who is making repairs upon the automobile which he has purchased.

(Emphasis added).

DuPont's knowledge of the danger of asbestos did not make DuPont the sole cause in fact of Mr. Nye's injuries. Rather, based on their knowledge of the dangers of the asbestos-containing products, it may be shown that *both* DuPont *and* North Brothers were the causes in fact of Mr. Nye's injuries as a result of their failure to warn him of the products' dangers. North Brothers disputes this and contends that it cannot be the cause in fact of Mr Nye's injury for two reasons. First, North Brothers argues that if DuPont had not purchased the asbestos-containing products North Brothers supplied DuPont, "DuPont would have bought them from another source." Second, North Brothers notes that Mr. Nye admitted in deposition testimony that he never saw the boxes that were used by North Brothers to ship its products to DuPont. North Brothers [*56] argues that Mr. Nye would never have seen any warnings on the boxes even if they had been there. Both arguments are without merit. As to the first argument, DuPont *did* purchase asbestos-containing products from North Brothers, and it is irrelevant what DuPont would have done had it not purchased the products from North Brothers. As to the second argument, North Brothers could have availed itself of alternative means of effectively warning Mr. Nye and other DuPont employees of the dangers of the products it sold DuPont and was not limited to placing a warning on boxes that were not visible to such employees. For example, warnings might have been printed directly on the products or, if that was not feasible, North Brothers could have provided employees warning pamphlets or conducted joint information sessions with DuPont to alert employees to the dangers associated with the products. See Whitehead v. St. Joe Lead Co., 729 F.2d 238, 247 (3d Cir. 1984).

In summary, we hold that the learned intermediary doctrine is not applicable under the circumstances of this case. The trial court's jury instruction based on that doctrine, absolving North Brothers of liability for Mr. Nye's injury upon [*57] a finding that DuPont was already aware of the dangers of the asbestos-containing products or that adequate warnings were given to DuPont of such dangers, was erroneous and was not otherwise proper under the law of causation. It is further apparent that this error in the instruction more probably than not affected the judgment of the jury. Accordingly, we find

that the jury instruction was reversible error.

Conclusion

For the reasons stated, we hold that, pursuant to Tennessee Code Annotated section 29-28-106(b), North Brothers is subject to suit on strict liability grounds for injuries allegedly sustained by Mr. Nye as a result of his exposure to the asbestos-containing products that North Brothers supplied to DuPont. We further hold that the trial court committed harmful error in adopting the learned intermediary doctrine in its instruction to the jury. Accordingly, we affirm the judgment of the Court of Appeals. The judgment of the trial court is reversed, and the case is remanded for a new trial. Costs are assessed to the appellant, National Service Industries, Inc., f/k/a/ North Brothers, Inc., and its surety, for which execution may issue if necessary.

SHARON G. LEE, JUSTICE

CONCUR BY: JANICE [*58] M. HOLDER (In Part)

DISSENT BY: JANICE M. HOLDER (In Part)

DISSENT

JANICE M. HOLDER, J., concurring in part and dissenting in part.

I concur in the majority's conclusion that the learned intermediary doctrine is not applicable to the facts of this case. I disagree, however, that Pittsburgh Corning Corporation ("Pittsburgh Corning") and Owens Corning Corporation ("Owens Corning") were unavailable for service of process and that North Brothers, Inc. ("North Brothers") therefore is subject to suit in strict liability pursuant to Tennessee Code Annotated section 29-28-106 (2000).

In September 2005, Hugh Todd Nye was diagnosed with mesothelioma, a disease that results from exposure to asbestos. On May 15, 2006, Mr. Nye and his wife, Evelyn Nye, ("the Nyes") filed a complaint alleging that North Brothers was liable for injuries to Mr. Nye. North Brothers sold, but did not manufacture, the asbestos products to which Mr. Nye was exposed. The Nyes alleged that North Brothers was strictly liable for Mr. Nye's injury. Tennessee Code Annotated section 29-28-106(b) permits a seller to be held strictly liable for a defective product manufactured by another if the manufacturer of that product is not "subject to service [*59] of process . . . or has been judicially declared insolvent." The trial court found that all of the defendant manufacturers of the asbestos products, Johns Manville Corporation ("Johns Manville"), Raybestos-Manhattan, Inc. ("Raybestos"), Owens Corning, and Pittsburgh Corning, were unavailable for service of process and that North Brothers therefore faced potential liability on strict liability grounds.

"The construction of a statute and its application to the facts of a case are questions of law, which we review de novo." Larsen-Ball v. Ball, 301 S.W.3d 228, 232 (Tenn. 2010). Tennessee Code Annotated section 29-28-106(b) states that no product liability action based on strict liability "shall be *commenced* or maintained against any seller . . . unless the manufacturer . . . shall not be subject to service of process." (emphasis added). The statute specifically references the commencement of the action. This language requires us to determine the status of the law and facts on the date the action was commenced. Cf. Braswell v. AC and S, Inc., 105 S.W.3d 587, 589-90 (Tenn. Ct. App. 2002) (holding that a claim made pursuant to Tennessee Code Annotated section 29-28-106 accrues and the statute [*60] of limitations begins to run when the manufacturer declares bankruptcy). Whether the Nyes' claim against North Brothers can be commenced or maintained pursuant to Tennessee Code Annotated section 29-28-106(b) requires us to determine whether the Nyes could have obtained service of process on the asbestos manufacturers on the date the Nyes commenced their case.

On the date the Nyes filed their complaint, each of the manufacturers had filed for bankruptcy. A petition for bankruptcy automatically stays proceedings against the debtor. 11 U.S.C. § 362(a) (2006). The automatic stay applies to claims [1] determined to arise before the debtor files for bankruptcy ("pre-petition claims"). Jeld-Wen, Inc. v. Van Brunt (In re Grossman's, Inc.), 607 F.3d 114, 122 (3d Cir. 2010) (en banc). Claims that arise after the debtor petitions for bankruptcy ("post-petition claims") are not subject to the automatic stay. In particular, the automatic stay prevents service of process on a debtor in bankruptcy. 11 U.S.C. § 362(a)(1). [2]

1 A bankruptcy claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, [*61]

legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (2006).

2 11 U.S.C. § 362(a)(1) creates an automatic stay that prevents "the commencement or continuation, including the issuance or employment of process . . . or other action . . . that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."

The bankruptcy court has exclusive jurisdiction to determine the nature of the claims and the extent of the automatic stay. Cf. Cathey v. Johns-Manville Sales Corp., 711 F.2d 60, 62 (6th Cir. 1983) (holding that the bankruptcy court has exclusive authority to grant relief from a stay). Determination of whether the claims against the manufacturers were pre- or post-petition, therefore, requires us to apply the test the presiding bankruptcy court would have applied at the time the Nyes filed their complaint against North Brothers.

The bankruptcy cases of Owens Corning and Pittsburgh Corning were both filed in the Third Circuit. In re Owens Corning, 419 F.3d 195, 201-02 (3d Cir. 2005); In re Pittsburgh Corning Corp., 417 B.R. 289, 295 (Bankr. W.D. Pa. 2006). [*62] On the date the Nyes filed their complaint against North Brothers, the Third Circuit followed the now-abandoned accrual test set forth in Avellino & Bienes v. M. Frenville Co. (In re M. Frenville), 744 F.2d 332 (3d Cir. 1984) overruled by In re Grossman's, 607 F.3d at 121.

According to the Frenville test, a claim is post-petition if the cause of action accrues according to the law of the forum state after the bankruptcy petition is filed. Frenville, 744 F.2d at 337. At the time the Nyes commenced their action, a bankruptcy court applying the law of the Third Circuit to the Nyes' claims against the manufacturers would look to the law of the state of Tennessee to determine when the Nyes' cause of action accrued. Tennessee law dictates that in "creeping disease" cases, such as asbestos-related injuries, the cause of action accrues with the diagnosis of the disease. See Wyatt v. ACandS, Inc.., 910 S.W.2d 851, 856-57 (Tenn. 1995); see also Potts v. Celotex Corp., 796 S.W.2d 678, 683 (Tenn. 1990) (holding the plaintiff's cause of action for mesothelioma did not accrue until the condition was diagnosed or reasonably could have been diagnosed).

Mr. Nye was diagnosed with mesothelioma in September [*63] 2005. The cause of action, and therefore the claim, accrued in 2005. Pittsburgh Corning filed for bankruptcy on April 16, 2000, and Owens Corning filed for bankruptcy on October 5, 2000. In re Pittsburgh Corning, 417 B.R. at 295; In re Owens Corning, 419 F.3d at 201-02. According to the Frenville test in effect at the time the Nyes commenced their action against North Brothers, the Nyes' claims against both Pittsburgh Corning and Owens Corning are post-petition. The automatic stay did not apply because both bankruptcies were filed before the Nyes' claim accrued in September 2005. The Nyes therefore could have obtained service of process on both Owens Corning and Pittsburgh Corning on the date they filed their complaint against North Brothers.

The Third Circuit's opinion in Grossman's overruled Frenville on June 2, 2010. 607 F.3d at 121. The majority asserts that the new test adopted in Grossman's to determine whether a claim is pre- or post-petition must be applied retroactively. See Wright v. Owens Corning, No. 09-1567, 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673, at *10 (W.D. Pa. Mar. 21, 2011) (memorandum opinion). [3] If the Grossman's test is applied, the Nyes' claim would be a pre-petition claim and would [*64] be subject to the automatic stay. If the Grossman's test had been applied by a court on May 15, 2006, therefore, Pittsburgh Corning and Owens Corning would not be available for service of process.

3 The majority also asserts that this court should not be obligated to follow the Frenville test because it is "bad law." I recognize that the Frenville test was widely disparaged. Even in the face of harsh criticism, however, courts in the Third Circuit were obligated to follow the Frenville test as established precedent. Jones v. Chemetron Corp.., 212 F.3d 199, 206 (3d Cir. 2000) ("We are cognizant of the criticism the Frenville decision has engendered, but it remains the law of this circuit.") (footnote omitted). Although we may prefer a different test, when we apply the law of the Third Circuit in a bankruptcy matter, we are obligated to follow established Third Circuit precedent.

The majority concludes that a change in the substantive law in a foreign jurisdiction should be retroactively applied to a procedural determination made

pursuant to Tennessee state law on the date the complaint was filed. As a result, the majority holds that a retroactive application of the Grossman's test today [*65] makes Pittsburgh Corning and Owens Corning unavailable for service of process on May 15, 2006.

I disagree that the retroactive application of Grossman's provides the result reached by the majority. On the date the Nyes filed the complaint against North Brothers, the Nyes could have served process on both Pittsburgh Corning and Owens Corning because the Third Circuit followed the now-abandoned Frenville accrual test. Subsequent actions of the Third Circuit Court of Appeals cannot make service of process unavailable retroactively. The determinative issue before us is whether service of process was available against Pittsburgh Corning and Owens Corning at the time the Nyes filed their complaint. The majority conflates this issue with a second issue of whether the lawsuits against those manufacturers would have been dismissed when the Third Circuit Court of Appeals subsequently overruled Frenville. Whether actions commenced against Pittsburgh Corning and Owens Corning would have been viable four years later when the Third Circuit Court of Appeals overruled Frenville is not before us.

Moreover, the case before us differs from both Grossman's and Wright. In those cases, the plaintiffs obtained [*66] service of process on the defendants after bankruptcy plans had been confirmed. See In re Grossman's, 607 F.3d at 117; Wright, 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673, at *1. The issue before the Grossman's and Wright courts was whether the plaintiffs' claims were pre-petition and had been discharged by the confirmation of the defendants' bankruptcy plans. See In re Grossman's, 607 F.3d at 117; Wright, 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673, at *1. The Grossman's and Wright courts did not retroactively invalidate service of process. Instead, those courts ruled that the claims on which the lawsuits were based were subject to discharge by the bankruptcy confirmation. In re Grossman's, 607 F.3d at 127; Wright, 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673, at *13. [4]

> 4 The Wright court ruled that the plaintiff's claims were discharged and granted the defendant's summary judgment motion. 2011 U.S. Dist. LEXIS 29042, 2011 WL 1085673, at *13. The Grossman's court ruled that the claims were subject to discharge, but remanded the case to determine if discharge of the bankruptcy claims violated due process. 607 F.3d at 127-28.

In contrast, the Nyes never attempted to serve process to commence lawsuits against Pittsburgh Corning and Owens Corning although service of process could have been obtained [*67] as to these manufacturers. Tennessee Code Annotated section 29-28-106(b) provides that an action may be commenced against a non-manufacturing seller on strict liability grounds when the manufacturer is not amenable to service of process. Having failed to serve these manufacturers, the Nyes now seek a ruling that service of process that had never been attempted would have been invalid at the time the action was commenced.

I would hold that service of process could have been obtained against both Pittsburgh Corning and Owens Corning on May 15, 2006. I agree with the majority, however, that service of process was not available against both Johns Mansville and Raybestos by virtue of the effect of the channeling injunctions included in the confirmation of their bankruptcy plans. [5]

> 5 The legislative intent of Tennessee Code Annotated section 29-28-106 was to provide a remedy for an injured plaintiff "against whomever was most likely to compensate plaintiff for his or her injuries." Braswell, 105 S.W.3d at 589. The last legislative action on section 29-28-106 occurred in 1983, nearly a decade before this Court adopted comparative fault in McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992). Tennessee Code Annotated section 29-28-106 [*68] was enacted when joint and several liability among all manufacturers applied, and the statute refers to "a manufacturer." This Court has never addressed the issue of the interrelationship between comparative fault and Tennessee Code Annotated section 29-28-106.

The trial court erred when it found that Pittsburgh Corning and Owens Corning were not amenable to service of process. The trial court permitted the liability of North Brothers, a seller, to be determined by the jury pursuant to Tennessee Code Annotated section 29-28-106(b). In addition, the trial court specifically declined to rule on the issue of whether the manufacturers were insolvent, and the record does not contain sufficient evidence for us to make this determination as to Owens

Corning and Pittsburgh Corning. This Court has previously remanded a case to the trial court to make a determination of whether the manufacturer was insolvent for the purposes of Tennessee Code Annotated section 29-28-106. Baker v. Promark Prods. W., Inc., 692 S.W.2d 844, 849 (Tenn. 1985). I would remand this case to the trial court for a determination as to the solvency of Pittsburgh Corning and Owens Corning.

I am authorized to state that Justice [*69] Koch concurs in this opinion.

JANICE M. HOLDER, JUSTICE

Caution
As of: Oct 16, 2010

STATE OF TENNESSEE v. SHELVY A. BAKER

No. M2005-00298-CCA-R3-CD

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

2006 Tenn. Crim. App. LEXIS 707

May 10, 2006, Session
September 14, 2006, Filed

SUBSEQUENT HISTORY: Post-conviction relief denied at *Baker v. State, 2006 Tenn. Crim. App. LEXIS 810 (Tenn. Crim. App., Oct. 13, 2006)*

PRIOR HISTORY: [*1] *Tenn. R. App. P. 3*; Judgment of the Trial Court Affirmed. Direct Appeal from the Criminal Court for Davidson County. No. 2002-A-112. Cheryl Blackburn, Judge.

COUNSEL: David A. Collins, Nashville, Tennessee, for the appellant, Shelvy A. Baker.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, the State of Tennessee.

JUDGES: GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

OPINION BY: GARY R. WADE

OPINION

The defendant, Shelvy A. Baker, was convicted of second degree murder. *See Tenn. Code Ann. § 39-13-210* (1997). The trial court imposed a sentence of twenty-five years to be served at one hundred percent. In this appeal as of right, the defendant argues (1) that the trial court erred by refusing to dismiss the indictment and (2) that the evidence was insufficient to support the conviction. The judgment of the trial court is affirmed.

OPINION

At approximately 8:00 p.m. on July 14, 1999, the victim, Terrance Wilkins, was with his girlfriend, [*2] Patricia Harris, and two other men in the parking lot of the Barcelona Apartments. When Ms. Harris left to buy some beer, "everything was fine," but upon her return about twenty to twenty-five minutes later, a medic was treating the victim as he lay on the ground. After being transported by ambulance to the hospital, the victim, who had been shot, was pronounced dead. In the course of the investigation, the defendant was identified as a suspect by the Metropolitan Nashville Police Department and ultimately charged with the crime.

In the trial, which was some five years after the murder, Ms. Harris testified that on the evening prior to the shooting, she had argued with the victim, who was drinking and smoking marijuana while also on medication to treat a chemical imbalance. During the course of the argument, the victim had kicked in her front door and broke a mirror in her apartment.

Sarah Hill, who was a resident of Barcelona Apartments when the shooting took place, was in police custody for an attempted forgery conviction at the time of the trial. She testified that the defendant, known to her as

T-Loc and as a member of the Crips gang, confessed to her that he had killed the [*3] victim. Ms. Hill recalled that on the night prior to the shooting, the victim also had an argument in the apartment complex parking lot with a woman she could identify only as Tamara. She stated that she and a roommate, Nikki Napier, had intervened during the altercation by asking to borrow a compact disc. She testified that the victim became defensive, yelled at the women, and ordered them to leave. Ms. Hill stated that when she returned to her apartment, she told her boyfriend, Anthony Johnson, about the incident and that Johnson and Clifton Smith, Ms. Napier's boyfriend, left to confront the victim. According to Ms. Hill, Ms. Napier, who was still with the victim and Tamara, claimed that the victim had pushed her down. She recalled that the victim apologized to her and the two men and that "everything . . . was basically squashed."

Ms. Hill testified that the defendant, who was armed with a gun, and a man named Chris Goodbread had made a visit to her apartment on the following night. She stated that the two men left in the company of Smith and that some fifteen or twenty minutes later, she heard three gunshots. According to Ms. Hill, Smith returned to the apartment "look[ing] [*4] like he had seen a ghost" and informed her that the defendant had just shot "Little Buddy." While acknowledging that she did not disclose everything she knew to the detectives who investigated at the scene on the night of the murder, she recalled that after the police left, the defendant telephoned Ms. Hill, directed her not to say anything, and explained that he had shot the victim because he had pushed Ms. Napier. She testified that the defendant, who appeared to have a romantic interest in Ms. Napier, bragged about how the victim fell after being shot. Ms. Hill, who had also been incarcerated for facilitation of especially aggravated robbery, confirmed that Johnson, Smith, and Ms. Napier were Crips gang members.

Clifton Smith, who at the time of trial was incarcerated for especially aggravated robbery and facilitation to commit first degree murder, identified the defendant as having fired the shot that killed the victim. After confirming that he had been informed by Ms. Napier and Ms. Hill that the victim had struck them the night before the shooting, he testified that he met the defendant and Goodbread for the first time on the following day. Smith recalled that when he left the [*5] apartment with the two men, they just happened to see the victim, who tried to explain that he had not assaulted the two women. Smith stated that he believed the victim but when he began to shake his hand, the defendant suddenly shot the victim three or four times. Smith testified that he panicked, ran to Ms. Hill's apartment, informed her and Ms. Napier of the shooting, and then traveled to his mother's house. According to Smith, no one displayed a gun on the night of the shooting until the defendant shot the victim. He testified that the victim was shot from the front or from a side angle. Smith acknowledged that he had no excuse for not reporting the incident to the police.

Chris Goodbread, who was fifteen at the time of the shooting and had known the defendant for three or four years prior to that, testified that he traveled to the Barcelona Apartments with the defendant and heard a discussion about an incident involving some girls on the previous night. He stated that when one of the women informed the men that the victim was outside, he left the apartment with the defendant and Smith in order to confront him. Goodbread claimed that he tried to distance himself from the three [*6] men when they got into a heated discussion and he paid little attention to the conversation until the defendant fired the gun. He maintained that he was not sure whether the victim had been shot because he saw him "just turn[] like he was fixing to run away." Goodbread testified that he immediately fled toward another apartment complex and that the defendant caught up with him halfway there. He claimed that he asked why the victim had been shot and that the defendant, in response, "[j]ust kind of smiled and was kind of hyper, scared, and really didn't say much at all." He recalled that the defendant then dumped the shells from the revolver before the two men walked to the house belonging to the defendant's aunt. Goodbread testified that when the police questioned him a week or two later, he led them to the location where the shells had been discarded.

Anthony Johnson, who was incarcerated at the time of trial for aggravated robbery and who also faced felony drug charges, was dating Ms. Hill at the time of the shooting. He testified that on the day he and Smith were told by Ms. Napier and Ms. Hill that the victim had struck them, they tried to confront the victim but he fled. [*7] Johnson explained that he had met the defendant only once before. He claimed that he had no recollection of having told his attorney or the district attorney that the defendant had made any incriminating statements in his presence.

Nikki Napier, who was incarcerated at the time of trial, initially refused to cooperate as a state witness. When threatened with contempt, she agreed to respond to questioning but was evasive, insisting that she could not remember the incident and could not recall her statements to police or the assistant district attorney. She did testify, however, that during an argument with a man on the day before the shooting, the man hit her. She explained that Smith and Johnson chased him away. She indicated that she had overheard several people, including the defendant, admit to the shooting. Ms. Napier acknowledged that the defendant, Goodbread, and Smith were all in her apartment on the night of the murder and

on cross-examination explained that she had "blocked everything out" about the incident. She admitted that she did not believe any of the men who had admitted to shooting the victim.

By stipulation, the state then read the deposition of Michelle Knight, [*8] an investigator with the Davidson County Sheriff's Office. Officer Knight testified that she had recorded a telephone conversation the defendant had while he was incarcerated in the county jail. She identified an audiotape of the conversation, explaining that the tape was made from a computerized recording system. The tape contained a statement by the defendant to his mother that he is "locked up" because he "took care of my business and killed a n[****]r." When asked if he was admitting to killing someone, he responded, "Yep! On, on the phone, yep!"

Metropolitan Nashville Police Department Detective Bill Pridemore testified that because he had interviewed the defendant, he had become familiar with his voice. He then identified the voice of the defendant on the taped telephone conversation.

Officer William Kirby, who investigated the crime scene, testified that because of darkness, he did not find any projectiles or weapons at the scene on the night of the murder. He confirmed that he did recover three shells two weeks later that were several hundred yards away from where the victim lay after the shooting.

Tennessee Bureau of Investigation (TBI) Agent Steve Scott, who examined [*9] the bullet and shell casings recovered near the crime scene, determined that the casings were .38 caliber. It was his view that the bullet recovered from the victim's body was either a .38 or .357 caliber and was consistent with having been fired from one of the three shell casings recovered at the crime scene.

Dr. Bruce Levy, Chief Medical Examiner for the state and the medical examiner for Davidson County, performed an autopsy. He testified that a bullet entered the upper-right portion of the victim's back and passed through his right lung and his heart before coming to rest just beneath the skin on the left side of his chest. It was his opinion that the victim died from internal bleeding from the wounds. Dr. Levy, who concluded that the alcohol content of the victim was not at an intoxication level, determined that he had smoked marijuana before his death.

Leonard Hallum, the defendant's uncle, testified for the defense as part of an effort to establish an alibi. He claimed that the defendant, whom he had met two weeks prior to the murder, was at his house at 4:15 p.m. on the afternoon of the shooting. Hallum, who lived within walking distance of the crime scene, stated that he [*10] did not know the names of any of the defendant's friends.

Nathan Norman, the defendant's cousin, claimed that from 4:00 p.m. to 8:00 p.m. on the evening of the murder, he and the defendant played a video game. He recalled that at 9:00 p.m., his mother returned to his residence and informed them that there were police at the Barcelona Apartments. He testified that he walked to a friend's apartment in the Barcelona complex, asked what had happened, and, when he returned to his residence at approximately 11:00 p.m., the defendant was not present.

Autumn Norman, another of the defendant's cousins, testified that the defendant was at the residence when she returned from school on the afternoon of the shooting. She stated that because the defendant was new to the neighborhood, no one knew he was living there. She claimed that nobody either telephoned him or stopped by the residence that afternoon. She claimed that the defendant never went anywhere during his time at her residence and had not made any friends.

Marsha Hallum, the defendant's aunt, testified that she helped raise the defendant because his mother was abusive toward him as a child. She recalled that on the night of the shooting, [*11] she arrived home at between 8:30 and 9:00 p.m. and saw several police cars at the nearby Barcelona Apartments. She claimed that when she went to bed at 9:30 p.m., the defendant was at her home.

James Norman, another of the defendant's cousins, testified that on the night of the shooting, the defendant joined him, a friend, and the friend's girlfriend for an evening at a strip club. He claimed that they left between 9:00 and 10:00 p.m. and returned between 2:00 and 3:00 a.m. He described the defendant as having been in a fair mood when he first saw him that night. On cross-examination, he acknowledged that he was asked for the first time on the day before the trial about the defendant's whereabouts on the night of the shooting, which had taken place some five years earlier.

Dexter Norris, a pastor who was living at the Barcelona Apartments on the night of the murder, testified that he was walking his dog when he heard three shots. He stated that he then saw a young African American male run past him with a gun in his hand. According to Norris, his dog broke free from his collar and chased the man. He testified that after he caught his dog, he went to the victim and, when the same [*12] man who he had seen run from the scene joined the gathering crowd, the dog "started having a fit." Norris also recalled seeing a red car, driven by a white woman, pull out of the parking lot as the man was running away. He recognized the man, an individual other than the defendant, as a drug dealer and learned that the police had arrested him that night. On

cross-examination, Norris acknowledged that when he was interviewed on the night of the shooting, he told police that the man ran by him about five minutes after he had heard the shots. He also conceded that he had told police that the gun the man was carrying looked like a semi-automatic pistol, not a revolver.

Terry Hale, a resident of the Barcelona Apartments on the night of the shooting, testified that he heard three gunshots, grabbed a phone, ran to the window, and saw the victim take one or two steps before falling to the ground. He estimated the distance from his residence to where the shooting occurred to be about thirty or forty feet. He stated that he did not see anyone other than the victim after the shots were fired. He testified that after he called 911, he went to the victim in an effort to help and remained there [*13] until emergency personnel arrived. He recalled that from the time he first looked out the window, the victim was within his sight except for the "split second" it took for him to get from his window to his front door.

Paul Hines, who was arrested as a suspect on the night of the shooting, testified that he was the first person to reach the victim after he had been shot. He claimed that no one else approached the victim until the ambulance arrived. He stated that he was arrested for the shooting and released without explanation one hundred days later.

Detective Jim Fuqua, the lead investigator in the case, testified as a defense witness. He determined that Goodbread and Smith were the only two eyewitnesses and identified Hines as the initial suspect before concluding that the case against him was "a little thin." The detective explained that he eventually learned about the incident involving the victim which had occurred on the night before the shooting and was then able to pursue the leads that ultimately developed the defendant as the primary suspect.

In rebuttal, the state re-called Detective Fuqua, who testified that the defendant had admitted that he was present when the shooting [*14] occurred. He stated that in his initial interview, the defendant claimed that Smith had shot the victim and then led him to where he thought the shell casings might be. None, however, were found. The detective testified that Goodbread, as Officer Kirby had confirmed in his testimony, later located the shells at a point near the area identified by the defendant. He recalled that during a second interview, the defendant later claimed that he gave Smith the bullets that were used to shoot at the victim.

I.

The defendant first asserts that the trial court erred by refusing to dismiss the indictment. Specifically, he claims that the delay in presenting the case to the grand jury violated his due process rights. The state submits that the delay was not intentional as a means of gaining a tactical advantage and that the defendant had failed to demonstrate substantial prejudice as the result of the time which had elapsed between the shooting and the indictment.

The crime occurred on July 14, 1999. The defendant was indicted two and one-half years later on January 25, 2002. The trial was conducted on August 23 and 24, 2004. At the hearing on the motion to dismiss the indictment, Detective [*15] Fuqua acknowledged that he had created a case file on the Terrance Wilkins murder and delivered it to the district attorney's office no later than August of 1999, only a few weeks after the crime. The evidence offered at the hearing established that a year later, when a separate trial involving the defendant was about to begin, the detective inquired as to the status of the murder case and learned that the district attorney's office had lost the file. The detective prepared another case file and forwarded it to T.J. Haycox, who was with the "fast track" unit in the office, a unit designed to "speed[] up the legal process." In a letter dated October 18, 2000, Haycox, who had left the office by the time of the hearing on the motion, notified Detective Fuqua that the case would not be prosecuted. When the victim's mother learned of the decision, she complained to Detective Fuqua, who referred her to the district attorney's office. When she voiced her concerns to office personnel, the indictment process "started immediately." Detective Fuqua could not identify any possible advantage to the prosecution for delaying the case. Later, Haycox, who had moved out of state, explained to Detective [*16] Fuqua that he had decided not to present the Wilkins murder to the grand jury because of the lengthy sentence the defendant received in the unrelated murder case.

At the hearing, Dan Hamm, the assistant district attorney who had apparently been sent Detective Fuqua's initial report, claimed that he had no recollection of the Wilkins murder being assigned to him in 1999. Deputy District Attorney General Tom Thurman, who supervised the "fast track" program, was critical of Haycox. He testified that general office procedure required his review and that he also had no recollection of any conversation with Haycox or any involvement in the case before the initial decision not to prosecute. He did, however, recall the separate murder charges brought against the defendant for his involvement in crimes committed at a Waffle House in Davidson County. General Thurman explained that while he himself "would never say don't prosecute a murder case because [the defendant] is already serving a certain amount of time in prison," Haycox did have the authority during the term of his employment to determine whether or not to pursue a prosecution. General

Thurman nevertheless insisted that Haycox should [*17] have discussed the issue with him before making a decision of that nature.

On cross-examination, General Thurman contended that had he been aware of the Terrance Wilkins charge, he would have likely tried it first in hopes of a conviction and then using this murder as a possible aggravating circumstance in the separate Waffle House case, thereby warranting a request for the death penalty or a sentence of life without parole. In response to questioning, he stated that he would not have delayed the prosecution of the Wilkins case as a means of deterring the defendant from filing a petition for post-conviction relief in the Waffle House murders. General Thurman testified that when he learned about the facts surrounding the shooting of Wilkins, he overruled Haycox's decision not to prosecute.

At the hearing on the motion, the defendant testified that he had moved into his aunt's house just prior to the Wilkins shooting. He insisted that he could not remember what he did that day or that night. The defendant admitted that he would not have had a better recollection about the day of the Wilkins shooting had he been asked about it in late 1999 or early 2000 but nevertheless maintained that [*18] his "whole family could [have] provide[d] an alibi because . . . I was new out there. I didn't know [any]body so the only reasonable place I can remember is either going to work with my auntie or being at home with my little cousin or somebody like that." The defendant acknowledged that his memory was the "same" at the time of the hearing as it would have been one day after the incident. It was his recollection that the Wilkins murder case was not discussed during the plea negotiations in the Waffle House murders.

The trial court denied the defendant's motion to dismiss the indictment after concluding that his due process rights were not violated by the pre-indictment delay. It found that there was no intent on the part of the District Attorney's office to delay the matter and that the mistake was solely attributable to "bureaucratic negligence" rather than an attempt to obtain a tactical advantage or to otherwise harass the defendant. "[T]his matter unfortunately slipped through the cracks." The trial court further determined that the defendant failed to demonstrate actual prejudice.

Under our law, the right to due process as afforded by the *Fifth Amendment to the United States Constitution* [*19] proscribes excessive pre-indictment delay of criminal charges. *Rule 48 of the Tennessee Rules of Criminal Procedure* provides that "[i]f there is unnecessary delay in presenting the charge to a grand jury against a defendant who has been held to answer to the trial court, . . . the court may dismiss the indictment." *Tenn. R. Crim. P. 48(b)*. In order to achieve dismissal based upon pre-indictment delay, the defendant must show that (1) the delay caused substantial prejudice to his rights to a fair trial and (2) the delay was an intentional device to gain tactical advantage over the accused. *United States v. Marion, 404 U.S. 307, 324, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)*; *State v. Baker, 614 S.W.2d 352, 354 (Tenn. 1981)*; *State v. Dunning, 762 S.W.2d 142, 144 (Tenn. Crim. App. 1988)*.

The period of delay between the shooting in July of 1999 and the indictment in this case was two and a half years. The defendant conceded at the time of the hearing on the motion to dismiss that his memory of the time and events surrounding the shooting was no different than it would have been one day after the incident. He argued prejudice, however, [*20] because his family members could have provided him with an alibi. In fact, several of his family members did testify in an effort to establish an alibi defense. Each of them remembered the date of the shooting for different reasons and some provided helpful alibi evidence. The defendant offered no other proof as to why his right to a fair trial had been substantially prejudiced by the pre-indictment delay. For example, he did not assert that access to physical evidence was compromised or that he was unable to secure any particular witness on his behalf as a result of the delay in the prosecution. Further, the defendant has failed to demonstrate that the delay was an intentional device by the state to gain a tactical advantage over the accused.

The trial court found that the "delay of the indictment was essentially a result of bureaucratic negligence" by the Office of the District Attorney and not intentionally designed to gain any advantage. In our view, that holding was not meant to trivialize the magnitude of the oversight. That none of the prosecuting attorneys had any recollection of having reviewed the file received from Detective Fuqua in 1999, that a first degree murder charge [*21] was "lost" for over a year, and that a temporary decision not to prosecute was made without more communication either within the staff or with the family of the victim pays no tribute to the administrative procedures within the office. That does, in fact, qualify as "bureaucratic negligence." In a district of that size, however, a mistake of that nature is at least plausible. Nevertheless, had there been a hint of prejudice to the defense and a modicum of tactical advantage to the state, a dismissal of the indictment might have been warranted. General Thurman testified that upon discovering the circumstances of the case, he immediately pursued an indictment. He maintained that the officer did not delay an indictment in order to obtain a tactical advantage. The defendant did not offer any evidence to the contrary. The trial court accredited the testimony of General Thurman.

The record confirms that the trial court did not err by refusing to dismiss the indictment.

II.

The defendant next asserts that the evidence was insufficient to support the conviction. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which [*22] might be drawn therefrom. *State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)*. The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. *Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)*. When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Tenn. R. App. P. 13(e)*; *State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983)*. Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)*.

Here, two state witnesses testified that they saw the defendant shoot the victim. According to another witness for the state, the defendant confessed to having shot the victim. [*23] Officers found shell casings near the scene which were consistent with the fatal bullet, thereby corroborating the testimony of one eyewitness. In a recorded telephone conversation, the defendant admitted to his mother that he was guilty of a murder. Although several of the defendant's family members helped develop an alibi defense, the jury, as was its prerogative, chose to accredit the testimony of the state's witnesses. *See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995)*. In our view, the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that the defendant committed the crime.

Accordingly, the judgment is affirmed.

GARY R. WADE, PRESIDING JUDGE

STATE OF TENNESSEE v. WILLIAM CLAY BOHANAN, JR.

No. M2006-00360-CCA-R3-CD

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

2007 Tenn. Crim. App. LEXIS 203

November 29, 2006, Assigned on Briefs
March 2, 2007, Filed

PRIOR HISTORY: [*1] *Tenn. R. App. P. 3*; Judgment of the Criminal Court Affirmed. Appeal from the Criminal Court for Davidson County. No. 2004-D-3048. Steve Dozier, Judge.

DISPOSITION: Judgment of the Criminal Court Affirmed.

COUNSEL: Michael A. Colavecchio, Nashville, Tennessee, for the Appellant, William Clay Bohanan, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Hugh Ammerman and Katrin Miller, Assistant District Attorneys General, for the Appellee, State of Tennessee.

JUDGES: DAVID G. HAYES, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

OPINION BY: DAVID G. HAYES

OPINION

The Appellant, William Clay Bohanan, Jr., was convicted by a Davidson County jury of felony escape and vandalism of property valued under $ 500, a Class A misdemeanor. On appeal, Bohanan raises two issues for our review: (1) whether the trial court erred in failing to charge the jury on the defenses of duress and necessity; and (2) whether the evidence was sufficient to support the convictions. Following review, the judgments of conviction are affirmed.

OPINION

Factual Background

[*2] On June 20, 2004, the Appellant was an inmate of the county jail at the Criminal Justice Center in Nashville where he was awaiting trial for two counts of felony murder, one count of aggravated arson, and one count of arson. During the morning shift change on June 20th, it was discovered that three inmates, one of which was the Appellant, were missing from their assigned cell. In the cell, correctional officers found three orange jumpsuits stuffed with newspapers, as well as a drawing of the ceiling area going into a "mechanical room" found beneath the Appellant's bed. Additionally, a note was found under the Appellant's pillow which stated he was sorry but that he was innocent and the police were corrupt.

Upon receiving notification of the apparent escape, Sergeant Randy Porter of the Davidson County Sheriff's Office went outside to conduct a "perimeter check" of the premises and discovered sheets hanging from the roof. Upon securing the roof area, Porter found inmate-issued orange shoes and laundry bags stuffed with towels. On the ground below the sheets, he found jumpsuits and plastic bags. The investigation eventually re-

vealed that the inmates had escaped from their cell by crawling [*3] through the ceiling in the bathroom. The group then made a hole in a block wall in order to gain access to the "mechanical room" before getting into the "air handling units" or vents, which permitted access to the roof. As a result of the escape, the bathroom ceiling, the wall between the bathroom and the "mechanical room," and the grating on the air unit in the "mechanical room" were damaged. The total cost to repair the damage caused was $ 1,612.

Officer Ryan Lockwood of the Metro Police Department was assigned to investigate the escape of the three inmates. After interviewing the Appellant's girlfriend twice, Officer Lockwood was directed to search for the Appellant at the "park or recreational area on Hamilton Creek Road." On June 22, 2004, Officer Jimmy Upchurch, a K-9 officer, was assigned to assist in the search. He began searching in an area of the park which had heavy vegetation and lots of large boulder type rocks. Approximately ten minutes into his search, the dog alerted, and the Appellant was found hiding between some large boulders. Following his apprehension, the Appellant was returned to the jail.

On December 10, 2004, a Davidson County grand jury returned a two-count [*4] indictment against the Appellant charging him with felony escape and vandalism of property over $ 1000. A jury trial commenced on October 31st. At trial, the Appellant's defense centered around his assertions that he was forced to escape to avoid mistreatment by police. According to the Appellant, he was in constant fear, partly because of prior run-ins with law enforcement in which he asserted that police brutality had occurred. According to the Appellant, he was also threatened and harassed during his current incarceration prior to the escape. Following the presentation of evidence, the Appellant was convicted of felony escape and the lesser included offense of vandalism of property under $ 500. A sentencing hearing was held on December 9, 2005, after which the trial court imposed concurrent sentences of two years for the escape and eleven months and twenty-nine days for the vandalism. Additionally, as statutorily required, the court ordered that the sentences be served consecutively to the life sentence which the Appellant was serving. The trial court subsequently denied the Appellant's motion for new trial, and this timely appeal followed.

Analysis

On appeal, the Appellant [*5] has raised two issues for our review. First, he argues that the trial court erred in refusing to instruct the jury on the defenses of duress and necessity. Second, he asserts that the evidence is insufficient to support his convictions for escape and vandalism.

I. Failure to Charge Duress and Necessity

First, the Appellant asserts that the trial court erred in refusing his request to charge the defenses of duress and necessity to the jury. Under the United States and Tennessee Constitutions, a defendant has a constitutional right to trial by jury. *U.S. CONST. amend VI*; *Tenn. Const. art. I, § 6*; *see also State v. Bobo, 814 S.W.2d 353, 356 (Tenn. 1991)*; *Willard v. State, 174 Tenn. 642, 130 S.W.2d 99 (Tenn. 1939)*. This right encompasses the defendant's right to a correct and complete charge of the law. *State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)*. Consequently, the trial court has a duty "to give a complete charge of the law applicable to the facts of a case." *State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)*; *see also Tenn. R. Crim. P. 30*.

Our law requires that all elements of each offense be [*6] described and defined in connection with that offense. *State v. Cravens, 764 S.W.2d 754, 756 (Tenn. 1989)*. Jury instructions must, however, be reviewed in the context of the overall charge rather than in isolation. *Sandstrom v. Montana, 442 U.S. 510, 527, 99 S. Ct. 2450, 2461, 61 L. Ed. 2d 39 (1979)*; *see also State v. Phipps, 883 S.W.2d 138, 142 (Tenn. Crim. App. 1994)*. A charge is prejudicial error "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997)*.

When the evidence in the record fairly raises or supports the existence of a defense, the trial court is compelled to instruct the jury on the issue. *Manning v. State, 500 S.W.2d 913, 915-16 (Tenn. 1973)*. Because duress and necessity are general defenses, as opposed to affirmative defenses, if the evidence fairly raises either defense, the trial court must submit the issue to the jury. *T.C.A. § 39-11-203(c)* (2003); *State v. Culp, 900 S.W.2d 707, 710 (Tenn. Crim. App. 1994)* (citing *State v. Hood, 868 S.W.2d 744, 748 (Tenn. Crim. App. 1993)*). [*7] Whether the evidence has raised a defense and, therefore, requires a jury instruction depends upon an examination of the evidence in the light most favorable to the defendant because the trial courts and appellate courts must avoid judging the credibility of the witnesses when making this determination. *State v. Shropshire, 874 S.W.2d 634, 639 (Tenn. Crim. App. 1994)*. Where the proof "fairly raises" the defense, the trial court "must submit the defense to the jury and the prosecution must 'prove beyond a reasonable doubt that the defense does not apply.'" *Culp, 900 S.W.2d at 710*. We review the trial court's instructions to the jury *de novo* with no presumption of correctness. *State v. David Wayne Smart, No. M2001-02881-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 418 (Tenn. Crim. App. at Nashville, May 13,*

2003); *see also State v. Bowles, 52 S.W.3d 69, 74 (Tenn. 2001)*.

At trial, the Appellant testified that he had previously experienced multiple run-ins with law enforcement and that long-standing problems existed which caused him to fear for his safety during his current incarceration. According to the Appellant, he was attacked and viciously beaten by officers [*8] in 2003 when he was attempting to assist the officers in resolving a dispute at a club. The Appellant filed a report with the Internal Security Division as a result of the incident. The Appellant testified that police threatened him during the subsequent trial that he would be placed "under the jail" unless he signed a retraction of the complaint.

The Appellant also testified about an alleged incident of abuse which occurred when he was arrested on the felony charges for which he was incarcerated when he escaped. According to the Appellant, large vehicles filled with police officers in gas masks, who were brandishing army rifles, arrived to arrest him and continually taunted him with threats of what they would do when they found him while the Appellant hid in his attic. He testified that this caused fear and that he felt he might be killed. He stated that once the police found him, an officer stomped him so hard that he fell through the ceiling into the bathroom below, after which he was attacked and viciously beaten by officers.

The Appellant also contends that during his current incarceration at the jail, certain officers threatened that he would be placed in the general population [*9] of the jail. He further stated that the officers indicated that they would "look the other way," thus, allowing the violent offenders to injure or even kill him. According to the Appellant, jail personnel taunted him and threatened him, in addition to depriving him of medical care and denying him access to legal research. He said these actions, coupled with his past encounters with law enforcement, caused him duress, and he felt that he had to escape to protect himself. He stated that he felt it was futile to complain, as he would be complaining to the very people who were committing the offenses. According to the Appellant, he intended to contact a law enforcement officer he knew in Alabama to seek guidance about the situation following his escape.

The trial court refused to charge the defenses of duress and/or necessity based upon *Culp*, specifically finding:

> . . . [W]hen you compare the factors in *Culp*, . . . which, obviously is an escape case, to the facts here, they are completely different. Those facts that I'm talking about leading up to the potential present, imminent, impending harm of death or serious bodily injury, as to induce a well-grounded apprehension [*10] of death or serious bodily injury. . . . I don't have any of that proof. I have vague references by [the Appellant] of what he thought could happen in jail. . . . I have testimony from [the Appellant] that people - - or at least one or more sheriff's deputies sang lullabies. But I don't have the proof for me that . . . has been discussed and acknowledged here by the defense attorney that these factors just aren't met. . . . I'm here to follow the law and under this case and the facts that I have before me, I do not find that these defenses have been fairly raised. I don't have any administrative personnel here saying what complaints have been made, how continued complaints would be futile. I don't have the immediate reporting after the threats have been withdrawn. I don't find that I have proof about their being present, imminent impending well-grounded apprehension of death or serious bodily injury, based on the facts that I have here before me.

a. Necessity

The defense of necessity considers conduct to be legally justified if: (1) the person reasonably believes the conduct is immediately necessary to avoid imminent harm; and (2) the desirability and urgency of avoiding [*11] the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct. *T.C.A. § 39-11-609* (2003). The Sentencing Commission Comments to this section state that the defense of necessity is applicable in exceedingly rare situations where criminal activity is "an objectively reasonable response to an extreme situation." *T.C.A. § 39-11-609*, Sentencing Comm'n Comments. This court has held that in order for a defendant to be entitled to the defense of necessity, he "must show an immediately necessary action, justifiable because of an imminent threat, where the action is the only means to avoid the harm." *State v. Watson, 1 S.W.3d 676, 678 (Tenn. Crim. App. 1999)* (citing *State v. Green, 915 S.W.2d 827, 832 (Tenn. Crim. App. 1995)*). In *State v. Green*, this court ruled that because the statute codifies the common law, common law distinctions between the defenses of duress and necessity are instructive. *State v. Green, 995 S.W.2d 591, 606 (Tenn. Crim.*

App. 1998). In particular, the common law indicates that: [*12]

> Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.

Id. (quoting *United States v. Bailey, 444 U.S. 394, 409-10, 100 S. Ct. 624, 634, 62 L. Ed. 2d 575 (1980)*). The defense of necessity is, thus, generally only available where nonhuman acts prompt the illegal action. *State v. Davenport, 973 S.W.2d 283, 287 (Tenn. Crim. App. 1998)*; *see also State v. Polston, No. W2003-02556-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 718 (Tenn. Crim. App. at Jackson, Aug. 19, 2004)* [*13] .

In this case, the Appellant failed to present any evidence that there were any threats caused by physical forces outside his control which motivated his escape from the jail and the resulting damage caused. Even accepting the Appellant's allegations as true, all the conduct and threats of future conduct complained of by the Appellant were the result of human action. Thus, it was not error for the court to refuse to instruct the jury on the defense of necessity.

b. Duress

Duress is a defense to prosecution where the person or a third person is threatened with harm which is present, imminent, impending, and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. *T.C.A. § 39-11-504* (2003). The threatened harm must be continuous throughout the time the act is being committed and must be one from which the person cannot withdraw in safety. *Id*. Further, the desirability and urgency of avoiding the harm must clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct. *Id*. This court has specifically [*14] held that the compulsion must be immediate and imminently present and of such nature to produce a well-founded fear of death or serious bodily injury. *State v. Robinson, 622 S.W.2d 62, 73 (Tenn. Crim. App. 1980)*. There must be no reasonable means to escape the compulsion to commit the offense. *Id*.

Following review, we agree with the trial court that the evidence, even considered in the light most favorable to the Appellant, did not raise the defense of duress. He failed to present any evidence that he was forced to escape from the jail in order to prevent his immediate death or serious bodily injury. Accepting the Appellant's testimony as true, the complained of behavior, which included threatening to place the Appellant in the general population, denying him access to legal research and medical treatment, commenting on his pending charges, and singing lullabies, does not establish a definite threat to the Appellant's immediate safety. Apparently, these alleged comments had been occurring for some time, and the Appellant testified to no one specific event which indicated that the occurrence of the threat was imminent. As such, the possible complained of harm, [*15] the threat of being placed in a different pod with violent offenders, was not present, imminent, or impending and was not of such a nature to induce a well-grounded apprehension of death or serious bodily injury if he had not escaped. Thus, the Appellant was not able to identify a specific immediate threat of harm that motivated his escape.

Moreover, there is no indication in the record that the Appellant filed any type of complaint regarding the behavior. *See Culp, 900 S.W.2d at 710-11*. While the Appellant testified that he thought complaining would be futile, the record does not support that conclusion. According to jail personnel, the Appellant filed a complaint on behalf of another prisoner, and the situation was corrected. Thus, the record does not establish the futility of seeking an administrative remedy. Moreover, the Appellant failed to report his escape to the proper authorities when he reached a position of safety away from the immediate threat. *See Id. at 711*. The Appellant was apprehended three days after his escape after a full scale search was conducted. Clearly, he was not making any attempt to turn himself in to the proper authorities. [*16] Thus, the defense of duress is not fairly raised by the proof, and the trial court did not err in refusing to so instruct the jury.

II. Sufficiency of the Evidence

The Appellant also asserts that the "evidence introduced at trial was insufficient as a matter of law to allow the jury to arrive at a verdict of guilty beyond a reasona-

ble doubt as to the counts upon which [the Appellant] was sentenced." In considering the issue of sufficiency of the evidence, we apply the rule that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)*; *see also Tenn. R. App. P. 13(e)*. Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992)*. All questions involving the credibility of witnesses, the [*17] weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987)*. This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)*.

"A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973)*. A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982)*. These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990)*.

The Appellant first challenges his conviction for felony escape in violation of *Tennessee Code Annotated section 39-16-605* [*18] which provides that "[i]t is unlawful for any person arrested for, charged with, or convicted of an offense to escape from a penal institution. . . ." *T.C.A. § 39-16-605(a)* (2003). The offense of escape is a Class E felony if the person was being held on felony charges. *Id.* at *(b)(2)*. The Appellant asserts that the evidence is insufficient to support this conviction because the proof establishes that, although he left the jail where he was being held on felony charges, he left under duress in order to protect his own safety.

We find the Appellant's argument to be misplaced. Initially, we are constrained to note that, as we concluded *supra*, the defenses of duress or necessity were not fairly raised by the evidence. The record establishes that the Appellant was incarcerated at the Criminal Justice Center on June 20, 2004, awaiting trial on multiple felony charges. He, along with two other inmates, left the jail by climbing into the ceiling over the bathroom, going through a wall into the "mechanical room," entering the air vents, and exiting onto the roof of the jail. From the roof, the Appellant and his fellow escapees used sheets to descend [*19] to ground level and proceeded to leave the premises without permission. Further, the Appellant did not return to the jail until he was captured by police three days later. Indeed, as noted, the Appellant himself admits that he left the jail while incarcerated on felony charges. This evidence is more than sufficient to support the Appellant's conviction of felony escape.

The Appellant also challenges his conviction for misdemeanor vandalism. Our criminal code states that "[a]ny person who knowingly causes damage to or the destruction of any real or personal property of another or of the state, the United States, any county, city, or town knowing that the person does not have the owner's effective consent is guilty" of vandalism. *T.C.A. § 39-14-408(a)* (2003). Specifically, the Appellant asserts that "the State failed to prove that the [Appellant] ever vandalized anything that the State asserted was vandalized in this case. Additionally, the State failed to prove that the items that were alleged to have been repaired were only repaired to their original condition and not improved upon, to prevent future escapes. Finally, the State failed to prove, essentially, [*20] that any of the vandalism was caused by anyone specifically, especially by the others who escaped that same day."

The evidence presented at trial established that the damage to the jail facility, both real and personal, occurred during the escape. Testimony was given that the metal ceiling in the bathroom was pried back, a hole was created in the wall between the bathroom and the "mechanical room," the door and filter on the air unit in the "mechanical room" were bent, and the vents leading to the roof were pried back. According to testimony given, the cost to repair this damage was $ 1612. The damage was discovered shortly after the escape and various items used in the escape were found in areas which were damaged. Thus, it was reasonable for a jury to infer that the damage was done in order to facilitate the escape from the jail facility.

The Appellant's argument that the State failed to prove which of the three escapees caused the damage is misplaced, as a person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct or by the conduct of another for which the person is criminally responsible. *T.C.A. § 39-11-401(a)* [*21] (2003). *Tennessee Code annotated section 39-11-402(2)* (2003) provides that an appellant is criminally responsible for the actions of another when, "acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, [the appellant] solicits, directs, aids, or attempts to aid another person to commit the offense." Specifically, when an appellant is aware of the intentions

of his co-defendants and proceeds to aid or attempt to aid in the endeavor, the appellant is responsible for all natural and probable consequences of his co-defendant's actions during the commission of the crime. *State v. Richmond, 90 S.W.3d 648, 654 (Tenn. 2002)*. Thus, it is immaterial which of the three escapees caused the damage to the jail premises as all were actively engaged in the escape and were, therefore, each responsible for the actions of the others. Likewise, the Appellant's argument that the premises were repaired to a better condition than prior to the vandalism is immaterial. Clearly, damage was done to the building in the course of the escape. While the jury rejected the State's asserted value [*22] of the damage, it is clear that the jury obviously accredited the testimony that damage of less than $ 500 occurred. This issue is without merit.

CONCLUSION

Based upon the foregoing, the Appellant's judgments of conviction for felony escape and misdemeanor vandalism are affirmed.

DAVID G. HAYES, JUDGE

Analysis
As of: Oct 16, 2010

STATE OF TENNESSEE v. MATTHEW R. HAKODA, a/k/a MATTHEW R. DRENHAKODA, a/k/a MATTHEW D. KELLER

No. M2005-01864-CCA-R3-CD

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

2006 Tenn. Crim. App. LEXIS 774

July 19, 2006, Assigned on Briefs
September 21, 2006, Filed

SUBSEQUENT HISTORY: Post-conviction relief denied at *Hakoda v. State, 2008 Tenn. Crim. App. LEXIS 568 (Tenn. Crim. App., July 2, 2008)*
Appeal denied by *State v. Hakoda, 2008 Tenn. LEXIS 818 (Tenn., Oct. 27, 2008)*

PRIOR HISTORY: [*1] *Tenn. R. App. P. 3* Appeal as of Right; Judgments of the Criminal Court Affirmed. Appeal from the Criminal Court for Davidson County. No. 2004-B-1212. Steve Dozier, Judge.

DISPOSITION: Judgments of the Criminal Court Affirmed.

COUNSEL: Eileen M. Parrish, Nashville, Tennessee, for the appellant, Matthew R. Hakoda, a/k/a Matthew R. Drenhakoda, a/k/a Matthew D. Keller.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Hunter Eisenbeck and Rachel Marie Sobrero, Assistant District Attorneys General, for the appellee, State of Tennessee.

JUDGES: JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN, J., and J.S. DANIEL, SR. J., joined.

OPINION BY: JOSEPH M. TIPTON

OPINION

The defendant, Matthew R. Hakoda, appeals his convictions on three counts of solicitation of first-degree murder, a Class B felony, and his resulting sentence of twenty-nine years in the Department of Correction. The defendant argues that: (1) the evidence was insufficient to support his convictions; (2) the trial court erred in denying his motion to continue; (3) the trial court erred by admitting into evidence [*2] fragments of taped telephone conversations between him and his mother; (4) the trial court erred in allowing testimony regarding suspicion that he committed arson; and (5) the prosecutor committed prosecutorial misconduct during her opening statement. Although we conclude that the trial court erred in allowing evidence that the defendant was under suspicion for arson, we hold that the error was harmless and that no other error exists. We affirm the judgments of the trial court.

OPINION

The defendant was charged with soliciting fellow jail inmate, Joseph Chamberlain, to murder his wife and her two children. At the trial, Investigator Kevin Carroll with the Davidson County Sheriff's Department testified that every telephone call made by jail inmates was recorded in the normal course of business. He said the defendant was housed at the Davidson County Correctional Work Center (CWC) on January 27, 2004. The state in-

troduced excerpts of three telephone calls the defendant made to his mother on January 27. In the first excerpt, from a conversation at 8:32 a.m., the defendant told his mother to write down a series of items that he wanted. He told her, "I want one to do deer with, [*3] one to do quail with . . . one to do defense with, home defense . . . one to hose down [a] car with." The defendant told his mother that he hoped she could "figure this out." The defendant also instructed his mother that he would "need all the bells and whistles to go with those."

In the second excerpt, from a telephone call made at 5:20 p.m., the defendant's mother reminded the defendant that the telephone calls were being recorded. During this conversation, the defendant expressed anger and instructed his mother to "put the smack down where it needs to be put down." He also instructed her to get his "garbage" and to give it to his girlfriend, Scarla. The defendant's mother assured him that "we've got everything taken care of." They also talked about family members, including his two brothers, and how they were "taking all this." The defendant again stated that he hoped they were "on track," to which his mother responded, "It doesn't take a rocket scientist to put . . . puzzles together." The defendant talked about getting his "business" out of the house, and his mother stated that she would put a gun in the trunk and ammunition in the glove box of a car. His mother also stated [*4] that, "as far as I'm concerned, I don't have a f--ing sister." The second excerpt ends with the defendant stating that "hopefully come Sunday, we'll mourn together about the loss of family members."

During the third excerpted conversation, from a telephone call made at 7:14 p.m., the defendant told his mother to "transfer the goodies" and to take possession of cash. He spoke repeatedly of a "goody bag" and told his mother to use telephones "that aren't . . . you know." The defendant got angry with his mother, who did not immediately understand his directions, and he told her that she was "so slow."

Next, Joseph Chamberlain testified that he was an inmate at CWC on January 28, 2004. He testified that while working in the kitchen on that day, the defendant approached him and asked if Chamberlain "could get a job done for him." Chamberlain stated that the defendant explained that he wanted his stepchildren and possibly his wife killed. Chamberlain said the defendant was particularly interested in having the two children killed because "it would devastate the mother." He testified that the defendant did not tell him how he wanted the killings accomplished but that the defendant did tell [*5] him about weapons that he had, including at .22 caliber handgun with a silencer, which the defendant referred to as "a pea-shooter with a muffler," and a .45 caliber gun that the defendant did not want to use because it was registered in the defendant's name. According to Chamberlain, the defendant also said he wanted the killings done before the defendant was released from jail, so he could have an alibi and because "he was already under investigation and being watched for a . . . previous fire and stalking." Chamberlain said that he told the defendant he would help because he was afraid the defendant would find somebody else to do it and that he asked the defendant to provide him with information on the victims. He stated that he had no intention of actually helping the defendant and that he immediately told his "pod counselor" about his conversation with the defendant.

Chamberlain testified that two days after this initial encounter, the defendant again approached him. The defendant gave him a piece of paper, which was introduced into evidence, with handwritten personal information about the defendant's wife, including her full name, social security number, date of birth, place [*6] of employment, vehicle description, license plate number, and physical description. The paper also included information about his wife's two children, including where they went to school. The note stated, "The children definitely need to be taken care of at all costs, because they're so precious." The note also contained information about the defendant, including his date of birth, social security number, address, and cellular telephone numbers. Chamberlain testified that on February 2, the defendant again approached him and asked if he had any guns for sale. He said the defendant discussed possible payment options, including a bond his mother was supposed to sign, some appliances the defendant had in storage, and a litter of puppies. He said that they talked about possible installment payments but that no set amount was ever determined. Chamberlain said the defendant repeated that he definitely wanted the children killed but that he possibly wanted the wife hurt or maimed, perhaps through the use of acid.

Chamberlain testified that the next time he met with the defendant was on February 3 and that he had worn a "wire" provided by the police. He said the defendant appeared suspicious [*7] of him and did not provide much information. He also stated that the transmitting and recording devices did not work and that authorities were unable to hear his conversation with the defendant. Chamberlain testified that he spoke to the defendant briefly on two other occasions. He said the defendant was angry at the lack of progress with his request. He said the defendant told him that the police had searched his aunt's house, where he was previously living, and had found his .45 caliber gun. The defendant also told him that the .22 caliber pistol was in a shed on a neighbor's property that was guarded by a pit bull. Chamberlain testified that the police informed him that he would not get out of jail any sooner or receive any other help as a

result of his cooperation in the defendant's case. He stated that, in fact, jail life became more difficult for him afterward, as he was labeled a "snitch" by other inmates and was taken out of communal facilities.

On cross-examination, the defense questioned Chamberlain about apparent inconsistencies between his current testimony and his testimony at the preliminary hearing. Chamberlain admitted that at the preliminary hearing, he stated that [*8] the first time the defendant told him he wanted to kill the children was January 30, not January 28. Chamberlain said he was mistaken during the preliminary hearing. He testified that the defendant had approached him because he had a reputation for knowing "how to clear out a party," based on a previous incident when he informed a friend to call the police to stop a party. Chamberlain testified that he was previously in jail because he had not paid child support and that when the defendant initially approached him, the defendant only had thirteen days left of his jail sentence whereas Chamberlain was not scheduled for release for another five months. Chamberlain said he led the defendant to believe that his attorneys and his brother were working to get him out early. The defense also questioned Chamberlain on the methods of payment proposed by the defendant, and Chamberlain stated that he knew the defendant was unemployed.

Officer William Kirby of the Metropolitan Nashville Police Department testified that he examined and located latent fingerprints on the paper allegedly written by the defendant and given to Chamberlain. Linda Wilson, an Identification Analyst with Metro Police, [*9] was qualified as an expert in fingerprint identification. She testified that she identified four latent fingerprints on the paper as belonging to the defendant. Metro Police Detective Timothy Sneed, with the Domestic Violence Division, testified that he spoke with staff at CWC and with Chamberlain about the allegations against the defendant. He said he informed Chamberlain that the police department could not assist him with getting out of jail early. He said Chamberlain's written statements were consistent with his interviews. He stated that through a search warrant based on information provided by Chamberlain, he found the .45 caliber gun in the defendant's aunt's house and a magazine for a .45 caliber gun in a shed in the defendant's aunt's yard which was guarded by a pit bull. Sneed also said the defendant was suspected in the burning of the defendant's wife's house.

On cross-examination, Detective Sneed testified that the police did not find a .22 caliber gun during their searches. He stated that he did not question any jail inmates other than Chamberlain. He said that he knew the defendant was "about to get out" of jail by the time he became involved in the investigation and [*10] that Chamberlain had approximately five months left to serve. He testified that there was nothing in the note written by the defendant and given to Chamberlain that indicated a murder was to take place or a price, location, date, or method for a murder. He said he did not interview the defendant's mother or charge her with any crime in connection with the alleged solicitation. He stated that he learned that the defendant had attempted to hire a private investigator but that he did not follow up on that information. On re-direct examination, Detective Sneed stated that Joseph Chamberlain was not a private investigator and that it would violate an order of protection to keep observation or make contact with the protected party through a third person.

The defendant's wife, Ruth Dren-Hakoda, testified that she and the defendant married in 1999, divorced, and remarried in 2001. She filed for a second divorce in 2003. She stated that she obtained an order of protection against the defendant in September 2003 and that she saw the defendant on her property in violation of the order several times. She said the information about her and her children given by the defendant to Chamberlain was [*11] correct, with the exception of her height. She identified the handwriting on the paper as belonging to the defendant. She said that after hearing of the allegations in the present case, she and her children went into hiding out of fear for their safety. She said the defendant owned a .45 caliber handgun and a .22 caliber gun, and she believed the latter was registered in her name. As to appliances in the defendant's possession, she said he had a refrigerator. She also said he had pit pulls that he bred and whose puppies he sold for anywhere between $ 100 and $ 250.

On cross-examination, Ms. Dren-Hakoda testified that the defendant did not touch her on the occasions that he violated the protective order. She said she never told police that he threatened to kill or harm her or her children. She did say, however, that she felt threatened by the defendant.

The defendant's mother, Debbie Keller, testified for the defendant. She discussed the excerpted telephone conversations with her son that were previously submitted into evidence. She said that while her son was in jail, she talked to him on the telephone multiple times a day for approximately fifteen minutes at a time, for a total [*12] of at least thirty hours. She explained that in the January 27, 8:32 a.m. conversation, she understood that her son was asking her for needles. She said the defendant liked to sew and had a deerskin that he planned to make into moccasin boots. She said "quails" were items used to decorate the boots. She said she thought her son was also talking about a hose needed for a carwash and did not know what he meant by "home defense." She said that the defendant had awakened her from sleep and that she just pretended to understand and write down

what he said in order to go back to sleep. She said that she did not think he was talking in a code and that he was not talking about guns. She said that during the 7:14 p.m. conversation, the defendant was instructing her to speak to a bondsman about getting a friend out of jail. She said she understood only part of what the defendant was saying. She said she understood that "goody bag" referred to money for the bond. She also testified that during the 5:20 p.m. conversation, she and her son were talking about strained family relationships. She said her sister Carol, in whose house she was living, was unhappy about the police coming to her house because [*13] of the defendant. She said "smack down" was a wrestling term and a figure of speech that the defendant only used as a joke. She said the "garbage" the defendant referred to were his clothes that he wanted removed from Carol's house. She said that the defendant wanted her to get some guns out of Carol's house but that she did not do so. She said that the defendant had recently had a falling out with his brother Benji and that the comment about mourning the loss of family members referred to his conflict with Benji and her plan to cut off ties with Carol.

Ms. Keller also testified that the three tapes played for the jury were not the complete conversations that she had with the defendant, although she could not remember what else was discussed. She said the only appliances the defendant had were an old homemade computer, a non-functioning television set, and a hand saw. She said that the defendant never threatened his wife and that he cared about his step-children. On cross-examination, Ms. Keller stated that she did not know to what the $ 6000 to $ 8000 the defendant discussed with her referred and that she sometimes only pretended to understand her son. She later said the large sum [*14] of money was for a down payment on a house. She said she did not know what her son's reference to "carwash" or "home defense" meant.

Mario Hambrick, a bail bondsman, testified that he had worked with the defendant several times. He said that after a conversation with the defendant, he had given the defendant telephone numbers for two private investigators. Tommy Jacobs, a retired police officer and professional private investigator, testified that, in his experience, it is common for people involved in divorces to hire private investigators. He testified that a private investigator would need information from a client about the person to be investigated, such as the person's name, address, place and hours of employment, and frequented locations. He said it would be important to have information on any children involved, including where they went to school.

After trial, the jury returned guilty verdicts on all three charges of solicitation of first-degree murder. The trial court sentenced the defendant to twenty-nine years in prison as a Range I, standard offender. In this appeal, the defendant argues that: (1) the evidence was insufficient to support his convictions, (2) he should [*15] have been granted a continuance to review the approximately forty hours of taped telephone conversations between him and his mother, (3) the trial court erred in admitting into evidence the fragmented telephone conversations, (4) the trial court erred in admitting evidence related to his suspected involvement in the arson of his wife's home, and (5) the prosecutor committed misconduct by referring to the defendant's suspicion on charges of arson during her opening statement.

I. SUFFICIENCY OF THE EVIDENCE

The defendant argues that the evidence was insufficient to support his convictions for solicitation. He argues, in particular, that the state's key witness, Joseph Chamberlain, was "not credible enough for a rational trier of fact to establish the elements of solicitation, beyond a reasonable doubt." The state argues that the jury had the opportunity to evaluate the credibility of witnesses and chose to accredit Chamberlain's testimony. We agree with the state.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have [*16] found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979)*. We do not reweigh the evidence but presume that the trier of fact has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. *See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984)*; *State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)*. Questions about witness credibility are resolved by the jury. *See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997)*.

The defendant was convicted of three counts of solicitation to commit first-degree murder. Our code describes the offense of solicitation as follows:

> Whoever, by means of oral, written or electronic communication, directly or through another, intentionally commands, requests or hires another to commit a criminal offense, or attempts to command, request or hire another to commit a criminal offense, with the intent that the criminal offense be committed, is guilty of the offense of solicitation.

T.C.A. § 39-12-102(a).

The state presented [*17] evidence that the defendant approached Joseph Chamberlain with a request to kill the defendant's wife and her two children. Chamberlain testified that the defendant approached him on multiple occasions about this request and that the defendant provided him with information to accomplish the murders. On cross-examination, the defendant questioned Chamberlain's credibility and brought up inconsistencies in his testimony. The jury was free to discredit Chamberlain's testimony, and it was free to accept the defendant's theory that he was trying to find a private investigator, not a murderer for hire. The jury's verdict reflects that it chose to believe Chamberlain. The state also presented the testimony of a police officer and circumstantial evidence that corroborated Chamberlain's testimony. We conclude that the state presented sufficient proof to allow a rational juror to find beyond a reasonable doubt that the defendant asked Chamberlain to kill his wife and her children with the intent that Chamberlain accomplish the killings.

II. DENIAL OF CONTINUANCE

The trial in this case was scheduled to begin April 4, 2005. On March 28, the defendant filed a motion to continue, citing [*18] that he had not yet received crucial state evidence, including a copy of the recorded telephone conversations he had with his mother while he was in jail. A hearing on the motion to continue was held on April 1. The afternoon before, defendant's counsel received a copy of approximately forty hours of the recorded conversations on compact disc but was unable to open the files on her computer. At the hearing, it was established that the conversations had actually been sent to the defendant's original trial counsel sometime in November 2004, that defense counsel did not request the discovery from the prior counsel, and that although current counsel began her representation of the defendant in January, she did not file a motion to continue until March 28. In denying the continuance, the trial court stated, "I don't think it's really the State's fault . . . or they should be faulted or the trial should be continued, because you haven't gotten those tapes, when apparently the former attorney did and they're listed in discovery."

The defendant argues that the trial court erred in denying his motion to continue. He argues that he was not given adequate time to listen to the approximately [*19] forty hours of recorded telephone conversations between him and his mother and that this caused him prejudice. The state counters that it was within the trial court's discretion to deny the motion, that the state was not at fault for the defendant's lack of preparation, and that the defendant has not established that he was prejudiced by the denial of the continuance.

The granting of a continuance rests within the sound discretion of the trial court. *Moorehead v. State, 219 Tenn. 271, 409 S.W.2d 357, 358 (1966)*. A reversal may only occur if the denial was an abuse of discretion and the defendant was improperly prejudiced in that a different result might reasonably have been reached if the continuance had been granted. *See State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App. 1990)*; *Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973)*.

We conclude that the trial court acted within its discretion in denying the motion to continue. The trial court found that the state complied with its discovery duties, *see Tenn. R. Crim. P. 16*, when it furnished the recordings to the defendant's first counsel and that the defendant's current [*20] counsel was at fault for not requesting the recordings sooner when the recordings were listed in the state's response to discovery. Furthermore, while asserting that he was prejudiced by the denial of a continuance, the defendant did not offer any proof at the hearing for the motion for new trial that having more time to listen to or transcribe the recordings would have benefitted the defense. The defendant has not offered any insight as to what new information the full forty hours of recordings had to offer or how having more time to review the recordings before trial would have enhanced his defense. We conclude that the defendant has failed to show that the trial court abused its discretion in denying his motion to continue.

III. ADMISSION OF EXCERPTED TELEPHONE CONVERSATIONS

The defendant next argues that the trial court erred in admitting into evidence the three excerpts of taped telephone conversations between him and his mother. He argues that only brief fragments from the forty hours of conversation were admitted and that he was prejudiced by the inaccuracy and vagueness of the excerpts introduced into evidence. The state argues that the admission of the evidence was [*21] proper because it was relevant, the defendant could have requested introduction of the entire conversations, and the defendant was not prejudiced by introduction of the excerpts. We conclude that no reversible error exists in the introduction of the taped conversations.

The standard of appellate review is abuse of discretion when the decision of the trial judge concerning admissibility of evidence is based on relevance and potential for prejudice. *See State v. Dubose, 953 S.W.2d 649, 652 (Tenn. 1997)*. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Tenn. R. Evid. 401*. Under *Tennessee Rule of Evidence 402*, relevant evidence is gener-

ally admissible. However, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See Tenn. R. Evid. 403*.

The defendant argues, without citing to the rule, that the excerpted telephone conversations caused him unfair prejudice and should have been excluded under *Tennessee Rule of Evidence 403*. This prejudice, according [*22] to the defendant, was the result of the vague and incomplete nature of the recordings. However, the recordings were not left to stand on their own at trial. The defendant presented his own witness, his mother, to testify as to the meanings of what was said during the excerpted conversations. The defendant's mother also testified that the excerpts did not encompass the entire conversations she had with her son, although she failed to specify how the exclusion of other parts of the conversations changed the apparent meaning of the excerpted parts. The evidence was relevant to the state's theory that the defendant had been planning to have his wife and her children killed. It was offered as circumstantial evidence, from which the jury could infer that the defendant was speaking of his alleged plans. The defendant was free to rebut this evidence and attempted to do so. The defendant has not established how he was unfairly prejudiced by the introduction of this evidence. We conclude that the probative value of the evidence outweighed any prejudicial effect it might have had. The trial court did not abuse its discretion by admitting the tapes into evidence.

The defendant also cites *State v. Jones, 598 S.W.2d 209, 223 (Tenn. 1980)*, [*23] for the proposition that the trial court should have given a limiting instruction that only the statements, admissions, and declarations of the defendant in the taped conversations may be considered. We note that the defendant did not request such an instruction at trial and did not raise this issue in his motion for new trial. This issue is waived. *See Tenn. R. App. P. 3(e), 36(a)*; *State v. Howell, 868 S.W.2d 238, 255-56 (Tenn. 1993)*; *see also State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)* (holding that the trial court "generally has no duty to exclude evidence or to provide limiting instruction to the jury in the absence of a timely objection").

IV. EVIDENCE OF SUSPICION FOR ARSON

The defendant argues that the state's evidence of his suspicion for arson was improper character evidence that should have been excluded. The state argues that the defendant has waived this issue for failure to cite appropriate authorities, to wit, the Tennessee Rules of Evidence, in his brief. The state also argues that the information regarding the defendant's connection with arson was not offered as character evidence but to prove intent and to provide context.

[*24] After a pretrial hearing on the defendant's motion in limine to exclude the evidence, the trial court allowed testimony that the defendant was suspected of starting a fire at his wife's house. This evidence was related to Joseph Chamberlain's testimony that the defendant approached him while they were both in jail. According to Chamberlain, the defendant had requested that Chamberlain commit the murders while the defendant was still in jail, in order that he could have an alibi because he was already under suspicion for the burning of his wife's house. In making its determination, the trial court stated, "I do think it's relevant, in terms of placing into context the reason, if in fact the jury believes Mr. Chamberlain . . . and the context of the particular discussion, as to why, according to Mr. Chamberlain, [the defendant] wants these acts committed prior to him getting out [of jail]."

First, we address the state's waiver argument. Generally, issues that "are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." *Tenn. R. Crim. App. 10(b)*. In this case, the defendant essentially argues that the [*25] admission of evidence violated the rules of evidence but does not cite to those rules. While a citation to the Tennessee Rules of Evidence would be most appropriate, the defendant does cite to cases which discuss the application of evidentiary rules. We will treat this issue as not waived.

Under our evidentiary rules,

> Evidence of other crimes, wrongs, or acts is not admissible *to prove the character of a person in order to show action in conformity* with the character trait. It may, however, be admissible for some other purpose. The conditions which must be satisfied before allowing such evidence are:
>
> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b) (emphasis added).

In support [*26] of its argument that the evidence was admissible, the state cites a Tennessee Supreme Court decision which held that evidence of other crimes, wrongs, or acts can be admitted pursuant to *Rule 404(b)* for the purpose of providing contextual background or "to 'paint a picture' of the events leading up to and surrounding" the criminal conduct on trial. *State v. Gilliland, 22 S.W.3d 266, 271 (Tenn. 2000)*. We note, however, that this holding in *Gilliland* was narrow. Accordingly,

> when the state seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the state must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

Id. at 272.

The state argues that the evidence in dispute was necessary to provide context [*27] to the conversation in which the defendant allegedly solicited Joseph Chamberlain to commit murder and to explain "what precipitated this conversation." However, if the state's chief concern was to demonstrate why the defendant made the solicitation to Chamberlain when he did, then it need only have proved that the defendant wanted the murders committed while he was in jail in order that he would have an alibi. The additional testimony regarding the defendant also being under suspicion for the fire at his wife's house was not necessary. Furthermore, the absence of this evidence would not have created a "chronological or conceptual void" nor would it have resulted in "significant jury confusion" as to a material aspect of the case. Thus, *Gilliland* does not apply to this case, and the trial court erred in allowing this evidence under the "contextual background" exception.

The state also argues that the evidence was admissible to show motive or intent, both of which are acceptable "other purposes" for which evidence may be admitted under *Rule 404(b)*. *See State v. Parton, 694 S.W.2d 299, 302 (Tenn. 1985)*. The state essentially makes the same argument it did regarding [*28] the "contextual" necessity of the evidence, that evidence of the defendant's suspicion for arson explains why the defendant made the solicitation when he did. As noted above, however, this was adequately established through evidence that the defendant was in jail and wanted an alibi.

We conclude that the trial court erred by admitting evidence of the defendant's suspicion for arson. Nevertheless, we hold that the error was harmless. The petitioner has not shown that he was prejudiced by the admission of the evidence or that the evidence more probably than not affected the result of the trial. *See T.R.A.P. 36(b)*; *Tenn. R. Crim. P. 52(a)*. The state presented direct evidence that the defendant solicited Joseph Chamberlain to commit murder, and the jury chose to accredit the testimony of Mr. Chamberlain. Evidence that the defendant said he was under suspicion for arson was minimal and was not a major issue during trial. In view of the record as a whole, we conclude that the error was harmless and that the defendant is not entitled to reversal on this issue.

V. PROSECUTORIAL MISCONDUCT

During her opening statement, the prosecutor stated, "You'll hear that he [the defendant] [*29] told Joseph Chamberlain that he needed it [the murder] done . . . while the Defendant was in jail . . . so that he could have an alibi, because he was suspected of burning his wife's house down." The defendant argues that this constituted prosecutorial misconduct because the prosecutor violated the rule against introducing prior bad acts character evidence. The defendant further argues that because neither the state nor the court took curative measures and because the weight of the evidence was against the state, this alleged misconduct prejudiced him. The state counters that the defendant waived this argument by not objecting at trial and that, regardless, the prosecutor broke no clear and unequivocal rule of law.

As the state points out, the defendant did not make a contemporaneous objection to the prosecutor's statement. Ordinarily, this would result in a waiver of the issue. *See Tenn. R. App. P. 36(a)* (stating that an appellate court is not obligated to grant relief "to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.") *See also State v. Robinson, 146 S.W.3d 469, 511 (Tenn. 2004)* [*30] (concluding that defendant waived the issue of improper prosecutorial comments for failing to make a contemporaneous objection). Regardless of any waiver, however, this issue does not warrant reversal. The prosecutor's statement was a reference to evidence that, as discussed above, while not properly admitted, was harmless. The defendant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing and the record as a whole, we conclude that there exists no reversible error in the judgments of the trial court, and the judgments of the trial court are affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE

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UNITED STATES OF AMERICA v. ELLIOT COLUMBUS MEDLIN

No. 3:09-00204

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2010 U.S. Dist. LEXIS 18089

March 1, 2010, Filed

COUNSEL: [*1] For Elliot Columbus Medlin, Defendant (1): James Kevin Cartwright, LEAD ATTORNEY, Clarksville, TN.

For USA, Plaintiff: Kelly D. Young, LEAD ATTORNEY, Office of the United States Attorney (MDTN), Nashville, TN.

JUDGES: ROBERT L. ECHOLS, UNITED STATES DISTRICT JUDGE.

OPINION BY: ROBERT L. ECHOLS

OPINION

MEMORANDUM

Defendant Elliot Medlin filed a Motion to Suppress (Docket Entry No. 19), to which the Government filed a response in opposition (Docket Entry No. 29).

Defendant seeks to suppress all evidence seized during the search of 114 Westlawn Drive, Nashville, Davidson County, Tennessee, on January 20, 2009, on the ground that the search warrant issued by a state General Sessions Court Judge was predicated on an affidavit that did not establish probable cause for the search. Defendant also seeks to suppress any and all statements, recordings, and/or transcripts of statements purportedly made by him on the ground that they were collected in violation of his right to counsel, his right to remain silent, and the marital communications privilege. The Court held a suppression hearing on Thursday, February 25, 2010.

I. FACTS

With regard to the first issue--whether the search warrant was supported by probable cause--the Government [*2] did not present any witnesses at the evidentiary hearing. Rather, the Government relied on a copy of the search warrant affidavit which was attached as an exhibit to the Government's response to the motion to suppress. (Docket Entry No. 29-1.) The content of the affidavit will be discussed below.

With regard to the second issue--whether Defendant's statements should be suppressed--the Government called one witness, Michelle Ray, to introduce audio recordings of telephone calls made by the Defendant while he was detained at the local jail. Ray is an investigator with the Davidson County Sheriff's Office and she is the point-of-contact for inmate telephone calls. She brought with her to the hearing certain records from the jail's management system, which is a computerized database used to keep track of inmates. According to Ray, these records are considered to be Sheriff's Office business records. If a member of the public or media requests the records, they are provided. Thus, the records are open to inspection by any one, including law enforcement.

Each inmate who enters the jail is assigned an "OCA," a unique numerical identifier based on fingerprints. The OCA is assigned when the inmate [*3] is first booked into the jail. Defendant was assigned an OCA of 79368 when he was booked on January 20, 2009. (Gov't Ex. 1 at 1.) The records show Defendant was housed first in the booking area and then he was transferred to 1A, sometimes referred to as the gym, at 4:42 a.m. on January 21, 2009. When Defendant was moved from the booking area to 1A, he changed from

civilian clothing to jail clothing and he received a copy of the inmate handbook. (Gov't Ex. 2.) The inmate handbook contained a section entitled "***Phone Calls:***"

> There are collect phones in each housing area. To use them, you will have to set up an account with the phone company. Calls are NOT private; they are recorded. Staff may listen to calls with anyone but your lawyer. The recordings may be turned over to the police if they show evidence of criminal activity.

(*Id.* at 2.) Defendant was later housed in 3A.

In the housing areas inmates are required to use a pin number to initiate a call. The pin is based on the OCA number with enough leading zeros to create a seven-digit number. In other areas of the jail, a pin number is not required and the inmate may pick up a phone and dial a number. A pin number is not required to use [*4] a phone in the booking area or in 1A.

When an inmate initiates a call from the jail, the call begins with an automated tag to notify the inmate that the phone call is being recorded. The recording asks for the inmate's information and then plays a tag line which includes a pre-recording made by the inmate, usually stating his name, for the person on the other end of the call so the receiving person will know who the call is from. The recorded preamble to the phone call tells both the inmate and the receiving person that the telephone call is being recorded or monitored. This happens each time the inmate places a call.

Ray provided the Government with two sets of records. The first set showed calls made using the pin number assigned to Defendant. From that set the Government determined calls were made to a particular telephone number. The Government then requested a second set of records to show all calls from the jail to a specific telephone number even if a pin number was not used to make the calls. In the first set of records, the calls using a pin number assigned to the Defendant were made from the gym area at a time when Defendant was housed there.

Recordings of telephone calls initiated [*5] by the Defendant were admitted into evidence on a CD. (Gov't Ex. 3.) Each call included a header line that contained detailed information about the call, including identification of the actual station within the jail from which the phone call was placed and the destination of the call. When played in the courtroom, each call began with a tape-recorded message stating: "This call may be recorded or monitored. I have a collect call from Elliot Medlin an inmate at Davidson County criminal justice center. To accept dial zero and hold. To refuse, dial 5." It is up to the recipient to accept or reject the collect call.

Inmates [*6] can initiate three-way calls by first calling one number and then asking the receiving person to dial another number to connect another third person on the telephone call. The jail system tracks only the direct-dialed calls so that, even though there is a subsequent phone call within a phone call, the system shows only the original number dialed. The only way to identify who is being called on a third-party call is to listen to each call. The third person who is dialed into the call does not hear the tape-recorded message stating that the call is being recorded or monitored.

In this case, however, certain third-party recipients of calls from the Defendant were on actual notice that the calls were being recorded or monitored. This is shown by two of the phone calls on Government Exhibit 3. In a three-way call on January 22, 2009 at about 13:32 hours, approximately five minutes and 40 seconds into the call, the Defendant, identified through his OCA, asks the person he dialed directly about a person named "Tommy." A female voice speaks up and says, "They're probably listening to this conversation." In a call on January 22, 2009 at 11:11 hours, about ten minutes into the call, after it [*7] has become a three-way call, a female voice says something like, "Don't do that. This phone is tapped[.]"

Defendant's pin number was used to make calls to a particular phone number while on other occasions calls were made to the same phone number without use of Defendant's pin number. A reasonable inference is that the Defendant made calls to the same phone number from various stations within the jail, some of which required use of his pin number and some of which did not.

Defendant did not present any witnesses. Other than cross-examining the Government's witness, Defendant did not produce any additional evidence in support of his motion to suppress.

II. ANALYSIS

A. Whether the affidavit provided probable cause for the search warrant

To establish probable cause necessary for issuance of a search warrant, the supporting affidavit must set forth "a nexus between the place to be searched and the evidence sought." *United States v. Penney, 576 F.3d 297, 311 (6th Cir. 2009)* (quoting *United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004)*). The task of the issuing judge "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit [*8] before him, . . . there is a fair probability that contraband or evidence of a crime

will be found in a particular place." *Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)*. The task of this Court is simply to ensure that the state judge had a substantial basis for concluding that probable cause existed. *Penney, 576 F.3d at 311*. The state judge's discretion should be reversed only if it was arbitrarily exercised; a reviewing court is to accord the judge's determination "great deference." *United States v. Allen, 211 F.3d 970, 973 (6th Cir. 2000)* (en banc) (citing *Gates*). "[L]ine-by-line scrutiny [of an underlying affidavit is] . . . inappropriate in reviewing [a judge's] decisions." *Gates, 462 U.S. at 246 n.14*. "[T]he traditional standard for review of an issuing [judge's] probable cause determination has been that so long as the [judge] had a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing, the *Fourth Amendment* requires no more." *Id. at 236* (quoting *Jones v. United States, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960)*).

The Court concludes that the state judge who issued the search warrant in this case had a substantial basis for concluding that a search of 114 Westlawn [*9] Dr., Nashville, Davidson County, Tennessee, would uncover evidence of drug trafficking. Detective Steve Parks attested in his affidavit in support of the search warrant:

> Within the last 72 hours your affiant met with a reliable confidential informant (herein after referred to as CI). The CI stated that the CI could purchase a quantity of Oxycontin pills from a subject identified as "Elliott Medlin". After meeting with the CI at a predetermined meeting place, the CI and the CI's vehicle were searched for contraband and money, neither of which was found. The CI was given two hundred eighty dollars in previously photocopied twenty dollar bills, an electronic listening device, and a digital recorder. The said CI was then followed by Detectives of the West Crime Suppression Unit to 114 Westlawn Dr., Nashville, Davidson County, Tennessee, to purchase the quantity of Oxycontin Pills. The CI was observed to enter the front door of the residence and was heard to make contact with Elliot Medlin. Medlin was heard to ask the CI "How many" the CI wanted, referring to the Oxycontin pills. The CI was then observed to exit the door of the residence a short time later and enter the CI's vehicle. The [*10] CI was then followed by Detectives directly back to a predetermined meeting location where the CI handed over a cellophane bag containing four eighty milligram Oxycontin Pills. The CI and the CI's vehicle were once again searched for any money or contraband and none were found. The drugs were turned into the MNPD Property and Evidence Section.
>
> Additionally, the CI, under the direction and supervision of myself and other Detectives, and with myself and other Detectives present and observing, has purchased similar quantities of Oxycontin from 114 Westlawn Dr. and Elliot Medlin on four previous occasions within the last 90 days. The CI has also visually identified Elliot Medlin to your affiant through photograph as the person who has sold the Oxycontin pills to the CI.
>
> * * *
>
> Said CI is familiar with said drug, Oxycontin, from past exposure and experience. Your affiant knows said "CI" is reliable from past information received from said "CI" that has proven to be true and correct and has resulted in numerous lawful seizures of narcotics including Oxycontin. Affiant will disclose the "CI's" name to the Judge signing the warrant only. The "CI" [*11] wishes to remain anonymous for fear of reprisal.

(Docket Entry No. 29-1, Affidavit at 2.)

Thus, Detective Parks informed the state judge that, within the prior 72 hours, he sent a confidential informant into 114 Westlawn Drive in Nashville to purchase Oxycontin pills being sold illegally. The CI and his vehicle were searched before making the buy, and no drugs or contraband were recovered. The CI entered the residence with money received from Detective Parks, who monitored the drug purchase electronically and heard Medlin ask the CI "how many he wanted." The CI left the residence and immediately returned to a predetermined location to meet Detective Parks and give him the Oxycontin pills he purchased with the money provided to him. The CI identified Medlin in a photograph. The CI was familiar with Oxycontin through past exposure and experience. The CI had completed similar purchases of Oxycontin from Medlin at 114 Westlawn on four previous occasions within the prior 90 days. Detective Parks averred that he knew the CI to be reliable because the CI had provided information in the past that was accurate and resulted in lawful seizures of narcotics, including Oxycontin. Detective Parks [*12] was willing to iden-

tify the name of the CI to the judge, but no one else to preserve the CI's anonymity.

"[W]here a known person, named to the [judge], to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past, a neutral and detached [judge] may believe that evidence of a crime will be found." *Allen, 211 F.3d at 976*. Even though in *Allen* the informant's information was not corroborated, the Sixth Circuit nonetheless found there was probable cause to issue the search warrant. The court explained that to require corroboration of such information would aid lawbreakers and handicap the state. *See id.*

In the present case, the affidavit contained first-hand information from a reliable confidential informant that was corroborated by a police officer through electronic monitoring of the illicit transaction as it occurred. *See United States v. Sonagere, 30 F.3d 51, 53 (6th Cir. 1994)*(holding statement that event was observed firsthand entitled informant's tip to greater weight than might otherwise be the case). Thus, the instant facts present a stronger showing of probable cause than in *Allen.*

This case is also [*13] similar to *United States v. Pinson, 321 F.3d 558 (6th Cir. 2003)*, in which the Sixth Circuit affirmed this Court's denial of a motion to suppress evidence for lack of probable cause where a similar search warrant and supporting affidavit were at issue. *Id. at 560-565*. In that case, the defendant asserted "that the affidavit was a 'bare bones' affidavit, lacking information about the confidential informant and his reliability, lacking information on the 'buy"' conducted by the confidential informant, and "lacking evidence that ongoing drug trafficking was taking place at the residence." *Id. at 562-63*. Relying on *Allen,* the Sixth Circuit disposed of the contentions, observing that the attesting officer personally knew the CI, named the CI to the magistrate judge, and characterized the CI as reliable. *Id. at 563*. The court also pointed out the magistrate knew exactly what type of criminal activity the CI had experienced at the place to be searched because the CI personally had purchased cocaine there, which was corroborated by the attestations of the police officer. *Id.*

The Sixth Circuit further noted in *Pinson* that *Allen and United States v. Campbell, 256 F.3d 381 (6th Cir. 2001),* do [*14] not suggest the name or a description of a confidential informant must be included in the search warrant affidavit to establish probable cause. *Id. at 564*. Also, the affidavit need not name or describe the person who sold the drugs or name the owner of the property. *Id.*

Defendant Medlin contends that the affidavit failed to make any assertion that the CI had been inside Medlin's apartment, that he had ever seen drugs or other evidence inside Medlin's apartment, or that he had seen any evidence of a crime other than the one that occurred when Medlin allegedly sold him drugs. Without such an assertion, Medlin argues, the affidavit fails to establish the necessary nexus between the place to be searched and evidence sought.

Defendant's statements about the content of the affidavit are inaccurate, as shown by the exact language of the affidavit quoted above. The affidavit stated the CI had made four previous buys at 114 Westlawn from Medlin in the prior 90 days and the CI told Detective Parks he had seen Oxycontin pills at that location and could purchase them there. The CI wore a recording device that captured at least one of the drug buys disclosed in the affidavit and the CI identified [*15] Medlin by photograph to Detective Parks.

Based on the totality of the circumstances existing before the state judge, the search warrant was supported by adequate probable cause as set out in Detective Parks' affidavit. *See United States v. Martin, 526 F.3d 926, 937-938 (6th Cir. 2008)*. Defendant's motion to suppress all of the evidence seized pursuant to the search warrant will be denied.

B. Whether Defendant's recorded telephone conversations should be suppressed

Defendant next contends that his telephone conversations with his wife from jail are protected by the marital communications privilege. The Sixth Circuit has held that there are three prerequisites to the assertion of this privilege: "(1) At the time of communication there must have been a marriage recognized as valid by state law; (2) the privilege applies only to "utterances or expressions intended by one spouse to convey a message to the other," *United States v. Lustig, 555 F.2d 737, 748 (9th Cir.), cert. denied, 434 U.S. 926, 98 S. Ct. 408, 54 L. Ed. 2d 285 (1977)* and 434 U.S. 1045, 98 S.Ct. 889, 54 L.Ed.2d 795 (1978); and (3) the communication must be made in confidence. *See generally* 2 Jack B. Weinstein and Margaret A. Berger, [*16] Weinstein's Evidence § 505[4] (1992)." *United States v. Porter, 986 F.2d 1014, 1018 (6th Cir. 1993)*. "The burden of establishing the existence of the privilege rests with the person asserting it." *In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447, 450 (6th Cir. 1983)*.

Defendant produced no evidence that there was a marriage recognized as valid by state law. He also failed to show that the communications were made in confidence.

Defendant argued at the conclusion of the evidentiary hearing that the government failed to produce any evidence that the female voice identified on the

three-way telephone calls was his wife and that the female knew her conversations with the Defendant were being recorded or monitored. By asserting the privilege, it is the Defendant's burden to show the female was his wife and that he was validly married to her; otherwise, as the Government aptly pointed out, Defendant's claim must fail at the outset.

But even assuming that the female voice heard in the conversations was Defendant's lawful wife, the Government's evidence established that Defendant's jail telephone calls were not made in confidence. To the contrary, all calls were recorded and monitored [*17] by jail officials. Defendant was provided with a jail inmate handbook upon his admission to the jail which informed him explicitly that his telephone conversations would not be private and would be subject to monitoring. A unique OCA number was assigned to the Defendant which linked him to certain of the telephone calls. At the beginning of each call the Defendant made, whether by using his pin number or not, he heard a recorded statement telling him that his call was not confidential and that it would be recorded and/or monitored. The same recorded statement was heard by the recipient of the Defendant's calls. Thus, Defendant had no expectation of privacy in those calls and neither did those persons who participated in the calls. *See United States v. Hadley, 431 F.3d 484, 489, 509-510 (6th Cir. 2004)* (admitting into evidence recording of telephone call made by defendant to wife from jail where inmates were warned calls were recorded, inmates were given an identification number for use in placing collect calls, and calls made using the ID number included a recorded preamble identifying the inmate who originated the call); *United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998)* (jail [*18] telephone call between husband and wife not protected by marital communications privilege); *United States v. Etkin, 2008 U.S. Dist. LEXIS 12834 , 2008 WL 482281 at *3 (S.D.N.Y. Feb. 20, 2008)* (email sent from husband to wife on work computer system not protected by marital communications privilege where husband was warned his use of the computer was subject to monitoring).

Even if the female whose voice is heard on the third-party calls did not hear the recorded preamble as the recipient did, the female nevertheless had actual notice the calls were being monitored. On two different occasions she said, "They're probably listening to this conversation," and "Don't do that. This phone is tapped." Because the female knew the calls were being monitored, she had no expectation the calls were made to her in confidence.

Finally, there is no merit to Defendant's general contention that all of his statements should be suppressed as taken in violation of his *Fifth Amendment* right to remain silent and his *Sixth Amendment* right to counsel. Defendant was not subject to interrogation by law enforcement officers when he made the statements to the persons he called. *See Moran v. Burbine, 475 U.S. 412, 421-422, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986)* ("the record [*19] is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements. . . Indeed it appears that it was respondent, and not the police, who spontaneously initiated the conversation"). Rather, having been warned that the telephone system used recording equipment and was monitored, Defendant voluntarily, knowingly and intelligently placed calls to persons outside the jail and thereby waived any right to remain silent that he may have had. *Withrow v. Williams, 507 U.S. 680, 689-690, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993)*. The use of a jail telephone system to make personal calls is also not a "critical stage" of the criminal prosecution to require the assistance of counsel. *See Kansas v. Ventris, ___ U.S. ___, 129 S.Ct. 1841, 1844-1845, 173 L. Ed. 2d 801 (2009)*. Even if Defendant possessed a *Sixth Amendment* right to counsel when he made the phone calls, he voluntarily, knowingly and intelligently waived that right. *See Montejo v. Louisiana, ___ U.S. ___, 129 S.Ct. 2079, 2085, 173 L. Ed. 2d 955 (2009)*.

III. CONCLUSION

For all of the reasons stated, Defendant's Motion to Suppress (Docket Entry No. 19) will be denied.

An appropriate Order will be entered.

/s/ Robert L. Echols

ROBERT L. ECHOLS

UNITED STATES DISTRICT JUDGE

ORDER

In [*20] accordance with the Memorandum entered contemporaneously herewith, Defendant Elliot Columbus Medlin's Motion To Suppress (Docket Entry No. 19) is hereby DENIED.

It is so ORDERED.

/s/ Robert L. Echols

ROBERT L. ECHOLS

UNITED STATES DISTRICT JUDGE

JUANA VILLEGAS, Plaintiff, v. METROPOLITAN GOVERNMENT OF DAVIDSON COUNTY/NASHVILLE DAVIDSON COUNTY SHERIFF'S OFFICE, et al., Defendants.

NO. 3:09-00219

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

2011 U.S. Dist. LEXIS 45792

April 27, 2011, Decided
April 27, 2011, Filed

PRIOR HISTORY: Villegas v. Metro. Gov't of Davidson County/Nashville, 2009 U.S. Dist. LEXIS 108578 (M.D. Tenn., Nov. 18, 2009)

CASE SUMMARY:

OVERVIEW: Plaintiff pretrial detainee stated a viable § 1983 claim because the conduct of county officers in shackling her during the final stages of labor during her pregnancy and postpartum recovery and in denying her a breast pump provided for her medical care constituted deliberate indifference and interference under the Eighth and Fourteenth Amendments.

OUTCOME: Summary judgment denied.

CORE TERMS: shackling, inmate's, woman, pain, summary judgment, leg, pregnant, breast pump, deposition, baby, staff, jail, prison, post-partum, shackle, nurse, shackled, patient's, indifference, detention, genuine, restrained, birth, prisoner, doctor's, flight, correctional, detainee, transport, delivery

LexisNexis(R) Headnotes

Civil Procedure **>** ***Summary Judgment*** **>** ***General Overview***
Governments **>** ***Courts*** **>** ***Authority to Adjudicate***
[HN1] District courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the opposing party was on notice that she had to come forward with all of her evidence.

Civil Procedure **>** ***Summary Judgment*** **>** ***Standards*** **>** ***General Overview***
[HN2] Fed. R. Civ. P. 56(c) provides that summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Civil Procedure **>** ***Summary Judgment*** **>** ***Standards*** **>** ***Genuine Disputes***
Civil Procedure **>** ***Summary Judgment*** **>** ***Standards*** **>** ***Materiality***
[HN3] The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Civil Procedure > Summary Judgment > Standards > Materiality
[HN4] As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Civil Procedure > Summary Judgment > Standards > Materiality
[HN5] A material fact for Fed. R. Civ. P. 56 purposes occurs where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Civil Procedure > Summary Judgment > Opposition > Motions for Additional Discovery
[HN6] A motion for summary judgment is to be considered after adequate time for discovery. Where there has been a reasonable opportunity for discovery, the party opposing the motion must make an affirmative showing of the need for additional discovery after the filing of a motion for summary judgment.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Supporting Materials > General Overview
[HN7] A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. There is no express or implied requirement in Fed. R. Civ. P. 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Evidence > Procedural Considerations > Burdens of Proof > Allocation
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
[HN8] A moving party bears the burden of satisfying the Fed. R. Civ. P. 56(c) standards. The moving party's burden is to show clearly and convincingly the absence of any genuine issues of material fact.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
[HN9] So long as a movant has met its initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party then must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e).

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
[HN10] Once a moving party meets its initial summary judgment burden, a respondent must adduce more than a scintilla of evidence to overcome the motion and must present affirmative evidence in order to defeat a properly supported motion for summary judgment. The respondent must do more than simply show that there is some metaphysical doubt as to the material facts. Further, where the record taken as a whole could not lead a rational trier of fact to find for the respondent, the motion should be granted.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Implausible Claims
[HN11] On summary judgment, a trial court has at least some discretion to determine whether the respondent's claim is implausible.

Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Need for Trial
[HN12] A court deciding a motion for summary judgment must determine whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.

Civil Procedure > Summary Judgment > Standards > Genuine Disputes

[HN13] Summary judgment will not lie if the dispute about a material fact is genuine that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Civil Procedure > Summary Judgment > Standards > Need for Trial
Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts
[HN14] The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If a defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
[HN15] The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient for summary judgment; there must be evidence on which the jury could reasonably find for the plaintiff.

Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Need for Trial
[HN16] A judge's inquiry on summary judgment asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict--whether there is evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Civil Procedure > Summary Judgment > Evidence
[HN17] In ruling on a motion for summary judgment, a court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant.

Civil Procedure > Summary Judgment > Standards > Need for Trial
[HN18] The purpose of a hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute.

Civil Procedure > Summary Judgment > Evidence
Evidence > Inferences & Presumptions > Inferences
[HN19] On summary judgment, all facts and inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Opposition > Supporting Materials
[HN20] A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Fed. R. Civ. P. 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshalling of evidence, however, does not require the nonmoving party to designate facts by citing specific page numbers. Designate means simply to point out the location of.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Opposition > Supporting Materials
[HN21] On summary judgment, the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court requires.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Absence of Essential Element of Claim
[HN22] On summary judgment, a movant must meet the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the nonmovant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient

opportunity for discovery, has no evidence to support an essential element of his or her case.

Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Need for Trial
Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts
[HN23] A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of law.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Scintilla Rule
Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts
[HN24] As on federal directed verdict motions, the scintilla rule applies, that is, on summary judgment, a respondent must adduce more than a scintilla of evidence to overcome the motion.

Civil Procedure > Summary Judgment > Standards > Materiality
Evidence > Procedural Considerations > Burdens of Proof > Allocation
Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
[HN25] On summary judgment, the substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
[HN26] On summary judgment, a respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
[HN27] A trial court does not have a duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
[HN28] On summary judgment, a trial court has discretion in evaluating the respondent's evidence. The respondent must do more than simply show that there is some metaphysical doubt as to the material facts. Further, where the record taken as a whole could not lead a rational trier of fact to find for the respondent, the motion should be granted.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Implausible Claims
[HN29] On summary judgment, a trial court has at least some discretion to determine whether the respondent's claim is implausible.

Civil Procedure > Summary Judgment > Standards > General Overview
[HN30] Four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party clearly and convincingly established the absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts under the governing law?

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment

Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
Immigration Law > Enforcement > General Overview
[HN31] Eighth Amendment standards are applied to claims regarding medical care predicated on the Due Process Clause of the Fourteenth Amendment. Under Eighth Amendment standards, a court must be especially deferential to prison authorities in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Yet, in evaluating a due process claim for a particular practice, the Court must consider the purpose of detention, and where the recognized government interest in detention of illegal aliens is regulatory, ensuring the appearance of aliens at future immigration proceedings and preventing danger to the community.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN32] There is a distinction between punitive measures that may not be constitutionally imposed prior to a determination of guilt and regulatory restraints that may.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN33] Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under 42 U.S.C.S. § 1983.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN34] The objective component of an Eighth Amendment claim, that is, a serious medical condition, does not necessarily require the person to manifest symptoms of a disease. Determining whether there is a violation requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwilling to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN35] Under Helling, a serious medical complaint is one that is sure or very likely to cause serious illness and needless suffering, or a condition that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention, or a serious medical need is one that has been diagnosed by a physician as mandating treatment. Actual physical injury due to indifference is unnecessary as the Eighth Amendment protects against future harm to inmates that is not a novel proposition. Unnecessary suffering and mental anguish from delay in care is sufficient for Eighth Amendment purposes, as is conduct that causes severe emotional distress.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN36] As to the subjective element of evidence for an inmate's Eighth Amendment claim, a court is to consider the prison authorities' current attitudes and conduct, and the intent on the part of the prison officials. A detailed inquiry into his state of mind, is unnecessary as conscious

indifference is not required. Knowledge of the asserted serious needs or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN37] As examples of deliberate indifference, the U.S. Supreme Court lists guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. A prison or jail officials' failure to provide prescribed medical treatment or comply with a medical treatment plan violates the Eight Amendment. Complying with a doctor's prescription or treatment plan is a ministerial function, not a discretionary one.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN38] Government officials cannot restrain residents except when and to the extent professional judgment deems this necessary to assure such safety. A prison official who handcuffs a convicted inmate to a prison hitching post for seven hours in dire conditions and without any clear emergency situation and in a manner that creates a risk of particular discomfort and humiliation and in doing so acts with deliberate indifference to the inmate's health and safety violates the inmate's Eighth Amendment to be free of cruel and unusual punishment.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN39] While a woman is in labor shackling is inhuman and violates her constitutional rights. A prison official who shackles a woman in labor acts with deliberate indifference since the risk of injury to women prisoners is obvious. An inmate in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk.

Civil Rights Law > Prisoner Rights > Medical Treatment
Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN40] The risks involved in shackling a woman in labor near childbirth are deemed to be obvious and to have entered the collective consciousness of society so that an officer must be aware of the medical risks.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN41] Under the Due Process Clause, a detainee may not be punished prior to an adjudication in accordance with due process law.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process > Cruel & Unusual Punishment
[HN42] Another element of the Eighth Amendment analysis is whether the conduct at issue violates contemporary standards of decency to expose anyone unwillingly to such a risk.

Civil Rights Law > Prisoner Rights > Visitation
Constitutional Law > Substantive Due Process > Scope of Protection
Criminal Law & Procedure > Postconviction Proceedings > Imprisonment
[HN43] The Constitution protects certain kinds of highly personal relationships and outside the prison context, there is some discussion in our cases of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents. In a

detention setting, courts permit the denial of contact visits with pretrial detainees.

Civil Rights Law > Contractual Relations & Housing > Equal Rights Under the Law (sec. 1981) > Remedies
[HN44] Any breach of contract claim premised on a federal contract is within the exclusive jurisdiction of the Court of Claims under 28 U.S.C.S. § 1491(a).

Civil Rights Law > Prisoner Rights > Confinement Conditions
[HN45] Forced exposure to the other sex's viewing of a naked inmate is actionable.

COUNSEL: [*1] For Juana Villegas, Plaintiff: Harry Elliott Ozment, LEAD ATTORNEY, Law Offices of Elliott Ozment, Nashville, TN; John L. Farringer, IV, Phillip F. Cramer, William L. Harbison, LEAD ATTORNEYS, Sherrard & Roe, Nashville, TN.

For Metropolitan Government of Davidson County/Nashville -- Davidson County Sheriff's Office, Defendant: Allison L. Bussell, LEAD ATTORNEY, Kevin C. Klein, Metropolitan Legal Department, Nashville, TN.

For Janet Napolitano, in her official capacity as Secretary of Department of Homeland Security, Defendant: Mark H. Wildasin, LEAD ATTORNEY, Michael L. Roden, Office of the United States Attorney, Nashville, TN.

For John Doe 1, John Doe 2, John Doe 3, John Doe 4, Defendants: Allison L. Bussell, LEAD ATTORNEY, Metropolitan Legal Department, Nashville, TN.

For United Methodist Communications, Defendant: Joel D. Eckert, LEAD ATTORNEY, Bradley Arant Boult Cummings LLP, Nashville, TN.

JUDGES: WILLIAM J. HAYNES, JR., United States District Judge.

OPINION BY: WILLIAM J. HAYNES, JR.

OPINION

MEMORANDUM

Plaintiff, Juana Villegas, filed this action under 42 U.S.C. §§ 1981 and 1983, against the Defendants: Metropolitan Government of Nashville Davidson County, Tennessee, Nashville Davidson County Sheriff's Office [*2] [1], Janet Napolitano, in her official capacity as Secretary of Department of Homeland Security, and John Doe #1, John Doe # 2, John Doe # 3 and John Doe #4. Plaintiff's specific claims are that the Defendants' conduct violated her rights under the Due Process Clause of the Fourteenth Amendment for their deliberate indifference to Plaintiff's serious medical needs arising from Defendants' shackling of Plaintiff during the final stages of her labor during her pregnancy and post-partum recovery. Plaintiff also asserts other federal constitutional claims that the Defendants violated her First Amendment right to familial association and her Fourth Amendment right of personal privacy. Plaintiff further asserts claims that the Davidson County Sheriff's Office ("DCSO") breached its contract with the Immigration and Customs Enforcement ("ICE") on Metro's detention of her and Defendants' conduct violated the Tennessee Constitution, Article 1, Section 8 and Section 32. In earlier proceedings, Plaintiff nonsuited her claims against the John Doe Defendants. (Docket Entry No. 53). The Court dismissed Plaintiff's claims against the Secretary. (Docket Entry Nos. 44 and 45). The remaining parties proceeded [*3] with discovery.

1 The Court deems Metro to be the real party in interest because a "Sheriff's department" is not a person under Section 1983. See Petty v. County of Franklin, 478 F.3d 341, 347 (6th Cir. 2007). Claims against the sheriff of a county in his official capacity are against the pertinent governmental entity here, Metro. Leach v. Shelby County Sheriff, 891 F.2d 1241, 1245-46 (6th Cir. 1989).

Before the Court are the parties' cross-motions for summary judgment, (Docket Entry Nos. 77 and 84), but Plaintiff seeks only partial summary judgment on her federal and state constitutional claims.

In their motion for summary judgment, Defendants contend, in sum: (1) that handcuffing and shackling Plaintiff during her active labor and post-partum recovery have penological justifications; (2) that Plaintiff cannot show any objective harm by reason of Defendants' acts or omissions, nor that the Defendants acted in reckless disregard of any risk to Plaintiff by their handcuffing and shackling her and; (3) that Defendants' policies restricting

Plaintiff's right to personal privacy and access to her child, as well as visits or telephone contacts with family members, were also based upon penological [*4] justifications. Thus, without actionable federal claims, Defendants also seek dismissal of Plaintiff's state law claims without prejudice.

In her motion, Plaintiff asserts, in essence, that Defendants' shackling of her during her active labor, shortly before actual delivery and during her post-partum recovery as well as Defendants' agents' disregard of a physician's "no restraint" directive, violated Plaintiff's Fourteenth Amendment right to be free from deliberate indifference to her serious medical condition. In addition, Plaintiff contends that Defendants also exhibited recklessness during her hospital stay and interfered with her rights to personal privacy and familial association.

A. Findings of Fact

1. Plaintiff's Initial Confinement

On July 3, 2008, Tim Coleman, a Berry Hill, Tennessee [2] police office arrested Plaintiff, Juana Villegas, who was nine months pregnant, for driving without a valid license. (Docket Entry No. 93, Plaintiff's Response to Defendant's Statement of Undisputed Facts at ¶ 1). After Plaintiff could not produce a driver's license, Coleman arrested Plaintiff and transported her to the DCSO jail. Id. at ¶¶ 2-3. DCSO accepts and houses individuals arrested by local [*5] law enforcement agencies without inquiry into whether the arrest was proper. Id. at ¶ 6. In Davidson County, a judicial commissioner determines if probable cause exists to justify an arrest and Plaintiff made some type of appearance before a commissioner. Id. at ¶ 7. From July 3rd until July 5th 2008, Plaintiff was held in the Davidson County jail. Id. at ¶ 13. Because July 4th was a holiday, Davidson County courts did not meet that day. Id. On the evening of July 5th, Plaintiff was confined at the Correctional Development Center, a female correctional facility on Harding Place in Nashville. Id. at ¶ 12.

> 2 Berry Hill is a separate city within Metropolitan Government of Nashville and Davidson County.

While in the DCSO's custody, a DCSO employee and agent of the United States under DCSO's 287(g) program with ICE, screened Plaintiff for classification, inquired of Plaintiff's legal status and determined that Plaintiff was not lawfully in the United States. Id. at ¶ 9. Plaintiff initially asserted that she was deported by voluntary agreement. [3] ICE then placed a federal detainer on Plaintiff pending resolution of her state charges. Id. at ¶ 10. The ICE detainer caused Plaintiff to be classified [*6] as a medium-security inmate. (Docket Entry No. 86-1, Barshaw Deposition at 5, 6). Although Plaintiff was able to secure bond for the traffic offense, the ICE detainer precluded Plaintiff's release from DCSO custody. (Docket Entry No. 94-21,Carachure Deposition at 37-39).

> 3 In a separate action, Plaintiff asserted that she was deported by voluntary agreement, but in Villegas v. Holder, 2010 U.S. App. LEXIS 23182, 2010 WL 6439842, at *4-*6 (6th Cir. Nov. 8, 2010), the Sixth Circuit ruled that Plaintiff had been ordered to leave the country.

2. Commencement of Plaintiff's Labor

According to Defendants, at approximately 10:00 p.m. on July 5th, Plaintiff informed Richard Ramsey, a male jail guard that her "water," *i.e.*, amniotic fluid "broke" and "that she was having labor pains." (Docket Entry No. 93, Plaintiff's Response to Defendants' Statement Undisputed Facts at ¶ 14). Plaintiff told the officer who was at her cell to distribute food "my baby is coming." (Docket Entry No. 86-15, Villegas Deposition at 116). DCSO's jail incident report reflects that Plaintiff's water actually broke at 9:00 p.m. (Docket Entry No. 94-22). In any event, jail guards transported Plaintiff to the jail infirmary where a nurse confirmed that [*7] Plaintiff's water had broken and summoned an ambulance. (Docket Entry No. 93, Plaintiff's Response to Defendants' Statement of Undisputed Facts at ¶¶ 14 and 16).

Plaintiff was placed on a stretcher and transported to Metro General Hospital ("MGH") with her wrists restrained in front of her body and her legs restrained together. Id. at ¶ 18. Lt. Kristina Quintal, a jail supervisor sent two male officers to transport Plaintiff. (Docket Entry No. 86-1, Barshaw Deposition at 17-20). In route to the hospital, Matthew Barshaw, a DCSO officer asked Lt. Quintal if Plaintiff needed to be shackled because "what's going through my head now is what if all of a sudden the baby started -- took more time to unrestrain these restraints in the back of the ambulance." Id. at 23. Plaintiff testified that she was in pain, from contractions

during this time. (Docket Entry No. 86-15, Villegas Deposition at 123, 128). According to Defendants, because hospitals are "conducive to security breaches including escape," inmates at hospitals remain shackled, including Plaintiff. (Docket Entry No. 79, Stalder Declaration at 7g, i).

3. Plaintiff's Hospitalization

When Plaintiff arrived in her hospital room at MGH, she [*8] remained shackled until her transfer to the hospital bed from the ambulance stretcher. (Docket Entry No. 86-1, Barshaw Deposition at 28). Nurses requested a jail officer to remove Plaintiff's handcuffs to change Plaintiff into a hospital gown. Id. at 28, 29. Plaintiff was unshackled and Barshaw and Farragher a fellow male officer, remained in Plaintiff's room, but turned their backs to Plaintiff, as the nurses and a doctor requested. Id. at 29. A doctor requested that the officers turn their backs while she examined Plaintiff's lower extremities. Id. Once in her hospital gown, officers Farragher and/or Bradshaw again restrained Plaintiff's hands and legs while she was in the hospital bed. (Docket Entry No. 93, Plaintiff's Response to Defendants' Statement of Undisputed Facts at ¶ 26). Plaintiff asserts that she repeatedly asked the guards to remove the restraints. (Docket Entry No. 94-5, Villegas Declaration at ¶ 6).

Brandi Moore, a corporal in DCSO's transportation division, relieved Officers Faragher and Barshaw very shortly after Plaintiff's arrival at MGH. (Docket Entry No. 93, Plaintiff's Response to Defendants Statement of Undisputed Facts at ¶ 27). Farragher informed Moore that [*9] Plaintiff was a medium security inmate with a "hold," "detainer" or something to that effect. Id. at ¶¶ 28 and 29. Moore also had a "charge sheet" with Plaintiff's name, charge, and custody level. Id. at ¶ 29. Moore removed the handcuffs from Plaintiff, but restrained one of Plaintiff's legs to the hospital bed. Id. at ¶ 30. According to Moore, she overheard MGH medical staff talking to a doctor about a "No Restraint Order," but the doctor did not respond. (Docket Entry No. 86-6, Moore Deposition at 35, 50). A nurse, however, commented that the officers "shouldn't put leg irons on her" and Moore described the nurse as "rude." Id. at 59-60. A nurse described to jail officers the high risk of blood clots after giving birth, if the shackles were not removed. [4] (Docket Entry No. 86-5, Ray Deposition at 53-55). According to Plaintiff's hospital records, at 11:20 p.m. on July 5, 2008, Dr. Kesha Robertson signed a physician's order stating: "Please remove shackles" and this Order was placed in Plaintiff's hospital file. Id. at 25-26. Moore did not see a "No Restraint Order," but the next day Officer Flatt told her of the "No Restraint Order." (Docket Entry No. 78-4 at 84-85).

> 4 Defendants contend [*10] that the nurse's statement to Metro's investigator on this risk is inadmissible hearsay, but the declarant is a Metro nurse who is an employee of the Defendant Metro and whose statement is within the scope of her employment and adverse to Metro's position in this action. Such statements, including the Defendants' investigator, are admissible under Fed. R. Evid. 801(d)(2)(D), on the Defendants' officers' state of mind. See Stalbosky v. Belew, 205 F.3d 890, 895 (6th Cir. 2000): Moore v. Kuka Welding Sys. & Robot Corp, 171 F.3d 1073, 1081-82 (6th Cir. 1999); Williams v. General Motors Corp, 18 Fed. Appx. 342, 347-49 (6th Cir 2001).

David Peralta, another DCSO officer, relieved Moore at 11:00 p.m. on July 5th and Moore told Peralta to be prepared for a "no restraint order." (Docket Entry No. 86-6, Peralta Deposition at 9-10). Shortly after 11:00 p.m., Peralta removed Plaintiff's restraints. Id. at 12-13. Plaintiff gave birth to her child at approximately 1:00 a.m. on July 6, 2008. (Docket Entry No. 93, Plaintiff's Response to Defendants' Statement of Undisputed Facts at ¶ 35). Plaintiff remained unrestrained during Peralta's shift, but Peralta shackled Plaintiff just minutes before his [*11] shift change at 7:00 a.m., because of DCSO policy. (Docket Entry No. 86-6, Peralta Deposition at 22). Peralta restrained one of Plaintiff's ankles to the bed after Plaintiff opted for the ankle restraint in lieu of a wrist restraint. Id. at 24.

When Moore returned on July 6th, Officer Flatt informed her that a No Restraint Order was in effect (Docket Entry No. 86-6, Moore Deposition at 63), but Sergeant Harrison, her supervisor ordered Moore to "put restraints" on Plaintiff. Id. at 64. Plaintiff saw her child, but after delivery, the nurse took the baby to enable Plaintiff to rest. (Docket Entry No. 86-16, Villegas Deposition at 141-142). Defendant cites Plaintiff's statement that her child was "with [her] the whole time." Id. at 142. During her post-partum recovery, one of Plaintiff's legs was shackled to her hospital bed. (Docket Entry No. 93, Plaintiff's Response to Defendants

Statement of Undisputed Facts at ¶¶ 40, 41). Yet, whenever Plaintiff went to the restroom or walked or bathed during her post-partum recovery, both of Plaintiff's legs were restrained. Id. at ¶ 42.

As to Plaintiff's other claims, DCSO policy also did not allow Plaintiff to use the telephone or to have any visitors [*12] visit to her hospital room. (Docket Entry No. 93, Plaintiff's Response to Defendants' Statement of Undisputed Facts at ¶¶ 45, 49). Defendants assert these limitations are for "public, institutional, inmate and officer safety" and is a common and acceptable correction practice." Id. at ¶¶ 46, 50. Defendants' expert also cites MGH's policy restricting inmate access to telephone calls. (Docket Entry No. 80 at 8-9).

At the time of Plaintiff's discharge from MGH, citing safety concerns, DCSO officials did not allow Plaintiff to be transported to the DCSO jail leave the with a breast pump that the hospital staff provided. (Docket Entry No. 93, Answers to Interrogatories at ¶ 54) Defendants do not consider a breast pump to be a critical medical device under its jail policy. (Docket Entry No. 80, Leach Declaration at 10). Without the breast pump, Plaintiff described her pain from the engorgement or swelling of her breasts. (Docket Entry No. 86-15 Answers to Interrogatories at ¶ 5). Plaintiff testified that she cries repeatedly monthly from this shackling experience surrounding the birth of her child. (Docket Entry No. 86-17, Villegas Deposition at 178-79).

4. Expert Medical Proof

Both parties [*13] submitted expert medical proof on the risks, effects and injuries attributable to Defendants' shackling of Plaintiff in transport to the hospital, during Plaintiff's stay at the hospital and Defendants' denial of the breast pump provided by MGH staff.

Defendants' medical expert proof is that at that time of Peralta's initial release of Plaintiff from all restraints, Plaintiff's cervix was dilated only to 3 centimeters, (Docket Entry No. 81, Spetalnick Affidavit at ¶ 5(b)), and Plaintiff was also unrestrained during her entire progression from 3 centimeters to 10 centimeters until birth of her child. Id. Dr. Bennett Spetalnick, the medical director of labor and delivery for Vanderbilt University Medical Center and an assistant professor of obstetrics and gynecology at the Vanderbilt University School of Medicine, opined that the use of restraints during Plaintiff's labor and post-partum did not enhance Plaintiff's medical risks nor did she suffer excessive pain:

> [a]lthough the risk of a DVT (deep venous thrombosis) and PE (pulmonary embolism) is increased with pregnancy and postpartum, my medical opinion, based on the literature and personal experience, is **that these risks are not enhanced** [*14] **by a leg restraint and/or handcuffs.** Ambulation is encouraged in the peripartum period, but the amount of ambulation recommended to prevent a DVT is not prevented by leg restraints as they were used in Ms. Villegas['s] situation. There is no significant risk to the patient with a leg restrained up to the time of delivery and immediately post-partum and none in this case with no leg restrained for 7 hrs B 2 hrs prior and for 5 hours after delivery. The facts of the case also documented by the nurses indicate "Thrombophlebitis, Both Legs, none" with multiple reports through the entire hospital stay, which in layman's terms indicate that the nursing staff repeatedly ruled out these conditions for Ms. Villegas.
>
> b. The restraining of one leg is not a danger to the patient or her unborn child. Although vaginal access to a laboring woman for examinations by caregivers is necessary and a leg restraint is a theoretical impediment in the case of an emergency, my medical opinion is that a restraint would not prevent, significantly impede, or make less accurate the vaginal exam. Furthermore, the facts of this case indicate that the patient was unrestrained from 3 to 10 cm dilation and for 5 hrs. [*15] after delivery.
>
> c. Although a leg restraint, like any other fomite, can carry bacteria, my medical opinion is that there is no evidence that the use of these restraints under the circumstances of this case created a significant infectious risk for Ms. Villegas.

. . . .

e. Although postpartum complaints of back pain are common, there is no evidence a handcuff or leg restraint while laboring or postpartum caused any more leg and back pain noted by Ms. Villegas in her deposition, than might theoretically effect any patient whether pregnant or not.

f. **Although labor is very painful, it is medically anticipated that the pain experienced in latent labor is less severe than that experienced in active labor.** The facts of the case indicate that Ms. Villegas was dilated to 3 cm on admission and remained at 3 cm until at least 23:30. Thus, she was in latent labor until at least 23:30. Her records indicate that all of her restraints were removed prior to active labor. At 23:45, when 4cm and starting active labor, she made her first request for pain medication and was given Stadol. **Since the patient placed her pain as a 5 on a 10 scale one hour before delivery, the facts in the NGH records do not support** [*16] **her claim of excessive pain while wearing restraints: "07/06 00:30 PAIN SCALE (1-10): 5 & 07/06 08:00, 12:45, 13:00, 17:15, 17:29, 20:30: 07/07 08:49, 20:30; 07/08 08:00: Denies Pain: 0=No pain."**

(Docket Entry No. 81 at 2-3) (emphasis added).

For the Plaintiff, Dr. Sandra Torrente, an assistant professor in the department of obstetrics and gynecology at Meharry Medical College and graduate of the Kansas Medical School, has spent several years on MGH's maternity ward. (Docket Entry No. 94-4 at 7). Dr. Torrent reviewed the medical effects of Plaintiff's shackling. In a more extensive analysis than Dr. Spetalnick, Dr. Torrente differs about the effects of Plaintiff's shackling and also opined on other issues that Dr. Spetalnick did not address:

37. **The shackling of a woman who is in her third trimester and whose water has broken is extremely dangerous because of, among other things, a potential for the umbilical cord prolapse.** Umbilical cord prolapse occurs when the baby's head is not engaged (not in the pelvis) and the umbilical cord moves below the baby's head. In this position, the cord can kink and cause a lack of blood to the baby. The baby because hypoxic, which can cause brain injury. [*17] In this situation, the mother needs an emergency caesarean.

38. A woman whose membranes have ruptured needs to be assessed as soon as possible for potential umbilical cord prolapse. This is performed through a cervical exam and should be performed as soon as possible. . .

39. If a woman's legs are shackled during labor, she cannot be effectively monitored for umbilical cord prolapse, and she is not able to deliver a baby. Moreover, if a woman's legs are shackled together, the ability to provide emergency medical care may be restricted and/or delayed.

40. When stress is introduced to a woman who is pregnant, this stress can induce labor. A stress-induced labor can cause potential serious complications, placing both the mother and child at risk.

41. In my medical opinion, placing shackles on Ms. Villegas after her water broke and keeping these shackles on her during ambulance transport to the hospital evidenced indifference to Ms. Villegas' medical needs.

A proper cervical exam cannot be conducted while a woman is restricted with foot-long leg shackles. It is my opinion that if Ms. Villegas had developed an umbilical cord prolapse or other complication, she was at a much higher risk of having [*18] such a life-threatening condition go unnoticed and untreated. . . .

42. [H]aving her legs shackled

> certainly increased the risk of injury to both Ms. Villegas and her unborn child.
>
> * * *
>
> **47. Medical personnel need constant unrestricted access to a woman in labor. There are a number of complications that can occur during labor which necessitate the ability of healthcare providers to provide immediate medical assistance. The process of freeing the woman from restraints can inhibit this process. For example, when a woman is in labor and the baby develops a non-reassuring fetal heart tracing, the patient needs to be able to move to her left lateral decubitus position to increase blood flow to the baby.** The uterus is displaced to the right in a woman and moving the patient to her left lateral decubitus improves the mode of resuscitating the baby through the mother by improving blood flow to the fetus; we also provide high flow oxygen by a face mask.

(Docket Entry No. 94-4, at 19-23)(emphasis added). [5]

> 5 These references to pagination are to the Court's electronic filing system's pagination.

Dr. Torrente details other significant risks in shackling of Plaintiff during her labor and post-partum [*19] recovery:

> **18. Placing a pregnant woman in leg irons or shackles increases her risk of developing a potentially life-threatening blood clot. This risk is increased and present throughout a woman's entire pregnancy; however, it is at the greatest risk post-partum.** This is a primary risk to women post-partum and the main prevention for blood clots is to be ambulatoryCi.e., being able to freely move and walk aroundCas often as possible. Monitoring a woman whose water has broken and keeping her unrestrained are also important because of the potential occurrence of umbilical cord prolapse, which requires monitoring of a woman's cervix and an emergency caesarean if the condition is discovered.
>
> Throughout pregnancy and labor, a woman should not be restrained because of the increased risk in falling due to a pregnant woman's impaired balance. **Women who are pregnant have three major physiologic changes that increase their fall risk. First her center of gravity changes to be above her legs, second the enlarging abdomen, and third the relaxation of the pelvic joints leads to unsteadiness in her gait. Restraints B particularly leg restraints B would increase her fall risk which can lead to injury** [*20] **of both the woman and the unborn child.**
>
> **19. A woman who has given birth should not be restrained in any manner for her entire hospital stay. It is vitally important that a woman have full range of movement of her limbs and remain ambulatory to prevent blood clots and general discomfort.** A woman whose hand or hands are restrained by handcuffs also cannot safely handle a newborn child and should not be entrusted with a child when her hands or arms are restrained in any manner. . .
>
> **21. The use of shackles on a woman during labor and post-partum is extremely unsanitary and unacceptable.**

Id. at 13-15) (emphasis added). Dr. Torrente also explained that the shackling of Plaintiff "certainly increased the risk of injury to both Ms. Villegas and her unborn child" with a stress induced labor. Id. at 21.

As to the opinions of Dr. Spetalnick on the absence of any increased risks due to Plaintiff's shackling, Dr. Torrente responds:

> Ms. Villegas was shackled while she was in active labor and after her water broke. **Based on my review of Ms. Villegas' medical charts and her personal history, she could have easily**

> **progressed to the final phase of labor while she was shackled in the ambulance or in the hospital** [*21] **room. The fact that Ms. Villegas progressed from being dilated at 3 cm to 10 cm in only two hours proves this point and is apparently overlooked by Dr. Spetalnick. There is no indication that Metro monitored Ms. Villegas' dilation and made any purposeful decision to remove the shackles based on her level of dilation. Moreover, it is apparent that Metro subjected Ms. Villegas to unnecessary pain and suffering by shackling her after her water broke. Dr. Spetalnick's claim that Ms. Villegas was only in "latent labor" does not mean from a medical standpoint that Ms. Villegas was not in pain or that birth could not have progressed very quickly.**

Id. at 3 (emphasis added).

Dr. Jill DeBona, a graduate of the Vanderbilt Medical School, licensed psychiatrist and assistant clinical professor of the Vanderbilt Medical School interviewed and evaluated Plaintiff. (Docket Entry No. 94-3 at 3-5). Dr. DeBona describes Plaintiff's emotional distress, mental anguish and subsequent mental disorder caused by Plaintiff's shackling in the ambulance and at the hospital:

> While in the ambulance, Ms. Villegas had to face the terror that her baby might die. She did not realize that an officer was in the ambulance. [*22] She believed that there was no one to remove the shackles.
>
> Just as her labor had been short with the births of her two previous children, she believed that this labor would also be short. Yet, during this labor, she could not move or open her legs. Unable to move or open her legs, she feared that her son would not be able to be delivered. She had to sit with the terror that her baby might die inside of her body. According to Ms. Villegas, there was nothing that she could do to help him. She felt helpless.
>
> Ms. Villegas experienced a profound stressor, the threat of death to her unborn child. The threat of death to a family member, in this case Ms. Villegas's baby, is an example of the type of extreme stressor that can lead to the development of Post-Traumatic Stress Disorder. Additionally, Ms. Villegas's response of terror and helplessness is often seen in trauma victims who develop Post Traumatic Stress Disorder.

(Docket Entry No. 94-3 at 20). Dr. DeBona also explained: "While in the ambulance, Ms. Villegas had to face the terror that her baby might die." Id. at 8.

As to the effects of the entire time of Plaintiff's shackling, Dr. DeBona opined as follows:

> Ms. Villegas experienced thirty-six [*23] hours of shackling with a heavy leg iron. This shackling was degrading and humiliating. Ms. Villegas's self concept is that she is a mother, a worker, a wife, not a criminal. **This humiliation at the hands of the police has caused a break in trust, in the institutions and people that are supposed to protect her. Her core sense of self, as a human being with value, has been shaken. Her sense of security has been shattered. A traffic violation can lead to thirty six hours of shackling. And her response again was one of helplessness.**
>
> **The literature on the psychological effects of restraints primarily refers to the use of physical restraints in the hospital. Jones et al. (2007) note that the use of physical restraints in hospitalized patients resulted in a higher incidence of PTSD.** Physical restraints ranged from the use of mittens on a patient's hands to the more restrictive practice of tying the patient's limbs to the bed. According to Jones, hospitalized patients who wore mittens or who were tied to the hospital bed had higher rates of PTSD than unrestrained patients. Ms. Villegas was not only restrained but she was shackled

> with a leg iron.
>
> Thus, we see that Ms. Villegas experienced a [*24] number of stressors July 3-10, 2008 that met the threshold for PTSD.

Id. at 34.

As to the Defendants' agents' denial of the breast pump provided by MGH staff, Dr. Spetalnick's affidavit is silent. Dr. Torrente stated: "If a woman is unable to express her milk for several days, because she does not have access to her child or to a breast pump, the woman can develop engorged breasts and mastitis." (Docket Entry No. 94-4, Torrente Report at 33). "Mastitis is an infection of the breast tissue that results in severe breast pain, swelling, significant fever, rigors and chills." Id. "The best cure for this condition, and that which is normally prescribed, is for the mother to express her milk, utilizing a breast pump." Id. "When a woman's breasts become engorged in this way they become rock solid and the pain is just horrendous." Id. In Dr. Torrente's expert medical opinion, "the development of mastitis by Ms. Villegas was almost certainly caused by her inability to use a breast pump in the hours and day following her release from General Hospital." Id. at 34. According to Dr. Torrente, this denial injured Plaintiff: "It is my opinion that the discomfort and pain that she complains of could [*25] have been prevented and/or relieved if she had been allowed to return to the detention center with a breast pump and use the pump regularly." Id.

Based upon her evaluation of Plaintiff, Dr. DeBona corroborates Dr. Torrent about the significance of Defendants' denial of the breast pump:

> **It is clear that Ms. Villegas needed a breast pump to relieve the painful engorgement that she was experiencing.**
>
> Yet, it didn't occur to her that she could ask for a breast pump and that her request might be granted. She had already endured profound experiences of helplessness in the custody of the sheriff's department. Now she was back in jail and suffering from a painful medical condition. Instead of asking for the help that a breast pump might offer, she remained silent, passive. Her coping mechanisms had been taxed. She felt defeated. Helpless.
>
> After enduring so much, it seems that Ms. Villegas had given up. Instead of requesting available help from the officers, a nurse or a doctor, she remained silent and endured pain.
>
> Such surrender despite the experience of pain is reminiscent of the studies by van der Kolk. In his work, dogs in cages were exposed to electric shocks from which escape was impossible. [*26] When they were then given the shocks and also allowed a possible escape, they did not exit. They stayed in their cages and endured the pain of the shocks. They had learned that escape was impossible despite the evidence to the contrary. They simply gave up and suffered. In effect, they had learned that they were helpless to save themselves. This state is termed one of 'learned helplessness'.
>
> After enduring so much, it seems that Ms. Villegas had also given up. Instead of requesting available help from the officers, a nurse or a doctor, she remained silent and endured the pain. She, too, had developed a state of learned helplessness.
>
> According to Maier and Seligman (1984), this state of learned helplessness resembles the symptoms of defeat, withdrawal, and lack of motivation seen in individuals with Post Traumatic Stress Disorder.

(Docket Entry No. 94-3 at 23-24).

As to denial of contact visits or telephone usage at the hospital, Plaintiff was not allowed to contact her husband or other family, by telephone or otherwise throughout her stay at the hospital. (Docket Entry No. 86-1, Barshaw Deposition at 40 and Docket Entry No. 86-6, Peralta Deposition at 35-36). Dr. DeBona also described [*27] Plaintiff's fears from this lack of visitation with her child and husband:

> Ms. Villegas's two day old nursing infant was taken from her. She didn't know his whereabouts. Ms. Villegas was told that her husband had been called to pick up the baby. However, she wasn't permitted to see or speak to her husband to confirm that he had, in fact, received the call or picked up the baby. She feared that someone had taken, possibly kidnapped, her infant son. She had to face the horror that something bad may have befallen her baby and that she might never see him again. Her response again was one of intense fear and helplessness.

(Docket Entry No. 94-3, DeBona Report at 34).

5. Penological Justification for Plaintiff's Shackling

Defendants submit that the shackling at issue is required as a precaution to prevent escape or to prevent an inmate from injuring herself or other persons or damaging property.

Daron Hall, Metro's Sheriff and Rule 30(b)(6) witness, explained that DCSO examines "policies of other Sheriff's Departments around the country," " to see if there are standards nationally that pertain to what we're talking about" and to find "what's the best way to do it or a new way of doing it." (Docket [*28] Entry No. 86-13, Hall Deposition at 12). DCSO has "access to the National Institute of Corrections ... which is the largest jail network and then the American Correctional Association, the American Jail Association" that employs "auditors in all of those associations, traveling, doing audits in other institution" who "bring back ideas." Id. at 12, 13. DCSO professes to adopt "the cutting edge of best practices" and "exceed the standard" on treating pregnant women. Id. at 13, 19. In determining the "best practices," Hall asserts that "people who are in the world of corrections nationally look at [DCSO]" as "exceed[ing] what the national expectation is in many, many ways." Id. at 18-19, 21-22, 50-52, 55-56.

As to Plaintiff's shackling, Hall explained that the "knowledge and information" that DCSO used to create the changes regarding shackling pregnant inmates "wasn't new" in 2008 and was known by DCSO before that time. Id. at 24-25. Hall admitted that the policies in effect in July 2008 did not, to his satisfaction, consider the practicality of the circumstance of the pregnant inmate. Id. at 58. According to DCSO Officer Humphries, the justification for Plaintiff's restraints during active [*29] labor and her post-partum recovery was to prevent her escape. (Docket Entry No. 86-7, Humphries Deposition at 69-70).

According to Defendants' expert proof, Richard Stalder, former president of the American Correctional Association and Association of State Correctional Administrators and Defendants' expert:

> In the case of Plaintiff Villegas, the stress of pending deportation could easily promote what otherwise may be uncharacteristic unlawful behaviors, including flight from custody and subsequent illegal activity. The relationship between public safety, custody status, general security practices and restraint policy is strong and justified.
>
> * * *
>
> Plaintiff Villegas was a female offender with obvious special medical needs but had to remain subject to system priorities and classification policy (such policy incorporating her special needs requirements through the recognition of "special needs - a designation for inmates requiring . . . services (for) physical impairments or medical . . . concerns." 000177). Consistent with the operating protocols of multiple jurisdictions, Plaintiff Villegas' medical condition was not an automatic waiver of good classification practices nor a door to amnesty [*30] for the consequences of past behaviors (including her illegal return to the United States after her past deportation). While the federal government has the ability to consider "compassionate release," the entity responsible for custody is far more limited in considering options for "compassionate reduction in security." This is particularly applicable to the external provision of medical services in the clinic/outpatient/inpatient environment ("external" in this context referring to

> locations outside of the secure perimeter of the facility). These environments are conducive to security breaches including escape. (For example, DCSO policy, consistent with other jurisdictions throughout the nation, states that "inmate notification of appointments to outside facilities prior to the scheduled date and time of the actual transport is strictly prohibited and may result in the rescheduling of the transport." (DCSO policy on Inmate Transportation 000141)).

(Docket Entry No. 79 at 4, 5-6, Stalder Declaration at ¶ 7(d) and (g)).

According to Donald Leach, Defendants' correctional expert about the shackling of the Plaintiff:

> . . . .The application of the handcuffs and shackles prior to transport [*31] to the hospital was a discretionary act made in "good faith" by the officers on the scene based on their understanding of the agency's policy and procedures. The staff exercised reasonable discretion and judgment in the application of the restraints and demonstrated a concern for Ms. Villegas' welfare both during the labor and after the baby's birth.
>
> d. Additionally, the Davidson County Sheriff's Office had in place appropriate policies addressing the use of restraints on pregnant female inmates. These policies are intended to reduce the risk to pregnant female inmate while protecting the public's safety the safety of the officers and staff and the inmate. The Davidson County Sheriff's Office's policies reflect acceptable and appropriate correctional practice for prisons and jails throughout the United States. The use of restraints on pregnant female inmates during transport, labor or even the birth process is a common and acceptable security practice.
>
> e. The use of restraints during transport is a security protocol intended to protect the public safety, protect the staff and protect the inmate. The type and amount of restraints used varies according to the classification of the inmate. [*32] The greater the threat the inmate presents the greater the level of restraints that will be employed. The use of restraints during transport is intended to reduce the likelihood of violent acts, escape attempts and contraband possession. The predominant concern is the protection of the community by the retention and control of the inmate when outside of the jail's security perimeter. This is reflected in the DCSO policy "Use of Restraints," which states: "Use of restraints may be based on any of the following: the need to prevent escape of an inmate under escort; the security classification of an inmate; the physical and mental health of an inmate; the demonstrated behavior of an inmate; the need to prevent injury to self, staff, other persons, or property; medical reasons, by direction of medical staff." (000152).
>
> f. Effective restraint policies allow for limitations on the application of restraints based upon medical issues. When presented with a valid, medical reason, the use of restraints can be curtailed. This concern for the medical well-being of the pregnant female inmate is embedded in the Davidson County Sheriff's Office policies on "Inmate Transportation" and "Hospital Inmate [*33] Security." These policies contain appropriate, reasonable statements regarding the limitation on restraint use based on medical reasons:
>
> > o "The health services administrator may recommend a reduced level of restraint based on the inmate's physical ailment or disability. This recommendation must be stated in writing, recording the inmate's physical limitations and the consequences a particular

> type of restraint will have on the inmate and/or his ailment if used. The recommendation must be signed by the physician or a health services staff member acting on the physician's authority." DCSO Policy, "Inmate Transportation" (000140/000141).
>
> o "All inmates shall be restrained by mechanical restraint devices at all times unless otherwise directed by the attending physician." DCSO Policy "Hospital Inmate Security" (000195) (Bolding mine)

> g. The hospital's own policy recognizes the need to work with the correctional staff to balance security with the provision of medical care. Included in this is an evaluation by trained medical professionals concerning the physical effect of having the restraints on the patient.
>
> h. Once Ms. Villegas delivered her baby, she was no longer pregnant and could be restrained [*34] according to the DCSO and the Nashville General Hospital policies. There were no medical reasons provided to the staff to preclude the application of the restraints for the remainder of her stay in the hospital.

(Docket Entry No. 80 at 4-6) As to denial of a breast pump, Leach states that DCSO officers assumed that the Metro jail health personnel would decide the necessity of the breast pump and opines that a breast pump is not a critical medical device under correctional policy. Id. at 10.

Plaintiff's medical expert addresses the appropriateness of the shackling of Plaintiff. Dr. Torrente stated that MGH staff has previously informed Metro officers about the adverse medical effects of shackling and that Defendants' officers have access to "No Restraint Orders" in the medical files of persons in their custody.

> **It is my understanding and knowledge that it has been commonly communicated by the medical staff at Metro General to detention officers and their superiors that shackling of women in the labor and delivery wing of the hospital is against best medical practice and interferes with the medical needs of the patients.** Nonetheless, it has been my understanding that medical providers must [*35] resort, on occasion, to issuing a no restraint order. This is commonly verbally conveyed to the detention officers followed by an order being placed in the patient's file at the nurses' station. **In my experience at Metro General, there is nothing to prevent a detention officer from requesting a copy of such an order after being verbally informed of its existence. Sometimes a detention officer will request that the doctor fax a copy of the order to a supervisor at the detention facility, although this is not requested every time an order is issued.**
>
> . . . .
>
> **In my experience, Ms. Villegas' doctor and health care providers followed standard practice in Nashville when they verbally informed her detention officers of the "no restraint order" and then placed a written "no restraint order" in Ms. Villegas' medical file.**

(Docket Entry No. 94-4, Torrente Report at 36-37) (emphasis added).

As to the Defendants' cited concerns of flight and danger, Dr. Sandra Torrente opined that on the flight issue, "[a] woman who is in active labor would not, from a medical point of view, pose a physical flight risk due to her condition" because she is "focused on childbirth and she does not have the energy or ability [*36] to flee an officer located outside her room and then flee the maternity ward." (Docket Entry No. 94-4, Torrente

Report at 15, 30). Similarly, Plaintiff would not "pose a risk of flight for the first 48 hours following birth of her child due to her physical status." Id. at 15. Dr. Torrente's report also reflects that the maternity ward at Metro General Hospital is "locked down," id., and "to enter *or exit* the ward, a person would have to personally check-in with a nurse who would have to authorize the exit and unlock the doors." Id. at 30. Moreover, the record reflects that "[a] woman in her third trimester of pregnancy also poses little risk of flight from custody or aggressive behavior." Id. "For the first 48 hours after giving birth, a woman poses an incredibly small risk of flight or aggressive behavior" because "a woman is extremely exhausted postpartum and will simply not have the physical energy to flee or act aggressively." Id. at 31.

Defendants cite Plaintiff's testimony that she had no complaints about her treatment by DCSO staff or medical staff from 11:00 p.m. to 7:00 a.m. (Docket Entry No. 86-16, Villegas Deposition at 139). At the noted pages, Villegas testified:

> Q. **[F]rom** [*37] **the time the restraints were taken off and the guard was waiting outside until the time the restraints were put back on do you have any complaints about the way you were treated?**
>
> A. **No.**
>
> Q. The B the doctor and nurses were able to do their jobs, right?
>
> A. Yes.
>
> Q. You were able to move about as you needed, correct?
>
> A. Well, I just -- **I fell asleep and stayed asleep. I didn't move around or get out of bed or anything.**
>
> Q. And you're referring to after you gave birth?
>
> A. Yes.
>
> Q. And my B I guess the point of clarification was, you were able to move about as you B as you wanted to during that time?
>
> A. Yes.

(Docket Entry No. 86-15, Villegas Deposition at 131 (emphasis added). Yet, these statements refer only to the time when Plaintiff was not shackled or was asleep.

B. Conclusions of Law

"The very reason of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Advisory Committee Notes on Rule 56, Federal Civil Judicial Procedure and Rules (West Ed. 1989). Moreover, [HN1] "district courts are widely acknowledged to possess the power to enter summary judgment sua sponte, so long as the opposing party was on notice that she [*38] had to come forward with all of her evidence." Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Accord, Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the United States Supreme Court explained the nature of a motion for summary judgment:

> [HN2] Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment 'shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' By its very terms, this standard provides that [HN3] the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.
>
> [HN4] As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that [*39] are irrelevant or

> unnecessary will not be counted.

477 U.S. at 247-48 (emphasis in the original and added in part). Earlier the Supreme Court defined [HN5] a material fact for Rule 56 purposes as "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted).

[HN6] A motion for summary judgment is to be considered after adequate time for discovery. Celotex Corp. v. Catrett, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Where there has been a reasonable opportunity for discovery, the party opposing the motion must make an affirmative showing of the need for additional discovery after the filing of a motion for summary judgment. Emmons v. McLaughlin, 874 F.2d 351, 355-57 (6th Cir. 1989). But see Routman v. Automatic Data Processing, Inc., 873 F.2d 970, 971 (6th Cir. 1989).

There is a certain framework in considering a summary judgment motion as to the required showing of the respective parties as described by the Court in Celotex:

> Of course, [HN7] a party seeking summary judgment always bears the initial [*40] responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim.

Celotex, 477 U.S. at 323 (emphasis deleted).

As the Court of Appeals explained, [HN8] "[t]he moving party bears the burden of satisfying Rule 56(c) standards." Martin v. Kelley, 803 F.2d 236, 239, n. 4 (6th Cir. 1986). The moving party's burden is to show "clearly and convincingly" the absence of any genuine issues of material fact. Sims v. Memphis Processors, Inc., 926 F.2d 524, 526 (6th Cir. 1991)(quoting Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986)). [HN9] "So long as the movant has met its initial burden of 'demonstrating the absence of a genuine issue of material fact,' the nonmoving party then 'must set forth specific facts showing that there is a genuine issue for trial.'" Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989) [*41] (quoting Celotex and Rule 56(e)).

[HN10] Once the moving party meets its initial burden, the Court of Appeals warned that "[t]he respondent must adduce more than a scintilla of evidence to overcome the motion [and] . . . must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989)(quoting Liberty Lobby). Moreover, the Court of Appeals explained that:

> The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further,' [w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. [HN11] The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.'

Street, 886 F.2d at 1480 (cites omitted). See also Hutt v. Gibson Fiber Glass Products, 914 F.2d 790 (6th Cir. filed 1990) ([HN12] "A court deciding a motion for summary judgment must determine 'whether the evidence presents a sufficient disagreement to require a submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." quoting Liberty [*42] Lobby)).

If both parties make their respective showings, the Court then determines if the material factual dispute is genuine, applying the governing law.

> More important for present purposes, [HN13] summary judgment will not lie if the dispute about a material fact is 'genuine' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

> * * *
>
> Progressing to the specific issue in this case, we are convinced that [HN14] the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. [HN15] The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. [HN16] The judge's [*43] inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict -- 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'

Liberty Lobby, 477 U.S. at 248, 252 (citation omitted and emphasis added).

It is likewise true that:

> [HN17] [I]n ruling on a motion for summary judgment, the court must construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant. Further, the papers supporting the movant are closely scrutinized, whereas the opponent's are indulgently treated. It has been stated that: [HN18] 'The purpose of the hearing on the motion for such a judgment is not to resolve factual issues. It is to determine whether there is any genuine issue of material fact in dispute. . . .'

Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F.2d 425, 427, 91 Ohio Law Abs. 602 (6th Cir. 1962) (citation omitted). As the Court of Appeals stated, [HN19] "[a]ll facts and inferences to be drawn therefrom must be read in a light most favorable to the party opposing the motion." Duchon v. Cajon Company, 791 F.2d. 43, 46 (6th Cir. 1986) [*44] app. 840 F.2d 16 (6th Cir. 1988) (unpublished opinion) (citation omitted).

The Court of Appeals further explained the District Court's role in evaluating the proof on a summary judgment motion:

> [HN20] A district court is not required to speculate on which portion of the record the nonmoving party relies, nor is it obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim. Rule 56 contemplates a limited marshalling of evidence by the nonmoving party sufficient to establishing a genuine issue of material fact for trial. This marshalling of evidence, however, does not require the nonmoving party to "designate" facts by citing specific page numbers. Designate means simply "to point out the location of." Webster's Third New International Dictionary (1986).

Of course, [HN21] the designated portions of the record must be presented with enough specificity that the district court can readily identify the facts upon which the nonmoving party relies; but that need for specificity must be balanced against a party's need to be fairly apprised of how much specificity the district court requires. This notice can be adequately accomplished through [*45] a local court rule or a pretrial order.

> 1. Complex cases are not necessarily inappropriate for summary judgment.
>
> 2. Cases involving state of mind issues are not necessarily inappropriate for summary judgment.
>
> 3.[HN22] The movant must meet the initial burden of showing 'the absence of a

genuine issue of material fact' as to an essential element of the non-movant's case.

4. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.

5. [HN23] A court should apply a federal directed verdict standard in ruling on a motion for summary judgment. The inquiry on a summary judgment motion or a directed verdict motion is the same: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the party must prevail as a matter of law.'

6.[HN24] As on federal directed verdict motions, the 'scintilla rule' applies, i.e., the respondent must adduce more than a scintilla of evidence to overcome the motion.

7. [HN25] The substantive law governing the case will determine what issues of fact are material, and any heightened burden of proof required [*46] by the substantive law for an element of the respondent's case, such as proof by clear and convincing evidence, must be satisfied by the respondent.

8. [HN26] The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'

9. [HN27] The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

10. [HN28] The trial court has more discretion than in the 'old era' in evaluating the respondent's evidence. The respondent must 'do more than simply show that there is some metaphysical doubt as to the material facts.' Further, '[w]here the record taken as a whole could not lead a rational trier of fact to find' for the respondent, the motion should be granted. [HN29] The trial court has at least some discretion to determine whether the respondent's claim is 'implausible.

Street, 886 F.2d at 1479-80.

The Court has distilled from these collective holdings [HN30] four issues that are to be addressed upon a motion for summary judgment: (1) has the moving party "clearly and convincingly" established the [*47] absence of material facts?; (2) if so, does the plaintiff present sufficient facts to establish all the elements of the asserted claim or defense?; (3) if factual support is presented by the nonmoving party, are those facts sufficiently plausible to support a jury verdict or judgment under the applicable law?; and (4) are there any genuine factual issues with respect to those material facts under the governing law?

Plaintiff's claim for denial of medical care arises from Defendants' shackling during her active pre-birth labor (when her "water broke") and during her post-partum recovery and is predicated on the Due Process Clause of the Fourteenth Amendment because Plaintiff was a detainee, not a convicted prisoner. City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 244-46, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983). Yet, the Supreme Court applies [HN31] Eighth Amendment standards to such claims. Bell v.Wolfish, 441 U.S. 520, 545, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). To be sure, as Defendants state, under Eighth Amendment standards, the Court must be "especially deferential to prison authorities 'in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional [*48] security.'" Rhodes v. Chapman, 452 U.S. 337, 361-62, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981) (citations omitted) (Brenman, J., concurring). Yet, in evaluating a due process claim for a particular practice, the Court must consider the purpose of detention, Youngberg v. Romeo, 457 U.S. 307, 320 n. 27, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) and here, the recognized government interest in detention of illegal aliens is regulatory, namely, "'ensuring the appearance of aliens at future immigration

proceedings'" and "'preventing danger to the community.'" Zadvydas v. Davis, 533 U.S. 678, 690, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001). [6]

> 6 Defendants argue extensively that shackling serves a penological purpose, (Docket Entry No. 82, Defendants' Memorandum at 16, 17, 19, 20, 21, 23 and 25 and Docket Entry No. 96, Defendants' Response to Plaintiff's motion for summary judgment at 9, 10, 13, 15, 16, 17 19 and 20), but "[p]enological interests . . . relate to the treatment . . . of persons convicted of crimes." Benjamin v. Fraser, 264 F.3d 175, 187 n.10 (2nd Cir. 2001). Plaintiff is not a convicted person. As the Supreme Court stated: "This Court has recognized[HN32] a distinction between punitive measures that may not be constitutionally imposed prior to a determination of guilt and regulatory restraints [*49] that may". Bell, 441 U.S. at 537. In addition, Bell refers to "order", "discipline" and "institutional security," id., at 546-47, none of which is implicated, given Plaintiff's medical condition at the hospital and lack of criminal or disciplinary history.

Under the Eighth Amendment, the standard for deciding whether this right to adequate medical care was violated is as follows:

> [HN33] [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983.

Estelle v. Gamble, 429 U.S. 97, 104-05, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (citation and footnotes omitted).

Later, in Helling v. McKinney, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), the Supreme Court refined the distinct objective and subjective components for this Eighth Amendment claim. [HN34] The objective component, i.e., [*50] a serious medical condition, does not necessarily require the person to manifest symptoms of a disease explaining that:

> Also with respect to the objective factor, determining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS. **It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose** *anyone* **unwilling to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.**

Id. at 36 (italicize in the original with other emphasis added).

[HN35] Under Helling, a serious medical complaint is one that "is sure or very likely to cause serious illness and needless suffering," 509 U.S. at 33, or a condition "that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention," Blackmore v. Kalamazoo County, 390 F.3d 890, 897 (6th Cir. 2004) (quoting Friend v. Rees, 779 F.2d 50, 1985 WL 13838 (6th Cir. Oct. 1, 1985)), [*51] or a serious medical need "'is one that has been diagnosed by a physician as mandating treatment.'" Id. (quoting Gaudreault v. Municipality of Salem, 923 F.2d 203, 208 (1st Cir. 1990) with other citations omitted)). Actual physical injury due to indifference is unnecessary as "the Eighth Amendment protects against future harm to inmates [that] is not a novel proposition." Helling, 509 U.S. at 33. Unnecessary suffering and mental anguish from delay in care is sufficient for Eighth Amendment purposes, Boretti v. Wiscomb, 930 F.2d 1150, 1154 (6th Cir. 1991) (citing Estelle, 429 U.S. at 103), as is conduct that causes "severe emotional distress." Parrish v. Johnson, 800 F.2d 600, 610-11 (6th Cir. 1986).

[HN36] As to the subjective element of evidence, the Court is to consider "the prison authorities' current

attitudes and conduct," Helling 509 U.S. at 36, and the "intent on the part of the prison officials." Stubbs v. Wilkinson, 52 F.3d 326, 1995 WL 234672, at *2 (6th Cir. 1995) (unpublished). Yet, "a detailed inquiry into his state of mind," is unnecessary as conscious indifference is not required. Weeks v. Chaboudy, 984 F.2d 185, 187 (6th Cir. 1993). "Knowledge of the asserted serious needs [*52] or of circumstances clearly indicating the existence of such needs, is essential to a finding of deliberate indifference." Horn v. Madison County Fiscal Court, 22 F.3d 653, 660 (6th Cir. 1994).

[HN37] As examples of deliberate indifference, the Supreme Court listed " guards in intentionally denying or delaying access to medical care or **intentionally interfering with the treatment once prescribed**". Estelle, 429 U.S. at 105 (emphasis added with footnotes to citations omitted). In the Sixth Circuit, prison or jail officials' failure to provide prescribed medical treatment or comply with a medical treatment plan violates the Eight Amendment. Boretti, 930 F.2d at 1154-55; Byrd v. Wilson, 701 F.2d 592, 595 (6th Cir. 1983)(per curiam). "Complying with a doctor's prescription or treatment plan is a ministerial function, not a discretionary one." Boretti, 930 F2d at 1156.

The critical part of Plaintiff's claim is Defendants' shackling of her during her final stages of her labor after her amniotic fluid or water broke. [HN38] Government officials cannot restrain residents except "when and to the extent professional judgment deems this necessary to assure such safety. . . ." Youngberg, at 324 (mental patients). [*53] Later, in Hope v. Pelzer, 536 U.S. 730, 738, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the Supreme Court held that a prison official who handcuffed a convicted inmate to a prison hitching post for seven hours in dire conditions and without any clear emergency situation and in a manner "that created a risk of particular discomfort and humiliation" and in doing so "acted with deliberate indifference to the inmate's health and safety" violated of the inmate's Eighth Amendment to be free of cruel and unusual punishment.

As to use of restraints in shackling of a pregnant detainee in labor, in Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009) (en banc) [7] the Eighth Circuit summarized the constitutional history of holdings that since 1994 such restraints were unconstitutional as deliberate indifference to a serious medical condition:

> **[I]n the District of Columbia ... [i]n 1994 that court held that [HN39] "[w]hile a woman is in labor ... shackling is inhumane" and violates her constitutional rights.** Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F.Supp. 634, 668-69 (D.D.C.1994), modified in part on other grounds, 899 F.Supp. 659 (D.D.C.1995). The court held defendant prison officials liable, [*54] explaining that a prison official who shackles a woman in labor acts with "deliberate indifference ... since the risk of injury to women prisoners is obvious." Id. at 669. **The court found it significant that one prison official had shackled a pregnant inmate even though he himself later stated "that he would not shackle a third trimester woman," from which the court concluded "that he recognize[d] the risk."** Id. Turensky's similar admission could also be found to show that she applied the leg restraints on Nelson despite recognizing the risks involved in shackling her during labor. These constitutional holdings in Women Prisoners were never appealed and they remained in effect at the time Nelson went into labor. See Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 320 U.S. App. D.C. 247 (D.C.Cir.1996).
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> * * *
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> **Existing constitutional protections, as developed by the Supreme Court and the lower federal courts and evidenced in ADC regulations, would have made it sufficiently clear to a reasonable officer in September 2003 that an inmate in the final stages of labor cannot be shackled absent clear evidence that she is a security or flight risk. Indeed, "[t]he obvious cruelty inherent** [*55] **in this practice should have provided [Turensky] with some notice that [her] alleged conduct violated [Nelson's] constitutional protection against cruel**

> **and unusual punishment. [Nelson] was treated in a way antithetical to human dignity ... and under circumstances that were both degrading and dangerous."**

Id. at 532-34 (quoting Hope, 536 U.S. at 745 with emphasis added). Accord Coleman v. Rahija, 114 F.3d 778 (8th Cir. 1997) and Brawley v. State of Washington, 712 F. Supp.2d 1208 (W.D. Wash. 2010).

> 7 Defendants argue that Nelson was a 6-5 decision and this fact devalues its holding on whether there is a clear constitutional violation here. (Docket Entry No. 96, Defendants' Memorandum at 3). First, this argument is more akin to a qualified immunity defense that is unavailable to local governmental entities. Owen v. City of Independence, 445 U.S. 622, 649-50, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). For Defendants, the only issue is whether the Constitution was violated, not whether the right to be free from shackling was clearly established. There is not any factual dispute that DCSO's policy was the cause of Plaintiff's shackling, as reflected by the testimony of DCSO officers and Defendants' experts.

In Nelson, the Eighth [*56] Circuit concluded that the officer" should have been aware of the risks involved with labor and childbirth because they are obvious" and that "a factfinder could infer [that the officer] 'recognized that the shackles interfered with [the detainee's] medical care, could be an obstacle in the event of a medical emergency, and **caused unnecessary suffering at a time when Nelson would have likely been physically unable to flee,'" id. at 542**, "because of the pain she was undergoing and the powerful contractions she was experiencing as her body worked to give birth." Id. at 530 (emphasis added and citations to medical publications omitted). Thus, the Eighth Circuit deemed[HN40] the risks involved in shackling a woman in labor near childbirth to be "obvious" and to "have entered the collective consciousness" of society so that the officer must have been aware of the medical risks. Id. at 530 n.5.

The Eighth Circuit also found, "there does not even appear to have been a competing penological interest in shackling her," given that the inmate had not been any problem. Id. at 530. The Eighth Circuit also concluded that "[a] reasonable factfinder could determine from the record in this case that [the [*57] officer] . . . was not facing an emergency situation but nevertheless 'subjected [Nelson] to a substantial risk of physical harm, to the unnecessary pain caused by the [shackles] and the restricted position of confinement . . . [and] created a risk of particular discomfort and humiliation.'" Id. at 532 (citing Hope, 536 U.S. at 738). The Eighth Circuit deemed the right to be free of such restraints to be "clearly established" as of "September 2003". Id. at 531.

In Brawley, a pregnant inmate "was shackled to the hospital bed on April 15, 2007 and April 16, 2007" and that Court found that:

> **Common sense**, and the DOC's own policy, **tells us that it is not good practice to shackle women to a hospital bed while they are in labor.**
>
> * * *
>
> There is evidence in the record that Plaintiff endured unnecessary pain due to being chained to her bed. . . . **Dr. Easterling testified that "[t]he ability to move and change positions is integral to a woman trying to cope with pain, and so [Plaintiff's] ability to deal with pain by changing positions is severely impaired.**" Dkt. 30-3, at 26.
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> * * *
>
> Dr. Easterling testified that it is important for women who are in labor to be able to move around to avoid venocaval [*58] occlusion, hypertension, and fetal compromise. Dkt. 30-3, at 26. Defendants offer no evidence to counter this opinion.
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> * * *
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> **There is no evidence that she posed a flight risk. The evidence shows that on April 15, 2007, when Officers Glasco and Joy took her to the hospital, at a minimum, she was a pregnant woman at or near full term, was running a fever, was in pain, and was moving slowly.** Dkt. 23-3, at 43-45.

* * *

. . . [S]he had a serious medical need and was exposed to an unnecessary risk of harm.

712 F. Supp. 2d at 1219, 1220 (emphasis added).

Here, Plaintiff had no prior criminal history or prior arrest or flight risk and had not been engaged in any conduct to pose a danger to the community or to anyone. While Plaintiff was in labor or post-partum recovery, the medical testimony of Dr. Sandra Torrente and the commendable conduct of Officer Peralta clearly establish that Plaintiff was neither a risk of flight nor a danger to anyone. Although Defendants cite expert testimony of the danger of illegal immigrants fleeing and engaging in illegal activities [8] justifying these restraints, Hall, Metro's sheriff, released Plaintiff on July 9th. Villegas, 2010 U.S. App. LEXIS 23182, 2010 WL 6439842 at *1.

8 There is not any [*59] empirical support for Defendants' experts' assertions that illegal aliens, as a group, commit crimes that endanger the public safety. A 2011 article reported that "nearly half of all people described as "illegal aliens" obtained their legal status by overstaying valid visas." Keith Cunningham-Parmeter, "Alien Language: Immigration Metaphors and the Jurisprudence of Otherness" 79 Fordham L. Rev. 1545, 1575 (2011). Another article suggests the need to distinguish between "criminal aliens" and "illegal aliens". Teresa A. Miller, "Blurring the Boundaries between Immigration and Crime Control after September 11th," 25 Boston College Third World Journal 81, 122 n.212 (2005). Federal law recognizes this distinction. See e.g., 8 U.S.C. §1326 (a) and (b)(2). Another article notes that the 287(g) program was limited to aliens who "pose a threat to communities." "From 287(g) to S.B. 1010: The Decline of Federal Immigration Partnership and the Rise of State Level Immigration Enforcement", 52 Ariz. L. Rev. 1083, 1108 (2010). Assuming this limitation, with her lack of criminal history and arrest for a traffic offense, Plaintiff would not appear to meet this latter standard.

The Court applies Hope, [*60] Women Prisoners at D.C., Nelson and Brawley and the undisputed facts [9] to conclude that Defendants' shackling of Plaintiff during the final stages of her active labor and her post-partum recovery, violated the Due Process Clause of the Fourteenth Amendment, given Plaintiff's serious medical condition and the Defendants' indifference to that condition by shackling her during these time periods. The medical proof demonstrates that such shackling was medically necessary and caused unnecessary physical and mental suffering. In addition, under Boretti and Byrd, the Court concludes that Defendants' denial of the breast pump that the MGH provided for Plaintiff's medical care also constitutes deliberate indifference under the Eighth and Fourteenth Amendments as denial and interference with care prescribed by a health care provider. The Court concludes that the Defendants' shackling of Plaintiff in the final stages of her pregnancy and post-partum recovery as well as the denial of the prescribed breast pump, constitute punishment under the Due Process Clause that is also prohibited under Bell. 441 U.S. at 535. ([HN41] "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication [*61] in accordance with due process law).

9 Given the legal precedents on shackling women in the final stages of labor and post partum recovery, as here, the Court does not consider Dr. Spetalnik's medical opinion or the Defendants' argument about whether the MGH nurses provided DCSO's officers with a copy of the no restraint order to create a material factual dispute. Moreover, as a matter of law, actual physical injury is not required. Subjecting a person to unnecessary suffering and mental anguish under the Eighth Amendment is sufficient as the facts and Dr.DeBona's report undisputedly establish. Dr. Spetalnick's opinion to not address Villegas's mental pain and anguish.

Defendants cited two decisions as justifying Plaintiff's shackling during her transport to the hospital and at the hospital. Hoyte v. Wagner, 2009 U.S. App. LEXIS 2197, 2009 WL 215342 (3rd Cir. Jan. 30, 2009) and Taggart v. MacDonald, 131 Fed. Appx. 544 (9th Cir. 2005). Hoyte involved a male "criminal alien" with prior convictions for drug trafficking, trespass and "menacing." 2009 U.S. App. LEXIS 2197, 2009 WL 215342 at *1. There, the Third Circuit deemed shackling reasonable. In Taggart, a convicted state prisoner with a history of seizures was shackled to provide medical [*62] treatment and did not present any evidence of excessive use of force during the shackling. Here, Plaintiff has not been

convicted of a crime or engaged in violent conduct. Plaintiff is a pregnant female in the final stages of labor in her pregnancy, has medical proof and substantial case law that her shackling was medically and physically unnecessary and resulted in the infliction of excessive pain and a mental disorder. As the Supreme Court stated: "This Court has recognized a distinction between punitive measures that may not be constitutionally imposed prior to a determination of guilt and regulatory restraints that may". Bell, 441 U.S. at 537. Because Plaintiff is a detainee without a prior conviction or history of violent conduct, the Court deems Hoyte and Taggart to be factually inapposite.

The testimony and opinions of Defendant's correctional experts are unpersuasive for several reasons. First, Defendants' expert ignored the defined trend among states and federal agencies, to abandon shackling in this context. Plaintiff does not seek any amnesty as Leach asserts, but only the removal of shackles where she was physically unable to flee or pose any danger, as reflected by Dr. [*63] Torrent's medical expert opinion. Officer Peralta's release of the shackles evinces Plaintiff's practical inability to flee or to be a danger in her condition.

Second, as a matter of law, with Hope in 2002, the Supreme Court clearly held that shackling in a prison setting can violate the Eighth Amendment. As to concerns of flight, Defendants' experts agree that Plaintiff's pregnancy condition was obvious and their opinions on security concerns also cannot trump the law as reflected by Nelson, Women Prisons of D.C., and Brawley. [10] Leach's opinion that the Defendants were not "deliberately indifferent," (Docket Entry No. 80 at 3) (quotations in the original), is inadmissible as the use of distinct legal phrase that is beyond his competence. Berry v. City of Detroit, 25 F.3d 1342, 1353-54 (6th Cir. 1994) (disallowing an expert to testify to the term "deliberately indifferent"). Defendants' expert's statements about Defendants' good faith does not control the constitutional question for these local governmental entities. Littlejohn v. Rose, 768 F.2d 765, 772 (6th Cir. 1985) ("despite the good faith intentions of the officers through which it acts, a local government entity cannot assert [*64] a good faith immunity defense in any circumstances") (citing Owen).

> 10 Even if qualified immunity were available here, in extraordinary cases, as here, decisions of non Sixth Circuit courts were held to establish the existence of a clearly established constitutional right. Daugherty v. Campbell, 935 F.2d 780, 785-87 (6th Cir. 1991) (citing Bell, the First, Fifth and Eighth Circuits to hold cavity searches of prison visitors to be a clearly established Fourth Amendment violation).

Third, there is not any proof cited nor discerned from the Court's review of the record, that a jail medical official approved the handcuffing of the Plaintiff or would assess Plaintiff's need for a breast pump. If true, these facts also cannot supplant constitutional principles or the clear medical testimony of the necessity of the breast pump reflected by the opinions of the MGH staff, Dr. Torrente and Dr. DeBona. The medical credentials of the unidentified MGH medical official to make these essential is not identified. In any event, with MGH's staff's provision of the breast pump, under Boretti the DCSO officers lacked the discretion to refuse the breast pump. Finally, in evaluating the Defendants' experts' [*65] opinions the Court is mindful of the Supreme Court's admonition:

> Respondents and the District Court erred in assuming that opinions of experts as to desirable prison conditions suffice to establish contemporary standards of decency. As we noted in *Bell v. Wolfish*, 441 U.S. at 543-544, n. 27, 99 S.Ct. 1861, 1876, n. 27, 60 L.Ed.2d 447, such opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." See U.S. Dept. of Justice, Federal Standards for Prisons and Jails 1 (1980). Indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as "the public attitude toward a given sanction." *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (joint opinion).

Rhodes, 452 U.S. at 348 n. 13 (1981).

[HN42] Another element of the Eighth Amendment analysis is whether the conduct at issue "violates

contemporary standards of decency to expose anyone unwillingly to such a risk." Helling, 509 U.S. at 36). The Supreme Court and the Nelson court cite national health organizations in deciding [*66] constitutional claims. See e.g. Ferguson v. City of Charleston, 532 U.S. 67, 78-79, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001) (citing American Medical Association materials on effects of urine testing of pregnant women who were arrested for drug use); Nelson, 583 F.3d at 530 (citing website of the American Medical Association and other articles).

Here, Plaintiff cites a resolution of the American Medical Association ("AMA") that:

> a local jail shall use the least restrictive restraints necessary when the facility has actual or constructive knowledge that an inmate is in the 2nd or 3rd trimester of pregnancy. **No restraints of any kind shall be used on an inmate who is in labor, delivering her baby or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents: (i) An immediate and serious threat of harm to herself, staff or others; or (ii) A substantial flight risk and cannot be reasonably contained by other means.**"

(available at http://www.ama-assn.org/amal/pub/upload/mm/38/a10-resolutions.pdf.) at 432 (emphasis added).

In addition, on June 12, 2007, the American College of Obstetricians and Gynecologists reported its findings on the interface of institutional concerns and safety [*67] of pregnant women in custody:

> **The practice of shackling an incarcerated woman in labor may not only compromise her health care but is demeaning and unnecessary.** Most women in correctional facilities are incarcerated for non-violent crimes and are accompanied by guards when they are cared for in medical facilities. Testimonials from incarcerated women who went through labor with shackles confirm the emotional distress and physical pain caused by the restraints. Women describe the inability to move to allay the pains of labor, the bruising caused by chain belts across the abdomen, and the deeply felt loss of dignity.
>
> The safety of hospital personnel is paramount and for this reason, adequate correctional staff must be available to monitor incarcerated women in labor, both during transport to and from the correctional facility and during the hospital stay. However, the safety of personnel has not been compromised in the years since laws preventing shackling have been instituted in California and Illinois. The safety track record demonstrates the feasibility of preserving the dignity and providing compassionate care of incarcerated laboring women.

(available at www.acog.org/departments/underserved/20070612SaarLTR.pdf) [*68] (emphasis added).

Since 2000, twenty one states as well as federal law enforcement and prison agencies have concluded that shackling of a pregnant woman shortly before delivery and post-partum recovery does not promote any penological interest. *See* Elizabeth Alexander, "The Ben J. Altheimer Symposium: Prisoners: Rights: The Rights of the Convicted and Forgotten Article: Unshackling Shawanna: The Battle Over Chaining Women Prisoners During Labor and Delivery," 32 U. Ark. Little Rock L. Rev. 435 (2010) (citing written policies adopted by the Federal Bureau of Prisons, the United States Marshal Service, States and the District of Columbia). [11]

> 11 Defendants incorrectly assert that these changes in at least the States occurred in 2009, after Plaintiff's experiences. Alexander's article reflects these changes in the States of Illinois (2000), California (2006), Vermont (2006), and Arkansas (2003). 32 U. Ark. Little Rock L. Rev. at 436-37, nns. 9, 13, 17, 21 and 35, but the Federal Bureau of Prisons change was in September 2008. Of course, Nelson deemed this right to be free of such restraints is clearly established as of September, 2003. 583 F.3d at 531.

Rule 33 of the United Nations Minimum Standard [*69] for the Treatment of Prisoners provides that shackles should not be used on inmates except as a

precaution against escape, on medical grounds at the direction of a medical officer, or to prevent an inmate from injury to self or others or from damaging property. www2.ohchr.org/English/law/treatmentpris oners.htm. Amnesty International deems the use of restraints on pregnant prisoners a "cruel, inhuman and degrading form of treatment in violation of both the UN Convention Against Torture and the International Covenant on Civil and Political Rights." www.amnesty/usa.org/violence-against-whe n/abuse-of-women-in-custody/fact-sheet-s hackling-o f-pregnant-prisoners/page.do?id=1108308 (Amnesty USA, Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women," Amnesty International (2006). [12] The United States is a signatory of the UN Convention Against Torture, and has ratified the International Covenant on Civil and Political Rights. Id. Where a convention has been ratified by the United States, rights thereunder may be enforceable. See Breard v. Greene, 523 U.S. 371, 376, 118 S. Ct. 1352, 140 L. Ed. 2d 529 (1998), Medellin v. Texas, 552 U.S. 491, 504-08, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008) and Mora v. New York, 524 F.3d 183, 186 n. 3 (2d Cir. 2008) [*70] and authorities cited therein. This Court does not decide the enforceability issue, but with Plaintiff, a citizen of another country and a federal detention program, the United States's ratification of international conventions and standards are persuasive of the contemporary standards on shackling pregnant women.

> 12 See Graham v. Florida, 130 S.Ct. 2011, 2033, 2034, 176 L. Ed. 2d 825 (2010) (citing law review articles and Amnesty International materials in deciding an Eighth Amendment claim).

Thus, in addition to the cited judicial decisions, this Court further concludes that these medical publications, convention rules, social studies and standards also establish that the shackling of a pregnant detainee in the final stages of labor shortly before birth and during the post-partum recovery, violates the Eighth Amendment's standard of contemporary decency.

As to Plaintiff's First Amendment claim for the Defendants' denial of her right to visit or contact her husband, in Overton v. Bazzetta, 539 U.S. 126, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003), the Supreme Court stated that:

> We have said that [HN43] the Constitution protects "certain kinds of highly personal relationships" . . . [a]nd outside the prison context, there is some discussion in our cases [*71] of a right to maintain certain familial relationships, including association among members of an immediate family and association between grandchildren and grandparents.

Id. at 131 (citations omitted). In a detention setting, courts have permitted the denial of contact visits with pretrial detainees, Inmates of Allegheny City Jail v. Pierce, 612 F.2d 754 (3d Cir. 1979), including for INS detainees. Hooper v. Clark, et al, No. C06-5282 RBL/KLS, 2007 U.S. Dist. LEXIS 11656, 2007 WL 562345 (W.D. Wash. Feb. 16, 2007). As a factual matter, there was no constitutional violation of depriving Plaintiff from her child as Plaintiff testified that her child was with her "the whole time" and that the nurse took the baby to enable Plaintiff to rest. In any event, Plaintiff's detention was under a Section 287(g) program, and INS Detention Standards regarding visitation reveal the following:

> Facilities holding INS detainees shall permit authorized persons to visit detainees, within security and operational constraints. To maintain detainee morale and family relationships, INS encourages visits from family and friends. Facilities shall allow detainees to meet privately with their current or prospective legal representatives and [*72] legal assistants, and also with their consular officials.

INS Detention Standard (September 20, 2000) available at ww.ice.gov/doclib/dro/detention-standard s/pdf/visit.pdf. Here, any violation of this administrative provision does not support a constitutional violation.

As to any Section 1981 claim, Plaintiff, at best, is a third party beneficiary to the contract between INS and DCSO. In such instances, there is not any Section 1981 claim, rather only a breach of contract claim. See Smith v. Corrections Corp. of America, 19 Fed. Appx. 318, 320-21 (6th Cir. 2001) and authorities cited therein. Accordingly, [HN44] any breach of contract claim premised on this federal contract is within the exclusive jurisdiction of the Court of Claims under 28 U.S.C. § 1491(a). See also Matthews v. United States, 810 F.2d 109, 111 (6th Cir. 1987).

As to the Plaintiff's Fourth Amendment claim, the Sixth Circuit has held that [HN45] forced exposure to the other sex's viewing of a naked inmate is actionable. Kent v. Johnson, 821 F.2d 1220, 1224-25 (6th Cir. 1987) (male inmate's naked exposure to female guards actionable). Here, the male officers did not view Plaintiff when she changed into a hospital gown and followed the [*73] doctor's instruction to turn away from Plaintiff. These circumstances are not desirable, but are not unconstitutional absent Plaintiff's actual forced exposure to the male officers. Brannum v. Overton County School Bd., 516 F.3d 489, 495-96 (6th Cir. 2008); Mills v. City of Barbourville, 389 F.3d 568, 579-80 (6th Cir. 2004).

For these collective reasons, the Court concludes that the Plaintiff's motion for partial summary judgment should be granted on her Fourteenth Amendment claim for the Defendants' shackling of her during Plaintiff's active final stages of labor and subsequent postpartum recovery and denial of breast pump, but should otherwise be denied except for Plaintiff's breach of contract claim that should be dismissed without prejudice for lack of subject matter jurisdiction. As a matter of comity, the Court declines to entertain Plaintiff's state constitutional claims that are also dismissed without prejudice. See Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927, 935 (6th Cir. 1991). To this extent, the Defendants' motion for summary judgment should also be granted in part and denied in part.

An appropriate Order is filed herewith.

ENTERED [*74] this the 27th day of April, 2011.

/s/ William J. Haynes, Jr.

WILLIAM J. HAYNES, JR.

United States District Judge

ORDER

In accordance with the Memorandum filed herewith, Plaintiff's motion for partial summary judgment (Docket Entry No. 84) is **GRANTED** on Plaintiff's Fourteenth Amendment claim for the Defendants' shackling of her during the final stages of her labor and subsequent post-partum recovery. Plaintiff's breach of contract claim is **DISMISSED** without prejudice for lack of subject matter jurisdiction and as a matter of comity, Plaintiff's state law claims are **DISMISSED** without prejudice. To this extent, the Defendants' motion for summary judgment (Docket Entry No. 77) is **GRANTED in part and DENIED in part.** Counsel for the parties have twenty (20) days from the date of entry of this Order to submit an Agreed Order for a hearing on damages.

It is so **ORDERED.**

ENTERED this the 27th day of April, 2011.

/s/ William J. Haynes, Jr.

WILLIAM J. HAYNES, JR.

United States District Judge