IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60287

JOSEPH GERHART, Individually, and Next Friend of Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard, Minors; AMANDA JO GERHART, Individually, and Next Friend of Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard, Minors,

Plaintiffs-Appellees,

v.

JOHNNY BARNES, in his Official and Individual Capacity; BRETT MCALPIN, Deputy, in his official and individual capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:11-CV-586

(Filed Apr. 26, 2018)

Before: BARKSDALE, DENNIS, and ELROD, Circuit Judges.

PER CURIAM.*

The panel's prior opinion in this case is withdrawn and the following substituted in its place.

In this interlocutory appeal, Officer Johnny Barnes and Deputy Brett McAlpin appeal the denial of their summary-judgment motions on qualified-immunity and Mississippi tort-law grounds. We AFFIRM the district court's order denying summary judgment on qualified-immunity grounds as to Barnes's and McAlpin's unlawful-entry claim; DISMISS for lack of jurisdiction the interlocutory appeal of McAlpin's excessive-force claim; and REVERSE the denial of summary judgment on the Mississippi tort claim and RENDER judgment on that claim.

I.

A panel of this court previously ruled on an interlocutory appeal based on qualified immunity by the third individual, Agent Brad McLendon, who entered the Gerharts' home. *See Gerhart v. McLendon*, 714 F. App'x 327 (5th Cir. 2017).[1] The factual summary in

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* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Rule 47.5.4.

[1] In that opinion, this court affirmed the district court's judgment determining that McLendon was not entitled to qualified immunity. *McLendon*, 714 F. App'x at 328-29. As stated in that opinion, "we lack jurisdiction to review the district court's factual findings" and thus "base our legal conclusions on the facts that the district court found sufficiently supported in the summary

McLendon is based on the statement of facts that the district court provided in its opinion granting in part and denying in part McLendon's motion for summary judgment. The district court did not set forth any findings of fact in its order allowing the Gerharts to proceed on some of their claims against Barnes and McAlpin, although it incorporated by reference the transcripts of a prior telephonic conference call and hearing with the parties. We therefore reiterate here the statement of facts from this court's opinion in *McLendon*:

> By June 2010, Detective Jamie Scouten of the Pearl Police Department had spent several months investigating the residence at 473 Robert Michael Drive in Pearl, Mississippi. As part of that investigation, Scouten used a confidential informant ("CI") to conduct "buy-bust" operations in which the informant would purchase methamphetamine at the residence. The U.S. Drug Enforcement Administration ("DEA") learned about Scouten's operation. It requested that he conduct another buy-bust operation in order to "freshen up" the probable cause for arrest and search warrants. Based on the DEA's interest, Scouten requested back-up from other law enforcement agencies, including Rankin County

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judgment record." *Id.* at 329 n.1. "Due to our limited jurisdiction, we cannot review the district court's factual findings. Nor do we have the benefit of the evidence as it will emerge at trial. Thus, our opinion should not be read to preclude dismissing this case on qualified immunity grounds at another point in the proceedings." *Id.* at 334 n.6.

and the Rankin County District Attorney's Office. Prior to the operation, he prepared warrants and supporting affidavits for 473 Robert Michael Drive. The plan was for the CI to purchase methamphetamine and bring it to the officers, who would test it. Scouten would then fill in the salient details in the warrant and get a judge's approval.

. . . .

The operation took place on June 7, 2010. Scouten held a briefing beforehand at the police station. During that briefing, Scouten told all of the officers participating that the target residence was 473 Robert Michael Drive. He then wrote "473 Robert Michael Drive" across the top of a sheet of paper and asked the CI to draw a diagram of the interior of the residence. Scouten and the CI also went over a number of other key details during that briefing, including the location, the persons involved, the type of narcotics, and the identity of the CI. This last piece of information was key because if the officers needed to enter the residence, it was important for the CI's safety that they could identify her. Scouten used Google Earth images to familiarize officers with the location and appearance of the target residence. Scouten also mentioned that an unusual van with a "dualie [sic] axle" was parked in the driveway of the target residence. Because the target residence had burglar bars around all windows, Scouten told

the others that they would have to enter through a side door.[2]

. . . .

Scouten divided the officers into several vehicles, making sure that at least one officer in each vehicle could access the Pearl Police Department's radio channels. McLendon was assigned to a vehicle with two other officers: Brett McAlpin of the Rankin County Sheriff's Department and John Barnes of the Pearl Police Department. Barnes, McAlpin, and McLendon were tasked with stationing themselves at the end of Robert Michael Drive, where they would maintain visual contact with the residence in order to track the CI and ensure that no suspects left. They were the only officers who could see the target residence. The others were parked out of sight at a nearby church.

The CI and the officers left the station around 7:00 p.m. The plan was for McLendon to follow the CI to the residence. McLendon insisted that he did not follow the CI to the target residence, though others testified that he did. Barnes and Scouten, for instance, both testified that McLendon had to brake as the CI turned into the driveway of the target residence in order to avoid hitting her vehicle. McLendon then drove past the residence for about 200 yards, turned around, and parked facing the residence. It was still daylight

[2] The Gerhart house did not have any burglar bars.

when they arrived, weather conditions were normal, and the terrain between the officers and the target residence was level.

Barnes, McAlpin, and McLendon gave inconsistent testimony about who identified the target residence and how. Barnes claimed that he identified the target residence (at 473 Robert Michael Drive) correctly and pointed out the van with the unusual "dualie [sic] axle." McAlpin initially testified that both Barnes and McLendon identified 481 Robert Michael Drive as the target residence, though he later stated that only Barnes did so. McLendon also testified that Barnes identified 481 Robert Michael Drive as the target residence as they drove past and that he specifically pointed to a young man standing outside that residence.

The CI entered 473 Robert Michael Drive and bought $600 of methamphetamine. Suddenly, the CI texted Scouten to tell him she was in danger. Scouten broadcast to the other officers that the CI was in danger. He told them to converge on the target residence and do everything they could to help the CI. All vehicles acknowledged the signal—except McLendon's. Barnes testified that he had turned his radio off because McLendon was trying to tune into the radio broadcast from the CI's recording equipment. Scouten specifically requested a response from McLendon's vehicle. Barnes replied that he did not hear the prior transmission, and Scouten repeated it. McAlpin was aware of the second call to go to the

target residence, whereas McLendon testified that it never happened.

Meanwhile, Brett Gerhart was standing in front of his house at 481 Robert Michael Drive when he noticed McLendon's black Cadillac Escalade drive by and park at the end of the street. Some time later, he heard McLendon's tires screech as McLendon raced toward the Gerhart residence. McLendon drove onto the Gerharts' yard and parked between some trees. According to Brett, the blue siren lights on McLendon's car were not on, and so there was no indication that it was a police vehicle. As Scouten was rounding the corner, he saw McLendon driving down the street. After Scouten got out of his vehicle, he heard yelling and saw McAlpin, McLendon, and Barnes running across the Gerhart yard and into the house.

Barnes, McAlpin, and McLendon got out of the vehicle and pulled out their weapons. McAlpin told Brett to get on the ground, though it is disputed whether he identified himself as a police officer. All three officers were, however, wearing vests identifying them as police officers. Brett testified that he did not notice the vests until the officers left. When [McLendon's] vehicle came to a stop on the Gerharts' yard, Brett ran into the residence through a side door and locked the door behind him. He went through the residence, shouting, "They have guns!" McAlpin kicked in the side door and started to chase Brett. Brett testified that he then ran through the

front door to prevent intruders from coming into the house. According to Brett, McAlpin caught him at the front door, threw him to the ground, and began kicking him in the side and back of the head. McAlpin acknowledges that he pointed his gun at Brett's head but denies kicking him. McAlpin then brought Brett into the living room.

McLendon encountered Joseph Gerhart, Brett's father, when he entered the residence. Joseph was on the floor by that time, and McLendon aimed his gun at Joseph's face. When Joseph tried to get up to help his son, McLendon put his hand on Joseph's back and repeatedly told him to stay down. Barnes was the last to enter the residence, where he encountered Amanda Gerhart in a fetal position, holding a baby in her arms. Amanda testified [that] she only assumed a fetal position after Barnes pointed his gun at her. After Barnes asked for Amanda's name, he realized that they were in the wrong house. Amanda, however, testified that Barnes never said anything to her. She managed to retreat to her son Ian's room and told him to call 911. Ian made the call and told the operator that there were men with guns in the house.

Barnes found McAlpin in the living room, where he had Brett pinned to the ground. After Barnes told McAlpin that they were in the wrong house, McAlpin got off of Brett and left. McLendon likewise left when he discovered that they were in the wrong house.

> While Barnes, McAlpin, and McLendon were inside the Gerhart residence, Scouten and the other officers had converged on the target residence. After Scouten arrived, he initially believed that it would not be possible to get in without breaching tools, and he went to look for McAlpin, who was supposed to bring them to the target residence. He walked toward the Gerhart residence and saw McAlpin and McLendon leaving. Someone yelled from the target residence that they had finally managed to break in without the breaching tools, and Scouten returned to the target residence.
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> Brett suffered injuries to his face and neck, and the city of Pearl ultimately paid for the door that McAlpin destroyed. The Pearl Police Department also conducted an investigation of the incident, which concluded that the officers were inattentive.

McLendon, 714 F. App'x at 329-32 (footnote omitted).

II.

A. Jurisdiction

We have jurisdiction to review a district court's denial of a claim of qualified immunity; such a denial, to the extent it turns on an issue of law, is an immediately appealable "final decision" under 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 526-27, 530 (1985). This is so because qualified immunity is "an *immunity from suit* rather than a mere defense to liability; . . . it

is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526. On interlocutory appeal of the denial of a motion for summary judgment based on qualified immunity, our jurisdiction "extends to such appeals only 'to the extent that the denial of summary judgment turns on an issue of law.'" *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (en banc) (quoting *Mitchell*, 472 U.S. at 530). In denying an official's motion for summary judgment based on qualified immunity, the district court makes two distinct determinations, at least implicitly. *Id.* "First, the district court decides that a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law. Second, the court decides that a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct." *Id.* On interlocutory appeal, we have jurisdiction to review only the first type of determination. *Id.*

Thus, "[i]n deciding an interlocutory appeal of a denial of qualified immunity, we can review the *materiality* of any factual disputes, but not their *genuineness*." *Wagner v. Bay City*, 227 F.3d 316, 320 (5th Cir. 2000). "A fact is '*material*' if it '*might affect* the outcome of the suit under the governing law.'" *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). "An issue is '*genuine*' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Id.* "We review the materiality of fact issues *de novo*." *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (en banc), *cert. denied*, No. 17-1095, 2018 WL

707021 (Apr. 16, 2018)." When the district court fails to set forth the factual disputes that preclude granting summary judgment, we may be required to review the record in order 'to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" *Kinney*, 367 F.3d at 348 (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)).

B. Standard of Review

"Our standard of review for interlocutory appeals differs from the usual Federal Rule of Civil Procedure 56 standards for summary judgment." *Martinez-Aguero v. Gonzalez*, 459 F.3d 618, 621 (5th Cir. 2006); *see also Kinney*, 367 F.3d at 347. Normally, of course, we review a district court's denial of summary judgment *de novo*. *Kinney*, 367 F.3d at 347. However, on an immunity-based interlocutory appeal of a denial of summary judgment, "we do not apply the standard of Rule 56 but instead consider only whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Id.* at 348.

C. Qualified Immunity

To overcome the defense of qualified immunity, plaintiffs must show first that "the official violated a statutory or constitutional right" and second that "the right was 'clearly established' at the time of the challenged conduct." *Melton*, 875 F.3d at 261 (quoting *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en

banc)). "Although a case *directly* on point is not necessary, there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his conduct is definitively unlawful." *Id.* at 265 (quoting *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015)). Thus, "a clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Id.* (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

"Because the plaintiff is the non-moving party, we construe all facts and inferences in the light most favorable to the plaintiff." *Id.* at 261. Thus, "on interlocutory appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." *Gonzales v. Dallas County*, 249 F.3d 406, 411 (5th Cir. 2001).

III.

A. Unlawful Entry

The officers contend that the unlawful-entry claim fails because the district court's order refers to this claim as one for "Fifth Amendment violations under 42 U.S.C. § 1983 for unlawful entry," even though the Fifth Amendment does not apply to claims against municipal actors like Barnes and McAlpin. *See Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996) ("[T]he Fifth Amendment applies only to the actions of the federal government. . . ."). However, this appears to be a mere

scrivener's error, as the district court conducted a lengthy Fourth Amendment analysis on the same unlawful-entry claim asserted against McLendon. *See Gerhart v. Rankin County*, No. 3:11-CV-586-HTW-LRA, 2017 WL 1238028, at *10-12 (S.D. Miss. Mar. 31, 2017), *aff'd sub nom. Gerhart v. McLendon*, 714 F. App'x 327 (5th Cir. 2017).

"A warrantless search of a home is presumptively unreasonable, absent probable cause, consent, or exigent circumstances." *McLendon*, 714 F. App'x at 333 (citing *United States v. Jones*, 239 F.3d 716, 719 (5th Cir. 2001)). Officials do not violate the Fourth Amendment by entering the incorrect residence when their conduct is "consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *See Maryland v. Garrison*, 480 U.S. 79, 88 (1987) (considering whether a seizure of contraband violated the Fourth Amendment when the seizure occurred before the officers realized that they had entered the wrong third-floor apartment that was also on the premises described in the warrant). In *Garrison*, the Court stated that "[i]f the officers had known, *or should have known*, that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to [the correct] apartment." *Id.* at 86 (emphasis added). The Court concluded that "[t]he objective facts available to the officers at the time *suggested no*

distinction between [the correct] apartment and the third-floor premises." *Id.* at 88 (emphasis added).

In addition to the guidance of *Maryland v. Garrison*, a robust consensus of persuasive authority supports the principle from *Garrison* that officers' conduct should be "consistent with a reasonable effort to ascertain and identify the place intended to be searched." *See id.* Perhaps most notable is *Hunt v. Tomplait*, 301 F. App'x 355 (5th Cir. 2008), which this court relied on in *McLendon* as directly on-point. *See McLendon*, 714 F. App'x at 333.

In *Hunt*, we affirmed the district court's determination that officers were not entitled to qualified immunity from Fourth Amendment claims involving an unlawful entry. 301 F. App'x at 356. The officers in *Hunt* attempted to apprehend a suspect who had evaded arrest by allegedly exchanging gunfire with Houston police and attempting to run over a uniformed officer with his vehicle. *Id.* Using information obtained in part from a cellular tracking device, the officers obtained a warrant for the suspect's father's residence. *Id.* However, the officers leading the search did not read the warrant and instead assumed that the suspect was at a different property, where one of the officers knew that some of the suspect's relatives lived. *Id.* at 357. As a result, the officers searched the wrong home. *Id.* at 357-58. We held that the district court did not err in determining that the officers' attempts to locate the correct residence did not "constitute a reasonable effort to ascertain the place to be searched." *Id.* at 361-62.

In *Hartsfield v. Lemacks*, the Eleventh Circuit considered a factually similar unlawful entry. 50 F.3d 950 (11th Cir. 1995), *as amended* (June 14, 1995). In *Hartsfield*, the officer leading the search had previously accompanied a confidential informant to the residence listed in the warrant. *Id.* at 951. The Eleventh Circuit relied in part on evidence before the district court that showed that the houses were separated by at least one other residence and that their appearances were distinguishable. *Id.* at 952. One witness testified that the house incorrectly entered had a fence around it and that the house described in the warrant had "junk cars strewn outside." *Id.* Of key importance to the Eleventh Circuit, it was undisputed that the unlawful entry took place during daylight hours and that the house numbers were clearly marked. *Id.* Accordingly, the Eleventh Circuit reversed the district court's immunity-based grant of summary judgment to the officer on the unlawful-entry claim, holding that given in part "the guidance of the *Garrison* [C]ourt's description of reasonable police efforts, all reasonable police officers should have known that [the officer's] acts—searching the wrong residence when he had done nothing to make sure he was searching the house described in the warrant—violated the law." *Id.* at 955-56 (citing *Duncan v. Barnes*, 592 F.2d 1336, 1337-38 (5th Cir. 1979); *Wanger v. Bonner*, 621 F.2d 675, 681-82 (5th Cir. 1980)). In *Hunt*, we stated that "[t]he reasoning in *Hartsfield* is sound." 301 F. App'x at 362-63.[3]

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[3] In distinguishing its facts from those at issue in the Eleventh Circuit's decision in *Hartsfield*, this court in *Rogers v. Hooper*

In *Dawkins v. Graham*, the Eighth Circuit affirmed the district court's denial of summary judgment to officers based on qualified immunity on an unlawful-entry claim. 50 F.3d 532, 534 (8th Cir. 1995). The officers in *Dawkins* entered a house at "611 Adam" instead of "611 Byrd"; Adam Street was a block before Byrd Street. *Id.* at 533. Among other facts the Eighth Circuit noted, the relevant houses were different colors, and Adam Street and Byrd Street were clearly marked. *Id.* at 534. Applying *Garrison*, the Eighth Circuit held that the "objective facts available to the officers at the time of the raid distinguished the premises at 611 Adam from the premises at 611 Byrd." *Id.* at 534-35. Therefore, summary judgment in favor of the officers on qualified immunity was inappropriate in part because "the law prohibiting the officers' conduct was clearly established at the time of the raid." *Id.* at 535.

In *McLendon*—which involved the third officer's interlocutory appeal in the same underlying case at issue here—this court held that, in light of the relevant caselaw, "an officer must make reasonable, non-feeble efforts to correctly identify the target of a search—even if those efforts prove unsuccessful." 714 F. App'x at 334.

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emphasized both the fact that the *Rogers* operation took place at night and the fact that the relevant houses were next door to each other. 271 F. App'x 431, 434-35 (5th Cir. 2008) (affirming grants of summary judgment to officers based on qualified immunity). The scenario underlying *Gerhart* is easily distinguishable from the scenario in *Rogers*; importantly, the operation at issue in *Gerhart* took place during the day, and the relevant homes were not immediately next door to each other.

On the record before it as viewed on interlocutory appeal, this court determined that McLendon's efforts "fell far short of that standard." *Id.* (footnote omitted). This court in *McLendon* relied in particular on the fact that the officer apparently did not attend the pre-operation briefing; denied knowledge of critical details of the plan (including the identity of the confidential informant and the location and appearance of the target residence); and "made no affirmative effort to learn those details." *Id.* Thus, this court held that McLendon violated clearly established law on the factual record before the court. *Id.* at 335.

In the absence of specific factual findings regarding the district court's denial of Barnes's and McAlpin's motions for summary judgment, we review the record in order "to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." *See Kinney*, 367 F.3d at 348 (quoting *Johnson,* 515 U.S. at 319). On the record before us, Barnes and McAlpin attended the briefing prior to the buy-bust operation, although McAlpin stated that he was "in the hallway or on the outskirts of" the "immediate area" where the briefing occurred. The briefing discussed key details including the address of the target residence, a diagram of the residence, and the identity of the confidential informant. Scouten used Google Earth images to familiarize officers with the location and appearance of the target residence. In addition, Scouten mentioned that an unusual van with a "dualie [sic] axle" was parked in the driveway of the target residence. Scouten also told

the officers that they would have to enter the target residence through a side door because the target residence had burglar bars around all windows.

As noted above, Barnes and McAlpin were responsible for maintaining visual contact with the residence to track the confidential informant and ensure that the suspect did not leave. Moreover, Scouten's case report indicates that McAlpin was assigned to carry door-breaching tools and was "to use these tools to gain entry into the residence if needed." According to Scouten's case report, the vehicle in which Barnes and McAlpin rode followed the confidential informant's vehicle. It appears that Barnes, McAlpin, and McLendon were the only ones who followed the confidential informant all the way to the target residence. However, when asked whether he knew the correct address of the target residence from the briefing, Barnes testified, "I knew that area. I didn't know the exact house." McAlpin also testified that he was unaware of the exact address. The district court likely assumed that these facts were sufficiently supported in the record for summary-judgment purposes.

In its opinion and order denying McLendon's summary-judgment motion based on qualified immunity as to the unlawful-entry claim, the district court analogized the facts of the case to those in *Hartsfield. Rankin County*, 2017 WL 1238028, at *11-12. The district court determined that the officers failed to read the search warrant for themselves. *Id.* at *12. The district court also determined that the buy-bust operation occurred during daylight hours; the Gerhart residence

was separated by one house from the target residence; and the target residence had distinguishing features that the Gerhart residence lacked, specifically the "dualie [sic] axle" van and the burglar bars. *Id.* In addition, the district court noted the investigative report on the entry into the Gerharts' residence, which "indicates that inattentiveness on the part of the officers was the direct cause of the Gerhart incident." *Id.* at *8.

We have emphasized that "[w]hat's reasonable for a particular officer depends on his role in the search." *McLendon*, 714 F. App'x at 335 (quoting *Hunt*, 301 F. App'x at 362 n.8). In *McLendon*, this court stated that "McLendon's lack of preparation is all the more unreasonable because he, Barnes, and McAlpin were the officers entrusted with visually monitoring the target residence and responding first in the case of an emergency." *Id.* at 336. This court determined in *McLendon* that the officer's efforts "fell far short" of objective reasonableness. *Id.* at 334. By this standard, Barnes's and McAlpin's conduct is unreasonable, as well. Consistent with the prior opinion in *McLendon*, we hold that, on the record before us as viewed on interlocutory appeal, Barnes's and McAlpin's conduct was not "consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *See Garrison*, 480 U.S. at 88.[4]

[4] Arguments about exigent circumstances do not alter this conclusion. As stated in *McLendon*, "[t]he danger facing the [confidential informant] was undoubtedly an exigent circumstance. But the [confidential informant] was at the target residence, not the Gerhart residence." 714 F. App'x at 336. Barnes's and McAlpin's

For the reasons explained above, and consistent with this court's holding in *McLendon*, it was clearly established at the time of the alleged unlawful entry here that "an officer must make reasonable, non-feeble efforts to correctly identify the target of a search—even if those efforts prove unsuccessful." *McLendon*, 714 F. App'x at 334. On the record before us, based on our limited standard of review at this interlocutory stage, we conclude that Barnes and McAlpin are not entitled to summary judgment based on qualified immunity on the unlawful-entry claim as a matter of law.

On the facts that have been determined to be sufficiently supported in the record for summary-judgment purposes, viewed in the light most favorable to the Gerharts, the district court correctly determined that Barnes and McAlpin were not entitled to summary judgment based on qualified immunity on the unlawful-entry claim. For the reasons discussed above, we affirm. *See Kinney*, 367 F.3d at 340; *Juarez v. Aguilar*, 666 F.3d 325, 336 (5th Cir. 2011) (affirming the district court's order in part and dismissing the appeal in part).

B. Excessive Force

McAlpin also appeals the denial of summary judgment on qualified-immunity grounds with regard to

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"determination that the danger was inside the Gerhart residence rather than the target residence was not reasonable" because on this record the officers failed to take reasonable affirmative steps to identify correctly the target residence. *See id.*

the excessive-force claim asserted against him. Whether a use of force is excessive and therefore a constitutional violation depends on whether there was "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009)).

We apply the *Graham* factors to determine whether the force used is "excessive" or "unreasonable." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). These factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" with the recognition that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97 (citation omitted). "Claims of excessive force are fact-intensive; whether the force used was 'clearly excessive' and 'clearly unreasonable' depends on 'the facts and circumstances of each particular case.'" *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012) (quoting *Graham*, 490 U.S. at 396).

In addition, the injury must be more than *de minimis* to be cognizable. *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). "[T]he amount of injury necessary to satisfy our requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 101 F.3d 430, 434-35 (5th Cir. 1996). "[E]ven insignificant injuries may support an excessive force claim, as long as they result from unreasonably excessive force. . . ." *Sam v. Richard*, No. 17-30593, 2018 WL 1751566, at *2 (5th Cir. Apr. 12, 2018) (holding that the plaintiff's alleged injuries, which included minor bleeding, met the "some injury" test of *Alexander v. City of Round Rock*, 854 F.3d 298 (5th Cir. 2017), and that the officer's use of force was objectively unreasonable at the summary-judgment stage).

Here, the parties dispute whether McAlpin kicked Brett Gerhart in the head repeatedly after throwing Brett facedown onto the concrete porch. Joseph Gerhart, Brett's father, testified that he heard his son screaming "I'm down, I'm down," and that McAlpin was kicking his son while his son was already on the ground. Moreover, Brett's father testified that McAlpin then brought Brett into the house, and rather than handcuffing him, pinned Brett to the floor with his knee, shoved a pistol in his face, and said, "If you move, I'll blow your f---ing head off."

However, McAlpin testified that he never hit or kicked Brett Gerhart during the incident in question. McAlpin contends that he found Brett Gerhart facedown on the concrete outside of the front door and

merely picked Brett up and took him back inside the house. According to McAlpin, "[t]here is no evidence that [Brett's] alleged injuries were caused by McAlpin or [Brett's] fall on the front porch, and these alleged injuries are by no means more than de minimis."

Therefore, on the factual record as viewed on interlocutory appeal, we determine that the district court likely considered McAlpin's alleged repeated kicking of Brett Gerhart to be a genuinely disputed issue. This dispute is material because it relates to a reasonableness analysis under *Graham* regarding whether Brett posed an "immediate threat to the safety of the officers or others, and whether he [was] actively resisting arrest or attempting to evade arrest by flight." *See Graham*, 490 U.S. at 396.[5] Our review is limited to whether the "facts are materially sufficient to establish that defendants acted in an objectively unreasonable manner." *Wagner,* 227 F.3d at 320. Because this genuine fact issue is material to whether McAlpin violated clearly established law by using excessive force, we lack jurisdiction over the interlocutory appeal as to McAlpin's excessive-force claim. *Newman*, 703 F.3d at 764 ("[W]e have no jurisdiction to review a district court's determination that there are genuine disputes of fact where we have decided, as a matter of law, that those factual issues are material.").

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[5] *See also Brown v. Lynch*, 524 F. App'x 69, 81 (5th Cir. 2013) (unpublished) (citing *Anderson v. McCaleb*, 480 F. App'x 768, 773 (5th Cir. 2012); *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000)) (stating that "[a]t the time of the incident, the law was clearly established in this circuit that repeatedly striking a non-resisting suspect is excessive and unreasonable force").

IV.

The Mississippi Tort Claim

The district court also denied the officers summary judgment on the Gerharts' state-law claim of reckless infliction of emotional distress.[6] Barnes and McAlpin argue that we should exercise pendent appellate jurisdiction to review the Gerharts' state-law tort claim. The Gerharts do not contest this jurisdictional argument. Nonetheless, we have the responsibility to determine the basis of our jurisdiction. *Alvidres-Reyes v. Reno*, 180 F.3d 199, 203 (5th Cir. 1999).

"The denial of immunity under Mississippi law, like a denial under federal law, is appealable under the collateral order doctrine." *Lampton v. Diaz*, 661 F.3d 897, 899 (5th Cir. 2011); *see also Hinds County v. Perkins*, 64 So. 3d 982, 986 (Miss. 2011) (en banc) (noting that "denials of immunity at the summary judgment stage are reviewed via the interlocutory appeal process"). We have held that "[i]n the interest of judicial economy, this court may exercise its discretion to consider under pendant appellate jurisdiction claims that are closely related to the issue properly before us." *Morin*, 77 F.3d at 119 (footnote omitted). Exercising this discretion is appropriate when, as here, we confront a claim of immunity under state law regarding

[6] While the district court refers to the tort claim as one for "reckless" rather than "intentional" infliction of emotional distress, we need not resolve whether the Gerharts properly pleaded a claim for reckless infliction of emotional distress. This is because neither claim here overcomes the Mississippi Tort Claims Act provision of immunity for government employees acting within the scope of employment and sued in their personal capacities.

the same conduct at issue in the qualified-immunity context. *See id.* Otherwise, were we "to refuse to exercise jurisdiction over the state law claims, our refusal would defeat the principal purpose of allowing an appeal of immunity issues before a government employee is forced to go to trial." *Id.* at 119-20 (footnote omitted).

The Mississippi Supreme Court has recognized that "any tort claim filed against a governmental entity or its employee shall be brought only under the [Mississippi Tort Claims Act]." *Conrod v. Holder*, 825 So. 2d 16, 19 (Miss. 2002) (citation omitted). Under Mississippi law:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, *but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties.*

Miss. Code. Ann. § 11-46-7(2) (emphasis added). "The [Mississippi Tort Claims Act] contains an exception to this immunity if an officer's conduct 'constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations'. . . ." *Rogers v. Lee County*, 684 F. App'x 380, 391 (5th Cir. 2017) (unpublished) (quoting Miss. Code. Ann. § 11-46-5(2)).

The Mississippi Supreme Court "has been consistent in rejecting the viability of claims against public employees where their political subdivision employer has been eliminated as a defendant." *Conrod*, 825 So. 2d

at 19 (quoting *Cotton v. Paschall*, 782 So. 2d 1215, 1218 (Miss. 2001)). "[U]nless the action is brought solely against an employee acting outside of the scope of his employment, the government entity must be named and sued as the party in interest under the Tort Claims Act." *Id.* (citation omitted). Moreover, it is "a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment." Miss. Code. Ann. § 11-46-5(3).

The Gerharts do not contest that the officers were acting within the course and scope of their employment here, nor do they argue that Barnes's and McAlpin's conduct constituted malice or criminal behavior. The district court dismissed Defendants Rankin County, Mississippi; Rankin County Sheriff's Office; and McAlpin in his official capacity. The Gerharts allege that McAlpin was an employee of Rankin County and/or Rankin County Sheriff's Office at the time of the incident. In addition, the district court dismissed Defendants City of Pearl, Mississippi and Barnes in his official capacity. The Gerharts allege that Barnes "was at all times material hereto an officer employed by the Defendants, the Pearl Police Department and the City of Pearl, Mississippi" and that "[h]is acts of commission or omission are vicariously attributed to the Defendant, the City of Pearl, Mississippi."

Thus, the immunity provided by the Mississippi Tort Claims Act shields Barnes and McAlpin from personal liability. In allowing the Gerharts to proceed with this tort claim against the officers in their individual

capacities, the district court erred. Thus, we reverse that part of the district court's order denying summary judgment on the Gerharts' state-law tort claim against the officers in their individual capacities, and we render judgment on that claim.

V.

Accordingly, we AFFIRM the district court's denial of summary judgment on qualified-immunity grounds as to the unlawful-entry claim; DISMISS for lack of jurisdiction the interlocutory appeal from the denial of summary judgment on qualified immunity for the excessive-force claim; and REVERSE the denial of summary judgment on the Mississippi tort claim and RENDER judgment on that claim.[7]

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[7] Barnes requests that we reassign the case to a different district court if the case is remanded. McAlpin does not make this request. The Gerharts contend that Defendants' strategic litigation choices rather than the district court's actions are the main reason for the lawsuit spanning six years. In addition, the Gerharts amended their complaint four times, and their fourth amended complaint was filed in December 2016. "A federal court of appeals has the supervisory authority to reassign a case to a different trial judge on remand." *United States v. Winters*, 174 F.3d 478, 487 (5th Cir. 1999); *see Johnson v. Sawyer*, 120 F.3d 1307, 1333 (5th Cir. 1997); 28 U.S.C. § 2106. "However, this is an extraordinary power and should rarely be invoked." *Winters*, 174 F.3d at 487. This case does not demand such an exercise of our authority, and we deny Barnes's request for reassignment.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60287

D.C. Docket No. 3:11-CV-586

JOSEPH GERHART, Individually, and Next Friend of Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard, Minors; AMANDA JO GERHART, Individually, and Next Friend of Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard, Minors,

Plaintiffs-Appellees

v.

JOHNNY BARNES, In his Official and Individual Capacity; BRETT MCALPIN, Deputy, in his official and individual capacity,

Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Mississippi

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

JUDGMENT

(Filed Apr. 26, 2018)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed, dismissed for lack of jurisdiction, reversed and rendered.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

IN THE UNITED STATES COURT OF APPEALS
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No. 17-60287

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JOHNNY BARNES, in his Official and individual Capacity; BRETT MCALPIN, Deputy, in his official and individual capacity,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Mississippi
USDC No. 3:11-CV-586

(Filed Mar. 12, 2018)

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

PER CURIAM:*

In this interlocutory appeal, Officer Johnny Barnes and Deputy Brett McAlpin appeal the denial of their summary-judgment motions on qualified immunity and Mississippi tort law grounds. We AFFIRM the district court's denial of summary judgment on qualified immunity grounds and REVERSE the denial of summary judgment on the Mississippi tort claim and render judgment on that claim.

I.

A panel of this court previously ruled on an interlocutory appeal based on qualified immunity for the third individual, Agent Brad McLendon, who entered the Gerharts' home. *See Gerhart v. McLendon*, No. 17-60331, 2017 WL 4838405 (5th Cir. Oct. 25, 2017).[1]

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* Pursuant to Fifth Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Fifth Circuit Rule 47.5.4.

[1] In that opinion, we affirmed the district court's judgment holding that McLendon was not entitled to qualified immunity. *McLendon*, 2017 WL 4838405, at *1. As we stated in that opinion, "we lack jurisdiction to review the district court's factual findings" and thus "base our legal conclusions on the facts that the district court found sufficiently supported in the summary judgment record, *Gerhart v. Rankin Cnty.*, No. 3:11-CV-586, 2017 WL 1238028 (S.D. Miss. Mar. 31, 2017)." *Id.* at *1 n.1. "Due to our limited jurisdiction, we cannot review the district court's factual findings. Nor do we have the benefit of the evidence as it will emerge at trial. Thus, our opinion should not be read to preclude dismissing this case on qualified immunity grounds at another point in the proceedings." *Id.* at *5 n.6.

We discussed the facts in detail in that opinion and we reiterate those facts below:

> By June 2010, Detective Jamie Scouten of the Pearl Police Department had spent several months investigating the residence at 473 Robert Michael Drive in Pearl, Mississippi. As part of that investigation, Scouten used a confidential informant ("CI") to conduct "buy-bust" operations in which the informant would purchase methamphetamine at the residence. The U.S. Drug Enforcement Administration ("DEA") learned about Scouten's operation. It requested that he conduct another buy-bust operation in order to "freshen up" the probable cause for arrest and search warrants. Based on the DEA's interest, Scouten requested back-up from other law enforcement agencies, including Rankin County and the Rankin County District Attorney's Office. Prior to the operation, he prepared warrants and supporting affidavits for 473 Robert Michael Drive. The plan was for the CI to purchase methamphetamine and bring it to the officers, who would test it. Scouten would then fill in the salient details in the warrant and get a judge's approval.
>
> . . . .
>
> The operation took place on June 7, 2010. Scouten held a briefing beforehand at the police station. During that briefing, Scouten told all of the officers participating that the target residence was 473 Robert Michael Drive. He then wrote "473 Robert Michael Drive" across

the top of a sheet of paper and asked the CI to draw a diagram of the interior of the residence. Scouten and the CI also went over a number of other key details during that briefing, including the location, the persons involved, the type of narcotics, and the identity of the CI. This last piece of information was key because if the officers needed to enter the residence, it was important for the CI's safety that they could identify her. Scouten used Google Earth images to familiarize officers with the location and appearance of the target residence. Scouten also mentioned that an unusual van with a "dualie [sic] axle" was parked in the driveway of the target residence. Because the target residence had burglar bars around all windows, Scouten told the others that they would have to enter through a side door.[2]

. . . .

Scouten divided the officers into several vehicles, making sure that at least one officer in each vehicle could access the Pearl Police Department's radio channels. McLendon was assigned to a vehicle with two other officers: Brett McAlpin of the Rankin County Sheriff's Department and John Barnes of the Pearl Police Department. Barnes, McAlpin, and McLendon were tasked with stationing themselves at the end of Robert Michael Drive, where they would maintain visual contact with the residence in order to track the CI and

[2] The Gerhart house did not have any burglar bars.

ensure that no suspects left. They were the only officers who could see the target residence. The others were parked out of sight at a nearby church.

The CI and the officers left the station around 7:00p.m. The plan was for McLendon to follow the CI to the residence. McLendon insisted that he did not follow the CI to the target residence, though others testified that he did. Barnes and Scouten, for instance, both testified that McLendon had to brake as the CI turned into the driveway of the target residence in order to avoid hitting her vehicle. McLendon then drove past the residence for about 200 yards, turned around, and parked facing the residence. It was still daylight when they arrived, weather conditions were normal, and the terrain between the officers and the target residence was level.

Barnes, McAlpin, and McLendon gave inconsistent testimony about who identified the target residence and how. Barnes claimed that he identified the target residence (at 473 Robert Michael Drive) correctly and pointed out the van with the unusual "dualie [sic] axle." McAlpin initially testified that both Barnes and McLendon identified 481 Robert Michael Drive as the target residence, though he later stated that only Barnes did so. McLendon also testified that Barnes identified 481Robert Michael Drive as the target residence as they drove past and that he specifically pointed to a young man standing outside that residence.

The CI entered 473 Robert Michael Drive and bought $600 of methamphetamine. Suddenly, the CI texted Scouten to tell him she was in danger. Scouten broadcast to the other officers that the CI was in danger. He told them to converge on the target residence and do everything they could to help the CI. All vehicles acknowledged the signal-except McLendon's. Barnes testified that he had turned his radio off because McLendon was trying to tune into the radio broadcast from the CI's recording equipment. Scouten specifically requested a response from McLendon's vehicle. Barnes replied that he did not hear the prior transmission, and Scouten repeated it. McAlpin was aware of the second call to go to the target residence, whereas McLendon testified that it never happened.

Meanwhile, Brett Gerhart was standing in front of his house at 481 Robert Michael Drive when he noticed McLendon's black Cadillac Escalade drive by and park at the end of the street. Some time later, he heard McLendon's tires screech as McLendon raced toward the Gerhart residence. McLendon drove onto the Gerharts' yard and parked between some trees. According to Brett, the blue siren lights on McLendon's car were not on, and so there was no indication that it was a police vehicle. As Scouten was rounding the corner, he saw McLendon driving down the street. After Scouten got out of his vehicle, he heard yelling and saw McAlpin, McLendon, and Barnes running across the Gerhart yard and into the house.

Barnes, McAlpin, and McLendon got out of the vehicle and pulled out their weapons. McAlpin told Brett to get on the ground, though it is disputed whether he identified himself as a police officer. All three officers were, however, wearing vests identifying them as police officers. Brett testified that he did not notice the vests until the officers left. When McClendon's vehicle came to a stop on the Gerharts' yard, Brett ran into the residence through a side door and locked the door behind him. He went through the residence, shouting, "They have guns!" McAlpin kicked in the side door and started to chase Brett. Brett testified that he then ran through the front door to prevent intruders from coming into the house. According to Brett, McAlpin caught him at the front door, threw him to the ground, and began kicking him in the side and back of the head. McAlpin acknowledges that he pointed his gun at Brett's head but denies kicking him. McAlpin then brought Brett into the living room.

McLendon encountered Joseph Gerhart, Brett's father, when he entered the residence. Joseph was on the floor by that time, and McLendon aimed his gun at Joseph's face. When Joseph tried to get up to help his son, McLendon put his hand on Joseph's back and repeatedly told him to stay down. Barnes was the last to enter the residence, where he encountered Amanda Gerhart in a fetal position, holding a baby in her arms. Amanda testified [that] she only assumed a fetal position after Barnes pointed his gun at her. After

Barnes asked for Amanda's name, he realized that they were in the wrong house. Amanda, however, testified that Barnes never said anything to her. She managed to retreat to her son Ian's room and told him to call 911. Ian made the call and told the operator that there were men with guns in the house.

Barnes found McAlpin in the living room, where he had Brett pinned to the ground. After Barnes told McAlpin that they were in the wrong house, McAlpin got off of Brett and left. McLendon likewise left when he discovered that they were in the wrong house.

While Barnes, McAlpin, and McLendon were inside the Gerhart residence, Scouten and the other officers had converged on the target residence. After Scouten arrived, he initially believed that it would not be possible to get in without breaching tools, and he went to look for McAlpin, who was supposed to bring them to the target residence. He walked toward the Gerhart residence and saw McAlpin and McLendon leaving. Someone yelled from the target residence that they had finally managed to break in without the breaching tools, and Scouten returned to the target residence.

Brett suffered injuries to his face and neck, and the city of Pearl ultimately paid for the door that McAlpin destroyed. The Pearl Police Department also conducted an investigation of the incident, which concluded that the officers were inattentive.

McLendon, 2017 WL 4838405, at *1–3 (footnote omitted).

II.

The Constitutional Claims

We have jurisdiction to review a district court's denial of a claim of qualified immunity; such a denial is immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511, 526–27, 530 (1985). This is because qualified immunity is "an *immunity from suit* rather than a mere defense to liability," and "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* at 526. "Because the plaintiff is the non-moving party, we construe all facts and inferences in the light most favorable to the plaintiff." *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (*en banc*) (citing *Mullenix v. Luna*, 135 S. Ct. 305, 307 (2015)). Thus, "on interlocutory appeal the public official must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." *Gonzales v. Dallas County*, 249 F.3d 406, 411 (5th Cir. 2001).

Our review is limited to "the purely legal question whether a given course of conduct would be objectively unreasonable in light of clearly established law." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (*en banc*). "[W]e cannot second-guess the district court's determination that genuine factual disputes exist." *McLendon*, 2017 WL 4838405, at *4 (citing *Kinney*, 367 F.3d at 348). "When the district court fails to set forth the factual disputes that preclude granting summary

judgment, we may be required to review the record in order 'to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" *Kinney*, 367 F.3d at 348 (quoting *Johnson v. Jones*, 515 U.S. 304, 319 (1995)).

"A good-faith assertion of qualified immunity alters the usual summary judgment burden of proof, shifting it to the plaintiff to show that the defense is not available." *Melton*, 875 F.3d at 261 (quoting *King v. Handorf*, 821 F.3d 650, 653 (5th Cir. 2016)). To overcome the qualified-immunity defense, a plaintiff must show first "that the official violated a statutory or constitutional right" and second that "the right was 'clearly established' at the time of the challenged conduct." *Id.* (quoting *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (*en banc*)). To avoid summary judgment on qualified immunity, "the plaintiff need not present absolute proof, but must offer more than mere allegations." *Id.* (quoting *King*, 821 F.3d at 654).

A. Unlawful Entry

The officers contend that the unlawful-entry claim fails because the district court's order refers to this claim as one for "Fifth Amendment violations under 42 U.S.C. § 1983 for unlawful entry," even though the Fifth Amendment does not apply to claims against municipal actors like Barnes and McAlpin. *See Morin v. Caire*, 77 F.3d 116, 120 (5th Cir. 1996) ("[T]he Fifth Amendment applies only to the actions of the federal government. . . ."). However, this appears to be a mere

scrivener's error, as the district court conducted a lengthy Fourth Amendment analysis on the same unlawful-entry claim asserted against McLendon. *See Gerhart v. Rankin County*, No. 3:11-CV-586-HTW-LRA, 2017 WL 1238028, at *10–12 (S.D. Miss. Mar. 31, 2017), *aff'd sub nom. Gerhart v. McLendon*, No. 17-60331, 2017 WL 4838405 (5th Cir. Oct. 25, 2017).

"A warrantless search of a home is presumptively unreasonable, absent probable cause, consent, or exigent circumstances." *McLendon*, 2017 WL 4838405, at *5 (citing *United States v. Jones*, 239 F.3d 716, 719 (5th Cir. 2001)). "Nonetheless, no Fourth Amendment violation occurs when officers attempting to perform a valid search mistakenly search the wrong property—as long as they make 'a reasonable effort to ascertain and identify the place intended to be searched.'" *Id.* (quoting *Maryland v. Garrison*, 480 U.S. 79, 88 (1987)).

Here, both Barnes and McAlpin attended the briefing prior to the buy-bust operation, although McAlpin states that he was "in the hallway or on the outskirts of' the "immediate area" where the briefing occurred. The briefing discussed key details including the address of the target residence, a diagram of the residence, and the identity of the confidential informant. Scouten used Google Earth images to familiarize officers with the location and appearance of the target residence. In addition, Scouten mentioned that an unusual van with a "dualie [sic] axle" was parked in the driveway of the target residence. Scouten also told the officers that they would have to enter the target

residence through a side door because the target residence had burglar bars around all windows.

As noted above, Barnes and McAlpin were responsible for maintaining visual contact with the residence in order to track the confidential informant and ensure that the suspect did not leave. Moreover, Scouten's case report indicates that McAlpin was assigned to carry door breaching tools and was "to use these tools to gain entry into the residence if needed." According to Scouten's case report, the vehicle in which Barnes and McAlpin rode followed the confidential informant's vehicle. It appears that Barnes, McAlpin, and the other officer were the only ones who followed the confidential informant all the way to the target residence.

Despite the importance of the briefing and their key leadership roles in the buy-bust operation (*e.g.*, breaching the target residence if necessary, maintaining visual surveillance), Barnes and McAlpin both failed to absorb critical details of the plan. When asked whether he knew the correct address of the target residence from the briefing, Barnes testified, "I knew that area. I didn't know the exact house." McAlpin also testified that he was unaware of the exact address. When asked if he saw the confidential informant's vehicle pull into the driveway of the target residence, McAlpin responded that he did not. As noted above, all of this took place while it was daylight. We hold that the district court relied on these facts in determining not to grant summary judgment to the officers.

We have emphasized that "[w]hat's reasonable for a particular officer depends on his role in the search." *McLendon*, 2017 WL 4838405, at *6 (quoting *Hunt v. Tomplait*, 301 F. App'x 355, 362 n.8 (5th Cir. 2008)). In its opinion and order denying McLendon's summary-judgment motion on qualified immunity, the district court found that the investigative report on the entry into the Gerharts' residence "indicates that inattentiveness on the part of the officers was the direct cause of the Gerhart incident." *Rankin County*, 2017 WL 1238028, at *8. Consistent with our prior opinion in *McLendon*, we hold that fact issues on whether Barnes and McAlpin violated the Fourth Amendment precluded the district court from granting summary judgment to the officers on the unlawful-entry claim.[3]

As for the second prong of the qualified-immunity analysis, we held in *McLendon* that it was clearly established at the time of the alleged unlawful entry that "an officer must make reasonable, non-feeble efforts to correctly identify the target of a search—even if those efforts prove unsuccessful." *McLendon*, 2017 WL 4838405, at *5 (citing *Rogers v. Hooper*, 271 F.

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[3] Arguments about exigent circumstances do not alter this conclusion. As we stated in *McLendon*, "[t]he danger facing the [confidential informant] was undoubtedly an exigent circumstance. But the [confidential informant] was at the target residence, not the Gerhart residence." 2017 WL 4838405, at *7. Barnes's and McAlpin's "determination that the danger was inside the Gerhart residence rather than the target residence was not reasonable" because there is a fact issue on whether the officers failed to take reasonable affirmative steps to ensure they knew the correct address. *See id.*

App'x 431, 435 (5th Cir. 2008)). Accordingly, a fact issue on whether Barnes and McAlpin violated clearly established law precluded the district court from granting summary judgment to the officers on the unlawful-entry claim.

B. Excessive Force

McAlpin also appeals the denial of summary judgment on qualified-immunity grounds with regard to the excessive-force claim asserted against him. Whether a use of force is excessive and therefore a constitutional violation depends on whether there was "(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." *Poole v. City of Shreveport*, 691 F.3d 624, 628 (5th Cir. 2012) (quoting *Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382 (5th Cir. 2009)).

We apply the *Graham* factors to determine whether the force used is "excessive" or "unreasonable." *Deville v. Marcantel*, 567 F.3d 156, 167 (5th Cir. 2009) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). These factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of

hindsight" with the recognition that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396–97 (citation omitted).

In addition, the injury must be more than *de minimis* to be cognizable. *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). "[T]he amount of injury necessary to satisfy our requirement of 'some injury' and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 101 F.3d 430, 434–35 (5th Cir. 1996).

Here, viewing the facts in the light most favorable to the plaintiffs, there IS a fact issue as to whether McAlpin kicked Brett Gerhart in the head repeatedly after throwing Brett facedown onto the concrete porch. Joseph Gerhart, Brett's father, testified that he heard his son screaming "I'm down, I'm down," and that the officer was kicking his son while his son was already on the ground. Moreover, Brett's father testified that McAlpin then brought Brett into the house, and rather than handcuffing him, pinned Brett to the floor with his knee, shoved a pistol in his face, and said, "If you move, I'll blow your f---ing head off." We hold that the district court relied on these facts in determining not to grant summary judgment to McAlpin on the excessive-force claim.

Applying the *Graham* factors, we note that there is a fact issue as to whether Brett posed an immediate threat to the officers' safety when he was lying prone on the concrete yelling that he was already down and whether Brett was actively resisting or attempting to evade arrest. Furthermore, there is some evidence that injuries to Brett's face resulted "directly and only from a use of force that was clearly excessive." *See Poole*, 691 F.3d at 628.

As to the second prong of the qualified-immunity analysis, we reiterate our holding in *Brown v. Lynch* that "[a]t the time of the incident, the law was clearly established in this circuit that repeatedly striking a non-resisting suspect is excessive and unreasonable force." 524 F. App'x 69, 81 (5th Cir. 2013) (unpublished) (citing *Anderson v. McCaleb*, 480 F. App'x 768, 773 (5th Cir. 2012); *Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008); *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000)). Thus, fact issues precluded granting summary judgment to McAlpin on the excessive-force claim.

III.

The Mississippi Tort Claim

The district court also denied the officers summary judgment on the Gerharts' state-law claim of reckless infliction of emotional distress.[4] Barnes and

[4] While the district court refers to the tort claim as one for "reckless" rather than "intentional" infliction of emotional distress, we need not resolve whether the Gerharts properly pleaded

McAlpin argue that we should exercise pendent appellate jurisdiction to review the Gerharts' state-law tort claim. The Gerharts do not contest this jurisdictional argument. Nonetheless, we have the responsibility to determine the basis of our jurisdiction. *Alvidres-Reyes v. Reno*, 180 F.3d 199, 203 (5th Cir. 1999).

"The denial of immunity under Mississippi law, like a denial under federal law, is appealable under the collateral order doctrine. *Lampton v. Diaz*, 661 F.3d 897, 899 (5th Cir. 2011); *see also Hinds County v. Perkins*, 64 So. 3d 982, 986 (Miss. 2011) (*en banc*) (noting that "denials of immunity at the summary judgment stage are reviewed via the interlocutory appeal process"). We have held that "[i]n the interest of judicial economy, this court may exercise its discretion to consider under pendant appellate jurisdiction claims that are closely related to the issue properly before us." *Morin*, 77 F.3d at 119 (footnote omitted). Exercising this discretion is appropriate when, as here, we confront a claim of immunity under state law regarding the same conduct at issue in the qualified-immunity context. *See id.* Otherwise, were we "to refuse to exercise jurisdiction over the state law claims, our refusal would defeat the principal purpose of allowing an appeal of immunity issues before a government employee is forced to go to trial." *Id.* at 119–20 (footnote omitted).

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a claim for reckless infliction of emotional distress. This is because neither claim here overcomes the Mississippi Tort Claims Act provision of immunity for government employees acting within the scope of employment and sued in their personal capacities.

The Mississippi Supreme Court has recognized that "any tort claim filed against a governmental entity or its employee shall be brought only under the [Mississippi Tort Claims Act]." *Conrod v. Holder*, 825 So. 2d 16, 19 (Miss. 2002) (citation omitted). Under Mississippi law:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, *but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties*.

Miss. Code. Ann. § 11-46-7(2) (emphasis added). "The [Mississippi Tort Claims Act] contains an exception to this immunity if an officer's conduct 'constituted fraud, malice, libel, slander, defamation or any criminal offense other than traffic violations. . . .'" *Rogers v. Lee County*, 684 F. App'x 380, 391 (5th Cir. 2017) (unpublished) (quoting Miss. Code. Ann. § 11-46-5(2)).

The Mississippi Supreme Court "has been consistent in rejecting the viability of claims against public employees where their political subdivision employer has been eliminated as a defendant." *Conrod*, 825 So. 2d at 19 (quoting *Cotton v. Paschall*, 782 So. 2d 1215, 1218 (Miss. 2001)). "[U]nless the action is brought solely against an employee acting outside of the scope of his employment, the government entity must be named and sued as the party in interest under the Tort Claims Act." *Id.* (citation omitted). Moreover,

it is "a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment." Miss. Code. Ann. § 11-46-5(3).

The Gerharts do not contest that the officers were acting within the course and scope of their employment here, nor do they argue that Barnes's and McAlpin's conduct constituted malice or criminal behavior. The district court dismissed Defendants Rankin County, Mississippi; Rankin County Sheriff's Office; and McAlpin in his official capacity. The Gerharts allege that McAlpin was an employee of Rankin County and/or Rankin County Sheriff's Office at the time of the incident. In addition, the district court dismissed Defendants the City of Pearl, Mississippi and Barnes in his official capacity. The Gerharts allege that Barnes "was at all times material hereto an officer employed by the Defendants, the Pearl Police Department and the City of Pearl, Mississippi" and that "[h]is acts of commission or omission are vicariously attributed to the Defendant, the City of Pearl, Mississippi."

Thus, the immunity provided by the Mississippi Tort Claims Act shields Barnes and McAlpin from personal liability. In allowing the Gerharts to proceed with this tort claim against the officers in their individual capacities, the district court erred. Thus, we dismiss the Gerharts' state-law tort claim against the officers in their individual capacities.

IV.

Accordingly, we AFFIRM the district court's judgment denying Barnes and McAlpin summary judgment as to qualified immunity on the Gerharts' constitutional claims, and we REVERSE and render judgment on the Mississippi tort claim.[5]

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[5] Barnes requests that we reassign the case to a different district court if the case is remanded. McAlpin does not make this request. The Gerharts contend that Defendants' strategic litigation choices rather than the district court's actions are the main reason for the lawsuit spanning six years. In addition, the Gerharts amended their complaint four times, and their fourth amended complaint was filed in December 2016. "A federal court of appeals has the supervisory authority to reassign a case to a different trial judge on remand." *United States v. Winters*, 174 F.3d 478, 487 (5th Cir. 1999); *see Johnson v. Sawyer*, 120 F.3d 1307, 1333 (5th Cir. 1997); 28 U.S.C. § 2106. "However, this is an extraordinary power and should rarely be invoked." *Winters*, 174 F.3d at 487. This case does not demand such an exercise of our authority, and we deny Barnes's request for reassignment.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JOSEPH GERHART, *et al.* PLAINTIFFS

vs. CIVIL ACTION NO.: 3:11-CV-586-HTW-LRA

RANKIN COUNTY, *et al.* DEFENDANTS

ORDER REGARDING VARIOUS MOTIONS FOR SUMMARY JUDGMENT

BEFORE THIS COURT are several dispositive motions that are all interrelated: The Rankin County Defendants'[1] Motion for Partial Summary Judgment **[Docket no. 162]**; The City of Pearl Defendants'[2] Motion for Summary Judgment **[Docket no. 169]**; and The Rankin County Defendants' Motion for Summary

[1] The Rankin County Defendants are: Rankin County, Mississippi; the Rankin County Sheriff's Office; Sheriff Ronnie Pennington in his official capacity as the former sheriff of Rankin County, Mississippi; and Deputy Brett McAlpin individually and in his official capacity.

Deputy Farris Thompson is a Rankin County Sherriff's Deputy who was originally named in this lawsuit who has been dismissed by order of this court. [Docket no. 34].

[2] The Pearl City Defendants are: Chief Ben Schuler, in his official capacity, who is the Chief of the City of Pearl Police Department; the City of Pearl, Mississippi, a municipality duly incorporated under the laws of Mississippi; Officer Jamie Scouten, individually and in his official capacity, who is an officer with the City of Pearl, Mississippi; and Officer Johnny Barnes, individually and in his official capacity, who is an officer with the City of Pearl, Mississippi.

Judgment **[Docket no. 171]**. The Plaintiffs[3] oppose all motions.

The Third Amended Complaint alleges: 42 U.S.C. § 1983 against all the defendants for violations of the Fifth and Fourteenth Amendments for unreasonable search and excessive force; Failure to train and supervise against Rankin County, the Rankin County Sherriff's Office, former Rankin County Sherriff Ronnie Pennington, the City of Pearl, the Pearl Police Department, and former City of Pearl Police Department Chief Ben Schuler; Civil conspiracy against all defendants; Reckless infliction of emotional distress against all defendants; and Negligent infliction of emotional distress against all defendants. [Docket no. 85].

On October 21, 2016, this court held a Telephonic Conference with all parties. After oral arguments from the parties on October 21, 2016, this court reserved ruling on said motions until its continued hearing in Courtroom 6A of the United States District Courthouse, Jackson, Mississippi, on October 24, 2016. A court reporter transcribed both hearings, including the bench rulings issued by this court on October 24, 2016. This court hereby adopts the transcripts of those conversations as a part of this order. The transcripts will reflect this court's review of the relevant case law and facts upon which this court relied in announcing its opinion during the October 24, 2016, hearing. This

[3] The Plaintiffs are: Brett Gerhart; Joseph Gerhart, individually and as next friend of Michael Gerhart, Ian Gerhart, and Sarah Robillard; and Amanda Jo Gerhart, individually and as next friend of Michael Gerhart, Ian Gerhart, and Sarah Robillard.

court also adopts its prior statement of facts issued as part of its order dismissing Agent Cochran in reaching its decision today. [Docket no. 122].

Further, this court was persuaded to GRANT in part and DENY in part the Rankin County Defendants' Motion for Partial Summary Judgment **[Docket no. 162]** and the Rankin County Defendants' Motion for Summary Judgment **[Docket no. 171]**. Accordingly, for the reasons announced to the parties in the oral arguments held by this court on October 24, 2016, this court DISMISSED the following Rankin County Defendants: Rankin County, Mississippi; the Rankin County Sheriff's Office; Sheriff Ronnie Pennington in his official capacity as the former sheriff of Rankin County, Mississippi; and Deputy Brett McAlpin in his official capacity. Furthermore, this court found the Plaintiffs may proceed on their claims against Deputy Brett McAlpin in his individual capacity for: Fifth Amendment violations under 42 U.S.C. § 1983 for unlawful entry; Excessive Force violations under 42 U.S.C. § 1983; and Reckless Infliction of Emotional Distress.

This court was also persuaded to GRANT in part and DENY in part the City of Pearl Defendants' Motion for Summary Judgment **[Docket no. 169]**. Therefore, for the reasons announced to the parties in the oral arguments held by this court on October 24, 2016, this court DISMISSED the following City of Pearl Defendants: Chief Ben Schuler, in his official capacity; the City of Pearl, Mississippi; Officer Jamie Scouten, individually and in his official capacity; and Officer Johnny

Barnes, in his official capacity. This court was further persuaded to allow the Plaintiffs to proceed on their claims against Officer Johnny Barnes in his individual capacity for: Fifth Amendment violations under 42 U.S.C. § 1983 for unlawful entry; and Reckless Infliction of Emotional Distress.

SO ORDERED AND ADJUDGED this the 31st day of March, 2017.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
NORTHERN DIVISION

JOSEPH GERHART AND AMANDA JO GERHART, individually and as next Friend of BRETT MICHAEL GERHART, IAN MICHAEL GERHART, AND SARAH ROBILLARD, MINORS — **PLAINTIFFS**

V. **CIVIL ACTION NO. 3:11-CV-586-HTW-LRA**

SHERIFF RONNIE PENNINGTON, in his official capacity as Sheriff of Rankin County; CHIEF BEN SCHULER, in his official capacity as Pearl Police Chief; THE CITY OF PEARL, MISSISSIPPI; OFFICER JAMIE SCOUTEN, in his official capacity; DEPUTY BRETT MCALPIN, in his official and individual capacities; OFFICER JOHNNY BARNES, in his official And individual capacities; BRAD MCLENDON, in his official and individual capacities; LEIGH HARVEY COCHRAN, in her official and individual capacities; OTHER UNKNOWN JOHN AND JANE DOES A-Z, in their official and individual capacities — **DEFENDANTS**

ORDER

(Filed Mar. 30, 2015)

Before the court are three motions: a Motion to Dismiss Plaintiffs' Second Amended Complaint or, in the Alternative, for Summary Judgment, filed by Pearl, Mississippi Police Department, Benn Schuler, Jamie Scouten, and the City of Pearl, Mississippi [docket no. 36]; a Motion to Dismiss, filed by Leigh Harvey Cochran [docket no. 101]; and a Motion for Extension of Time to File a Response/Reply as to [101] Motion to Dismiss, filed by Joseph Gerhart, Amanda Jo Gerhart, Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard [docket no. 113].

The Motion to Dismiss Plaintiffs' Second Amended Complaint or, in the Alternative, for Summary Judgment [docket no. 36] is dismissed as moot because plaintiffs have filed a Third Amended Complaint, which supersedes the second amended complaint upon which this motion is based.

Having read the parties' submissions, this court is persuaded to grant Leigh Harvey Cochran's Motion to Dismiss [docket no. 101]. Consequently, this court finds moot the plaintiffs' Motion for Extension of Time [docket no. 113], which requests more time to supplement response and permission to conduct immunity related discovery.

I. BACKGROUND

This lawsuit has its roots in a joint drug-surveillance operation conducted in June 2010. The operation included the following law enforcement agencies: the Pearl, Mississippi Police Department; the Rankin County, Mississippi Sheriff's Department; the Mississippi Bureau of Narcotics ("MBN"); and the District Attorney's Office.[1]

On June 7, 2010, at approximately 6:00 p.m., representatives of the four law enforcement agencies met at the Pearl Police Department. Case Report at ¶ 1, docket no. 85, exh. 2.[2] Present at this meeting were Jamie Scouten ("Scouten"), affiliated with the Pearl Police Department; Leigh Harvey Cochran ("Cochran") and Brad McLendon ("McLendon"), both MBN agents; Brett McAlpin ("McAlpin") a Deputy Sheriff with the Rankin County, Mississippi Sheriff's Department; and Johnny Barnes ("Barnes") an officer with the Pearl Police Department.

Scouten conducted the briefing session. He advised those present that his female confidential informant previously had arranged four valid narcotics "buys" with a male suspect living at 473 Robert Michael Drive in Pearl, Mississippi. *Id.* at ¶ 2. Scouten informed the group that he planned to send the

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[1] The plaintiffs' Third Amended complaint says that "the District Attorney's Office" was involved, but does not articulate which District Attorney's Office.

[2] Plaintiffs attached the case report to their Third Amended Complaint [docket no. 85].

confidential informant once more to the target house for a fifth "buy", at which time law enforcement would obtain a warrant and converge upon the house to make an arrest. *Id.* at ¶ 4. Based on the information in Scouten's report, plaintiffs contend that the location of this house was explicitly identified during the briefing.

That evening, officers from the four agencies assembled in separate vehicles. After one of the vehicles dropped off the confidential informant at the targeted house, the vehicles parked in different locations in anticipation of the informant making a "buy." McLendon, accompanied by McAlpin and Barnes, drove one of the cars and parked it on the street approximately two hundred feet from the target house. *Id.* at ¶ 9.

Once inside the target house, the informant sent a text message to Scouten stating that she was in danger. *Id.* at ¶ 11. Scouten announced the situation over the radio to the other officers. *Id.* Shortly thereafter, the vehicles proceeded to the house where the confidential informant had been dropped off. *Id.* McLendon, however, mistakenly proceeded to 481 Robert Michael Drive in Pearl, Mississippi, the home of the Gerharts, the plaintiffs herein. *Id.* at ¶ 13.

The plaintiffs, Joseph Gerhart ("Joseph"), Amanda Jo Gerhart ("Amanda"), Brett Michael Gerhart ("Brett"), Ian Michael Gerhart ("Ian")[3], and Sarah Robillard ("Robillard"), at this time, were situated at 481 Robert Michael Drive, their home in Pearl,

[3] Because these plaintiffs all have the same last name, this court will refer to them by their first names to avoid confusion.

Mississippi. Third Amended Complaint, docket no. 85. A black, unmarked car suddenly pulled into the front yard. *Id.* at ¶ 26. Brett, Joseph's and Amanda's son, was outside the house when the vehicle entered the front yard. *Id.* Brett hastily ran inside the house and frightfully informed his family that "They have guns!" *Id.* at ¶ 27. Just as Brett uttered these words, the law enforcement officers broke down the door and entered the home with their weapons drawn. *Id.* Supposedly, McAlpin threw Brett to the floor and held him at gunpoint. *Id.* at ¶ 28. According to the plaintiffs, even though Brett had placed his hands in plain view of the officer, Brett was pinned to the floor by the officer. *Id.* The plaintiffs add that McAlpin then kicked Brett in the head and arms and held a gun firmly to Brett's temple. *Id.* Joseph, who had been in the bedroom, entered the living area, and McLendon ordered him to the floor at gun point. *Id.* at ¶ 29. Amanda and Robillard, Brett's three-year-old niece, also were forced to the floor at gun point when they entered the living room. *Id.* at ¶ 30. With Robillard in her arms, Amanda was forced to her knees in the hallway while the officers detained her husband and son. *Id.* Amanda told her other son, Ian, who had been in his bedroom, to call 911, the emergency number. *Id.* at ¶ 31.

In his case report, Scouten, who went to the correct target house, says that he witnessed McLendon, McAlpin, and Barnes dash to the wrong house with their weapons drawn. Case Report at ¶ 13, docket no. 85, exh. 2. Scouten says that he yelled at the three officers to stop and that they were entering the wrong house.

Id. McLendon, McAlpin, and Barnes contend that they did not hear Scouten. *Id.* Scouten says he then ran toward the Gerharts' home. *Id.*

Barry Vaughn, another detective, though, entered the Gerharts' home ahead of Scouten and informed the officers that they had gone into the wrong house. *Id.* According to the plaintiffs, despite this information, the other officers physically had to pull McAlpin off Brett. Third Amended Complaint at ¶ 33, docket no. 85. The law enforcement officers then left the house. *Id.* At no time, emphasize plaintiffs, did the officers identify themselves, or explain why they had invaded the Gerharts' home. *Id.* at ¶ 33.

According to plaintiffs, McLendon and McAlpin informed Cochran, who had gone to the correct address, that they mistakenly had entered the wrong house. *Id.* at ¶ 34. In response, Cochran allegedly told them to "get their * * * * together." *Id.*

On June 8, 2010, Brett filed with the Rankin County, Mississippi Justice Court an affidavit of simple assault, in which he alleged that McAlpin had "kick[ed] the back of his head repeatedly into the concrete." Affidavit – Simple Assault, docket no. 85-7. On July, 6, 2010, pursuant to Miss. Code Ann. § 99-3-28[4], a

[4] Miss. Code Ann. § 99-3-28(1)(a) states, in its pertinent part:

> . . . [B]efore an arrest warrant shall be issued against any . . . sworn law enforcement officer within this state . . . for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the . . . law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a

Special Circuit Court Judge, Judge Kent McDaniel ("Judge McDaniel") was appointed to conduct a hearing, "to determine if adequate probable cause exist[ed] for the issuance of a[n] [arrest] warrant." Docket no. 85, exh. 8.

That same day, the Rankin County prosecutor, Richard H. Wilson ("Wilson"), acting on behalf of the State of Mississippi, filed a Motion to Dismiss the assault charge against McAlpin. Docket no. 85, exh. 8. In the Motion to Dismiss, the prosecutor averred that Brett's assault complaint against McAlpin lacked probable cause because McAlpin "had a reasonable belief that the felonious sale of narcotics was occurring." *Id.* Further, Wilson claimed in the Motion to Dismiss that "the location of the drug sale had been incorrectly identified" to McAlpin, and that McAlpin had "responded appropriately given the circumstances." The complainant, Brett, continued the affidavit, had been standing at or near the misidentified location, causing McAlpin to have a good faith belief based upon mistaken information as to the correct location. *Id.* Judge McDaniel denied Wilson's Motion to Dismiss. *Id.*

> circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.

In response, on September 2, 2010, Wilson filed an Amended Motion to Dismiss, in which he included affidavits executed by Cochran and McLendon. In her affidavit, Cochran stated that McAlpin "was responding to a distress call, by a confidential informant (C/I) involving the sale of illegal narcotics" and "that the location of the drug sale had been incorrectly identified" to McAlpin. Cochran Affidavit, docket no. 85, exh. 8. McLendon testified to the same in his affidavit. McLendon Affidavit, docket no. 85, exh. 8. Persuaded by this additional information, Judge McDaniel granted the Amended Motion to Dismiss Brett's assault charge against McAlpin.

This court notes with some concern that the order dismissing the evidentiary hearing and Brett's affidavit of simple assault rest solely on Judge McDaniel's conclusion that McAlpin had entered the Gerhart's home with a good faith and reasonable, although mistaken, belief that a felonious drug sale was occurring and that the confidential informant was in danger. Order to Dismiss, docket no. 85, exh. 8. Judge McDaniel's order does not address the central issue of Brett's assault charge: that McAlpin used excessive force.

Plaintiffs allege that the affidavits provided by both Cochran and McLendon to obtain dismissal contain false testimony. Plaintiffs quarrel with Cochran's and McLendon's affidavits in two aspects: (1) they parrot Wilson's previous assertions in the first Motion to Dismiss, which the court had denied; and (2) Cochran's and McLendon's contention that they have personal knowledge that "the location of the drug sale had been

incorrectly identified" to McAlpin is incorrect, since all defendants *sub judice* were present at Scouten's briefing where he allegedly identified the correct address. Wholly satisfied that the affidavits are untruthful, plaintiffs have labeled the affidavits as perjurious.

Plaintiffs filed the instant Title 42 U.S.C. § 1983[5] cause of action in this federal district court on September 20, 2011; plaintiffs Joseph, Amanda, Brett, Ian, and Robillard named as defendants Sheriff Ronnie Pennington, Chief Ben Schuler, the City of Pearl, Mississippi, Scouten, McAlpin, Barnes, McLendon, and Cochran. For their causes of action, plaintiffs alleged that these defendants had violated their Fourth[6],

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[5] Title 42 U.S.C. § 1983 states, in its pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

[6] U.S. CONST. amend. IV states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth[7], and Fourteenth[8] Amendment rights. They also pled conspiracy to deny due process, reckless infliction of emotional distress, and negligent infliction of emotional distress. Plaintiffs seek compensatory damages and punitive damages in an amount to be determined by a jury.

As against Cochran, plaintiffs charge that she violated their Fourteenth Amendment due process rights, engaged in a conspiracy to deny their Fourteenth Amendment due process rights, gave false testimony, and caused the plaintiffs to suffer emotional distress. Although the plaintiffs' accusations against

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[7] U.S. CONST. amend. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[8] U.S. CONST. amend. XIV § 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cochran are slightly different from those alleged against the other defendants, plaintiffs still include Cochran in the same *ad damnum* clause for damages.

II. JURISDICTION

Plaintiffs have invoked the subject-matter jurisdiction of this court under Title 28 U.S.C. § 1331[9], often referred to as "federal question jurisdiction." Under federal question jurisdiction, this court has the power to exercise subject-matter jurisdiction over a lawsuit if a plaintiff alleges some claim or right arising under the United States Constitution or federal law. Because plaintiffs assert claims under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, this court possesses subject-matter jurisdiction. Further, this court possesses supplemental jurisdiction, codified at Title 28 U.S.C. § 1367[10], to consider state law claims that are closely related to the claims over which the court already has jurisdiction. The state

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[9] Title 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

[10] Title 28 U.S.C. § 1367(a) states, in its pertinent part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article Ill of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties

law claims here are civil conspiracy, and reckless infliction of emotional distress.

III. STANDARD OF REVIEW

Defendant Cochran attacks plaintiffs' Third Amended Complaint under Rule 12(b)(6)[11] of the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted." Pursuant to the jurisprudence of this rule, this court must consider the facts in the light most favorable to the plaintiff and then determine whether the complaint states a valid claim for relief. *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 379 (5th Cir. 2003).

The United States Supreme Court has loudly trumpeted: the complaint must allege sufficient facts to give rise to a plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Further, courts "must take all of the factual allegations in the complaint as true," but they are "not bound to

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[11] Rule 12(b)(6) of the Federal Rules of Civil Procedure states:

> Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> * * *
>
> (6) failure to state a claim upon which relief can be granted. . . .

accept as true a legal conclusion couched as a factual allegation." *Id.*

IV. ANALYSIS

Cochran, an agent with MBN, has her Motion to Dismiss [docket no. 101] before this court. She contends that plaintiffs' allegations against her are baseless and, moreover, that she is shielded from suit by absolute immunity and qualified immunity. She also argues that plaintiffs' state law claims are barred by the Mississippi Tort Claims Act, codified at Miss. Code Ann. § 11-46-1, *et seq*.

In their complaint, plaintiffs accuse Cochran of the following federal claim: violation of due process guaranteed by the Fourteenth Amendment. Plaintiffs also accuse Cochran of the following state law claims: civil conspiracy and reckless infliction of emotional distress.

A. Absolute Immunity

Cochran contends that the plaintiffs' claims against her must fail because her challenged conduct, presenting a testimonial affidavit in support of dismissing McAlpin's probable cause hearing, is entitled to absolute immunity. Absolute immunity is an entitlement, giving its possessor the right "not to have to answer for [her] conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

In *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983), the United States Supreme Court concluded that "§ 1983 does not allow recovery of damages against a private party for testimony in a judicial proceeding." The Supreme Court's reasoning was two-fold. First, "when a private party gives testimony in open court in a criminal trial, that act is not performed under color of law." *Id.* at 329-30. Secondly, Congress did not intend for § 1983 to abrogate the common law immunity traditionally provided to witnesses. *Id.* at 330.

The Supreme Court recognized that testimony immunized in § 1983 lawsuits poses a danger: it might cause a criminal defendant to "be unjustly convicted on the basis of knowingly false testimony by police officers." *Id.* at 345. Because of the immunity, untruthful police officers would not fear any liability in civil court.

The Supreme Court, however, perceived a countervailing possibility: a witness' fear of subsequent exposure to damage claims for statements made in a judicial proceeding would have a chilling effect upon a witness' willingness to testify. *Id.* at 333 ("A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence."). The Supreme Court concluded, on balance, that the adversarial process of cross-examination, combined with the threat of prosecution in criminal

court for perjury,[12] was sufficient to protect the integrity of the judicial process. *Id.* at 342-43.

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[12] Both Mississippi courts and Federal courts provide for criminal prosecution of perjury: Miss. Code Ann. § 97-9-59 states:

> Every person who shall wilfully and corruptly swear, testify, or affirm falsely to any material matter under any oath, affirmation, or declaration legally administered in any matter, cause, or proceeding pending in any court of law or equity, or before any officer thereof, or in any case where an oath or affirmation is required by law or is necessary for the prosecution or defense of any private right or for the ends of public justice, or in any matter or proceeding before any tribunal or officer created by the Constitution or by law, or where any oath may be lawfully required by any judicial, executive, or administrative officer, shall be guilty of perjury, and shall not thereafter be received as a witness to be sworn in any matter or cause whatever, until the judgment against him be reversed.

Title 18 U.S.C. § 16.21 states:

> Whoever –
>
> **(1)** having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and, contrary to such oath states or subscribes any material matter which he does not believe to be true; or
>
> **(2)** in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;
>
> is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable

The *Briscoe* Court dealt with the testimony given at trial, an adversarial event. The Supreme Court then stated that it was not addressing whether the same testimonial immunity should apply to "pretrial proceedings such as probable cause hearings." *Id.* at 328 n. 5.

The Fifth Circuit, in *Moore v. McDonald*, 30 F.3d 616 (5th Cir. 1994), however, tackled this issue of whether a witness should be granted immunity during pre-trial proceedings. The Fifth Circuit concluded that absolute immunity applies to witness testimony at pretrial proceedings, provided that the pre-trial proceeding is "adversarial." *Id.* at 619. The court explained:

> Testimony at adversarial pretrial suppression hearings is distinguishable from testimony at nonadversarial probable cause hearings because "[i]n adversarial pretrial proceedings, as in trials, the witness testifies in court, under oath, under the supervision of the presiding judge and is subject to criminal prosecution for perjury."

Id. at 619 (*quoting Holt v. Castaneda*, 832 F.2d 123, 125 (9th Cir. 1987).

Cochran's testimonial affidavit was not subjected to the adversarial process described in *Moore.* Although the affidavit is sworn and notarized, Cochran's written statements were not tested by cross-examination. Indeed, no public probable cause hearing

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whether the statement or subscription is made within or without the United States.

was held at all. After receiving Cochran's and McLendon's affidavits, the state judge ruled on the papers, dismissing the probable cause hearing, as well as Brett's affidavit of simple assault.

This court, thus, is persuaded that: Cochran's affidavit was not part of an adversarial pre-trial proceeding; neither Cochran nor her affidavit risked cross-examination by anyone; thus, her statements are not entitled to absolute immunity. *See also Sage v. McElveen*, 53 F.3d 1280, *2 (5th Cir. April 19, 1995) (unpublished) ("this circuit recognizes no immunity for witnesses at non-adversarial probable-cause hearings").

B. Qualified Immunity

Cochran claims, alternatively, that she is entitled to qualified immunity, in her official and individual capacity, for her conduct. To defeat a claim of qualified immunity, plaintiffs (the Gerhart group) must (1) show that the defendant (Cochran) has violated a clearly established constitutional or statutory right, and (2) demonstrate that a reasonable person would have known of that clearly established right. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). When analyzing the second prong, the court must "consider whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007). The court reviews the evidence using "an objective standard based on the viewpoint of a

reasonable official" and considers the information available to the official in order to determine whether the law was clearly established at the time. *Id.* The question of reasonableness sometimes is not an easy one for the court. While it is intensely factual, "objective reasonableness is a question of law" to be reached by the court, not a jury. *Ramirez v. Knoulton*, 542 F.3d 124, 128 (5th Cir. 2008); *see also Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991).

Clothing this jurisprudence with factual adornments, Cochran asserts that she merely submitted a truthful affidavit to the state court describing McAlpin's activities that fateful night. This innocent conduct, she implies, should be the stuff of qualified immunity.

Plaintiffs' complaint accuses Cochran of committing the following misconduct: that she gave false testimony in her affidavit [Third Amended Complaint at ¶ 18, 40, docket no. 85]; that she participated in a conspiracy to cover-up and dismiss McAlpin's assault charge [Third Amended Complaint at ¶ 36, 42, 60, docket no. 85]; that her actions denied plaintiffs' rights to due process under the Fourteenth Amendment [Third Amended Complaint at ¶ 46, docket no. 85]; that she engaged in a joint, wrongful venture with the other defendants [Third Amended Complaint at ¶ 49, docket no. 85]; and that her conduct was reckless in preventing a hearing regarding the criminal assault charges, where said conduct was "designed to inflict emotional and mental anguish and distress" from the deprivation of Fourteenth Amendment due process rights [Third

Amended Complaint at ¶ 63, docket no. 85]. Although Cochran's motion defends against the charge of "negligent infliction of emotional distress," this alleged misconduct was levied against the defendants who allegedly wrongfully entered the Gerhart's home and allegedly assaulted Brett. Because Cochran was not among the officers who entered the Gerhart's home, this court does not read the complaint as alleging a claim of negligent infliction of emotional distress against Cochran.

To each alleged transgression, as earlier stated, Cochran relies upon the defense of qualified immunity, whose elements were previously discussed herein.

Cochran also contends that her conduct did not violate the plaintiffs' rights to due process of law, as guaranteed by the Fourteenth Amendment. She argues that the plaintiffs have no protected property interest in McAlpin's prosecution, nor did they have a right to a hearing on the state court judge's dismissal of the assault charge.

"Procedural due process under the Fourteenth Amendment of the United States Constitution is implicated where an individual is deprived of life, liberty, or property, without due process of law." *Meza v. Livingston*, 607 F.3d 392, 399 (5th Cir. 2010) (*citing* U.S. Const. amend. XIV, § 1, cl. 3). To determine whether an individual's procedural due process rights have been violated, courts apply a two-pronged test. *Id.* The court first determines whether the state or state official is interfering with a liberty or property interest, and then

the court determines whether "the procedures attendant upon that deprivation were constitutionally sufficient." *Id.* (*quoting Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989) (citations omitted)).

To have a property interest in a benefit that is entitled to Fourteenth Amendment procedural protection, one must have "a legitimate claim of entitlement to it." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1971); *see Personal Care Prods., Inc. v. Hawkins*, 635 F.3d 155, 158 (5th Cir. 2011). Thus, a person "must have more than an abstract need or desire for it" and "more than a unilateral expectation of it." *Roth*, 408 U.S. at 577.

As earlier stated, plaintiffs here assert that Cochran violated their due process rights under the Fourteenth Amendment. The plaintiffs claim they were deprived of any future opportunity to press charges against McAlpin because the court relied on Cochran's allegedly false affidavit and dismissed the charges against McAlpin. Plaintiffs cite Miss. Code Ann. § 99-43-21, which states that "[t]he victim has the right to be present through all criminal proceedings." Plaintiffs argue that Cochran, in submitting her allegedly fraudulent affidavit, prevented the plaintiffs from their future right to be present for the criminal proceedings. Plaintiffs, however, have provided no evidence to show that Cochran attempted to prevent the plaintiffs from being present at any criminal proceedings prior to dismissal. Further, after criminal

proceedings against McAlpin had been closed, plaintiffs' right to be present also ceased.

Cochran adds that plaintiffs do not have a protected property interest (either derived from federal or state law) in the arrest or prosecution of McAlpin for allegedly assaulting Brett. *See, e.g., Linda RS. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."). Furthermore, according to Cochran, the plaintiffs had no state-conferred right to present evidence at a judicial hearing in support of the assault charge filed against McAlpin. The only statute that conceivably could have given rise to such a "protected" interest is Miss. Code Ann. § 99-3-28[13]. This Mississippi statute, however, gives *law enforcement officials* the right to a probable cause hearing before the issuance of a warrant for their arrest – not the alleged victim.

Plaintiffs disagree with Cochran's assertions and argue that Cochran's allegedly fraudulent affidavit denied them access to the courts, which is a violation of their constitutional rights. Plaintiffs point to *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). In that case, plaintiffs brought a § 1983 action against a former prosecutor and the district attorney after the prosecutor murdered the plaintiffs daughter and the district attorney helped to cover-up the murder. *Id.* at 969. Because of the defendants' actions, plaintiffs not only were prevented from seeking prosecution for the

[13] *Supra* note 4.

murder, but they also were thwarted in their efforts to file a wrongful death action. *Id.* at 969-70.

The Fifth Circuit held that the defendants' cover-up had denied the plaintiffs their basic right of access to the courts. *Id.* at 973. *Ryland*, however, does not do away with the principle that an individual has no private right in the criminal prosecution of a wrongdoer; indeed, the opinion recognizes the absence of such an individual right. *Id.* at 970. *Ryland*, instead, finds that the defendants' conduct did more than prevent a *criminal* prosecution; it prevented a *civil* wrongful death lawsuit, to which the plaintiffs had a constitutionally-protected right to pursue. *Id.* at 973.

The right to "access the courts" does not guarantee a right to the criminal prosecution of another. *Leeke v. Timmerman*, 454 U.S. 83, 86-87, 102 S.Ct. 69, 70 L.Ed.2d 65 (1981) (while a plaintiff has the right to access "judicial procedures to redress any claimed wrongs," the court emphasized that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *BioRep, Inc. v. Johnson*, 1994 WL 424338 *2-3 (E.D. La. Aug. 4, 1994). In short, a denial of access to the courts will not occur unless the defendant's actions have prevented or delayed the plaintiffs filing of a civil lawsuit. *Foster v. City of Lake Jakcson*, 28 F.3d 425, 430 (5th Cir. 1994).

In the case *sub judice*, plaintiffs only assert that Cochran interfered with the criminal prosecution in state court by submitting an allegedly false affidavit. There is no suggestion that Cochran's affidavit has

prevented, interfered with, or delayed the plaintiffs' filing a § 1983 lawsuit in this court. Therefore, Cochran's affidavit did not prevent plaintiffs' access to this court.

Cochran also contends that the plaintiffs cannot show that she "caused" a due process violation. Causation is an integral element of a § 1983 claim, and the defendant's "actions must have actually caused" the constitutional deprivation. *Hart v. O'Brien*, 127 F.3d 424, 446 (5th Cir. 1997), *abrogation on other grounds recognized by Spivey v. Robertson*, 197 F.3d 772, 775 (5th Cir. 1999). In order to satisfy the causation requirement, a plaintiff must establish that the defendant had "a right of legal control over the persons or events giving rise to the injury complained of." *Doe v. Rains Cnty. Indep. Sch. Dist.*, 66 F.3d 1402, 1414-15 (5th Cir. 1995). Further, the plaintiff must show that the defendant had a duty under state law to act and the defendant breached that duty. *Id.* at 1414-15, Cochran avers that she did not have a duty or the authority to convene a probable cause hearing in the matter; the Special Circuit Judge was the person responsible for doing so. *See* Miss. Code Ann. § 99-3-28.

This court is satisfied that Cochran is entitled to qualified immunity, in both her individual and official capacity, for her involvement in procuring a dismissal of the assault affidavit. Even if Cochran submitted a false affidavit to the state court, the plaintiffs never possessed an individual right to the prosecution of McAlpin. Without demonstrating the violation of a clearly established individual right, the plaintiffs cannot overcome Cochran's qualified immunity.

C. State Law Claims

Cochran contends that the plaintiffs' state law claims are vulnerable under the Mississippi Tort Claims Act. First, Cochran argues that the defendants cannot sustain any state law claims against her in her individual capacity because the Mississippi Tort Claims Act insulates her from personal liability for the performance of her job duties.

As to claims against her in her official capacity, Cochran states that the plaintiffs did not name MBN as a defendant, an omission, claims Cochran, which is fatal to plaintiffs' state law claims against defendants Cochran and McLendon in their official capacities, i.e. agents of MBN. Cochran additionally contends that plaintiffs' state law claims should be dismissed because plaintiffs failed to file pre-suit notice; and, finally, because plaintiffs filed their lawsuit outside of the statute of limitations. Each ground will be discussed below.

1. Individual Capacity

The Miss. Code Ann. § 11-46-7(2) explains:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this

> chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

Thus, when performing duties within the course and scope of the employee's duty, the employee cannot be held individually liable.

Courts have repeatedly found that this provision insulates law enforcement officers, provided the officers were not acting "in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury." *Mitchell v. City of Jackson*, 481 F.Supp.2d 586, 593 (S.D. Miss. 2006). "Reckless disregard" is a higher standard than negligence or gross negligence, requiring the plaintiff to prove that the defendant knowingly and intentionally committed a wrongful act. *Id.*

Plaintiffs, however, have not identified any conduct committed by Cochran that would exist outside the course and scope of her duty. Indeed, filing an affidavit in conjunction with a motion to dismiss an assault charge would constitute an official duty: providing sworn testimony about a drug bust in which she participated. Moreover, plaintiffs have not alleged the requisite "reckless disregard" necessary to push Cochran's conduct outside of the realm of her official duties. Accordingly, this court dismisses the state

claims alleged against Cochran in her individual capacity.

2. Failure to name MBN

Mississippi Courts have held that when a plaintiff sues a state government employee for actions she took in the scope of her employment, the plaintiff must name the employee's agency as a defendant or face dismissal of the lawsuit because "§ 11-46-7(2)[14] requires a political subdivision to be sued when seeking damages for negligence." *Conrod v. Holder*, 825 So.2d 16, 19 (Miss. 2002). The Mississippi Court of Appeals has declared that "unless the action is brought solely against an employee acting outside the scope of his employment, the government entity must be named and sued as the party in interest under the Tort Claims Act," *Mallery v. Taylor*, 805 So.2d 613, 622 (Miss.Ct. App. 2002).

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[14] Miss. Code Ann. § 11-46-7(2) states:

> An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense.

Plaintiffs have attempted to circumvent this rule now by claiming that Cochran was acting outside the course and scope of her employment. The plaintiffs, however, have sued Cochran in both her official and individual capacities. By naming Cochran in her official capacity as a defendant, plaintiffs were required also to name MBN, which they failed to do. Therefore, Cochran is entitled to a dismissal of the state law claims against her in her official capacity.

3. Failure to file pre-suit notice

The Mississippi Tort Claims Act requires a plaintiff to file a notice of claim with MBN ninety-days before filing a lawsuit. Miss. Code Ann. § 11-46-11(1)[15]. The Mississippi Supreme Court has stated that a plaintiff must strictly comply with this ninety-day notice period. *Univ. of Miss. Med. Ctr. v. Easterling*, 928 So.2d 815, 819-20 (Miss. 2006). Because plaintiffs never sent a notice of claim to MBN, they have failed to comply strictly with the requirements of Miss. Code Ann. § 11-46-11(1). Therefore, because of this omission, Cochran is entitled to dismissal of the state law claims, in her official capacity.

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[15] Miss. Code Ann. § 11-46-11(1) states:

> After all procedures within a governmental entity have been exhausted, any person having a claim under this chapter shall proceed as he might in any action at law or in equity, except that at least ninety (90) days before instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.

4. Statute of limitations

Cochran also contends that plaintiffs' state-law claims are barred by the applicable one-year statute of limitations. Miss. Code Ann. § 11-46-11(3)(a).[16] Plaintiffs' claim for reckless infliction of emotion distress and civil conspiracy are based upon Cochran's submission of an allegedly false affidavit, an event which occurred on September 2, 2010. Plaintiffs did not file this lawsuit until September 20, 2011, more than a year after the alleged events. For that reason, Cochran is entitled to dismissal of the state law claims against her, in her official capacity. *Southern v. Miss. State Hosp.*, 853 So.2d 1212 (Miss. 2003) (affirming lower court's dismissal of all claims, including intentional infliction of emotional distress, when the plaintiff failed to file suit within the one-year statue of limitations).

V. CONCLUSION

For the foregoing reasons, this court grant's defendant Cochran's Motion to Dismiss [docket no. 101]. Cochran cannot be held liable under § 1983 for her

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[16] Miss. Code Ann. § 11-46-11(3)(a) states:

> All actions brought under this chapter shall be commenced within one (1) year next after the date of the tortious, wrongful or otherwise actionable conduct on which the liability phase of the action is based, and not after, except that filing a notice of claim within the required one-year period will toll the statute of limitations for ninety-five (95) days from the date the chief executive officer of the state entity or the chief executive officer or other statutorily designated official of a political subdivision receives the notice of claim.

allegedly false affidavit. Nor can Cochran be held liable under the Mississippi Tort Claims Act for any of her actions in relation to the plaintiffs' claimed injuries. Therefore, this court dismisses all claims against Cochran, and dismisses her from this lawsuit. Further, the Motion to Dismiss Plaintiffs' Second Amended Complaint or in the Alternative for Summary Judgment [docket no. 36] and the Motion for Extension of Time [docket no. 113] are dismissed as moot.

SO ORDERED AND ADJUDGED, this, the 30th of March, 2015.

s/ HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

ORDER
CIVIL CAUSE NO. 3:11-CV-586-HTW-LRA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JOSEPH GERHART AND
AMANDA JO GERHART,
Individually and Next Friend
of Brett Michael Gerhart,
Ian Michael Gerhart and
Sarah Robillard, minors PLAINTIFFS

VS. CIVIL ACTION NO. 3:11CV586

RANKIN COUNTY, MISSISSIPPI,
SHERIFF RONNIE PENNINGTON,
Officially and in his individual capacity,
BEN SCHULER, Pearl Police Chief,
Officially and in his individual capacity,
THE CITY OF PEARL, MISSISSIPPI,
JAMIE SCOUTEN, Officer, in his
official and individual capacity, BRETT
McALPIN, Deputy, in his official and
individual capacity, JOHN AND
JANE A-Z DOES also in their official
capacity and individual capacity,
JOHNNY BARNES, in his official
and individual capacity, BRAD McLENDON,
in his official and individual capacity

TELEPHONIC CONFERENCE

BEFORE THE HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE
OCTOBER 21ST, 2016
JACKSON, MISSISSIPPI

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR

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501 East Court Street, Suite 2.500
Jackson, Mississippi 39201
(601) 608-4187

* * *

[25] THE COURT: All right. Thank you. All right. I have considered this argument on the failure to train. I'm not persuaded that the claim has vitality. The *O'Neal v. City of San Antonio*, 344 F.App'x. 885, 888, mention that inadequacy of training can serve as the basis for liability but only if the failure to train amounts to deliberate indifference to the rights of individuals who come into contact with police.

And then, further, that case says that if the training of police officers meets state standards, there could be no cause of action for a failure to train absent a showing that this legal minimum of training was inadequate to enable the officers to deal with the usual and recurring situations faced by jailers and peace officers. So that's *O'Neal* at 888. So, then, I'm not persuaded that this claim should go forward. So [26] I'm dismissing the failure to train claim.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

JOSEPH GERHART AND
AMANDA JO GERHART,
Individually and Next Friend
of Brett Michael Gerhart,
Ian Michael Gerhart and
Sarah Robillard, minors PLAINTIFFS

VS. CIVIL ACTION NO. 3:11CV586

RANKIN COUNTY, MISSISSIPPI,
SHERIFF RONNIE PENNINGTON,
Officially and in his individual capacity,
BEN SCHULER, Pearl Police Chief,
Officially and in his individual capacity,
THE CITY OF PEARL, MISSISSIPPI,
JAMIE SCOUTEN, Officer, in his
official and individual capacity, BRETT
McALPIN, Deputy, in his official and
individual capacity, JOHN AND
JANE A-Z DOES also in their official
capacity and individual capacity,
JOHNNY BARNES, in his official
and individual capacity, BRAD McLENDON,
in his official and individual capacity

CONTINUATION OF MOTION
HEARING HELD 10-21-16

BEFORE THE HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE
OCTOBER 24TH, 2016
JACKSON, MISSISSIPPI

REPORTED BY: MARY VIRGINIA "Gina" MORRIS, RMR, CRR

---

501 East Court Street, Suite 2.500
Jackson, Mississippi 39201
(601) 608-4187

* * *

[61] THE COURT: All right. Thank you. I can rule on these two matters and then we'll take a recess. The argument here swirls around the potential liability of the City of Pearl [62] and Rankin County where the defense has – has provided the defense of *Monell*.

Now, on the Section 1983, the first thing we have to recognize is that there is no respondeat superior. Respondeat superior would visit liability on a governmental organization for the actions of its many workers, employees if they were to commit some violation that would subject them to liability. And then under respondeat superior, the government entity would have to be responsible for it. But Section 1983 does not provide for respondeat superior.

What Section 1983 says is that you can – and *Monell says* is that you can only hold a governmental entity responsible for its own conduct, its own misconduct. And its conduct has to be defined as conduct that's been approved by its final policymaker either by an express edict, which would be direct evidence that the governmental entity has provided some constitutional

affront to the public, or by evidence of a widespread misuse that – or custom or habit or tradition of which the municipality or governmental entity should be aware and has taken no efforts to correct it.

So, then, where you have a governmental entity that is – that it has – there's a governmental entity which has indulged in some disapproving conduct that's offensive to the constitution because of an express edict that this governmental entity has provided through its final policymaker, that is, [63] someone who can speak for that governmental entity, then the governmental entity cannot be deemed to be liable.

A final policymaker is someone who can speak for the governmental entity. A final policymaker is not an employee. It is not some agent just for a particular exercise. A final policymaker is the governing body. The final policymaker is someone under statute or – well, under statute who has authority to speak for that governmental entity. And to determine then who would have the authority, one would look to state law.

So in this particular instance, if one wanted to know who has final authority relative to a city, one would look to state law to see who the governing authority is. And that would be the city council. That would be the others elected to speak for the city and who should be held accountable for the city.

So we do not have here any expressed edict by any of these governmental entities to say *Go out and conduct yourself so that you will invade someone's home without proper credentials or without proper notice or*

without proper approval by a judicial officer. We don't have any such thing.

But then the Supreme Court when it passed *Monell* recognized that if the putative plaintiff were to look to see when that plaintiff has a potential lawsuit against a governmental entity and be restricted to only those instances [64] where the governmental entity has provided such – such unconstitutional ordinance or law as a written document, that most instances you would never find it and no plaintiff could ever be successful.

So *Monell*, then, has a second aspect which allows a successful plaintiff – allows a plaintiff to be successful; and that is where there is widespread custom, et cetera, persistent. Look at the language. And what that language essentially does is says that the governmental entity should have been aware of this misconduct and can't hide behind the fact that it's not subject to liability because it never passed any particular offensive law or ordinance or policy.

So *Monell* says that the governmental agency – the governmental entity can't hide behind widespread abuse where the governmental entity should know or should have known that such was going on and then be able to say, *Oh, but we didn't know. Monell* says you can't do that.

So where a plaintiff then can come to court and show that even though there's no express policy, there is a widespread, persistent policy, that certainly shows that the governmental entity was on notice or should

have been on notice. We have none of that here. And since we don't have that, I do not have a policymaker here. Therefore, I have to dismiss the charges against the City of Pearl and the charges against Rankin County under *Monell*.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-60287

JOSEPH GERHART, Individually, and Next Friend of Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard, Minors; AMANDA JO GERHART, Individually, and Next Friend of Brett Michael Gerhart, Ian Michael Gerhart, and Sarah Robillard, Minors,

Plaintiffs-Appellees

v.

JOHNNY BARNES, in his Official and Individual Capacity; BRETT MCALPIN, Deputy, in his official and individual capacity,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITIONS FOR REHEARING EN BANC

(Filed Jun. 25, 2018)

(Opinion *3/12/18*, 5 Cir. ___, ___ F.3d ___)

Before BARKSDALE, DENNIS, and ELROD, Circuit Judges.

PER CURIAM.

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Jennifer W. Elrod
UNITED STATES CIRCUIT JUDGE

PHELPS DUNBAR LLP Louisiana | **Mississippi** | Texas | Florida
Alabama | North Carolina | London

GREGORY TODD BUTLER #04969--1016
Partner
(601) 360-9366
butlert@phelps.com

January 23, 2018

BY ELECTRONIC FILING

Lyle W. Cayce, Clerk of Court
United States Court of Appeals
Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Re: *Gerhart v. Barnes, et al.*; Case No. 17-60287

Dear Mr. Cayce:

Pursuant to FED. R. APP. P. 28(j), I write to call the Court's attention to a case the Supreme Court decided yesterday: *District of Columbia v. Wesby*, No. 15-1485, slip op. (Jan. 22, 2018) (attached as Exhibit A). *Wesby* speaks to issues involved in this appeal, namely, whether Barnes committed a Fourth Amendment violation and, even if so, whether he is entitled to qualified immunity. What follows are some of the specific points from *Wesby* that relate to this case:

- *Wesby* highlights that, if a case can be resolved on the issue of qualified immunity, courts ordinarily should not address the underlying constitutional question: "We continue to stress

that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim." Slip op. at 13 n.7 (quoted case omitted).

- *Wesby* stresses that qualified immunity presents a "demanding standard" that "is 'especially important in the Fourth Amendment context.'" *Id.* at 13, 15.

- *Wesby* explains that, for the law to be clearly established, "[i]t is not enough that the rule is *suggested* by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 14 (emphasis added).

- *Wesby* cautions that, to overcome the qualified immunity defense, plaintiffs ordinarily must identify a specific case showing that a law enforcement officer's actions were unlawful under the particular circumstances confronted by the officer. *Id.* at 15 ("[W]e have stressed the need to 'identify a case where an officer acting under similar circumstances . . . was held to have violated the Fourth Amendment") (quoted case omitted). Only in "the rare 'obvious case'" may a plaintiff avoid pointing to a specific case that supposedly clearly establishes the law. *Id.* (emphasis added).

- *Wesby* emphasizes that, in addressing the underlying constitutional question, courts must "'examine the events leading up to the'" conduct at issue, "'and then decide whether th[ose]

historical facts, viewed from the standpoint of an objectively reasonable police officer," violate the Fourth Amendment. *Id.* at 7 (quoted cases omitted).

- *Wesby* notes that, in assessing whether a law enforcement officer acted reasonably, courts must consider "'common-sense conclusions about human behavior'" observed by the officer. *Id.* at 9. "'Unprovoked flight upon noticing the police' . . . 'is certainly suggestive' of wrongdoing and can be treated as 'suspicious behavior[.]'" *Id.*
- *Wesby* underscores that, in addressing the underlying constitutional question, courts should not credit a plaintiff's "innocent explanation for suspicious facts." *Id.* at 12; *see also id*. at 19 ("These cases suggest that innocent explanations – even uncontradicted ones – do not have any automatic, probable-cause vitiating effect."). What matters is what the law enforcement officer perceived at the time. *Id.* at 7-13.

Thank you for your consideration of this submission.

Respectfully submitted,

PHELPS DUNBAR LLP

/s/ *G. Todd Butler*

G. Todd Butler
Attorney for Appellant
Johnny Barnes

[Certificate Of Service Omitted]

PHELPS DUNBAR LLP Louisiana | **Mississippi** | Texas | Florida
Alabama | North Carolina | London

GREGORY TODD BUTLER #04969--1016
Partner
(601) 360-9366
butlert@phelps.com

February 2, 2018

BY ELECTRONIC FILING

Lyle W. Cayce, Clerk of Court
United States Court of Appeals
Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Re: *Gerhart v. Barnes, et al.*; Case No. 17-60287

Dear Mr. Cayce:

Pursuant to FED. R. APP. P. 28(j), I write to call the Court's attention to a recent decision from this Court. Barnes' opening and reply briefs relied on *Thomas v. Williams*, 2016 WL 1274760 (S.D. Tex. 2016), a mistaken entry case. Yesterday, a panel of this Court affirmed the district court's grant of qualified immunity in that case. The panel decision is attached as Exhibit A.

Thank you for your consideration of this submission.

Respectfully submitted,

PHELPS DUNBAR LLP

/s/ *G. Todd Butler*

G. Todd Butler
Attorney for Appellant
Johnny Barnes

[Certificate Of Service Omitted]

GREGORY TODD BUTLER #04969--1016
Partner
(601) 360-9366
butlert@phelps.com

April 2, 2018

BY ELECTRONIC FILING

Lyle W. Cayce, Clerk of Court
United States Court of Appeals
Fifth Circuit
Office of the Clerk
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Re: *Gerhart v. Barnes, et al.*; Case No. 17-60287

Dear Mr. Cayce:

Pursuant to FED. R. APP. P. 28(j), I write to call the Court's attention to the opinion the Supreme Court released today in *Kisela v. Hughes*, No-17467, slip op. (April 2, 2018) (attached as Exhibit A). The opinion speaks to the "especially important" issue raised in Appellant Johnny Barnes' pending petition for rehearing en banc – namely, the Panel's application of the qualified immunity doctrine in the Fourth Amendment context. *See Kisela*, slip op. at 5 (explaining that qualified immunity "is especially important in the Fourth Amendment context").

Kisela reversed the Ninth Circuit's denial of qualified immunity over the dissent of Justices Sotomayor and Ginsburg. *See* slip op. at 8. It rejects the notion that qualified immunity can be defeated simply by

characterizing the record as containing genuine issues of material fact. *Compare id.* at 1-8 (opinion of the Court) *with id.* at 1-15 (Sotomayer and Gibsburg, JJ., dissenting). What matters for purposes of the qualified immunity analysis is the legal question of whether a prior case already has placed the Fourth Amendment question "beyond debate." *Id.* at 4 (opinion of the Court).

Kisela emphasizes that Courts of Appeal may not use cases that define the law at a high level of generality to deny qualified immunity. *Id.* at 5. Indeed, "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the *specific facts* at issue." *Id.* (emphasis added). Like in the *District of Columbia v. Wesby* case that was issued earlier this Term, the Supreme Court again criticized appellate courts for "repeatedly" misapplying the specificity rule. *Id.* at 4 ("This Court has 'repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality.' ").

All of these same points are contained in Barnes' pending rehearing petition, so *Kisela* bolsters the justification for rehearing in this case. *See* Barnes' Rehearing Pet. at iv-vi. The Panel relied only on unpublished opinions and *Maryland v. Garrison*, 480 U.S. 79 (1987), which are "of no use in the clearly established inquiry." *See Kisela*, slip op. at 7. The Panel's analysis mirrors both the analysis that was rejected in *Kisela* as well as the analysis that a different Panel of this Court rejected in *Thomas v. Williams*, 2018 WL 671141 (5th Cir. Feb. 1, 2018).

Barnes' reiterates "that this Court's members have very different views on how the Supreme Court's qualified immunity precedents should be applied." *See* Barnes' Rehearing Pet. at v. That much is apparent from the votes that separated the Court in an en banc poll just last week. *See Jauch v. Choctaw County*, No. 16-60690 (5th Cir. Mar. 29, 2018) (Southwick, J., dissenting) (explaining that the Panel failed to correctly apply the "clearly established" standard announced in *Wesby*). This Court should take the Supreme Court's cue and either alter the panel opinion in this case or use this case as a vehicle to reconcile its qualified immunity decisions more generally.

Thank you for your consideration of this submission.

Respectfully submitted,

PHELPS DUNBAR LLP

/s/ *G. Todd Butler*

G. Todd Butler
Attorney for Appellant
Johnny Barnes

[Certificate Of Service Omitted]