

No. \_\_\_\_\_

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In the  
**Supreme Court of the United States**

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LARRY TAWNEY, JR.,  
*Petitioner,*

v.

PORTAGE COUNTY, OHIO; BILL BURNS, DAVID W. DOAK,  
DOUG DRAKE, MATT HOLBROOK, JOHN HOSTLER, JASON  
JOY, DALE KELLY, SHAWN LANSINGER, VINCENT T.  
LOMBARDO, DEREK MCCOY, BRYAN MORGANSTERN, ERIC  
NOELL, JUSTIN SCHIFKO, MIKE SKILTON, DAN SMITH,  
CAMERON STOCKLEY, ROBERT SYMSEK, BARRY THRUSH,  
CHAY VUE, AUSTIN WILSON, JANICE CLARK, CIRCE  
HARTMAN, ERICA JARVIS, CLAUDETTE MCCULLOUGH,  
AND SUSANNE SATTLER, IN THEIR OFFICIAL AND  
INDIVIDUAL CAPACITIES,  
*Respondents.*

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**On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Sixth Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Whether a trial court properly dismisses, as a matter of law, pursuant to Rule 56(c), F.R.C.P., a plaintiff's complaint wherein the plaintiff seeks compensation for claims under 42 U.S.C. § 1983 for violations of his Eighth Amendment rights against various defendants, a *Monell* claim against the county, and a state law claim for intentional infliction of emotional distress against 25 defendants. In one fashion or another, all of these claims concerned a rather brutal beating experienced by Plaintiff while in the custody of the Portage County Jail. Summary judgment was granted based upon the District Court's finding that that no reasonable jury could conclude that the beating had actually occurred based upon video and photographic evidence presented. However, records from the jail called into question the accuracy of this evidence. Consequently, the District Court clearly relied upon a weighing exercise which is prohibited in summary judgment proceedings.

## **LIST OF PARTIES**

Petitioner is: LARRY TAWNEY, JR.,

Respondents are: PORTAGE COUNTY, OHIO; BILL BURNS, DAVID W. DOAK, DOUG DRAKE, MATT HOLBROOK, JOHN HOSTLER, JASON JOY, DALE KELLY, SHAWN LANSINGER, VINCENT T. LOMBARDO, DEREK MCCOY, BRYAN MORGANSTERN, ERIC NOELL, JUSTIN SCHIFKO, MIKE SKILTON, DAN SMITH, CAMERON STOCKLEY, ROBERT SYMSEK, BARRY THRUSH, CHAY VUE, AUSTIN WILSON, JANICE CLARK, CIRCE HARTMAN, ERICA JARVIS, CLAUDETTE MCCULLOUGH, and SUSANNE SATTLER, in their official and individual capacities, Defendants-Respondents.

## **CORPORATE DISCLOSURE STATEMENT**

As Petitioner is an individual, no Corporate Disclosure Statement is required pursuant to Rule 29.6.

## **STATEMENT OF RELATED PROCEEDINGS**

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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**OPINION BELOW**

The Opinion below from the 6<sup>th</sup> Circuit Court of Appeals is unreported and is known as *Petitioner v. Portage County, et al.*, 6<sup>th</sup> Circuit No. 21-3809. The Opinion was filed on June 15, 2022. *See Appendix A.*

**STATEMENT OF JURISDICTION**

The United States District Court for the Northern District of Ohio had jurisdiction over this matter pursuant to 42 U.S.C. Section 1343. The final judgment was issued by the Trial Court on August 5, 2021. *See Appendix B & C.* The Notice of Appeal in this matter was timely filed in accordance with Rule 4(a)(1)(A), F.R.A.P., on September 2, 2021. The 6<sup>th</sup> District Court of Appeals derived jurisdiction from 28 U.S.C. Section 1291. The Petitioner, respectfully submits that the aforementioned order appealed from disposed of all claims made by all parties and is therefore a final, appealable order.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This cause involves interpretation of Rule 56(a) F.R.C.P. as interpreted in *Scott v. Harris*, 550 U.S. 372 (2007) and its progeny. The Rule provides:

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim

or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

### **STATEMENT OF THE CASE**

On July 10, 2020, Petitioner filed his Complaint against Portage County, Ohio and numerous individual defendants. (Complaint, RE 1, Page ID # 1-22) All of the individual defendants were named both in their individual and official capacities. The basis of the complaint was an assault against Petitioner while he was in the Portage County Jail awaiting transport to prison. As the officials that assaulted Petitioner were masked, Petitioner could not specifically say which individuals assaulted him in the Complaint and intended to modify the Complaint accordingly after complete discovery was completed in the matter. Based upon this assault, Petitioner brought seven Counts.

On October 27, 2020, all Defendants/Respondents made a Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. Proc. 12(c). (Motion for Judgment on Pleadings, RE 8, Page ID # 234-245). Among the bases in support of the Motion were issues concerning identification, official capacity, and immunity. Ultimately, none of the foregoing issues was the basis of the Trial Court's granting of Summary Judgment as is more fully addressed below. However, also included in the Motion for Judgment on the Pleadings was an indication that the incident in

question had never actually happened based upon a variety of evidentiary materials which were, at that point, not part of the pleadings.

Subsequently, the Trial Court recognized that it could not rely upon the outside evidentiary materials submitted in support of the Motion for Judgment on the Pleadings and on January 5, 2021 the Trial Court ordered that said Motion would be converted to a Motion for Summary Judgment and, in a separate order on January 15, 2021, the Respondent's were ordered to make the referenced materials evidentiary in nature by February 1, 2021. (Minute Order, 01/15/2021). The Trial Court also ordered that discovery in the matter be limited to discovery from Respondent's regarding those issues raised in the Respondents' Motion for Judgment on the Pleadings. On February 5, 2021, Respondent's filed a Notice which purported to authenticate all of the documents in question. (Notice, RE 16, Page ID # 322-323). Several days later, Respondent filed an Affidavit from one Roy Bice in further support of its Motion. (Notice, RE 17, Page ID # 335-336).

On June 7, 2021, Petitioner filed a Response to the Motion for Summary Judgment (despite the fact that no actual Motion for Summary Judgment had ever been filed) and explained why questions of fact existed preventing the granting of Summary Judgment. (Response, RE 20, Page ID # 344-358). In support thereof, Petitioner filed an Affidavit from himself, a Certification of Record, an Affidavit from Amanda Griffiths, an Affidavit from Fred Wolk, and an Affidavit from Benjamin Robinson. As is more fully addressed

below, all of these documents were intended to show questions of material fact as to whether or not Petitioner was actually attacked as alleged in his Complaint. (Response, RE 20-1 through 20-5, Page ID # 360-390).

On July 7, 2021, Respondents filed a Reply in support of their previously unfiled Motion for Summary Judgment (Reply, RE 22, Page ID # 403-411) and, the very next day, filed Exhibit B which was a flash drive containing a variety of materials. (Notice, RE 23, Page ID # 403-411). This time, Respondent's arguments were limited to whether there were any material facts in controversy as to whether or not any sort of attack upon Petitioner had actually occurred. According to Respondent, all of the materials submitted supported the proposition that such an attack was simply impossible.

On July 12, 2021, Petitioner filed a Sur-Reply to Respondents' filings. (Sur-Reply, RE 25, Page ID # 427-432). In an Opinion and Order filed on August 5, 2021, the Trial Court granted Summary Judgment to Respondents. (Opinion and Order, RE 26, Page ID # 433-448). In that regard, the Trial Court did not accept all of the arguments being made by the Respondents. The Trial Court was quite specific in its rulings and stated, *inter alia*:

Plaintiff Larry Petitioner, Jr. was sentenced in State court to a term of imprisonment. He spent the night in the county jail awaiting transport to prison. In this federal civil rights lawsuit, Plaintiff alleges that various public

employees entered his cell and viciously attacked him. Defendants Portage County, Ohio and the employees named as defendants in their official and individual capacities deny that anyone ever attacked Mr. Petitioner. On that basis they moved for judgment on the pleadings, attaching evidence they contend disproves the allegations. Because of concerns about the procedural propriety of considering these materials at the pleading stage, and to focus the parties on the threshold question whether this attack in fact happened, the Court converted the motion to one for summary judgment limited to the threshold question whether the alleged incident in fact occurred.

With the benefit of a summary-judgment record, the Court determines that the surveillance videos of Mr. Petitioner's cell on the night in question, along with the intake photograph at the State prison the next day, foreclose a reasonable jury from finding in his favor at trial. For these reasons, as more fully explained below, the Court **GRANTS** judgment in favor of Defendants.

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The Court reviewed the surveillance video Defendants supplied. It shows the following. Although it does not contain footage from 10 pm through midnight on July 12, 2018, from midnight until 5 am, no one entered Mr. Petitioner's cell. Around 5:30 am, the lights in the jail are on. Mr. Petitioner exits his cell for a

few minutes, then returns and lays on his bed with his legs curled up.

On the morning of July 13, 2018, Mr. Petitioner does not have any visible injuries on his head. It is not possible to tell whether he has any injuries to his body concealed beneath his clothing. The video shows Mr. Petitioner walking without difficulty next to a corrections officer. Further, it shows him briefly interacting in a friendly manner with the officer. Later that morning, videos show Mr. Petitioner entering and exiting his cell, which he mops. He also mops the area outside his cell and removes a bundle of his belongings from his cell. Shortly before noon, Mr. Petitioner sits on a bench, appears calm and comfortable, and eats a sandwich from a bag lunch as officers and prisoners walk around.

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However, the prison did take a series of color pictures of Mr. Petitioner from various angles upon his admission on July 13, 2018. (ECF No. 16-2, PageID #331–32.) These photos, which include views of Petitioner with his teeth showing and mouth closed, show *no* visible signs of injury of any kind. (*Id.*) Defendants' record confirms these photos (sic) were taken at intake on July 13, 2018. (*Id.*, PageID #333.) No information in the record calls that fact into question.

Based upon the foregoing, the Trial Court granted Summary Judgment to the Respondents. In so holding, the Trial Court relied solely upon the video evidence from the Portage County Jail and the photos allegedly taken at Petitioner's intake into the prison system. The Trial Court did reject certain arguments submitted by Respondents, including but not limited to an argument that Petitioner's intake medical report at the prison failed to indicate any injuries and Petitioner's alleged participation in a separate and distinct case.

In the case at bar, the Trial Court relied upon two evidentiary items submitted by Respondents and rejected all other arguments. First, the Trial Court analyzed the video evidence from the Portage County Jail and essentially determined that since the video did not show any injuries to Petitioner, did not show Petitioner behaving as if you were injured and did show Petitioner both eating and performing chores around the jail, **this video evidence foreclosed any reasonable jury from concluding that the attack alleged by Petitioner had actually occurred.** Next, the Trial Court turned to a photograph or photographs of Petitioner which were allegedly taken at his intake at the prison which showed no visible injuries to his face or head and made the same conclusion.

The videotapes of the pod show Petitioner coming and going from cell #107 on the first floor of the pod. Petitioner testified in his Affidavit that in July, 2018 he was housed in cell #169 on the second floor, **and the County's inmate roster supports Petitioner's contention that on the date in question his cell was upstairs in cell #169.** Furthermore, the

Affidavit of Benjamin Robinson (another inmate at the time) clearly established that Petitioner was housed on the second floor of the pod at the time of the incident and, moreover, this witness actually heard the masked correction officers going up to the second floor and heard a scuffle shortly thereafter. Consequently, there is a genuine issue of material fact as to whether the pod videos were taken on July 13, 2018, as Respondents claim. **Even the Trial Court clearly recognized that the videos are not date stamped.** (Opinion and Order, RE 26, 27, Page ID # 437). If the pod videos were taken on July 12-13, 2018, the videos showing the corrections officers patrolling do not make it inarguable that no one came into Petitioner's cell that night, because despite the County's claims that the videos are motion-activated and that they only activated every 30 minutes when a corrections officer made his rounds, it is clear from viewing the video that there are "jump cuts," i.e., that a corrections officer appears and disappears while actively walking in the pod in view of the camera. If the video is motion-activated, that does not explain why a person would seem to disappear in the middle of moving through the camera shot. The pod videos that show inmates coming and going from their cells suffer from the same infirmities. There is a genuine issue of fact as to whether the videos were taken on the morning of July 13, 2018 because, as stated above, Petitioner was not in cell #107 on the first floor at that time (both by his own testimony and the jail roster and the Affidavit of Benjamin Robinson), and the video depicts him coming and going from cell #107. Further, the videos are not complete depictions of whatever morning they were taken. There are clear edits, both by looking at the time

counter on the video, which shows large gaps in time, and because the video clearly shows Petitioner and other inmates “disappearing” from the video during times when, if the video was truly and completely motion-activated, it would have shown a continuous view. The time-counter on the video itself shows large gaps in time.

The evidentiary materials considered by the Trial Court clearly revealed material questions of fact as to whether the video evidence in question was actually taken during the relevant time period. Further, the gaps in coverage, sometimes quite large, and the inexplicable brakes in coverage which appeared to show inmates and corrections officers simply disappearing, call into question the authenticity of the videos. Certainly, a reasonable trier of fact could conclude that the videos in question do not show the relevant time period and/or had been tampered with. Consequently, the Trial Court erred in granting summary judgment based upon the videos.

The only other evidence relied upon by the Trial Court in support of its ruling consisted of a series of photographs taken of Petitioner upon his intake into the prison system. These photographs were authenticated by the proper authorities and depict various views of Petitioner’s head. Essentially, the Trial Court determined that the authentication of these photographs was unchallenged by Petitioner and that no injuries to Petitioner’s head were visible in the photographs. Nevertheless, Petitioner respectfully submits that the Trial Court improperly determined that these photographs foreclosed any reasonable trier

of fact from determining that the assault incident had occurred.

Assuming that the photographs in controversy are in fact authentic, that does not lead to the inescapable conclusion that a reasonable jury could only conclude from these photographs that no attack upon Petitioner had occurred. In that regard, Petitioner respectfully submits that this Court should be mindful that these were not medical photographs taken for the purpose of documenting injuries. Rather, they were simply head shots taken of every prisoner admitted into the system. Furthermore, there was conflicting evidence indicating Petitioner received treatments or injuries to his head while still at the Portage County Jail. In that regard, Petitioner submitted to the Trial Court an Affidavit from his sister, Amanda Griffiths, wherein she indicated how she had consulted with a County official, Janet Esposito, and received a copy of a “kite” Petitioner had submitted prior to leaving the County Jail indicating that he was experiencing problems with the stitches he had received on the inside of his mouth. (Affidavit, RE 20-3, Page ID # 382-383). Respondents failed to submit an affidavit from this public official indicating that in fact this document was not authentic or was in any way tampered with. A careful review of the document reveals that not only did Petitioner complain of his injury in that regard, but a nurse had responded to Petitioner indicating that the stitches he had received were only temporary and that he should follow up concerning such when he is admitted into the prison system. Once again, Respondents did not submit an Affidavit from the

nurse in question indicating that she had not received or responded to the kite in question.

In light of these circumstances, Petitioner respectfully submits that there was conflicting evidence as to whether Petitioner received injuries and treatments to his mouth area, both internal and external, as a result of the assault in question. A reasonable jury could have concluded in light of the kite that Petitioner had received injuries to his mouth and received treatments therefore. That is properly the function of the jury and not of a trial court. A reasonable jury could simply have concluded that for, whatever reason, the camera did not pick up any evidence of the injuries, most of which were internal. Consequently, the Trial Court committed reversible error by granting summary judgment on the basis of these photographs.

#### **REASONS FOR ALLOWANCE OF THE WRIT**

##### **I. Review Is Warranted In Order To Resolve The Question Of how trial courts should properly apply the “reasonable jury” standard in summary judgment proceedings.**

Following law is allegedly well-settled. A district court’s grant of summary judgment is reviewed de novo. *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 820 (6th Cir. 2007). Summary judgment is proper where the record 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). A dispute is genuine where “the evidence is such that a reasonable jury could

return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The moving party clearly bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party meets that burden, the non-moving party must point to evidence supporting its position that is “significantly probative” and not “merely colorable.” *Liberty Lobby*, 477 U.S. at 249.

A reviewing court views the facts and draws reasonable inferences in the light most favorable to the non-moving party. *Harrow Prods., Inc. v. Liberty Mut. Ins. Co.*, 64 F.3d 1015, 1019 (6th Cir. 1995). There is an exception, however, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it.” This exception most commonly applies where the record contains a videotape depicting the disputed facts and contradicting one party’s version of events. *See Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015). The court must draw reasonable inferences in favor of the nonmoving party from the video recording, but only to the extent supportable by the record. *Shreve v. Franklin Cnty., Ohio*, 743 F.3d 126, 132 (6th Cir. 2014) (“a court need draw only *reasonable* inferences in favor of the nonmoving party; it need not construe the record ‘in such a manner that is wholly unsupportable—in the view of any reasonable jury—by the video recording’” (quoting *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir. 2007)). However, summary judgment is not appropriate where the contents of a photograph or videotape are susceptible to more than one

interpretation. *See Coble v. City of White House*, 634 F.3d 865, 868-69 (6th Cir. 2011); *Dixon v. County of Roscommon*, 479 F. App'x 680, 682 (6th Cir. 2012).

Unfortunately, a review of the facts and circumstances involved in the case at bar reveal that **application** of the foregoing is anything but well-settled. Furthermore, a review of the relevant law reveals that the “reasonable jury” standard, itself, is quite controversial.

The reasonable jury standard has been questioned literally since its inception. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), J. Brennan dissenting. More recently, in *Scott v. Harris*, 550 U.S. 372 (2007) this Court determined that a videotape of a police chase demonstrated that a reasonable jury could not find that the police defendants used excessive force in that case. This decision involved both concurring opinions and a strong dissent by Justice Stevens. However, there was no question in that case that the videotape authentically depicted the actual chase in question. That is certainly not the situation in the case at bar. In reaction to the decision in *Scott*, Prof. Dan Kahan and his co-- authors conducted a survey involving over 1300 people and found that people differed on their interpretations of what they saw based upon their backgrounds. Dan A. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, Video Evidence and Summary Judgment*, 122 Harv. L. Rev. 837 (2009).

In the few instances where this Court has reviewed application of the standard, the results are interesting from the standpoint that significant disagreements can

exist resulting in decisions which are supported by a majority, but with a significant dissent. See, e.g., *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997). Consequently, application of rule has been characterized by some as simply granting a proxy for a trial judge to implement his own view of the sufficiency of the evidence. Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge's Own View of the Sufficiency of the Evidence*, *Judicature*, Vol.97 No.5 (March/April 2014). In fact, studies have shown a disturbing number cases exist wherein summary judgment has been granted to a defendant based upon the “reasonable jury” standard, those decisions reversed on appeal, and then an actual jury finds for the plaintiff. Michael W. Pfautz, *What Would A Reasonable Jury Do-Jury Verdicts Following Summary Judgment Reversals*, 115 *Colum. L. Rev.* 1255 (2015).

In conclusion, it is inarguable that this Court needs to accept jurisdiction of this matter and hopefully resolve proper application of the “reasonable jury” standard in summary judgment proceedings once and for all. Petitioner respectfully requests that this court be mindful of two things in making its decision in that regard. First, Petitioner is not suggesting that the rule be absolutely abrogated. Second, unlike the situation in *Scott, supra*, where the authenticity and accuracy of the videotape in question was not the subject of controversy, the videotape presented in the case at bar through the use of official documents obtained from the Defendants was shown to be questionable in terms of whether it actually was taken

on the evening in controversy. Thus, both the District Court and the 6th Circuit participated in and allowed a weighing exercise to occur when comparing the videotape evidence with document indicating that Petitioner was not actually in the cell depicted in the videotape on the evening in question. This Court should send a loud and unequivocal message that such a weighing has no function in a summary judgment exercise.

### **CONCLUSION**

In light of the above, Petitioner respectfully submits that this Court should accept jurisdiction of this matter.

Respectfully submitted,

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