APPENDIX

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APPENDIX A

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UNITED STATES COURTS OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-6084

[Filed: September 1, 2021]

ANNISSA COLSON,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CITY OF ALCOA, TENNESSEE, et al.,	)
	)
Defendants-Appellants.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

BEFORE: GIBBONS, WHITE, READLER, Circuit Judges.

JULIA SMITH GIBBONS, Circuit Judge. Defendant Mandy England appeals the district court's denial of her motion for summary judgment in plaintiff Annissa Colson's 42 U.S.C. § 1983 suit against England

for deliberate indifference to Colson's serious medical needs. Colson claims that England, a Blount County Jail correctional officer, refused to provide her with adequate medical care when Colson was brought to the jail with a knee injury. England argues that the doctrine of qualified immunity protects her from liability for her actions. On appeal, England argues that Colson was not suffering from an objectively serious medical need, that England did not consciously disregard any medical need, and that Colson's right to medical care was not clearly established. We affirm the district court's determination that Colson's right to medical attention was clearly established and dismiss the rest of England's appeal for lack of jurisdiction.

I.

On June 23, 2015, Alcoa Police Department officer Dustin Cook arrested Annissa Colson for driving while intoxicated and reckless endangerment after she drove her vehicle off the road. Colson consented to have her blood drawn for a blood alcohol test, so Cook and Alcoa Police officer Arik Wilson transported Colson to a nearby hospital.

When they arrived at the hospital, Colson got out of Cook's police vehicle but refused to enter the hospital to have her blood drawn. Cook told Colson that they would get a search warrant to draw her blood and ordered her to get back in his vehicle. After Colson repeatedly refused to get back in the car, Cook and Wilson attempted to force Colson into the back of the police vehicle. Colson claims that Wilson pushed on her knee and injured it during the struggle. Wilson admitted to Cook at the time that he heard Colson's

knee pop when he applied pressure to her leg. Colson eventually got into the back of the police vehicle, and Cook drove her to the Blount County Jail while Colson cried and complained about her injured knee.

Defendant England was one of the Blount County Jail officers who met Cook and Colson when they arrived at the jail. Cook greeted England and told her that Colson was "combative" and that they had used pressure points to get her into the police vehicle. He did not mention the potential injury to Colson's knee. England told Colson to get out of the vehicle and guided her from the garage into a pat-down room inside the jail to perform a preliminary search. Colson was crying but appeared to walk without a limp from the garage to the pat-down room. During her deposition, Colson admitted that she did not have a noticeable limp or problem walking at the time.

When they were in the pat-down room, Colson told England that her "knee is fucked up thanks to your officer." Dash Cam Video 2, 41:52–41:55. England told Colson "ok" and asked her to take a few steps forward and place her forehead against a wall. *Id.* at 41:56. Colson appeared unsteady on her feet and initially told England that she could not move, though she eventually complied. About ten seconds later, Colson yelled "ow, ow my fucking knee" and fell to the floor. *Id.* at 42:16–42:20. Colson claims that she fell because her knee was unstable, but England claims that she thought Colson's knee buckled because Colson was intoxicated. England and another officer helped Colson off the ground and held her arms to steady her. Colson continued to complain about her knee. Colson removed

her jewelry and attempted to step forward to give it to an officer but winced and looked unsteady, so England and another officer held her arms to steady her. A few seconds later, an officer offered Colson a hand to steady her while she removed her shoes, but Colson would not take the arm of any officer and removed her shoes herself.

A few minutes after Colson entered the pat-down room, Jennifer Russell, a nurse at the jail, came to examine Colson's knee. Russell was not in the room when Colson fell to the floor or when she appeared unsteady on her feet. Russell asked what she was checking for, and the officers told her to look at Colson's knee. Colson told Russell that the officers "fucked up [her] knee," that she had "never heard it pop so much" in her life, and that it hurt to move her leg. *Id.* at 46:23–46:28. Russell bent down to look at Colson's knee and asked her to move it. Colson told Russell that her knee hurt and that she could not straighten it. After examining Colson's knee for less than a minute, Russell said that she "don't see no swelling" and left the room. *Id.* at 47:12–47:18. Colson concedes that there was no swelling when Russell looked at her knee. England claims that she thought Russell's examination of Colson's knee was "quick" but indicates that she trusted Russell's medical judgment to tell the officers if Colson needed further medical attention. DE 139-2, England Dep., Page ID 2088, 2094. Colson did not receive any additional medical treatment while she was at Blount County Jail.

After Russell left, England and several other officers led Colson from the pat-down room and to a jail

cell. Based on the body-cam video, at least one officer was holding Colson's arm while she walked to the cell, but it is unclear whether the officer was restraining or supporting her.[1] Off camera, Colson and officers got into a struggle and several officers pinned Colson to the ground. England claims the struggle started because Colson kicked the officers, which Colson denies. The officers then placed Colson in a restraint chair and strapped down her arms and legs so they could draw her blood for the blood alcohol test. While England and other officers were holding Colson down, Colson allegedly bit England's arm.[2] England left the room and returned with a helmet, which she put on Colson until Russell could complete the blood draw. Colson was left in the restraint chair for several hours and then released on bond the next morning. The day after she was released on bond, Colson went to the hospital where she was diagnosed with a fractured tibia, torn anterior cruciate ligament, and a torn lateral collateral ligament.

On June 23, 2016, Colson filed a lawsuit against England, the City of Alcoa, Blount County, and other employees of the City of Alcoa and Blount County who were involved in her arrest. In addition to other claims, Colson alleged that England violated her constitutional rights by failing to provide medical treatment for her knee injury.

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[1] England claims that Colson walked "without any obvious need of medical assistance." CA6 R. 9, Appellant Br., at 16.

[2] Colson denies biting England.

England filed her first motion for summary judgment on August 16, 2017. England argued that she was entitled to qualified immunity on Colson's claim of wrongful denial of medical care because Colson did not suffer a serious medical need and England was not deliberately indifferent to Colson's injuries. The district court denied England's motion as to Colson's claim for inadequate medical care.[3] The district court found that Colson "identifie[d] more than enough evidence establishing genuine issues of material fact in the record" as to whether "her knee injury would have been obvious to a layperson." DE 105, Op., Page ID 1494. The district court cited Colson's "repetitious complaints about knee pain, her screams, and her intermittent ability to remain standing—all of which occurred in Officer England's presence." *Id.* The district court described how Colson "fell to the floor while agonizing about her knee" in front of England and "England had to steady Ms. Colson on a separate occasion, when she tottered and winced in the pat down room while stepping forward to put her ring in a bag." *Id.*

The district court concluded that "a reasonable jury could find that Officer England knew of [Colson's need for medical treatment] and disregarded it despite

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[3] England claims that she is challenging "the analysis/rulings" of both the district court's opinion denying her first motion for summary judgment and the district court's opinion denying her second motion for summary judgment. CA6 R. 9, Appellant Br., at 23 n.32. England never appealed the district court's first opinion, however, so the only appeal before the court challenges the district court's second opinion and order. But since the district court's second opinion relied heavily on its previous analysis, it is helpful to summarize the district court's first opinion as well.

having reasons to believe that the nurse rendered an unreliable medical opinion, if no medical opinion at all." *Id.* at Page ID 1500. First, the district court found that whether Russell issued a medical opinion was "dubious" because Russell's "lone statement was 'I don't see no swelling,' and she left the room without uttering another word to the officers." *Id.* at Page ID 1497. According to the district court, England had reason to know that Russell's opinion was not reliable because she was "privy to the exam and observed Ms. Colson's pained reactions to the movements that the nurse asked her to perform, if not her outright inability to perform them." *Id.* at Page ID 1498. Thus, the district court held that England had failed to show she was entitled to qualified immunity and denied her motion for summary judgment.

On November 9, 2018, England filed a second motion for summary judgment. England argued that she was entitled to summary judgment based on the more developed factual record and the present applicable legal standards. The district court disagreed and concluded that it did not "change[] the Court's analysis and conclusions regarding deliberate indifference." DE 202, Op., Page ID 3358–59. England filed a timely notice of appeal.

II.

"Although '[a]n order denying a motion for summary judgment is generally not a final decision' over which we have jurisdiction, limited review is available if, as here, 'the summary judgment motion is based on a claim of qualified immunity.'" *Downard for Estate of Downard v. Martin*, 968 F.3d 594, 599 (6th Cir. 2020)

(quoting *Plumhoff v. Rickard*, 572 U.S. 765, 771 (2014)). We may review the district court's denial of qualified immunity "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). For example, "[w]hen faced with an argument that the district court mistakenly identified clearly established law, the court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." *Johnson v. Jones*, 515 U.S. 304, 319 (1995). Further, "where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory review." *Wysong v. City of Heath*, 260 F. App'x 848, 853 (6th Cir. 2008) (quoting *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007)).

We may not, however, review the district court's determination that "the summary judgment record . . . raised a genuine issue of fact" or challenge the district court's factual inferences. *Johnson*, 515 U.S. at 313; *see also Scott v. Harris*, 550 U.S. 372, 380 (2007); *Romo v. Largen*, 723 F.3d 670, 675 (6th Cir. 2013) (applying *Johnson* and *Scott* to conclude that we may not review on interlocutory appeal a district court's factual inferences unless blatantly contradicted by the record). "[I]n the event that legal and factual challenges are confused or entwined, 'we must separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is "genuine").'" *DiLuzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 610 (6th Cir. 2015) (quoting *Roberson v. Torres*, 770 F.3d 398, 402 (6th Cir. 2014)).

If the defendant fails to concede the plaintiff's version of the facts on interlocutory appeal, we can "ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue" of whether the facts as alleged by the plaintiff support a violation of clearly established law. *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005); *see also Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 403 (6th Cir. 2007). But "[o]nce a defendant's argument drifts from the purely legal into the factual realm and begins contesting what really happened, our jurisdiction ends and the case should proceed to trial." *Berryman v. Rieger*, 150 F.3d 561, 564–65 (6th Cir. 1998); *see also McKenna v. City of Royal Oak*, 469 F.3d 559, 562 (6th Cir. 2006) (dismissing appeal for lack of jurisdiction because defendants "made no arguments concerning the denial of qualified immunity that [did] not rely on disputed facts"); *Thomas v. Bauman*, 835 F. App'x 5, 8 (6th Cir. 2020) (dismissing appeal for lack of jurisdiction when "defendants premise[d] their legal arguments on 'persuad[ing] us to believe [their] version of the facts'" (second and third alteration in original) (quoting *Berryman*, 150 F.3d at 564)).

III.

"We review a district court's denial of summary judgment on the grounds of qualified immunity de novo." *Bishop v. Hackel*, 636 F.3d 757, 765 (6th Cir. 2011). Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The court must view the facts and reasonable

factual inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "A genuine issue of material fact exists when there are 'disputes over facts that might affect the outcome of the suit under the governing law.'" *V & M Star Steel v. Centimark Corp.*, 678 F.3d 459, 465 (6th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Summary judgment is not proper "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

IV.

"The qualified-immunity doctrine shields government officials performing discretionary functions from civil liability unless their conduct violates clearly established rights." *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680 (6th Cir. 2013). To overcome a defendant's assertion of qualified immunity, a plaintiff must show both (1) that the defendant violated a constitutional right, and (2) that the right was clearly established at the time of the violation. *See Pearson v. Callahan*, 555 U.S. 223, 231–32 (2009). The court may decide these issues in either order. *Id.* at 236.

England challenges the district court's determination that a reasonable jury could find that she acted with deliberate indifference to Colson's serious medical needs. England claims she is entitled to qualified immunity for three reasons. First, she argues that she did not violate Colson's constitutional right because Colson did not objectively suffer from a serious medical need. Second, England claims she did

not subjectively know of Colson's need for medical care because she reasonably relied on Russell's medical opinion. Finally, England argues that even if she did violate Colson's constitutional right, the right was not clearly established.

A.

Under the Fourteenth Amendment, pretrial detainees have a "right to adequate medical care." *Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir. 2005). A prison official violates that right when she acts with "deliberate indifference" to an inmate's "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A constitutional claim for denial of medical care has both an objective and subjective component. *Blackmore v. Kalamazoo Cnty.*, 390 F.3d 890, 895 (6th Cir. 2004).[4] Under the objective component, the plaintiff must show a "sufficiently serious" medical need. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Under the subjective component, the plaintiff must show that the defendant "knew of her serious medical need and that, despite this knowledge, the official

[4] In a footnote, Colson argues that *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), abrogated the need for pretrial detainees to prove the subjective prong of the deliberate indifference test. This court has yet to decide whether *Kingsley*, which dealt with a pretrial detainee's excessive force claim, also applies to claims of deliberate indifference. *See, e.g.*, *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018); *Martin v. Warren Cnty.*, 799 F. App'x 329, 337 n.4 (6th Cir. 2020). Because the issue was not addressed by the district court and was not substantively briefed by the parties, we decline to resolve it here.

disregarded or responded unreasonably to that need." *Downard*, 968 F.3d at 600.

1.

The objective component is satisfied if the plaintiff's serious medical need "has been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Blackmore*, 390 F.3d at 897 (quoting *Gaudreault v. Mun. of Salem*, 923 F.2d 203, 208 (1st Cir. 1990) (emphasis omitted)). Whether the medical need is so obvious that a layperson would easily recognize it is a question of fact. *See id.* at 899 ("With these facts, a jury could reasonably find that Blackmore had a serious need for medical care that was 'so obvious that even a layperson would easily recognize the necessity for a doctor's attention.'" (quoting *Gaudreault*, 923 F.2d at 208)). However, if the case involves only "minor maladies or non-obvious complaints of a serious need for medical care," then the plaintiff must also submit verifying medical evidence to satisfy the objective component. *Estate of Carter*, 408 F.3d at 312 (quoting *Blackmore*, 390 F.3d at 898). Similarly, if the plaintiff's claim is based on an alleged delay in medical treatment, verifying medical evidence is necessary to prove that the failure to promptly treat the plaintiff's injury caused a detrimental effect. *Blackmore*, 390 F.3d at 898–99. Finally, where "an inmate has received on-going treatment for his condition and claims that this treatment was inadequate, the objective component . . . requires a showing of care 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable

to fundamental fairness.'" *Rhinehart v. Scutt*, 894 F.3d 721, 737 (6th Cir. 2018) (quoting *Miller v. Calhoun Cnty.*, 408 F.3d 803, 819 (6th Cir. 2005)).

England's only legal argument is that Colson did not meet the objective component because she failed to submit verifying medical evidence of a detrimental effect. England misconstrues our case law. There is no requirement that the plaintiff demonstrate a detrimental effect when, as the district court found here, the plaintiff's injury was so obvious that a layperson would recognize the need for medical treatment. *Blackmore*, 390 F.3d at 899–900. When the harm is obvious, the constitutional violation "is not premised upon the 'detrimental effect' of the delay, but rather that the delay alone in providing medical care creates a substantial risk of serious harm." *Id.* at 899. Further, Colson's claim is not that England delayed in providing medical treatment but rather that England failed to provide any adequate medical treatment. This is also not a situation where Colson suffered from an ongoing medical condition and was denied proper treatment. *See, e.g.*, *Rhinehart v. Scutt*, 894 F.3d 721, 741, 747 (6th Cir. 2018) (verifying medical evidence was necessary when alleged violation was inadequate treatment of plaintiff's end-stage liver disease). Because Colson's claim is based on the alleged obviousness of her injury, England's argument that Colson must establish a detrimental effect fails.

England also challenges the evidentiary sufficiency of the district court's conclusion that Colson's injury would have been obvious to a layperson and that Colson suffered a serious medical need. Even though

England states that she "is challenging only the *legal determinations* made based on the undisputed material facts in the record and when viewed in the light most favorable to Plaintiff," CA6 R. 16, Reply Br., at 4, England never concedes the facts as alleged by Colson or accepts the district court's factual inferences. For example, England repeatedly says that Colson did not have objective symptoms of a knee injury. The district court, however, identified several facts that support a finding that Colson had objective symptoms of a serious knee injury including "her intermittent ability to remain standing," which required England to steady Colson when she attempted to walk. DE 105, Op., Page ID 1494; *see also* DE 202, Op., Page ID 3358. Further, England repeatedly claims that Colson kicked the officers with her injured knee, which Colson denies. Put another way, England contests what really happened between the parties. Our jurisdiction over this interlocutory appeal does not extend to such factual questions. *Johnson*, 515 U.S. at 313; *Berryman*, 150 F.3d at 564–65; *DiLuzio*, 796 F.3d at 609–10. Accordingly, we do not have jurisdiction to consider this challenge to the objective component of the deliberate indifference test.

2.

Under the subjective component of the deliberate indifference test, the plaintiff must show that the defendant had "a sufficiently culpable state of mind" in denying medical care. *Phillips v. Roane Cnty.*, 534 F.3d 531, 542 (6th Cir. 2008); *see also Farmer*, 511 U.S. at 834–35. "Deliberate indifference 'entails something more than mere negligence,' but can be 'satisfied by

something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.'" *Blackmore*, 390 F.3d at 895–96 (quoting *Farmer*, 511 U.S. at 835). There is no constitutional violation "[i]f the officers failed to act in the face of an obvious risk of which they should have known but did not." *Garretson v. City of Madison Heights*, 407 F.3d 789, 797 (6th Cir. 2005). To be held liable, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Winkler v. Madison Cnty*, 893 F.3d 877, 891 (6th Cir. 2018) (quoting *Farmer*, 511 U.S. at 837).

"Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. For example, the factfinder "may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* A non-medically trained official is not deliberately indifferent when he defers to a "medical recommendation that he reasonably believes to be appropriate, even if in retrospect that recommendation was inappropriate." *McGaw v. Sevier Cnty.*, 715 F. App'x 495, 498 (6th Cir. 2017); *see also Winkler*, 893 F.3d at 895 (favorably citing *McGaw*); *Stojcevski v. Macomb Cnty.*, 827 F. App'x 515, 522 (6th Cir. 2020) ("[A]n officer who seeks out the opinion of a doctor is generally entitled to rely on a reasonably specific medical opinion for a reasonable period of time after it is issued, absent circumstances such as the onset of new and alarming

symptoms." (quoting *Barberick v. Hilmer*, 727 F. App'x 160, 163–64 (6th Cir. 2018) (per curiam)).

Once again, England contests the basic facts underlying the district court's determination rather than an issue of law. England claims that Colson has not satisfied the subjective component because England did not know that Colson was seriously injured. England repeats her allegations that Colson had no objective symptoms of an injury and "kicked furiously at officers." CA6 R. 9, Appellant Br., at 40. England's description of the events directly contradicts the district court's findings and Colson's account of events. We do not have jurisdiction to decide a question of fact such as what England knew at the time. *See Kindl v. City of Berkley*, 798 F.3d 391, 398, 400–01 (6th Cir. 2015) ("Defendants' principal arguments regarding qualified immunity reduce merely to a factual contention that Plaintiff cannot prove that they should have known of, much less that they were in fact aware of, Kindl's serious medical need. . . . We are in no better a position than the district court—or more to the point, a jury—to determine whether based on Kindl's statements, convulsions, alleged moans, requests for attention, and appearance, Defendants subjectively understood the gravity of her situation.").

Second, England argues that she cannot be deliberately indifferent because she relied on Russell's adequate medical examination and opinion. England is correct that a prison official may ordinarily rely on a medical professional's opinion, but only when the officer has no reason to believe that the medical professional's opinion was inappropriate or unreliable.

See Winkler, 893 F.3d at 895. Here, the district court found that there was a factual dispute both as to whether Russell issued a medical opinion at all and, if she did, whether that opinion was appropriate. These evidence sufficiency questions preclude our jurisdiction, which "does not extend to appeals that merely quibble with the district court's reading of the factual record." *Leary v. Livingston Cnty.*, 528 F.3d 438, 441 (6th Cir. 2008); *see also Johnson*, 515 U.S. at 313–14. We have declined to exercise jurisdiction in similar cases. *See Hopper v. Plummer*, 887 F.3d 744, 758 (6th Cir. 2018) (declining to exercise jurisdiction where it was "sharply disputed whether and to what extent" "non-medical prison officials reasonably rel[ied] on or defer[ed] to medical staff expertise"); *McKinney v. Lexington-Fayette Urb. Cnty. Gov't*, 651 F. App'x 449, 460 n.6 (6th Cir. 2016) ("The officers' arguments about the medical staff therefore pose questions of fact capable of resolution by competent evidence, including evidence about the officers' observations of facts that indicated that McKinney was in medical distress, the training that the officers received about how to care for an inmate who was in medical distress, and the officers' perceptions about the adequacy of the treatment that the medical staff provided to McKinney.") Accordingly, we decline to exercise jurisdiction over England's challenge to the district court's conclusions on the subjective component of the deliberate indifference test.

B.

Finally, England argues that even if she did violate Colson's constitutional right, that right was not clearly established based on the particular facts of this case.

Despite England's continued refusal to concede the facts in the light most favorable to Colson, we will "ignore the defendant's attempts to dispute the facts and nonetheless resolve the legal issue" of whether the facts support a violation of clearly established law, "obviating the need to dismiss the entire appeal for lack of jurisdiction." *Estate of Carter*, 408 F.3d at 310.

For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" based on pre-existing law. *Comstock v. McCrary*, 273 F.3d 693, 702 (6th Cir. 2001) (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The pre-existing law that makes a right clearly established comes primarily from the Supreme Court and the Sixth Circuit, but it can also come from other courts, including other circuits and district courts, if the decisions of those courts "point unmistakably to the unconstitutionality of the conduct." *Perez v. Oakland Cnty.*, 466 F.3d 416, 427 (6th Cir. 2006) (alteration omitted) (quoting *Summar v. Bennett*, 157 F.3d 1054, 1058 (6th Cir. 1998)). The plaintiff has the burden of showing that the right was clearly established. *Id.*

The question of whether law is clearly established should not be considered at a high level of generality. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *see also Perez*, 466 F.3d at 428 ("For a right to be clearly established, 'there need not

be a case with the exact same fact pattern, or even "fundamentally similar" or "materially similar" facts.'" (quoting *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005))); *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." (quoting *Hope*, 536 U.S. at 741)). Rather, the proper question is whether the existing precedent gave the defendant fair warning that her conduct was unconstitutional. *Hope*, 536 U.S. at 741; *see also Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (per curiam).

"As early as 1972, this court stated that 'where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process.'" *Estate of Carter*, 408 F.3d at 313 (quoting *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972)). "Furthermore, in 1992, this court explicitly held that a pretrial detainee's right to medical treatment for a serious medical need has been established since at least 1987." *Id.* (quoting *Heflin v. Stewart Cnty.*, 958 F.2d 709, 717 (6th Cir. 1992)). In *Quigley*, we concluded that "[i]t is clearly established that a prisoner has a right not to have his known, serious medical needs disregarded by his doctors." *Quigley*, 707 F.3d at 684. In 2004, we found that "[w]here the seriousness of a prisoner's needs for medical care is obvious even to a lay person, the constitutional violation may arise." *Blackmore*, 390 F.3d at 899; *see also Rich v. City of Mayfield Heights*, 955 F.2d 1092, 1097 (6th Cir. 1992) (Defendant had "a particularized right—the right to have medical assistance summoned immediately upon

the police officers becoming aware that he was in need of immediate medical care.").

England cites several cases that she argues demonstrate that she did not violate a clearly established constitutional right. Each case England cites, however, is distinguishable from this matter when viewing the facts of this case in the light most favorable to Colson. *See Durham v. Nu'Man*, 97 F.3d 862, 869 (6th Cir. 1996) (finding no obvious serious medical need where the plaintiff had no outward signs of serious injury); *Alspaugh v. McConnell*, 643 F.3d 162, 169 (6th Cir. 2011) (defendants not deliberately indifferent when plaintiff received "extensive treatment" for his injuries); *Loukas v. Gundy*, 70 F. App'x 245, 247 (6th Cir. 2003) (defendant not deliberately indifferent for delaying medical care when plaintiff did not have outward symptoms of injury beyond his complaints of pain); *Brooks v. Jones*, No. 1:14-cv-631, 2014 WL 7212897, at *7 (W.D. Mich. Dec. 17, 2014) (nurse not deliberately indifferent "[e]ven assuming that her evaluation was brief, her diagnosis incorrect, and her treatment ineffective for his condition" because there were "no facts from which to infer that [the nurse] was aware of, and deliberately indifferent to, a serious medical need requiring additional care"). Rather than contest the legal conclusion that a detainee has a right to adequate medical care for obviously serious injuries, England argues that Colson's injury was not obvious or serious. England once again challenges the factual basis of Colson's claim, which we do not have jurisdiction to review.

When viewed in the light most favorable to Colson, a reasonable officer in England's position would have been aware that she was violating Colson's right to adequate medical care. We have consistently held that prison officials violate a detainee's constitutional rights when they ignore a detainee's obvious, serious medical needs. *Estate of Carter*, 408 F.3d at 313. Here, a reasonable juror could conclude that England subjectively knew of and disregarded signs that Colson was at a serious risk of harm including Colson's difficulties standing and moving her knee. Accordingly, the district court properly held that Colson's right to adequate medical care was clearly established.

V.

We affirm the district court's determination that Colson's right to medical care was clearly established and dismiss the remainder of England's appeal for lack of jurisdiction.

CHAD A. READLER, Circuit Judge, dissenting. Officer Mandy England is entitled to qualified immunity. In this setting, I acknowledge, our interlocutory jurisdiction is limited, particularly as factual findings are "insulated from review." *Downard ex rel. Estate of Downard v. Martin*, 968 F.3d 594, 599 (6th Cir. 2020). As a result, our charge customarily is to "take, as given, the facts that the district court assumed when it denied summary judgment" on legal grounds, yet assess whether, in doing so, the district court "mistakenly identified clearly established law." *Johnson v. Jones*, 515 U.S. 304, 319 (1995); *accord DiLuzio v. Village of Yorkville*, 796 F.3d 604, 611 (6th Cir. 2015) (explaining that the appellate court's "legal

determination of whether the defendant violated a clearly established right" can be "based on those now (for this purpose) undisputed record facts" found by the district court (emphasis omitted)). That said, where the version of the facts presented to us is "blatantly contradicted" by video evidence in the record, we "should not adopt that version of facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Here, the salient facts either are not in dispute or are confirmed by a video recording of the events at hand. Following her 2015 arrest for driving under the influence, Annissa Colson was taken to the Blount County jail. England and several other officers escorted Colson into the jail's holding area for a routine pat down. There, Colson complained of severe knee pain from an injury sustained while struggling with her arresting officers. Hearing Colson's complaints, an officer asked aloud for a nurse. Another officer radioed in the request: "Would you send the nurse over here, please?"

Nurse Russell responded and examined Colson for about a minute. Body camera video captured all relevant aspects of the examination. As Colson cursed and struggled, an officer signaled for Russell to begin evaluating Colson's knee injury. Over resistance and abusive language from Colson, Russell examined Colson's range of motion by directing Colson to straighten her legs, bend her knee back, and then move her knee from side to side. Russell bent down to examine Colson's sore knee, and then her other knee to compare the two, touching each knee. Officers asked

Colson to stand still so that Russell could hold Colson's knees together for comparison. Once Colson complied, Russell examined the knees for several more seconds before concluding her examination, colorfully declaring, "I don't see no swelling," a medical conclusion, as the majority opinion acknowledges, Colson does not contest. Russell then left the holding area. Only a subsequent trip to the hospital would reveal Colson's fractured tibia and torn knee ligaments.

Colson alleges that England evinced deliberate indifference to Colson's serious medical needs, conduct that fell below constitutional norms. That may or may not be true. Either way, to overcome England's defense of qualified immunity, Colson must also show that, at the time these events unfolded, our decisions clearly established that England's actions violated the Constitution. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). And that showing, it bears emphasizing, must be "particularized" to the facts of each case. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (citation omitted); *see also al-Kidd*, 563 U.S. at 742 (explaining that clearly established law should not be defined "at a high level of generality"). To that end, Colson must identify a fact pattern from a prior case "similar enough to have given fair and clear warning to officers about what the law requires" so that "a reasonable official would understand that what he is doing violates the rule." *Beck v. Hamblen County*, 969 F.3d 592, 599 (6th Cir. 2020) (internal quotation marks and citations omitted). "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (citation omitted).

In denying summary judgment, the district court determined that "a reasonable jury could find that Officer England knew of Colson's [serious and obvious medical need] and disregarded it despite having reasons to believe that the nurse rendered an unreliable medical opinion, if no medical opinion at all." R. 202, PageID#3360; *see also* R. 105, PageID#1497 ("[W]hether the nurse even rendered any type of medical opinion to begin with—much less one that should invite deference—is dubious."). Any notion that Russell offered "no medical opinion at all," however, is "blatantly contradicted" by the body camera video footage of Russell's examination. *See Scott*, 550 U.S. at 380. Video footage plainly shows that Russell had Colson move her legs to assess her range of motion, that Russell bent down to examine each of Colson's knees for swelling, and that Russell did not discern any unusual swelling, which prompted Russell to believe that no further medical treatment was necessary. And even if a genuine issue exists as to whether this examination was inadequate, the fact remains that Russell conducted an examination for nearly 60 seconds and, at its close, offered her medical assessment, albeit somewhat inartfully. On this record, the clearly established inquiry must account for the medical component underlying England's qualified immunity defense.

In other words, the district court had a duty to address England's qualified immunity defense with respect to the particularized facts of the case—chief among them, that a medical examination took place—when evaluating the clearly established prong of the qualified immunity test. And once this case is

framed in the proper factual setting, England is entitled to qualified immunity. A reasonable officer in England's position would not have understood the Fourteenth Amendment to require her to override Russell's assessment—condensed as it may have been—of Colson's knee injury. Indeed, neither the majority opinion nor the district court points to any case that addresses with particularity the central factual premise of this one: an officer's deference to a medical professional's evaluation. *Beck*, 969 F.3d at 599 ("The plaintiff has identified a rule at too high a level of generality 'if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the identified rule] was firmly established.'" (alteration in original) (quoting *Wesby*, 138 S. Ct. at 590)). None of the pre-2015 cases the district court surveyed address a scenario where an officer consulted medical personnel with respect to a detainee's medical condition. Rather, they were all cases in which officers *failed* to consult a medical professional in a timely manner. *See* R. 202, PageID#3361 (citing *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005) (denying qualified immunity when officers failed to immediately call an ambulance for a nonbreathing detainee); *Estate of Carter v. City of Detroit*, 408 F.3d 305 (6th Cir. 2005) (denying qualified immunity when officers failed to seek medical attention for a patient experiencing symptoms of cardiac arrest); and *Heflin v. Stewart County*, 958 F.2d 709 (6th Cir. 1992) (denying qualified immunity when officers failed to immediately call an ambulance for a patient found hanging in a shower)). At most, these cases establish an officer's obligation to contact medical professionals promptly

when a detainee exhibits obvious symptoms of distress. Colson's jailers did so.

True, as both my colleagues and the district court have noted, we previously stated in *Estate of Carter v. City of Detroit* that a "detainee's right to medical treatment has been established since at least 1987." 408 F.3d at 313. But *Carter*'s formulation of the right in question is akin to a broad legal principle like "an unreasonable search and seizure violates the Fourth Amendment," something the Supreme Court has repeatedly said is "of little help in determining whether the violative nature of particular conduct is clearly established." *See al-Kidd*, 563 U.S at 741 (citation omitted); *see also City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015). Nor am I alone in this view—we previously reversed a district court for relying on *Carter* to establish the "right to medical care" at a high level of generality, emphasizing that clearly established law "must be more particularized than that":

> Yes, a pretrial detainee's right to medical treatment for a serious medical need has been established since at least 1987. And yes, that right encompasses physiological and psychiatric ailments. But these principles do not suffice on their own. Clearly established law may not be defined at such a high level of generality. It must be more particularized than that. The Supreme Court recently reminded us that a plaintiff must identify a case with a similar fact pattern that would have given fair and clear warning to officers about what the law

> requires. . . . [The plaintiff] has not pointed to, and we have not found, any case like this one . . . .

Arrington-Bey v. City of Bedford Heights, 858 F.3d 988, 992–93 (6th Cir. 2017) (internal citations and quotations omitted). Proving the point, the facts at hand in *Carter* did not involve a medical professional, let alone a scenario where a non-medically trained officer relied on a medical professional's evaluation. 408 F.3d at 305. For these reasons, I would not accept the district court's broadly described contours of the constitutional right at play here. Nor would I suggest, as the majority opinion does, that England bears the burden to *disprove* the generalized contours of a broadly defined right to detainee medical care. Maj. Op. at 16 ("Each case England cites . . . is distinguishable."). That puts the inquiry in reverse. After all, Colson, not England, bears the burden of proving the clearly established law specific to the contours of this case. *See Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 681 (6th Cir. 2013).

Nor, for that matter, may we dispense with the duty to identify a factually similar case. Time and again, the Supreme Court has required us to point to factually specific case law establishing the right in question. *See, e.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam); *Wesby*, 138 S. Ct. at 593; *Pauly*, 137 S. Ct. at 551; *Mullenix v. Luna*, 577 U.S. 7, 11–12 (2015) (per curiam). Sure enough, the Supreme Court has, on occasion, done otherwise in unique instances in which a constitutional violation is self-

evident from the particularly egregious conduct of government officials. *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). But Colson's case does not fall into that *sui generis* category of cases embodied by *Hope v. Pelzer*, and, more recently, *Taylor v. Riojas*. Consider the dramatic sequence of events in *Hope*. Prison guards shackled an inmate in a stress position to an outdoor hitching post for seven hours, shirtless in the baking sun, while taunting him and depriving him of water and bathroom breaks. *Id.* at 733–35. This "obvious cruelty," the Supreme Court rightly acknowledged, was "antithetical to human dignity" and "should have provided [the guards] with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* at 745. The same goes for *Taylor*, where the "particularly egregious" facts of confining an inmate in a frigid, feces-covered cell for six days should have put "any reasonable officer" on notice that such "conditions of confinement offended the Constitution." *Taylor*, 141 S. Ct. at 54. But those shocking circumstances are worlds apart from this case.

In short, nothing in our pre-2015 case law instructed England to disregard a medical professional's assessment. That is true even in view of the district court's factual findings—that Russell was not present when Colson fell and had trouble standing, that Russell examined Colson's knee for just about a minute, and that Russell's only statement to England after her brief examination was that she did not see swelling, at which point Russell walked away. The same goes for the inference drawn by the district court

that Russell's medical opinion was "unreliable." R. 202, PageID#3360. (I assume as given for today's purposes that such a statement truly constitutes an unreviewable factual inference and not a reviewable legal conclusion, although that distinction here, as elsewhere, is hardly clear. *See Romo v. Largen*, 723 F.3d 670, 685 (6th Cir. 2013) (Sutton, J., concurring in part and concurring in the judgment).)

Confirming the point, since Colson's arrest, we have held that a non-medically trained officer can "reasonably defer[]" to a medical professional's opinion, so long as she "had no reason to know or believe that [the] recommendation was inappropriate." *McGaw v. Sevier County*, 715 F. App'x 495, 498 (6th Cir. 2017) (citations omitted); *see also id.* at 498–99 ("Where, as here, an officer responds to a substantial risk of serious harm by asking for and following the advice of a professional the officer believes to be capable of assessing and addressing that risk, then the officer commits no act of deliberate indifference in adhering to that advice."). As the majority opinion implies, that rule might prove problematic to England's qualified immunity defense if the events underlying this case happened today. But looking back, as we must, this development only further demonstrates that the district court's broadly defined constitutional violation was both inadequately particularized and not clearly established as of 2015. *See Reichle v. Howards*, 566 U.S. 658, 669 (2012). When these standards are properly defined, Colson cannot overcome England's qualified immunity.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:16-CV-377

[Filed: September 14, 2020]

ANNISSA COLSON,

Plaintiff,

v.

CITY OF ALCOA, *el al.*,

Defendants.

MEMORANDUM OPINION

This civil action is before the Court for consideration of the motion for summary judgment filed by Defendant Mandy England [Doc. 138]. Plaintiff has responded [Doc. 164], and Officer England has replied [Doc. 174]. Oral argument is unnecessary, and the motion is ripe for the court's determination.

Plaintiff has filed suit pursuant to 42 U.S.C. §§ 1983, 1985, 1986, and 1988, alleging, violations of her constitutional rights under the Fourth, Eighth, and Fourteenth Amendments. Plaintiff also raises claims

under Tennessee law for assault and battery, negligence, and intentional infliction of emotional distress. For the reasons below, the motion will be **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

In its memorandum opinion addressing the summary judgment motion filed by the City Defendants [Doc. 186], the Court provided an exhaustive account of the video evidence in this matter. The Court will not reiterate that background again but incorporates the section of that memorandum opinion labeled "Body Camera Video," as if contained herein.

Plaintiff initially raised the following claims against Nurse Russell:

- Claim 3 – Excessive Force & Cruel & Unusual Punishment;
- Claim 4 – Excessive Force & Cruel & Unusual Punishment;
- Claim 9 – Failure to Provide Adequate Medical Care;
- Claim 10 – Failure to Protect;
- Claim 11 – Assault & Battery;
- Claim 12 – Intentional Infliction of Emotional Distress; and
- Claim 13 – Negligence.

[Doc. 1]. In August 2017, Officer England filed her first motion for summary judgment. [Doc. 66]. In response,

Plaintiff abandoned her claim for failure to protect against Officer England. [Doc. 101 at 4, n.2]. Considering Plaintiff's abandonment of this claim, the Court will **GRANT** summary judgment on Count 10 in favor of Officer England, and Count 10 will be **DISMISSED** as to Officer England. Plaintiff also clarified that both Claims 3 and 4 were based exclusively on Officer England slapping Plaintiff across the face while Plaintiff was restrained. [*Id*. at 4, n.3].

The Court ultimately granted Officer England's first motion for summary judgment as to the excessive force claims, finding that Officer England was entitled to qualified immunity on these claims, as, under the particular facts, the law was sufficiently clear so that a reasonable officer would have understood that a slap to Plaintiff's face was not gratuitous and did not violate her Fourth Amendment rights. [Doc. 105 at 22-23].[1] The Court, however, denied summary judgment as to Claims 9, 11, 12, and 13.

As to Claim 9, the Court concluded that the conflicting evidence regarding whether Plaintiff's knee injury would have been obvious to a layperson created

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[1] In its conclusion, the Court stated only that it granted summary judgment on Count 4 and did not make any direct statement as to whether summary judgment was granted or denied on Count 3. However, because Count 3 is also based on Officer England slapping her in the face, per Plaintiff's own response, the same analysis the Court applied to Count 4 is equally applicable to Count 3. The Court now clarifies that, in finding Officer England was entitled to qualified immunity on the excessive force claim, it also implicitly granted summary judgment on Count 3, and dismissed that claim.

a genuine factual dispute. [*Id*. at 25]. The Court also concluded that it was dubious whether Nurse Russell provided any type of medical opinion, and regardless, a genuine issue of material fact exists as to whether Officer England could reasonably have deferred to Nurse Russell's brief examination. [*Id*. at 28-29]. The Court further noted that, when the seriousness of a prisoner's need for medical care is obvious to even a lay person, a plaintiff need not show that actual harm was suffered. [*Id*. at 30]. The Court concluded that these factual questions in the record precluded the Court from granting qualified immunity to Officer England. [*Id*. at 31].

As to Claim 11, the Court noted that Officer England had not raised any argument regarding that claim, and therefore, the Court could not dismiss the claim. [*Id*. at 32-33]. As to Claim 13, the Court concluded that Officer England had not met her burden of showing that she was entitled to immunity under the TGTLA, or that there was no genuine issue of material fact on the merits of the claim. [*Id*. at 37-38]. Finally, as to Claim 12, the Court concluded that it could not weigh the available evidence regarding Plaintiff being forced to urinate on herself, and determine whether it constitutes outrageous behavior or a reasonable response to Plaintiff's own behavior, because that task belongs to the jury. [*Id*. at 40-42].

Officer England now seeks summary judgment on all the remaining claims against her: Claims 9, 11, 12, and 13.

I. STANDARD OF REVIEW

Officer England's motion is brought pursuant to Federal Rule of Civil Procedure 56, which governs summary judgment. Rule 56(a) provides in pertinent part: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The procedure set out in Rule 56(c) requires that "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion[.]" Fed. R. Civ. P. 56(c)(1). This can be done by citation to materials in the record, which include depositions, documents, affidavits, stipulations, and electronically stored information. Fed. R. Civ. P. 56(c)(1)(A). Additionally, a party may "show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B).

After the moving party has carried its initial burden of showing that there are no genuine issues of material fact in dispute, the burden shifts to the non-moving party to present specific facts demonstrating that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "The 'mere possibility' of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). Moreover, mere conclusory and unsupported allegations, rooted in speculation, are insufficient to meet this burden. *Bell v. Ohio State Univ.*, 351 F.3d 240, 253 (6th Cir. 2003).

To defeat a motion for summary judgment, the non-moving party must present probative evidence that supports its complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). The non-moving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor. *Id.* at 255. The court determines whether the evidence requires submission to a jury or whether one party must prevail as a matter of law because the issue is so one-sided. *Id.* at 251-52.

II. ANALYSIS

A. Claim 9 – Failure to Provide Adequate Medical Care

1. Deliberate Indifference

The Court first notes that is has already addressed most of Officer England's regarding deliberate indifferent as to Plaintiff's knee injury and has rejected those arguments. [Doc. 105, pp. 23-31].

First, Officer England again argues that she was not deliberately indifferent because she relied upon the medical judgment of Nurse Russell and did not do anything to "intentionally deny" or "intentionally interfere" with Plaintiff's medical care. [Doc. 139, pp. 14 & 16]. Second, Officer England argues that, based on recent authorities and a more developed record, she was not deliberately indifferent despite complaints that she should have done more after Nurse Russell examined Plaintiff as she did not know about any obvious serious medical need that required further

medical treatment. [*Id*. at 17].[2] Third, Officer England contends that, despite allegations about a "cursory examination," she did not "consciously expose" Plaintiff to any "excessive risk of serious harm" before or after Nurse Russell's examination. [*Id*. at 19]. Fourth, Officer England contends that there is no medical proof to support that Plaintiff was exposed to an "excessive risk of harm," and Dr. Holt testified that the delay in treatment had no effect on Plaintiff's knee. [*Id*. at 22]. Finally, Officer England contends that holding her liable would amount to "second-guessing" the medical judgment of Nurse Russell and all the medical experts in this case. [*Id*.].

As Plaintiff correctly points out in her response, Officer England's argument simply re-hashes part of her qualified immunity argument from her first motion for summary judgment, but nothing she has added serves to alter the Court's prior rejection of her argument. [Doc. 164 at 16-17]. The Court has already found that Plaintiff has identified more than enough evidence establishing genuine issues of material fact in the record as to whether her injury would have been obvious to a layperson. [Doc. 105, p. 31]. The Court also determined that there is "conflicting evidence" regarding Plaintiff's knee injury which require a jury's deliberation to determine deliberate indifference. [*Id*. at 25-26]. Nothing Officer England has brought before

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[2] Officer England also contests whether this Court's reliance on *Taylor v. Franklin Cnty*., 104 F. App'x 531, 538 (6th Cir. 2004) is misplaced. [Doc. 139, p. 18, n. 31]. However, the Court also relied on *Moore v. United States*, No. 07-14640, 2008 WL 4683425, at *2 (E.D. Mich. Oct. 22, 2008) for the same point.

the Court in the renewed motion for summary judgment memorandum [Doc. 139] or reply brief [Doc. 174] changes the Court's analysis and conclusions regarding deliberate indifference previously set forth. [Doc. 105, pp. 23-31].

2. Qualified Immunity

As the Sixth Circuit has established, "Plaintiff bears the burden of showing that defendants are not entitled to qualified immunity." *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009). "Plaintiff must show both that, viewing the evidence in the light most favorable to her, a constitutional right was violated and that the right was clearly established at the time of the violation." *Id*. If Plaintiff fails to show either that a constitutional right was violated or that the right was clearly established, she will have failed to carry her burden. *Id*. "Moreover, to satisfy the second prong of the standard, plaintiff must show that the right was clearly established in a 'particularized sense,' such that a reasonable officer confronted with the same situation would have known" that their actions violated that right. *Id*.

a. Detrimental Effect

Officer England argues that she is entitled to qualified immunity for any alleged wrongful denial of medical care because Plaintiff cannot show that she suffered any detrimental effect due to any alleged delay in treatment. [Doc. 139 at 23]. Plaintiff argues that she does not need to establish that she suffered from any "detrimental effect" with "expert medial proof," noting that this Court has already determined that a

reasonable jury could find that Plaintiff had an obvious serious medical need. [Doc. 164 at 24].

In the previous order denying summary judgment, The Court paused to stress an important point: "the requirement that the record must support a substantial risk of serious harm does not require actual harm to be suffered." [Doc. 105, p. 30] (internal quotes omitted). The Court cited several cases in support of this assertion and concluded that "the evidence shows that Ms. Colson demonstrated an obvious and serious need for medical treatment" and "that a reasonable jury could find that Officer England knew of this need and disregarded it despite having reasons to believe that the nurse rendered an unreliable medical opinion, if no medical opinion at all. [*Id*. at 30-31]. Nothing Officer England argues in her renewed motion for summary judgment memorandum [Doc. 139] or reply brief [Doc. 174] changes the Court's prior analysis and conclusion.

b. Clearly Established Right

Officer England argues that case law supports that she is entitled to qualified immunity because she did not violate any clearly established constitutional right based on the particularized facts of this case. [Doc. 139 at 25]. Officer England cites to *Durham v. Nu'Man*, 97 F.3d 862, 868-69 (6th Cir. 1996), *Alspaugh v. McConnell*, 643 F.3d 162, 165 (6th Cir. 2011), *Loukas v. Gundy*, 70 F. App'x 245, 246 (6th Cir. 2003), and *Brooks v. Jones*, 2014 U.S. Dist. LEXIS 173968, at *15-18 (W.D. Mich. Dec. 14, 2014). [*Id*. at 25-29]. Officer England contends that, based on these cases, it is not clear that "every reasonable officer" in her position

would have understood that her actions violated Plaintiff's constitutional rights. [*Id*. at 29].

Plaintiff responds that, as a pretrial detainee with an obvious and serious medical need, she had a constitutional right to medical care, and that right was clearly established. [Doc. 164 at 26]. Plaintiff contends that there is long-standing precedent establishing that a detainee has a constitutional right to medical care when an officer becomes aware that the detainee needs medical attention. [*Id*. at 27]. Plaintiff contends that *Durham*, *Alspaugh*, *Loukas*, and *Brooks* are all distinguishable from the factual scenario in this case. [*Id*. at 29-30].[3]

Officer England replies that Plaintiff misses the point that "every reasonable officer" in defendant's position must understand that she violated a constitutional right based on existing precedent within the context of the particularized facts of the case. [Doc. 174 at 14]. Officer England contends that Plaintiff's argument is based on a high level of generality, rather than the particularized facts of the case. [*Id*.].

As noted above, Plaintiff bears the burden of establishing that Officer England is not entitled to qualified immunity and must show that the constitutional right that she alleges was violated was "clearly established." *See Chappell*, 585 F.3d at 907. In her response to Officer England's second motion for summary judgment, Plaintiff cites the following cases to support her contention that her right to adequate

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[3] Officer England contests whether each of the cited cases are distinguishable from the instant case. [Doc. 174, pp. 15-17].

medical care was clearly established: *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005); *Estate of Carter v. City of Detroit*, 408 F.3d 305 (6th Cir. 2005); *Heflin v. Stewart Cnty.*, 958 F.2d 709 (6th Cir. 1992); and *Hopper v. Plummer*, 887 F.3d 774 (6th Cir. 2018).

In *Owensby*, the plaintiff died after restraint attempts by officers, and each of the defendants had viewed the plaintiff in physical distress, yet made no attempt to summon or provide any medical care until several minutes later, when it was discovered that the plaintiff was not breathing. 414 F.3d at 603. In evaluating whether the defendants had violated a clearly established right, the Sixth Circuit noted that the defendants did not dispute that in general, the Fourteenth Amendment right of pretrial detainees to adequate medical care is, and has long been, clearly established. *Id*. at 604. The Court then rejected the defendants' argument that the "contours" of the right were different in that case, because the plaintiff was a just-arrested, fleeing, and resisting suspect. *Id*.

In *Carter*, defendants knew that the plaintiff was exhibiting the classic symptoms of a heart attack, knew that she had cried out for help, and believed that she was three days behind on her heart medication. 408 F.3d at 310. In light of this, the Sixth Circuit concluded that the defendants' failure to order transport to take the plaintiff to the hospital violated her clearly established right to adequate medical treatment in pretrial custody. *Id*. The Sixth Circuit concluded that "[w]here the circumstances are clearly sufficient to indicate the need of medical attention for injury or

illness, the denial of such aid constitutes the deprivation of constitutional due process." *Id*. at 313 (quoting *Fitzke v. Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972)). The Sixth Circuit then stated that, in 1992, it had explicitly held that a pretrial detainee's right to medical treatment for a serious medical need has been established since at least 1987. *Id*. (citing *Heflin*, 958 F.2d at 717). Thus, the Court concluded, the right violated was clearly established. *Id*.

In *Heflin*, an inmate hanged himself in the shower, and officers concluded that the inmate was dead after checking his pulse and for signs of respiration, but never cut the body down from the hanging position, instead, leaving the inmate's body hanging for over 20 minutes. 958 F.2d at 711-12. The Sixth Circuit acknowledged that, for a right to be "clearly established," there must be more than a general constitutional right recognized, but rather, the right must have been established in a "more particularized" sense. *Id*. at 717. However, the Court stated that "[i]t is not necessary that the very action in question has previously been held unlawful. Rather, the unlawfulness of the action must be apparent to the official in light of pre-existing law." *Id*. (internal quotation marks omitted). The Court then stated that "[t]here c[ould] be no doubt that in 1987 existing law clearly established the right of pretrial jail inmates to receive care for their serious medical needs." *Id*. The Court thus concluded that the unlawfulness of doing nothing to save the plaintiff's life would have been apparent to a reasonable officer in light of the pre-existing law. *Id*.

In *Hopper*, the plaintiff suffered a seizure, and both corrections officers and medical staff responded, but officers handcuffed the plaintiff behind his back and restrained him face down on the floor, causing the plaintiff to suffocate after a 22-minute struggle. 887 F.3d at 748. With regard to whether they had violated a clearly established right, the defendants argued that the case was unique because prior cases had not involved law enforcement officers working alongside qualified medical staff in dealing with an inmate not responding to commands and struggling with officers. *Id*. at 758-59. However, the Sixth Circuit pointed out that the defendants failed to discuss case law cited by the district court which discussed the "longstanding precedent establishing that a detainee has a constitutional right to medical care when an officer becomes aware that the detainee needs medical attention." *Id*. The Court noted that it had made clear that "fundamental fairness and our most basic conception of due process mandate that medical care be provided to one who is incarcerated and may be suffering from serious illness or injury where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness." *Id*. (internal quotation marks and alterations omitted). The Court further noted that the defendants conceded that this was a medical situation, and concluded that it "fail[ed] to see how, considering our precedent, a detainee like [plaintiff] could have no clearly established right to adequate medical care under circumstances even defendants admit indicated a need for medical attention." *Id*.

The Sixth Circuit also rejected the defendants' claim that the presence and activities of medical personnel absolved them of any liability. *Id*. The Court noted that it was "sharply disputed whether and to what extent" the defendants reasonably relied on or deferred to medical staff expertise. *Id*. at 758. The Court concluded that "[w]hen the legal arguments advanced rely entirely on a defendant's own disputed version of the facts, the appeal boils down to issues of fact and credibility determinations that we cannot make." *Id*. (internal quotation marks omitted). Thus, the Court found that this was a determination for the jury. *Id*. at 759.

In light of the case law presented by Plaintiff, the Court concludes that Plaintiff has met her burden of showing that the right that was violated was "clearly established." Although Defendant England points out that Plaintiff has not cited a case with the same facts as the instant matter, the cases cited by Plaintiff make clear that Defendant England's interpretation of the "particularized" requirement is too narrow. Rather, the Sixth Circuit has repeatedly held that a pretrial detainee has a right to adequate medical care when it is obvious that the detainee needs medical attention, and has repeatedly held that this is a sufficiently particularized right to be "clearly established" within the qualified immunity framework. Notably, the Court has already concluded that Plaintiff's medical need was obvious, therefore, given the precedent cited by Plaintiff, the Court concludes that Plaintiff's right, as a pretrial detainee, to receive *adequate* medical care, is clearly established.

The Court has carefully reviewed the cases cited by Officer England, and none of those cases compel a different conclusion. Moreover, to the extent that Officer England asserts that there was no clearly established right because she relied on Nurse Russell's assessment, the Court has previously explained why there is a genuine issue of material fact as to whether Nurse Russell provided any medical evaluation at all, much less one that Officer England could reasonably have relied upon. Accordingly, as in *Hopper*, there is a genuine issue for the jury, and the Court will not conclude that Plaintiff's right to adequate medical care was not clearly established on this ground. Therefore, the Court will **DENY** summary judgment on Count 9 as to Officer England.

B. Claim 11 - Assault and Battery

In her response brief, Plaintiff states that she will abandon her claim for assault and battery against Officer England. [Doc. 164 at 31, n. 19]. Considering Plaintiff's abandonment of this claim, the Court will **GRANT** summary judgment on Count 11 in favor of Officer England, and Count 11 will be **DISMISSED** as to Officer England.

C. Claim 13 - Negligence

Officer England again contends that the plain language of Tenn. Code Ann. § 29-20-205 advises that a pure negligence claim would have to be against Blount County, as immunity would be removed for such a claim. [Doc. 139, p. 30]. The Court previously rejected this claim as Officer England did not address the exception laid out in the plain language of Tenn. Code

Ann. § 29-20-205(2). [Doc. 105, p. 35]. Officer England states that, although Plaintiff may assert that, if there are civil rights violations, only Officer England may be held liable, this is contrary to Supreme Court case law holding that negligence cannot support a constitutional right or civil rights violation. [Doc. 139, p. 31]. However, once again, Officer England fails to address the exception in Tenn. Code Ann. § 29-20-205(2) which explicitly states that "immunity from suit of all government entities is removed for injury proximately caused by a negligent act or omission of an employee … except if the injury arises out of … civil rights[.]"

The Court has already determined that "[t]he question of whether 29-20-205(2)'s exception applies to any given case is a threshold legal issue under the TGTLA, and because Officer England does not address it, the Court cannot award immunity to her or consider arguments concerning the merits of the TGTLA claim." [Doc. 105, p. 37] (internal citations omitted). As Officer England has once again failed to meet her burden as the movant for summary judgment on an affirmative defense claim by not addressing the exception under 29-20-205(2), the Court again cannot award summary judgment as to Count 13.[4] *See Guthrie v. Rutherford County*, No. M2015–01718–COA–R3–CV, 2016 WL

[4] Officer England primarily argues that Supreme Court case law holds that negligence cannot support a constitutional rights or civil rights violation as alleged in a case. [Doc. 139, p. 31]. This argument is not persuasive as the TGTLA specifically provides an exception for negligence claims arising out of civil rights, which the Court noted prior case law determined to "mean and include claims arising under the federal civil rights laws, *e.g.*, 42 U.S.C. § 1983" [Doc. 105, p. 35, n. 21].

7242815, at *3 (Tenn. Ct. App. Dec. 15, 2016) ("The question of whether the immunity has been removed from the entity being sued is a threshold determination that must be resolved in every TGTLA case in order to proceed to the merits of the case[.]" (citation omitted)); see also Tenn. Code. Ann. § 29-20-310(a) (providing that courts must "first determine" whether any exception under subsection 29-20-205 is "applicable to the facts" before addressing potential liability).

Previously, the Court noted that, had Officer England provided the Court with grounds to address the merits of the TGTLA claim, her argument would still fail as she did not address the three-prong test for proximate cause under Tennessee law. [Doc. 105, pp. 37-38]. Officer England again fails to reference, cite to, or argue the elements of the three-prong test for proximate cause under Tennessee law. [Doc. 139, pp. 32-33]. As Officer England essentially makes the same arguments as in her initial motion for summary judgment already rejected by the Court, the Court once again finds that Officer England fails to meet her burden as the movement for summary judgment. [*See* Doc. 105, p. 38]. Therefore, the Court will **DENY** summary judgment as to Count 13 for the same reasons it did before. [*Id.*].

D. Claim 12 - Intentional Infliction of Emotional Distress

In her renewed motion, Officer England argues that she is not liable for intentional infliction of emotional distress ("IIED") because her conduct was not sufficiently outrageous, and Plaintiff did not suffer any serious mental injury. [Doc. 139 at 33]. She contends

that she used the amount of force necessary to reasonably control Plaintiff, which is not "outrageous" behavior. Additionally, she contends that any delay in getting Plaintiff out of her own urine was not "outrageous" under the circumstances. [*Id*.]. Finally, Officer England contends that Plaintiff has not and cannot present proof of any serious mental injury. [*Id*. at 34]. Plaintiff responds that the Court previously rejected essentially the same argument by Officer England, concluding that it could not weigh the evidence and decide whether Officer England's conduct was outrageous behavior or a reasonable response to Plaintiff's own behavior at the time, because that task belongs to the jury. [Doc. 164 at 35].

Officer England again does not address the first prong of the IIED analysis, and instead focuses on the second and third prongs. Officer England's arguments regarding the second prong are the same ones which the Court has previously denied. [Doc. 105, pp. 40-41].[5] Therefore, the Court will deny the arguments for the second prong of the IIED analysis for the same reasons as before. [*Id*.].

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[5] Officer England cites *White v. Trayser*, 2011 WL 1135552, at *4 (E.D. Mich. Mar. 25, 2011) to say that "an inmate being in one's urine for a brief period of time (even when the inmate is not a combative/belligerent inmate) is not a constitutional violation." [Doc. 139, p. 34]. The Court has carefully reviewed this case, and it says nothing of the sort. In *White*, the only reference to urine at *4 is a citation to: *Fackler v. Dillard,* No. 06–10466, 2006 WL 2404498, at *3 (E.D. Mich. Aug.16, 2006) (throwing a four ounce cup of urine through an inmate's food slot resulting in urine splashing on the inmate was a *de minimis* use of force). Those facts are distinctly different from the facts alleged in this case.

As to the third prong, when Officer England first moved for summary judgment regarding this count, the record was incomplete regarding expert testimony and depositions. As the Court stated above, the burden lies with the movant to show that a fact cannot be disputed. Fed. R. Civ. P. 56(c). In her renewed motion, Officer England generally points to Plaintiff's testimony, stating that Plaintiff "has had an opportunity to present proof of a 'serious mental injury'" and has not done so. [Doc. 139, p. 34].[6] Officer England does not cite to any portion of Plaintiff's testimony nor offer any other evidence that Plaintiff has not and cannot establish serious mental injury. As the Court has previously stated, Officer England bears the initial burden to establish that the record is without evidence of a serious injury. [Doc. 105, p. 39]. Officer England again confuses the legal standard and does not meet her burden for summary judgment. The Court will therefore **DENY** Officer England's motion for summary judgment as to Count 12 for the same reasons as it has before. [*Id.*].

E. Punitive Damages

Finally, Officer England contends that she is not liable for punitive damages under § 1983 because she did not violate any constitutional right and did not personally act in "callous disregard" of any of Plaintiff's constitutional rights. [Doc. 139 at 34]. As to the state law claims, Officer England contends that punitive

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[6] Officer England also references the Court's previous order regarding the City of Alcoa defendants [Doc. 79] which does not address the issue of Plaintiff's urination.

damages are unwarranted because the undisputed material facts do not support that she acted intentionally, fraudulently, maliciously, or recklessly. [*Id.*].

The Court has previously granted summary judgment regarding punitive damages for the underlying negligence claim, Count 13. [Doc. 105, p. 42]. Further, as the Court has denied summary judgment as to the underlying claims of Count 12 above, Officer England is not entitled to summary judgment as to punitive damages. The Court will therefore **DENY** summary judgment for punitive damages as to Count 12.

III. CONCLUSION

Accordingly, for the reasons stated herein, Defendant England's renewed motion for summary judgment [Doc. 138] will be **GRANTED in part** and **DENIED in part**. Specifically, the Court will rule on summary judgment as follows regarding each count:

1. **GRANTS** summary judgment as to Count 3.
2. **DENIES** summary judgment as to Count 9.
3. **GRANTS** summary judgment as to Count 10.
4. **GRANTS** summary judgment as to Count 11.
5. **DENIES** summary judgment as to Count 12.
6. **DENIES** summary judgment as to punitive damages for Count 12.

7. DENIES summary judgment as to Count 13.

An order consistent with this opinion will be entered.

IT IS SO ORDERED.

ENTER:

s/ Leon Jordan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:16-CV-377

[Filed: September 14, 2020]

ANNISSA COLSON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF ALCOA, TENNESSEE, *et al.*,	)
	)
Defendants.	)
	)

O R D E R

For the reasons stated in the memorandum opinion filed contemporaneously with this order, Defendant Mandy England's renewed motion for summary judgment [Doc. 138] is **GRANTED in part** and **DENIED in part**. The Court orders as follows:

1. **GRANTS** summary judgment as to Count 3. Count 3 is **DISMISSED** as to Officer England.

2. **DENIES** summary judgment as to Count 9.

3. **GRANTS** summary judgment as to Count 10. Count 10 is **DISMISSED** as to Officer England.

4. **GRANTS** summary judgment as to Count 11. Count 11 is **DISMISSED** as to Officer England.

5. **DENIES** summary judgment as to Count 12.

6. **DENIES** summary judgment as to punitive damages for Count 12.

7. **DENIES** summary judgment as to Count 13.

IT IS SO ORDERED.

ENTER:

s/ Leon Jordan
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-6084

[Filed: November 1, 2021]

ANNISSA COLSON,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CITY OF ALCOA, TENNESSEE, ET AL.,	)
	)
Defendants-Appellants.	)
	)

O R D E R

BEFORE: GIBBONS, WHITE, READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Readler would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
KNOXVILLE DIVISION

No. 3:16-CV-377

[Filed: March 26, 2018]

ANNISSA COLSON,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF ALCOA, TENNESSEE, *et al.*,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION

This matter is before the Court on Defendant Officer Mandy England's Motion for Summary Judgment [doc. 66], Officer England's Brief Supporting the Motion [doc. 67], Plaintiff Annissa Colson's Response [doc. 101], and Officer England's Reply [doc. 102]. For the reasons herein, the Court will grant Officer England's motion in part and deny it in part.

I. BACKGROUND

On June 23, 2015, Officer Dustin Cook of the Alcoa Police Department parks his patrol vehicle alongside Springbrook Road—a two-lane road with fields on either side of it—in Blount County, Tennessee. [Video: Officer Cook VieVu, 19:25:56–60 (June 23, 2015) (on file with the Court); Officer Cook Aff., doc. 66-9, at 9]. Ahead, just off the road, a vehicle rests fender-first in a ditch. [Officer Cook VieVu at 19:26:09]. Behind the vehicle, a woman sits in the grass. [*Id.* at 19:26:07]. A man wearing a police officer's badge around his neck, but not wearing a uniform, stands in the grass not far away from her. [*Id.* at 19:26:10]. Officer Cook acknowledges him. "What's up?" Office Cook says to him. [*Id.* at 19:26:24]. "She's drunk," the off-duty officer says, pointing to the woman in the grass. [*Id.* at 19:26:27].

The off-duty officer tells Officer Cook that he was driving on Springbrook Road earlier in the afternoon, saw the woman driving her vehicle—the same vehicle now lying in the ditch—and witnessed a boy jump from the vehicle and run into the grass adjacent to the road. [*Id.* at 19:26:30–49]. According to the off-duty officer, the woman "gunned it" after the boy fled the vehicle, traversing off road, nearly hitting the boy, and crashing into the ditch. [*Id.*]. He describes the boy as the woman's son and informs Officer Cook that he is sitting safely in his sport utility vehicle by the road. [*Id.* at 19:26:32, 50]. He hands the woman's driver's license to Officer Cook. [*Id.* at 19:27:05]. Officer Cook radios for backup and approaches the woman sitting in the grass. [*Id.* at 19:27:07–12; 19:27:28–42].

"Ms. Colson," he says. [*Id.* at 19:27:42]. "Yes," she says. [*Id.* at 19:27:43]. He asks her how many drinks she consumed during the day. [*Id.* at 19:29:05]. Her answer is two shots of vodka. [*Id.* at 19:29:07–10]. After gathering some information about her prescribed medications, Officer Cook ends their conversation and walks to the sport utility vehicle by the road. [*Id.* at 19:29:10–40]. He finds Ms. Colson's son, Mason, inside and introduces himself. [*Id.* at 19:29:42–48]. He asks Mason to describe what happened. [*Id.*]. Mason says that he and his mom spent the day at a public pool and she brought "something that makes her drunk, alcohol," but he did not actually see her drink it. [*Id.* at 19:30:49–56, 19:30:36–40]. He adds that, after they left the pool and got to this point in the road, he pulled the emergency break in his mom's vehicle and ran away because she was driving "very fast" and he was afraid they were going to crash.[1]

After Officer Cook finishes speaking with Mason, Officer Arik Wilson arrives at the scene. [*Id.* at 19:33:48]. Officer Cook approaches Ms. Colson again and tells her that he would like her to submit to a field-sobriety test. [*Id.* at 19:36:21]. She declines to participate in the test. [*Id.* at 19:36:32]. He asks her to stand up. [*Id.* at 19:36:38]. She refuses. [*Id.* at 19:36:39]. He then places her under arrest, charging her with driving under the influence. [*Id.* at

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[1] At the time, Mason was ten-years old. [Officer Cook VieVu at 19:31:10]. Ms. Colson, in an affidavit that she filed with the Court, maintains that Mason ran from her vehicle because he was "mad that [she] would not take him to McDonald's." [Colson Aff., doc. 101-3, ¶ 10].

19:36:39–59].[2] He and Officer Wilson instruct her to stand up and place her hands behind her back, at least half a dozen times before she complies with their orders. [*Id.* at 19:36:36–19:37:35]. As Officer Cook escorts her to his patrol vehicle, he asks her if she will consent to a blood alcohol test. [*Id.* at 19:38:16–19]. Her answer is no. [*Id.*]. Officer Cook advises her that he will attempt to obtain a search warrant for her blood and will bring another charge against her if she does not consent to a blood alcohol test. [*Id.* at 19:49:02–06]. After he offers to drive her to a local hospital for the test, she relents and assents to the test. [*Id.* at 19:49:34–49]. Officer Wilson agrees to follow them to the hospital after Officer Cook tells him that Ms. Colson is "screaming and cussing a little." [*Id.* at 19:50:32–35].[3]

Once they reach the hospital, Ms. Colson exits Officer Cook's patrol vehicle and informs the officers that she will not consent to a blood alcohol test after all. [*Id.* at 19:59:06–11]. "Okay," Officer Cook says. [*Id.*]. He tells Ms. Colson that he will attempt to acquire a search warrant for her blood, and he instructs her to retake her seat in the patrol vehicle in the meantime. [*Id.* at 19:59:53–20:00:04]. Ms. Colson refuses to get back into the patrol vehicle. "I'm standing here," she says. [*Id.*]. After Ms. Colson does

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[2] Officer Cook, in an affidavit that he later filed in state court, declared that Ms. Colson had a "strong odor of an intoxicant" and "her speech was slurred." [Officer Cook Aff. at 10].

[3] Ms. Colson calls Officer Cook a "motherfucker" during their conversation about the blood alcohol test. [*Id.* at 19:74:39–42].

not heed his command for the fifth time, he uses force against her. [*Id.*]. "I'm standing here, fucker," she says in response. [*Id.*]. A struggle then ensues between Ms. Colson and the officers, with Officer Wilson trying to push her into the backseat from one side of the patrol vehicle and Officer Cook trying to pull her in from the other side. [*Id.* at 20:00:04–50]. To the sound of a thud, Ms. Colson—who is now outside the lens of Officer Cook's body camera—screams: "Ow, my fucking knee, motherfucker!" [*Id.*]. Officer Wilson tells Officer Cook that "her knee just popped." [*Id.* at 20:00:58].

At that point, they release Ms. Colson, [*id.* at 20:00:55], but continue to order her to get inside the patrol vehicle, [*id.* at 20:00:56–20:01:55]. And she continues to defy their orders, shouting about her knee, swearing at the officers, and pleading for time to breathe. [*Id.*].[4] The officers give her some time, but she only continues to ask for more, prompting them to reapply force to her. [*Id.* at 20:01:56—20:02:09]. She resists them, but they eventually manage to strong-arm her into the patrol vehicle. [*Id.*]. Officer Cook then radios his supervisor, describing the struggle that had ensued at the hospital and noting that Ms. Colson just "ripped the rubber off the side of [the patrol] car, on the inside of the door." [*Id.* at 20:03:36–20:04:32]. He also informs his supervisor of a possible injury to Ms. Colson's knee. [*Id.*]. His supervisor instructs him to bring her to the local jail.

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[4] Ms. Colson suffers from "a severe panic disorder," an anxiety disorder for which she takes medication. [Colson Aff. ¶ 7]. She maintains that she "experienced such an attack on June 23, 2015, when [she] was arrested by Officers Cook and Wilson." [*Id.* ¶ 9].

[*Id.*]. As Officer Cook transports her to the jail, she repeatedly swears at him, cries out for her mother, and wails about her knee. [*Id.* at 20:04:43–20:06:32].

They soon arrive at the jail's sally port, and Officer England is there waiting for them. [*Id.* at 20:06:20–20:07:10]. "Bringing you a combative one," Officer Cook says to her. [*Id.*]. He explains that he had to use force against Ms. Colson at the hospital, though he does not mention her possible injury. [*Id.*]. Officer England escorts Ms. Colson, who is sobbing but walking upright, from the sally port to a pat down room, where officers are present. [*Id.* at 20:07:11–48]. Ms. Colson tells Officer England that "my knee is fucked up thanks to your officers." [*Id.* at 20:07:49–50]. Officer England acknowledges her, responding, "Okay." [*Id.* at 20:07:51]. Seconds later, Ms. Colson falls to the floor, unable to support her own weight as Officer England is frisking her. "Ow, ow, my fucking knee!" she says. [*Id.* at 20:08:13–20]. Officer England lifts her to her feet and instructs her to stand. [*Id.* at 20:08:15–18]. Ms. Colson again says, "That's from your officers," referring to her knee. [*Id.* at 20:08:17–20]. Once more, Officer England acknowledges her. [*Id.*].

Officer Cook asks for the nurse. [*Id.* at 20:08:56–20:09:00]. Shortly afterwards, one of the other officers in the pat down room calls for the nurse. "Would you send the nurse over here, please?" the officer says into her walkie-talkie. [*Id.* at 20:09:28–37]. In response, Ms. Colson echoes her, saying, "Please." [*Id.* at 20:09:39]. While the officers remove Ms. Colson's jewelry as part of the pat-down process, Ms. Colson steps forward to place her ring in a plastic bag. [*Id.* at

20:11:27:31]. She totters and winces, prompting both Officer England and another officer to take her by the arms and steady her. [*Id.* at 20:11:21–32].

The nurse enters the pat down room and approaches Ms. Colson, who points out her injured knee and says she "never heard it pop so much in her life." [*Id.* at 20:12:02–25]. The nurse directs her to straighten her leg, to bend it back, and to move it from side to side. [*Id.* at 20:12:28–41]. "It hurts, it hurts," Ms. Colson says. [*Id.*]. The nurse next instructs her to stand up straight against the wall. "I can't," she says. "I can't straighten my legs." [*Id.* at 20:12:57–20:13:04]. After bending to examine Ms. Colson's knee, the nurse says, "I don't see no swelling," and she leaves the room. [*Id.* at 20:13:08–14]. In response to this statement, the officers guide Ms. Colson toward a cell located farther inside the jail. [*Id.* at 20:13:12–20:14:04]. Officer Cook lingers so he can speak with the nurse about drawing Ms. Colson's blood. [*Id.*]. As they are talking to each other, and as the officers are moving Ms. Colson into the cell, Ms. Colson—who is now outside the lens of Officer Cook's body camera—raises her voice at the officers. [*Id.* at 20:13:43–20:14:04]. She continuously yells the word "bitch." [*Id.* at 20:13:55–20:14:05].

"Hang on," Officer Cook says, "I'm going to record this." [*Id.* at 20:14:04–06]. As the commotion between Ms. Colson and the officers is stirring in the background, he moves toward the cell where the officers have taken her. [*Id.* at 20:14:06–11]. Inside, at least five officers are pinning her to the floor. [*Id.* at

20:14:12].[5] "Are you done?" one of them says to her. [*Id.* at 20:14:13]. "Bitch," she says back. [*Id.* at 20:14:14]. Officer Cook turns off his body camera; all goes black. [*Id.* at 20:14:15].

By the time Officer Cook turns his camera on again, Ms. Colson is lying in a restraint chair, strapped down to it. [Video: Officer Cook VieVu 2, 21:31:07 (June 23, 2015) (on file with the Court)]. Officer Cook shows Ms. Colson a search warrant from a magistrate. [*Id.* at 21:31:17–27; Search Warrant, doc. 66-6]. He informs her that the nurse is now going to draw her blood. [Officer Cook VieVu 2 at 21:31:28]. She complains that no one has let her use the restroom, even though she has requested to use it "for the last hour." [*Id.* at 21:31:31–32]. Officer Cook says that he is sure the jail's officers will let her use the restroom if she cooperates with them. [*Id.* at 21:31:33–36]. "Okay," she says, nodding. [*Id.* at 21:31:40]. Seconds later, she again asks for permission to go to the restroom. [*Id.* at 21:31:50–52]. "I pissed myself," she says. [*Id.* at 21:21:59–32:00:03]. In the background, a female officer—possibly Officer England—says, "Guys, you

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[5] According to a sworn statement from Officer England, Ms. Colson "became even more upset and belligerent" inside the cell. [Officer England Decl., doc. 66-4, ¶ 10]. "[S]he lunged at, kicked at, and struggled with us to prevent us from shutting the door" and "was taken down and then put into the restraint chair to bring her under control," not only "[f]or officer protection" but also "for her own safety." [*Id.*]. Corporal Michelle Bishop—who was the supervisory officer in charge at the jail on June 23, 2015—filed her own declaration corroborating Officer England's rendition of these events. [Corporal Bishop Decl., doc. 66-5, ¶¶ 7, 10].

don't have to worry about it. She's already peed." [*Id.* at 21:32:28–29].

The nurse enters the room and prepares to take blood from Ms. Colson's left arm, but Ms. Colson intimates that she would prefer to have the nurse draw blood from her right arm instead. [*Id.* at 21:32:33–21:33:07]. Accommodating her, the nurse moves to the restraint chair's opposite side, where she readies to draw blood from Ms. Colson's right arm. [*Id.*]. But Ms. Colson appears to resist her efforts, refusing to keep her arm at rest. [*Id.* at 21:33:22]. "I have no control over my arm staying still. I'm sorry," she says to the nurse. [*Id.* at 21:33:22–25]. She refuses to cooperate because the officers did not let her use the restroom: "I have no control over my arm staying still. I had to pee like an hour ago and nobody let me," she says. [*Id.* at 21:33:36–40]. Several officers enter the room, including Officer England, who says, "We're going to draw that motherfucking blood whether you like it or not." [*Id.* at 21:33:56–59]. Ms. Colson says, "I'm just going to move. I'm just going to keep moving and nobody's going to take my blood. Blah, blah, blah." [*Id.* at 21:33:59–21:34:03]. Nearly at eye-level with Ms. Colson, Officer England holds down her right arm with one hand and presses into her shoulder with the other hand, while two other officers also help to keep her still. [*Id.* at 21:34:06–44]. As the nurse is attempting to take Ms. Colson's blood, Ms. Colson lunges at Officer England's bare arm with her mouth. [*Id.* at 21:34:45].

Almost in one motion, Officer England recoils from Ms. Colson and slaps her in the face. [*Id.* at 21:34:46]. "Don't you fucking bite me!" Officer England says, her

eyes ballooning. [*Id.* at 21:34:49–50]. She leaves the room, while a male officer places a headlock around Ms. Colson. [*Id.* at 21:34:51–52]. "You're hurting my neck!" she says to him. [*Id.* at 21:34:53]. "Good, you shouldn't have just bit my officer," he says back to her. [*Id.* at 21:34:54–57]. "I didn't bite her. I tried to. I didn't bite the bitch, though," she replies. [*Id.* at 21:34:57–21:35:00]. Officer England says, "You fucking bit me, I've got the marks." [*Id.* at 21:34:58–21:35:00]. Carrying a motorcycle helmet, she returns to the room. [*Id.* at 21:35:11]. She fastens the helmet to Ms. Colson's head, with the officers' help. [*Id.* at 21:35:12–21:35:30]. The helmet has a convex guard covering the jaw and mouth area. [*Id.*]. While the officers hold Ms. Colson, the nurse finishes drawing her blood without further incident. [*Id.* at 21:35:31–21:38:48].

Following her release from the jail, Ms. Colson went to the hospital, where she learned that she had a fractured tibial plateau, a torn anterior cruciate ligament, and a torn lateral collateral ligament. [Colson Aff., doc. 101-3, ¶ 43]. She required surgery to repair the damage. [*Id.* ¶ 44]. Officer Cook later filed several affidavits against her, for charges that included felony reckless endangerment, driving under the influence, assault on a police officer,[6] and resisting arrest. [Officer Cook Aff. at 5–12]. Her blood sample from the night of June 23, 2015, revealed a blood

[6] Officer Cook accused Ms. Colson of kicking him while he tried to force her into his patrol vehicle at the hospital. [Officer Cook Aff. at 10]. During their struggle, his body camera records him saying to Ms. Colson, "Don't try to kick me." [Officer Cook VieVu at 20:00:10–11].

alcohol concentration of .151%, [Alcohol Report, doc. 66-2, at 1], which is approximately twice the legal limit under Tennessee law, Tenn. Code. Ann. § 55-10-401.[7]

Ms. Colson has now filed suit in this Court against the City of Alcoa, Tennessee; Blount County, Tennessee; and officers of these local governments in their official and individual capacities. She brings several claims under 42 U.S.C. § 1983, asserting that these parties violated her rights under the Fourth, Eighth, and Fourteenth Amendments of the Constitution. [Compl., doc. 1-1, 32–53]. As to Officer England, Ms. Colson maintains that these violations consist of the use of excessive force (Count Four) and the failure to provide adequate medical care (Count Nine). [*Id.* ¶¶ 116–18, 165–72].[8] Ms. Colson also brings three claims against Officer England under Tennessee law, including assault and battery (Count Eleven), intentional infliction of emotional distress (Count Twelve), and negligence (Count Thirteen). [*Id.* ¶¶ 178–82, 183–89, 190–94]. Officer England, in her individual capacity, now moves for summary judgment

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[7] Despite her blood alcohol concentration on that day and despite telling Officer Cook that she had consumed two shots of vodka, Ms. Colson now, in a sworn statement to the Court, insists that she only "drank a coke that had whipped cream alcohol in it." [Colson Aff. ¶ 10].

[8] Under § 1983, Ms. Colson also brought a claim against Officer England for failure to protect (Count Ten), [Compl. ¶¶ 173–77], but now informs the Court that she wishes to abandon that claim to the extent it applies to Officer England, [Pl.'s Br. at 4 n.2].

on most of these claims, arguing that she is entitled to qualified immunity. [Def.'s Mot. Summ. J. at 1–2].[9]

When Officer England moved for summary judgment, discovery had yet to begin in this case, and discovery is now ongoing. [*See* Scheduling Order, doc. 90, at 3 (allowing the parties to conduct discovery until ninety days before trial)]. By agreement of the parties, the Court permitted Ms. Colson to carry out limited discovery so that she could properly respond to Officer England's motion. [Order, doc. 83, 2–3]. The parties elected to limit discovery to the depositions of Officer England and Corporal Michelle Bishop, her supervisor. [*Id.*]. To date, the parties have reported no problems with their agreed-upon discovery process. Ms. Colson has now filed a response, with excerpts from the testimonies of Officer England and Corporal Bishop, and Officer England has filed a reply. The Court therefore deems Officer England's motion for summary judgment to be ripe for its consideration.

II. LEGAL STANDARD

Summary judgment is proper when the moving party shows, or "point[s] out to the district court," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), that the record—the admissions, affidavits, answers to interrogatories, declarations, depositions, or other materials—is without a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, Fed. R. Civ. P. 56(a), (c). The moving

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[9] Although Officer England requests summary judgment on all the claims, she does not address Ms. Colson's assault and battery claim in her legal brief.

party has the initial burden of identifying the basis for summary judgment and the portions of the record that lack genuine issues of material fact. *Celotex*, 477 U.S. at 323. The moving party discharges that burden by showing "an absence of evidence to support the nonmoving party's" claim or defense, *id.* at 325, at which point the nonmoving party, to survive summary judgment, must identify facts in the record that create a genuine issue of material fact, *id.* at 324.

Not just any factual dispute will defeat a motion for summary judgment—the requirement is "that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it may affect the outcome of the case under the applicable substantive law, *id.*, and an issue is "genuine" if the evidence is "such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In short, the inquiry is whether the record contains evidence that "presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251–52. When ruling on a motion for summary judgment, a court must view the facts and draw all reasonable inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. A court may also resolve pure questions of law on a motion for summary judgment. *See Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 550 (6th Cir. 2015).

III. ANALYSIS

As an initial matter, the Court notes that Officer England, in supporting her motion, has filed numerous video recordings—from the point of view of the officers' body cameras and dash cameras—for the Court's consideration. These videos bring illumination to many of the events and circumstances that the parties have disputed through the pleading stage and up to this point. Because the Court does not ordinarily receive video evidence when resolving motions for summary judgment, it will explain how it intends to view—not weigh, but view—this evidence through the prism of the legal standard governing summary judgment.

First, the Court may properly consider the videos as evidence at this stage in the litigation, and neither party argues otherwise. *See Griffin v. Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010) (recognizing that "a court may properly consider videotape evidence at the summary-judgment stage"); *see, e.g.*, *Lewis v. Charter Twp.*, 660 F. App'x 339, 340–47 (6th Cir. 2016) (relying on video evidence in a § 1983 case). Second, when viewing the videos, the Court has to construe them "in the light most favorable to [the nonmoving party]." *Dunn v. Matatall*, 549 F.3d 348, 353 (6th Cir. 2008).

But the Court also has to "view[] the facts in the light depicted by the videotape." *Scotty v. Harris*, 550 U.S. 372, 381 (2007). In other words, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the [video], so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380. In short,

the Court, under the guise of construing the videos in the light most favorable to Ms. Colson, will not peddle a version of events that is tantamount to "visible fiction." *Id.* at 381.

A. Section1983

Section 1983 permits a claim for damages against "[e]very person who, under color of [state law], 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." 42 U.S.C. § 1983. Because § 1983 has "a 'color of law' requirement," a defendant can be liable "only if state law, whether provided by statute or judicially implied, empowers him with some legal obligation to act." *Doe v. Claiborne County*, 103 F.3d 495, 512 (6th Cir. 1996) (citation omitted). A claim under § 1983 therefore consists of two elements: the defendant (1) must deprive the plaintiff of either a constitutional or a federal statutory right[10] and (2) must deprive the plaintiff of one of these rights while acting under color of state law (i.e., state action). *Id.* at 511. "Absent either element, a section 1983 claim will not lie." *Christy v. Randlett*, 932 F.2d 502, 504 (6th Cir. 1991).

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[10] A violation of a constitutional or federal statutory right is a prerequisite to a claim under § 1983 because § 1983 "does not confer substantive rights" on a plaintiff; rather, it is merely a conduit through which a plaintiff may sue another to "vindicate rights conferred by the Constitution or laws of the United States." *Aldini v. Johnson*, 609 F.3d 858, 864 (6th Cir. 2010).

B. Qualified Immunity

"Qualified immunity is a personal defense that applies only to government officials in their individual capacities." *Benison v. Ross*, 765 F.3d 649, 665 (6th Cir. 2014) (citation omitted). It insulates government officials "from undue interference with their duties," *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982), affording them "breathing room to make reasonable but mistaken judgments" and protecting "all but the plainly incompetent or those who knowingly violate the law," *Stanton v. Sims*, 571 U.S. 3, 5 (2013) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). To obtain qualified immunity, the defendant shoulders the initial burden to present evidence showing that his acts were within his discretionary authority. *Gravely v. Madden*, 142 F.3d 345, 347 (6th Cir. 1998); *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991). If the defendant dispatches this burden, the burden then shifts to the plaintiff, who must identify evidence satisfying a two-party inquiry. *Gravely*, 142 F.3d at 348; *Wegener*, 933 F.2d at 392.

Under this two-party inquiry, the defendant is entitled to qualified immunity unless the evidence, "viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) the right was clearly established." *Morrison v. Bd. of Trs.*, 583 F.3d 394, 400 (6th Cir. 2009) (citation and footnote omitted). "An answer of 'yes' to both questions defeats qualified immunity, while an answer of 'no' to either question results in a grant of qualified immunity."

Haley v. Elsmere Police Dep't, 452 F. App'x 623, 626 (6th Cir. 2011). In performing an analysis under the two-party inquiry, a court does not have to address the prongs sequentially; neither one is an antecedent to the other. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *see al-Kidd*, 563 U.S. at 735 (instructing courts to "think carefully before expending 'scare judicial resources' to resolve difficult and novel questions" under the two-party inquiry, particularly when those questions "will 'have no effect on the outcome of the case'" (quotation omitted)).

Before the Court begins its analysis, it notes that record contains no dispute regarding whether Officer England was acting within her discretionary authority during the events in question. First, Ms. Colson maintains that Officer England "used her position of authority" when violating her constitutional rights, and second, she accedes that "it is [her] burden to show that [Officer England] is not entitled to qualified immunity." [Pl.'s Resp. at 12, 25]. The Court therefore considers Ms. Colson to be the party carrying the burden. To discharge her burden, she must offer evidence satisfying both prongs of the two-part inquiry—with the Court viewing that evidence in the light most favorable to her. *Morrison*, 583 F.3d at 400.

1. Ms. Colson's Claim for Excessive Force

Under the Constitution, four provisions proscribe the use of excessive force—the Fourth, Eighth, Fifth, and Fourteenth Amendments—and whether one applies over the other depends on the circumstances. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2477 (2015) (Scalia, J., dissenting). Any excessive force claim under

§ 1983 therefore cannot be "governed by a single generic standard." *Graham v. Connor*, 490 U.S. 386, 393 (1989). Instead, "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Id.* at 394 (citation and footnote omitted).

i. The Specific Constitutional Right

Ms. Colson identifies the "challenged application of force" as Officer England's slap to her face: "Plaintiff's excessive force claim[] focuses only on England's actions in slapping Plaintiff across the face while she was restrained in the restraint chair." [Pl.'s Resp. at 1 n.3]. Officer England concedes that she "reflexively and defensively open handedly smacked Ms. Colson's face away from where she was biting my arm." [Officer England Decl., doc. 66-4, ¶ 15]. The "specific constitutional right allegedly infringed" by Officer England's slap to Ms. Colson's face, however, is a source of dispute between the parties. Ms. Colson describes her claim as falling within the Fourth Amendment's protections, whereas Officer England believes that the Fourteenth Amendment's protections should be in play instead. [Def.'s Br. at 10–28; Pl.'s Resp. at 12–13; Def.'s Reply at 4–5].

The parties' disagreement is hardly an insoluble one. The Fourth Amendment protects people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Under this amendment, a police officer's use of force "will constitute a seizure," and it will violate a federal right if it is "'objectively [un]reasonable' in light of the facts and circumstances."

Jackson v. Washtenaw County, 678 F. App'x 302, 306 (6th Cir. 2017) (quoting *Graham*, 490 U.S. at 397). "[I]t is well-settled that the Fourth Amendment's protections extend through the booking process." *Muhammad v. Skinner*, 193 F. Supp. 3d 821, 830 (E.D. Mich. 2016); *see Malory v. Whiting*, 489 F. App'x 78, 81 (6th Cir. 2012) ("The Fourth Amendment of the United States Constitution protects a person from being subjected to excessive physical force during the course of . . . booking[.]" (citations omitted)). The parties agree that Officer England slapped Ms. Colson while she was a pretrial detainee undergoing booking, [Officer England Decl. ¶ 7; Def.'s Br. at 4, 10, 19–20; Pl.'s Resp. at 3, 13], and this mutual concession ought to put to rest any issue about the applicable constitutional provision.

Even if this is not the case, "a pretrial detainee's excessive force claim brought under the Fourteenth Amendment's Due Process Clause is subject to the same objective standard as an excessive force claim brought under the Fourth Amendment." *Clay v. Emmi*, 797 F.3d 364, 369 (6th Cir. 2015) (citing *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–75 (2015)); *see Kingsley*, 135 S. Ct. at 2479 (Alito, J., dissenting) (stating that a pretrial detainee's excessive force claim under the Fourth Amendment "would be indistinguishable from [a] substantive due process claim"). So "under either amendment, the court would employ the same objective test for excessive force," *Clay*, 797 F.3d at 369 (citing *Kingsley*, at 2472–73), and the Court can therefore identify no reason to restyle Ms. Colson's claim as one falling within the Fourteenth Amendment rather than the Fourth Amendment, *see*

generally, *Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd.*, 833 F.3d 680, 688 (6th Cir. 2016) ("As the master of the complaint, the plaintiff may decide what claims to bring and how to prove them.").

ii. The Two-Part Inquiry for Qualified Immunity

Now that the Court has determined that the Fourth Amendment is the appropriate terrain for Ms. Colson's excessive force claim, it must next address Officer England's right to qualified immunity under the two-part inquiry. Again, the Court has license to begin with either prong, and it makes its decision based on "the circumstances in the particular case at hand." *Pearson*, 55 U.S. at 236. "There are cases in which it is plain that a constitutional right is not clearly established[.]" *Id.* at 237. This case is one of those cases, so the Court will begin with the second prong.

To show that Officer England violated a clearly established Fourth Amendment right under this prong, Ms. Colson's task is to demonstrate that the "contours" of that right, at the time of the conduct in question, were "sufficiently clear" so "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate," though the existence of precedent that is "directly on point" with the specific facts or circumstances at issue is unnecessary. *al-Kidd*, 563 U.S. at 741 (citations omitted). The test is simply whether the law was clear enough in relation to the specific facts that confronted an official when he acted. *See Crockett v. Cumberland*

Coll., 316 F.3d 571, 583 (6th Cir. 2003) ("Whether the right at issue was 'clearly established' will turn on the 'particularized' circumstances of the case" (quotation omitted)); *see also* al-Kidd, 563 U.S. at 742 ("We have repeatedly told courts . . . not to define clearly established law at a high level of generality" but in relation to "the violative nature of [the] particular conduct." (citations omitted)). Under this test, the parties cite reams of precedent to undergird their positions. Ms. Colson maintains that the law clearly establishes that an officer violates the Fourth Amendment by slapping a restrained detainee. [Pl.'s Resp. at 19]. Officer England, however, argues that the law clearly establishes that a slap is merely a de minimis use of force and does not violate the Fourth Amendment. [Def.'s Br. at 15 n.36].

"[I]n this Circuit, the law is clearly established that an officer may not use additional gratuitous force once a suspect has been neutralized." *Alkhateeb v. Charter Twp.*, 190 F. App'x 443, 452 (6th Cir. 2006) (citations omitted). While the Sixth Circuit has not adopted a blanket definition for the term "neutralized," it has imparted ample meaning to it by indicating, in various cases, that a person is neutralized when he is (1) restrained and (2) non-resistant. *See Lustig v. Mondeau*, 211 F. App'x 364, 371–72 (6th Cir. 2006) (stating that "[i]t is sufficiently obvious" that an officer would violate the Fourth Amendment by using additional force on a detainee who is already [1] "restrained in a full control hold by two officers" and [2] "nonviolent" (citing *Smith v. Cupp*, 430 F.3d 766, 777 (6th Cir. 2005))); *Bultema v. Benzie County*, 146 F. App'x 28, 37 (6th Cir. 2005) ("[W]e have . . . held for

more than twenty years that it is clearly established in this circuit that 'a totally gratuitous blow' to a suspect who is [1] handcuffed and [2] offering no resistance violates the Fourth Amendment." (citation omitted)); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) ("[I]t is clearly established that the Officers' use of pepper spray against [the plaintiff] after he was [1] handcuffed and [2] hobbled was excessive."); *see also Caie v. W. Bloomfield Twp.*, 485 F. App'x 92, 96–97 (6th Cir. 2012) (concluding that one officer's use of a taser on a prostrate plaintiff was not gratuitous because the plaintiff continued to "actively resist[] the officers' attempts to secure his arms" and the taser "gain[ed] control over a highly intoxicated, volatile, and uncooperative subject"); *see generally Rudlaff v. Gillispie*, 791 F.3d 638, 641, 643 (6th Cir. 2015) (defining "active resistance" as a person's use of physical force against an officer and recognizing that it entitles the officer to react with the "amount of force necessary to ensure submission").

When a person is neutralized—restrained and non-resistant—even an officer's de minimis use of force against that person, including a slap, will constitute excessive force under the Fourth Amendment. *See Pigram ex. rel Pigram v. Chaudoin*, 199 F. App'x 509, 513 (6th Cir. 2006) (determining that an officer violated the Fourth Amendment when he slapped the handcuffed plaintiff to squelch his "smart-ass mouth," rather than "to protect himself, other officers, or the public"); *Baskin v. Smith*, 50 F. App'x 731, 737 n.2 (6th Cir. 2002) ("A factor that is not crucial to an analysis of a claim for excessive force in violation of the Fourth Amendment is the extent of the injury inflicted.");

Ingram v. City of Columbus, 185 F.3d 579, 597 (6th Cir. 1999) (acknowledging that "a plaintiff may allege use of excessive force even where the physical contact between the parties did not leave excessive marks or cause extensive physical damage" (citation omitted)). A de minimis use of force can violate the Fourth Amendment because its protections are broad enough to prohibit "'antagonizing' and 'humiliating' conduct" when it "crosses the line 'into physical abuse of an incapacitated suspect.'" *Morrison*, 583 U.S. at 407 (quotations omitted).

In this case, the question is whether, on June 23, 2015, the law clearly established that Officer England, by slapping Ms. Colson while she was tied to the restraint chair, used excessive force in violation of the Fourth Amendment. The answer is no, based on this case's specific facts. Ms. Colson concedes that she was not fully restrained in the restraint chair, stating that she was "unable to move *most* of [her] body" but was able to move her head and neck. [Colson Aff. ¶¶ 29, 32 (emphasis added)]. The video shows that, with this partial range of motion, she turned her head sideward and incontrovertibly tried to bite Officer England's nearby arm. [Officer Cook VieVu 2 at 21:34:45]. No reasonable jury could form a different conclusion. Ms. Colson even admitted during the incident that she tried to bite Officer England: "I didn't bite her. I tried to. I didn't bite the bitch, though." [*Id.* at 21:34:57–21:35:00]. In line with this evidence, Officer England testified that Ms. Colson's mouth contacted her arm and left saliva on it, before she thwarted Ms. Colson's

attack by slapping her face. [Officer England Dep., doc. 101-1, 40:17–18].[11][12]

Ms. Colson now maintains that, at the time, she was in pain and simply "tried to nudge England's hand away from [her] chest with [her] chin." [Colson Aff. ¶ 32]. This rendering of the incident is outright fiction; it is untenable when the Court views it "in the light depicted by the videotape," and it is equally untenable when it views it in the light most favorable to Ms. Colson. *Scottv*, 550 U.S. at 381. To be clear, the Court is not weighing the evidence, not only because it would err by doing so but also because there is nothing for it to weigh. Simply, Ms. Colson's story is so "blatantly contradicted" by the video that the Court is under no obligation to "adopt that version of the facts for purposes of ruling on [the] motion for summary judgment." *Id.* at 380. Again, no reasonable jury could return a verdict for Ms. Colson based on her story.

The doctrine of qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law." *Stanton*, 571 U.S. at 5 (quoting *al-Kidd*, 563 U.S. at 743). When Officer England slapped Ms. Colson, she fit neither description. While true, Ms. Colson was mostly restrained when the incident took place, she was not—by her own admission—fully restrained, and with her limited ability to move, she

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[11] Officer England also testified that the attempted bite left a red mark on her arm but did not draw blood, and that afterwards the jail's nurses washed her with "hepatitis soap." [Officer England Dep. at 40:17–18; 40:21–22].

[12] Pincites to the record refer to the electronic page numbers.

managed to perpetrate an act of violence against Officer England. Under these *particular facts*, the law was sufficiently clear so that a reasonable officer, on June 23, 2015, would have understood that a slap to Ms. Colson's face was not gratuitous and did not violate her rights under the Fourth Amendment. *Compare Bultema*, 146 F. App'x at 37 (defining the parameters of neutralization, which requires a person to be restrained and not actively resistant to officers), *with Rudlaff*, 791 F.3d at 641, 643 (defining "active resistance" as a physical use of force against an officer); *see Caie*, 485 F. App'x at 96–97 (concluding that even though the plaintiff was face down on the ground, the officers did not act unlawfully by applying additional force to him because his ongoing bouts of resistance illustrated he was not neutralized); *see also Graham*, 490 U.S. at 396 ("Not every push or shove . . . violates the Fourth Amendment." (internal quotation and internal quotation marks omitted)). Ms. Colson therefore fails to discharge her burden, and Officer England is entitled to qualified immunity and summary judgment on Ms. Colson's claim under the Fourth Amendment.

2. Ms. Colson's Claim for Inadequate Medical Care

Next, Ms. Colson contends that Officer England violated the Eighth Amendment by failing to provide her with adequate medical care while she was a detainee on the night of June 23, 2015. [Pl.'s Br. at 20–22]. Again, the "first step in a qualified immunity analysis is whether . . . a constitutional violation occurred." *Dickerson v. McClellan*, 101 F.3d 1151,

1157–58 (6th Cir. 1996) (citations omitted). In undertaking this analysis, the Court begins by noting that the Eighth Amendment forbids "cruel and unusual punishments," U.S. Const. amend. VIII, and as a rampart against this type of punishment, it prohibits prison officials from "'unnecessarily and wantonly inflicting pain' on an inmate by acting with 'deliberate indifference' toward the inmate's serious medical needs," *Blackmore v. Kalamazoo County*, 390 F.3d 890, 895 (6th Cir. 2004) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *see also Grose v. Caruso*, 284 F. App'x 279, 284 (6th Cir. 2008) (recognizing that "it is well-settled that lack of proper medical treatment can constitute an Eighth Amendment violation" (citing *West v. Atkins*, 487 U.S. 42, 57 (1988))).[13] The Court therefore defines the constitutional violation at issue as whether Officer England consciously disregarded Ms. Colson's serious medical needs, or in other words, whether she treated her serious medical needs with deliberate indifference.

To establish deliberate indifference, Ms. Colson has to muster evidence to create a material factual dispute as to two components, one objective and one subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Baynes v. Cleland*, 799 F.3d 600, 618 (6th Cir. 2015). The objective component requires evidence showing that Ms. Colson had a serious medical need, which means "one that is so obvious that even a lay person would

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[13] The Eighth Amendment's protections apply analogously to pretrial detainees through the Fourteenth Amendment. *Baynes v. Cleland*, 799 F.3d 600, 618 (6th Cir. 2015); *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009); *Blackmore*, 390 F.3d at 895.

easily recognize the necessity for a doctor's attention." *Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008) (quotation omitted).[14] The subjective component requires evidence showing that Officer England (1) knew of and (2) disregarded a substantial risk to Ms. Colson's health. *Farmer*, 511 U.S. at 840–47. As to the first element—knowledge—she must have (a) been "aware of facts from which the inference could be drawn that a substantial risk of serious harm" to Ms. Colson was present, and she (b) must "[have] draw[n] the inference." *Id.* at 837.[15] As to the second element—disregard for a substantial risk of harm to Ms. Colson—Officer England must have "fail[ed] to take reasonable measures to abate" this risk. *Id.* at 847; *see Street v. Corrs. Corp. of Am.*, 102 F.3d 810, 816 (6th Cir. 1996).[16]

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[14] "Objectively, the risk of serious harm must be undeniably serious *at the time* the injurious actions are taken, *not in hindsight*." *Beyer ex rel. Estate of Beyer v. City of Johnson City*, No. 2:01-CV-45, 2003 WL 23737298, at *5 (E.D. Tenn. Feb. 24, 2003) (emphasis added) (citing *Durham v. Nu'man,* 97 F.3d 862, 869 (6th Cir. 1996)). So Ms. Colson's discovery, after the fact, that she had a broken leg and torn ligaments plays no part in the Court's analysis.

[15] Likewise, "knowledge must be gauged *at the time* of the alleged deprivation of the constitutional right, *not in hindsight*." *Id.* (emphasis added).

[16] *See Williams v. Mehra*, 135 F.3d 1105, 1112 n.9 (6th Cir. 1998) ("[T]his Court does not evaluate Defendants' qualified immunity defense under the objective test of whether a reasonable official would have known that his acts or omissions violated a clearly established right. Rather it is evaluated under the subjective test employed in *Farmer*." (citation omitted)), *vacated on other grounds*, 186 F.3d 685 (6th Cir. 1999).

i. The Objective Component

Under the objective component, Ms. Colson contends that her knee injury would have been obvious to a layperson, [Pl.'s Br. at 20–21], and in making this contention, she identifies more than enough evidence establishing genuine issues of material fact in the record. She highlights her repetitious complaints about knee pain, her screams, and her intermittent ability to remain standing—all of which occurred in Officer England's presence. [*Id.* at 21]. She underscores the fact that Officer England herself lifted her to her feet after she fell to the floor while agonizing about her knee. [*Id.*]. In addition to this fact, Officer England had to steady Ms. Colson on a separate occasion, when she tottered and winced in the pat down room while stepping forward to put her ring in a bag. [Officer Cook VieVu 2 at 20:11:21–32].

Countering this evidence, Officer England testified that Ms. Colson was "walking just fine," and she "walked all the way from the car to the pat down room" and "from the pat down room to [the cell]." [Officer England Dep. at 18:15, 18:17–19]. She also testified that Ms. Colson "tried kicking my officers using full range of motion" with her injured leg. [*Id.* at 18:19–25; 19:1]. But this conflicting evidence is precisely why the record contains genuine factual disputes. Some of the evidence points to obvious signs of injury at the time of the conduct in question. *Cf. Taylor v. Franklin County*, 104 F. App'x 531, 538 (6th Cir. 2004) (stating that a plaintiff's "debilitating immobility" was one symptom that indicated a serious problem, even if the defendants did not believe him); *Moore v. United States*, No.

07-14640, 2008 WL 4683425, at *2 (E.D. Mich. Oct. 22, 2008) ("If a lay person saw the way in which [the plaintiff] walked, he or she could easily recognize that [he] needs medical attention."). And other evidence indicates differently at the time of the conduct in question. The objective component of the deliberate indifference test therefore requires a jury's deliberation.

ii. The Subjective Component

In this circuit, "a non-medically trained officer does not act with deliberate indifference to an inmate's medical needs when he 'reasonably deferred to the medical professionals' opinions.'" *McGaw v. Sevier County*, No. 16-6729, 2017 WL 4924676, at *2 (6th Cir. Oct. 31, 2017) (quotation omitted); *see Spears v. Ruth*, 589 F.3d 249, 255 (6th Cir. 2009) (awarding qualified immunity to an officer despite a detainee's death because the officer reasonably deferred to the EMT's and the nurse's medical opinions that the detainee did not require hospitalization). Officer England relies on the leeway that a jail's non-medical staff has under the law, arguing that she was not deliberately indifferent because she relied on the nurse's professional assessment of Ms. Colson's knee. [Def.'s Br. at 24; Officer England Dep. at 13:6–10 (stating that she relied on the nurse's opinion that Ms. Colson's knee "was okay")]. Ms. Colson, however, points out that Officer England witnessed the nurse's examination of her knee and considered it to be hasty. [Pl.'s Resp. at 21; *see* Officer England's Dep. at 20:15–18 (testifying that the nurse's exam was "[q]uick")]. According to Ms. Colson, her various manifestations of pain in tandem with

Officer England's impression that the exam was cursory "surely triggered England's own suspicion that [her] knee was badly injured," precluding her reliance on the nurse's judgment. [Pl.'s Resp. at 21].

For a non-medically trained police officer to "reasonably defer[]" to a medical professional's opinion," he must have "had no reason to know or believe that [the] recommendation was inappropriate." *McGaw*, 2017 WL 4924676 at *2, 3; *see Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) ("[A]bsent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with . . . deliberate indifference."). In *McGaw v. Sevier County*, a newly minted opinion, the Sixth Circuit identified facts that are sufficient for an officer's reasonable reliance on a medical professional's opinion. The plaintiff in *McGaw* was noticeably impaired when he turned himself in at the Sevier County Jail on an outstanding warrant for his arrest, having ingested alcohol and opiates. *McGaw*, 2017 WL 4924676 at *1. He was unable to recite the time of day or sit up by himself, and when he told officers that he had consumed an unspecified amount of vodka and three roxicodone, they called the nurse. *Id.* The nurse performed an exam and discovered that he had constricted pupils and slurred speech, but his blood pressure, heart rate, and blood-oxygen levels were all normal. *Id.* After meeting with her supervisor, the nurse informed the officers that the plaintiff did not require a physician's oversight or hospitalization and could remain in a cell overnight for monitoring. *Id.* But

later that night, he died in his cell from cardiac arrest. *Id.*

The plaintiff's estate sued the officers under § 1983, contending that they had not provided the plaintiff with adequate medical care, in violation of his Eighth Amendment right. *Id.* at *2. The Sixth Circuit concluded that the officers did not act with deliberate indifference when they placed the plaintiff in the cell and administered no additional medical care to him, noting in particular that the subjective component was "clearly not met." *Id.* The Sixth Circuit reasoned that the officers were not deliberately indifferent because they recognized the plaintiff's ailment, summoned a proper person to assess his medical risks, and followed the nurse's "indication that this was an appropriate response to [his] condition." *Id.* at *2–3. And importantly, the Sixth Circuit pointed out that nothing in the record even supported an inference that the officers had "reason to know or believe that [the nurse's] recommendation was inappropriate." *Id.* at *3.

Unlike in *McGraw*, the facts in this case show that Officer England had reasons to believe that the nurse's assessment of Ms. Colson's knee was not reliable. As an initial matter, whether the nurse even rendered any type of medical opinion to begin with—much less one that should invite deference—is dubious. After the nurse completed her exam, her lone statement was "I don't see no swelling," and she left the room without uttering another word to the officers. [Officer Cook VieVue 2 at 20:13:08–14]. Unlike the nurse in *McGraw*, she did not confer with her supervisor and did not recommend a particular—or even a general—course of

action that the officers should follow based on her exam. The question of whether this evidence amounts to a medical opinion or recommendation at all is a genuine issue of material fact for a jury.

Next, as to whether Officer England had reasons to believe that the nurse's medical opinion—to the extent she offered one—was not reliable, Officer England was privy to the exam and observed Ms. Colson's pained reactions to the movements that the nurse asked her to perform, if not her outright inability to perform them. The exam began inauspiciously when the nurse inquired about Ms. Colson's problem, and Ms. Colson identified her injured knee and exclaimed that she had "never heard it pop so much in her life." [*Id.* at 20:12:02–25]. From there, she tried to extend her leg, bend it, and move it from side to side. [*Id.* at 20:12:28–41]. "It hurts, it hurts," she said. [*Id.*]. The nurse next instructed her to stand up straight against the wall. "I can't," she said. "I can't straighten my legs." [*Id.* at 20:12:57–20:13:04]. At the exam's conclusion, Officer England's own impression was that the exam was perfunctory. [Officer England's Dep. at 20:15–18].

This evidence—and the evidence that the Court has previously discussed to this point: Ms. Colson's complaints of knee pain, Officer England's acknowledgments of these complaints, and Officer England's impulse to steady Ms. Colson in the pat down room—raises genuine issues of material fact as to Officer England's state of mind. From these issues of fact, a reasonable jury could decide that Officer England not only knew that Ms. Colson had a serious medical need but also harbored reasons to believe that

the nurse's opinion was not reliable. *See Baynes*, 799 F.3d at 618–19 ("Because government officials do not readily admit the subjective component of th[e] [deliberate indifference] test, it may be 'demonstrat[ed] in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.'" (quoting *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 843 (6th Cir. 2002))). And the record indicates that the upshot of Officer England's reliance on the nurse is that Ms. Colson received no other medical attention—not crutches, not a knee brace, and not an X-ray—despite the fact that the jail contains its own "full medical room," a "full medical staff" that includes a medical doctor, and even a "mobile X-ray team." [Officer England Dep. at 16:17–25; 17:10–13; 18:11–15]; *see Farmer*, 511 U.S. at 847 ("[A] prison official may be held liable under the Eighth Amendment . . . if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.").

In reaching this conclusion as to the subjective component, the Court pauses here to stress an important point: the requirement that the record must support a substantial risk of serious harm "does not require actual harm to be suffered." *Blackmore*, 390 F.3d at 899 (citation omitted). Rather, "[w]here the seriousness of a prisoner's needs for medical care is obvious even to a lay person, the constitutional violation may arise." *Id.*; *see Baynes*, 799 F.3d at 618–19 ("[A] factfinder may conclude that a prison

official knew of a substantial risk from the very fact that the risk was obvious." (quoting *Terrance*, 286 F.3d at 843)); *Williams v. Mehra*, 186 F.3d 685, 694 (6th Cir. 1999) (Keith, J., concurring in part and dissenting in part) ("[A] claimant is not necessarily required to prove that the prison official had actual knowledge of the substantial risk; rather, one may conclude that a prison official knew of a severe risk from the very fact that the risk was obvious." (citing *Farmer*, 511 U.S. at 842)). And that is exactly the case here—the evidence shows that Ms. Colson demonstrated an obvious and serious need for medical treatment.[17] It also shows that a reasonable jury could find that Officer England knew of this need and disregarded it despite having reasons to believe that the nurse rendered an unreliable medical opinion, if no medical opinion at all.

In sum, the factual questions in the record raise genuine issues of material fact under the deliberate indifference test, precluding the Court from granting qualified immunity to Officer England. *See Bass v. Robinson*, 167 F.3d 1041, 1051 (6th Cir. 1999) ("We . . . hold that Defendants are not entitled to qualified immunity on this claim because a question of fact exists[.]" (citation omitted)). A jury has to consider Ms. Colson's claim under the Eighth Amendment.

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[17] Officer England argues that she is entitled to qualified immunity because Ms. Colson has no evidence of a "detrimental effect" from a delay in medical treatment, [Def.'s Br. at 26], but in cases like this one, in which the evidence shows that the injury was obvious, this argument is meritless. *See Blackmore*, 390 F.3d at 898 ("[T]he 'verifying medical evidence' requirement is relevant only to those claims involving . . . non-obvious complaints of a serious need for medical care.").

iii. Punitive Damages

Officer England also seeks summary judgment on Ms. Colson's request for punitive damages under § 1983, [*see* Compl. at 60 (pleading punitive damages)], arguing that Ms. Colson "has not . . . presented material facts to support . . . 'callous disregard' to any constitutional right," [Def.'s Br. at 28 (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983))]. Under § 1983, punitive damages are available to a plaintiff when a defendant's individual conduct "is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith*, 461 U.S. at 56. The Sixth Circuit has acknowledged that this standard is "consistent" with the standard for measuring deliberate indifference under the Eighth Amendment, and that "much of the evidence bearing on the one questions bears on the other." *Gibson v. Moskowitz*, 523 F.3d 657, 664 (6th Cir. 2008) (quotation omitted); *compare Farmer*, 511 U.S. at 839 (adopting a subjective recklessness standard "as the test for 'deliberate indifference' under the Eighth Amendment"), *with Smith*, 461 U.S. at 56 (stating that reckless indifference will establish a plaintiff's right to punitive damages).

Because material factual issues preclude summary judgment under the deliberate indifference standard governing Ms. Colson's Eighth Amendment claim, the Court must refrain from granting summary judgment under the similar standard governing her request for punitive damages. *See Gibson*, 523 F.3d at 664 (holding that the district court properly delegated the question of punitive damages to the jury because the plaintiff

presented "sufficient evidence to support a finding of deliberate indifference"); *Wright v. County of Franklin*, 881 F. Supp. 2d 887, 914 (S.D. Ohio 2012) (denying the defendant's request for summary judgment on the plaintiff's § 1983 claim for punitive damages because the factual issues as to deliberate indifference were equally relevant to whether punitive damages were appropriate).

3. Ms. Colson's Claims under Tennessee Law

Officer England requests summary judgment "as to any state-law claims" as well, though she only makes arguments pertaining to Ms. Colson's claims for negligence and intentional infliction of emotional distress. [Def.'s Br. at 27–28]. Because she does not raise any argument against Ms. Colson's claim for assault and battery, the Court cannot disturb that claim. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (quotation omitted)).

i. Negligence

Ms. Colson brings her negligence claim under the Tennessee Governmental Tort Liability Act ("TGTLA"), section 29-20-101. [Compl. at 59–60]. A negligence claim under the TGTLA requires facts showing that (1) the defendant owed a legal duty of care to the plaintiff; (2) the defendant engaged in conduct that was below the standard of care, resulting in a breach of the

legal duty; (3) an injury or loss; (4) cause in fact; and (5) proximate cause. *Cadorette v. Sumner Cty. Bd. of Educ.*, No. 01A01-9510-CV-00441, 1996 WL 187586, at *1 (Tenn. Ct. App. Apr. 19, 1996). In arguing that Officer England is negligent, Ms. Colson asserts that Officer England allowed her "to suffer throughout the night," "neglect[ed] her injuries and pain," and "fail[ed] to provide her with humane treatment." [Pl.'s Resp. at 24]. Officer England, however, contends that she is entitled to summary judgment because she has statutory immunity under the TGTLA, and even if she does not have immunity, she maintains that she is not negligent because she did not proximately cause any injury to Ms. Colson. [Def.'s Br. at 27].

The TGTLA governs liability in tort for Tennessee's governmental entities and employees, and it contains the codification of Tennessee's sovereign immunity law. As the fountainhead of sovereign immunity for Tennessee's governmental entities,[18] it insulates them, though not without some exceptions, from lawsuits involving alleged tortious conduct. *See* Tenn. Code Ann. § 29-20-201(a) ("Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from . . . the exercise and discharge of any of their functions, governmental or proprietary."). In addition to furnishing governmental entities with immunity, the

[18] The definition of a "governmental entity" under the TGTLA is longwinded but includes "any municipality, metropolitan government, [and] county" in Tennessee. Tenn. Code. Ann. § 29-20-102(3)(A).

TGTLA extends immunity to their employees,[19] but only when immunity is unavailable to governmental entities under the statute—or, that is to say, only when immunity for governmental entities is "removed" by the TGTLA: "No claim may be brought against an employee . . . [when] the immunity of the governmental entity is removed by this chapter[.]" *Id.* § 29-20-310(b).[20] In other words, the TGTLA does not provide governmental entities and employees with simultaneous immunity.

In one provision in particular, subsection 29-20-205(2), the TGTLA removes immunity for governmental entities, and by extension provides it to employees, for an injury "proximately caused by" an employee's negligent conduct—*except* when the negligent conduct causes an injury that "arises out of" certain cause of action:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury

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[19] The TGTLA defines an "employee" as "any official (whether elected or appointed), officer, employee or servant, or any member of any board, agency, or commission (whether compensated or not), or any officer, employee or servant thereof, of a governmental entity, *including the sheriff* and the sheriff's employees and, further including regular members of voluntary or auxiliary firefighting, police, or emergency assistance organizations." *Id.* § 29-20-102(2) (emphasis added).

[20] This provision contains an exception for claims "for health care liability brought against a health care practitioner." *Id.* § 29-20-310(b).

> arises out of: False imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right to privacy, or civil rights[.]

Tenn. Code Ann. § 29-20-205(2).[21] When this provision does not result in removal of immunity for governmental entities—that is, when the exception applies because a negligent act "arises out of" certain conduct—employees remain subject to liability in their individual capacities for negligence. *See Baker v. Snyder*, No. 1:05-CV-152, 2006 WL 2645163, at *10 (E.D. Tenn. Sept. 14, 2006) ("If the TGTLA does not remove sovereign immunity from a governmental entity, that entity's employees can be liable in their individual capacities." (citing *Baines v. Wilson County*, 86 S.W.3d 575, 583 n.5 (Tenn. Ct. App. 2002), *abrogated on other grounds by Young v. City of LaFollette*, 479 S.W.3d 785 (Tenn. 2015))).

Under the TGTLA, Tennessee courts recognize that the burden rests on the party moving for summary judgment. *See Sides v. Cooper*, No. W2011–00813–COA–R3–CV, 2011 WL 6712717, at *2 (Tenn. Ct. App. Dec. 21, 2011) (stating that, in a claim under the TGTLA, "we must consider . . . the evidentiary materials in the light most favorable to the movant's

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[21] This Court, in prior case law, construed the term "civil rights" that appears in this provision to "mean[] and includ[e] claims arising under the federal civil rights laws, *e.g.*, 42 U.S.C. § 1983." *Campbell v. Anderson County*, 695 F. Supp. 2d 764, 778 (E.D. Tenn. 2010).

opponent" (quotation omitted)); *Condra v. Bradley County*, No. E2007–01290–COA–R3–CV, 2009 WL 196020, at *5 (Tenn. Ct. App. Jan. 28, 2009) (stating that "the movant . . . did not meet its burden" to obtain summary judgment under the plaintiff's TGTLA claim). In addition, a defendant's request for statutory immunity under the TGTLA is an affirmative defense, *Morgan v. Memphis Light Gas & Water Co.*, No. W2016–01249–COA–R3–CV, 2018 WL 733217, at *1 (Tenn. Ct. App. Feb. 6, 2018), for which the defendant bears the burden of proof at trial, *Weaver v. Deverell*, No. W2011-00563-COA-R3-CV, 2011 WL 5069418, at *7 (Tenn. Ct. App. Oct. 26, 2011) ("An affirmative defense will shift the burden of proof to the defendant." (citation omitted)).

Because Officer England raises immunity under the TGTLA as an affirmative defense and requests summary judgment on it, [Officer England Answer, doc. 21, ¶ 202; Def.'s Br. at 27], she has the initial burden as the movant for summary judgment, *see Snyder v. Kohl's Dep't Stores, Inc.*, 580 F. App'x 458, 461 (6th Cir. 2014) (entitling a defendant to summary judgment on an affirmative defense "only if the record shows that [the defendant] established the defense so clearly that no rational jury could have found to the contrary" (internal quotation marks and quotation omitted)); *cf. Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 40–41 (Tenn. 2005) (stating that the movant bears the initial burden to "conclusively establish[]" that summary judgment is proper on an affirmative defense); *see generally George v. Alexander*, 931 S.W.2d 517, 527 (Tenn. 1996) ("An

affirmative defense pleads a matter that is not within the plaintiff's prima facie case." (citation omitted)).

Turning now to the parties' arguments, the Court begins with Officer England's request for immunity under subsections 29-20-205(2), 310(b). Officer England contends that she is entitled to immunity "because the immunity of defendant Blount County is removed as to any such negligence claim." [Def.'s Br. at 27]. This statement comprises the extent of her argument for immunity under the TGTLA; she does not cite any case law or even propose that subsection 29-20-205(2)'s exception, which is of course part of the statute's plain language, does not apply to the facts in the record. Ms. Colson asserts that Officer England's failure to confront the exception is fatal to her pursuit of immunity. [Pl.'s Resp. at 23].

The question of whether 29-20-205(2)'s exception applies to any given case is a threshold legal issue under the TGTLA, and because Officer England does not address it, the Court cannot award immunity to her or consider arguments concerning the merits of the TGTLA claim. *See Guthrie v. Rutherford County*, No. M2015–01718–COA–R3–CV, 2016 WL 7242815, at *3 (Tenn. Ct. App. Dec. 15, 2016) ("The question of whether the immunity has been removed from the entity being sued is a threshold determination that must be resolved in every TGTLA case in order to proceed to the merits of the case[.]" (citation omitted)); *see also* Tenn. Code. Ann. § 29-20-310(a) (providing that courts must "first determine" whether any exception under subsection 29-20-205 is "applicable to the facts" before addressing potential liability). Officer

England's barebones argument is well short of satisfying her burden as the movant under subsection 29-20-205(2).

Even if Officer England provided the Court with grounds to address the merits of the TGTLA claim, her argument as to proximate cause fails because it is equally threadbare. Under Tennessee law, proximate cause consists of a three-prong test, requiring that:

> (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm complained of; (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

Cadorette, 1996 WL 187586 at *2 (quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991). Officer England does not cite this test. She does not raise any argument that bears on each of its three elements. She contends that she "took action that was reasonable," but this contention deals with the applicable standard of care rather than proximate cause. [Def.'s Br. at 27]. She also argues that Ms. Colson's injuries were the result of her own behavior, but with this argument, she evokes a theory of contributory negligence—which is not an element of a negligence claim but an affirmative defense that Officer England has not raised to date. *See Payne v. CSX Transp., Inc.*, 467 S.W.3d 413, 436 (Tenn. 2015) (defining contributory negligence is "the legal concept that '[a] plaintiff's own negligence . . . played a

part in causing [his or her] injury" (quotation omitted)). And besides, Officer England cites no portion of the record to buttress her positions, despite carrying the burden as the movant. *See Celotex*, 477 U.S. 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of 'the [record]' which it believes demonstrate the absence of a genuine issue of material fact." (quotation omitted)). Officer England therefore fails to meet her burden as the movant for summary judgment on Ms. Colson's negligence claim.

ii. Intentional Infliction of Emotional Distress

Officer England also requests summary judgment on Ms. Colson's claim for intentional infliction of emotional distress. [Def.'s Br. at 28]. A viable claim for intentional infliction of emotional distress—which is also known under Tennessee law as a claim for outrageous conduct, *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 204 (Tenn. 2012)—requires conduct that is (1) intentional or reckless, (2) outrageous, and (3) resulted in a serious mental injury to the plaintiff, *Doe 1*, 154 S.W.3d at 31. Under the second element, the term "outrageous" requires behavior that is "so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly [i]ntolerable in a civilized community." *Id.* at 39 (internal quotation mark and quotation omitted). Under the third element, the plaintiff has to suffer a "particularly serious" mental injury, *id.*, which requires "significant impairment in [the plaintiff's] daily life," *Rogers*, 367 S.W.3d at 210.

Officer England moves for summary judgment by attacking the second and the third elements of Ms. Colson's claim. [Def.'s Br. at 28]. As to the third element, she maintains only that summary judgment is proper because Ms. Colson "cannot present proof of a 'serious mental injury.'" [*Id.*]. Ms. Colson is not the movant. She has no burden to "present" proof. Rather, Officer England bears the initial burden to establish that the record is without evidence of a serious injury. *See Celotex*, 477 U.S. 323 ("[A] party seeking summary judgment always bears the initial responsibility of . . . identifying those portions of 'the [record]' which it believes demonstrate the absence of a genuine issue of material fact." (quotation omitted)). The burden shifts to Ms. Colson to identify proof of her injury only if Officer England satisfies her initial burden. *Id.* By confusing the legal standard, Officer England makes no headway toward summary judgment under the third element of Ms. Colson's claim.

As to the second element—outrageous behavior—Officer England contends that the record evidence establishes that she "used the amount of force necessary to reasonably control Plaintiff" and that "[t]his [reasonable use of force] is not 'outrageous behavior.'" [Pl.'s Br. at 28]. Ms. Colson, however, asserts that Officer England's failure to heed her requests to use the restroom caused her to urinate on herself several times, in the presence of male officers who laughed at her. [Colson Aff. ¶¶ 35, 39]. She also maintains that when she requested to go to the restroom, Officer England said, "I don't give a fuck what you asked for," and "[W]e don't have to worry about it, she's already peed." [*Id.* ¶ 35; Officer Cook

VieVue 2 at 21:32:28–29].[22] Ms. Colson argues that all of this evidence establishes a genuine issue of material fact as to whether Officer England's behavior was outrageous, [Def.'s Resp. at 25], or "beyond all bounds of decency," *Doe 1*, 154 S.W.3d at 39 (quotation omitted).

The Court cannot weigh this evidence and decide whether it constitutes outrageous behavior or a reasonable response to Ms. Colson's own behavior at the time—that task belongs to the jury. Indeed, "[o]rdinarily the question of whether . . . acts are 'outrageous in character and extreme in degree' should to go the jury," *Lineberry v. Locke*, No. M1999-02169-COA-R3-CV, 2000 WL 1050627, at *3 (Tenn. Ct. App. July 31, 2000) (citing *Dunn v. Moto Photo, Inc.*, 828 S.W.2d 747, 753 (Tenn. Ct. App. 1991). The record contains enough evidence to preclude the Court from parting with the norm and resolving the question of outrageous behavior under its own initiative. It would invade the jury's province. The Court will therefore allow Ms. Colson's claim for intentional infliction of emotional distress to continue to trial.

iii. Punitive Damages

Lastly, Officer England seeks summary judgment on Ms. Colson's request for punitive damages under her

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[22] Ms. Colson declares that, in the end, "[t]he experience was embarrassing" and "also humiliating." [Colson Aff. ¶ 39]. The question of whether embarrassment and humiliation are insufficient to constitute a serious mental injury, however, is not one that Officer England raises in her motion, so the Court does not address it.

state-law claims. [*See* Compl. ¶¶ 14, 186, 188 (pleading punitive damages)]. Officer England maintains that "Plaintiff should not recover any punitive damages against Officer England under state-law because the undisputed material facts do not support that Officer England acted intentionally, fraudulently, maliciously, or recklessly in relation to Plaintiff." [Def.'s Br. at 28 (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992))].

By doing nothing more than regurgitating the legal standard for punitive damages to the Court—without citing any portion of the record—Officer England does not persuade the Court that punitive damages are unavailable under Ms. Colson's claim for intentional infliction of emotional distress. *See Moorhead v. J.C. Penney Co.*, 555 S.W.2d 713, 718 (Tenn. 1977) (recognizing that "punitive damages may, in the discretion of the trier of facts, be awarded in cases of recovery for outrageous conduct"). As a matter of law, however, an ordinary negligence claim cannot result in punitive damages. *Duran v. Hyundai Motor Am., Inc.*, 271 S.W.3d 178, 206 (Tenn. Ct. App. 2008). And more particularly, the TGTLA—the statute under which Ms. Colson claims negligence—prohibits a plaintiff from recovering punitive damages. *See Tipton Cty. Bd. of Ed. v. Dennis*, 561 S.W.2d 148, 152 (Tenn. 1978) ("[I]t seems to us inappropriate and not in accord with the legislative intent [of the TGTLA] to permit a punitive award against a public body and its employees where only a negligent act is involved, even though it might be characterized as gross[.]"). The Court will therefore permit Ms. Colson to pursue punitive damages for intentional infliction of emotional distress but not for

negligence. The Court offers no opinion regarding the availability of punitive damages under Ms. Colson's claim for assault and battery because Officer England does not broach this claim anywhere in her motion.

IV. CONCLUSION

Officer England meets her burden on summary judgment in some respects but not in others, and her Motion for Summary Judgment [doc. 66] is therefore **GRANTED in part and DENIED in part**. The Court orders as follows:

1. The Court **GRANTS** summary judgment on Count Four.
2. The Court **DENIES** summary judgment on Count Nine.
3. The Court **DENIES** summary judgment on Count Twelve.
4. The Court **GRANTS** summary judgment on Count Thirteen only to the extent that Ms. Colson seeks punitive damages.
5. The Court **DENIES** summary judgment on Count Thirteen in all other respects.

The Court will enter an order consistent with this opinion.

IT IS SO ORDERED.

ENTER:

s/ Leon Jordan
United States District Judge