IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2013 Session

KARL S. DAVIDSON v. GOVERNOR PHILLIP BREDESEN, IN HIS INDIVIDUAL CAPACITY AND DAVID COOLEY, DEPUTY TO THE GOVERNOR, IN HIS INDIVIDUAL CAPACITY

Appeal from the Chancery Court for Davidson County
No. 072339III Ellen H. Lyle, Chancellor

No. M2012-02374-COA-R3-CV - Filed October 29, 2013

Participant in protest action which took place at the Tennessee State Capitol brought an action alleging that former Governor and Deputy Governor retaliated against him for the exercise of his First Amendment rights during the protest. Participant appeals the grant of summary judgment against him and the trial court's ruling that certain documents created by the Governor's legal counsel were protected from discovery by the attorney-client and deliberative process privileges. Finding no error, we affirm the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL P. J., M. S., and FRANK G. CLEMENT, JR., J., joined.

John Edward Herbison, Clarksville, Tennessee, and Joseph H. Johnston, Nashville, Tennessee, for the appellant, Karl S. Davidson.

Harold Richard Donnelly and Hal Hardin, Nashville, Tennessee, for the appellees, Governor Phillip Bredesen and David Cooley, Deputy to the Governor.

OPINION

I. FACTS AND PROCEDURAL HISTORY

This case is before us for the second time. Karl Davidson, who participated in a sit-in demonstration at the Tennessee State Capitol in 2005 protesting proposed cuts to the

TennCare program, brought suit against various state officials,[1] asserting several claims arising out of the treatment of the protesters, including a claim under 42 U.S.C. § 1983 for violation of his First Amendment rights. The trial court dismissed Mr. Davidson's complaint for failure to state a claim; in the first appeal we affirmed the trial court's dismissal of all the claims except his First Amendment retaliation claim and remanded the case for further proceedings. *Davidson v. Bredesen*, 330 S.W.3d 876 (Tenn. Ct. App. 2009).

On September 10, 2010, Mr. Davidson amended his complaint to name former Governor Bredesen and former Deputy Governor Cooley as the only defendants ("Defendants" herein); he summarized his claims against them thusly:

> During the course of this sit-in demonstration, Plaintiff and other enrollees were willfully and maliciously harassed and intimidated by various state officials and certain State Highway Patrol officers. They were denied food and water on several occasions, which placed Plaintiff's health in jeopardy because of his diabetes and other medical conditions. Food items and clothing were also seized from Plaintiff on at least six (6) different occasions during this seventy-seven (77)-day period. Plaintiff avers on information and belief that these acts were either done at the express direction of Defendant Gov. Bredesen and/or Defendant Dep. Gov. Cooley, or done with their knowledge, approval, and acquiescence.
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> . . . The actions of Defendant Gov. Bredesen, by and through his agents, including but not limited to, Defendant Dep. Gov. Cooley, were carried out in retaliation for Plaintiff's protected conduct and therefore amount to a deprivation of Plaintiff's civil rights under color of law and entitle him to damages pursuant to 42 U.S.C. § 1983.

Defendants answered the amended complaint on January 5, 2011, generally denying all allegations.

Defendants filed a motion for summary judgment on December 7, 2011 along with a memorandum in support of the motion and a statement of undisputed material facts. The

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[1] In the original complaint, Mr. Davidson named the following individuals as defendants: Governor Phillip Bredesen, in his individual capacity; Gina Lodge, Commissioner of Department of Human Services, in her individual capacity; J. D. Hichey, Director of Bureau of TennCare, in his individual capacity; David Geotz, Commissioner of Department of Finance and Administration, in his individual capacity; Paula Flowers, Commissioner of Department of Commerce and Insurance, in her individual capacity; and David Cooley, Deputy to the Governor, in his individual capacity.

motion was to be heard on January 13, 2012, but was rescheduled to March 23 at the request of Mr. Davidson's counsel. On March 19 Mr. Davidson filed a motion to continue the March 23 hearing, partly on the grounds that he needed "further discovery and time to prepare responsive pleadings and affidavits." Although no order appears in the record, the motion was apparently granted and the hearing reset for April 13. On April 9 Mr. Davidson filed a response to the motion for summary judgment, accompanied by his amended and supplemental answers to Defendants' interrogatories and request for production and his "Sworn Response in Opposition to Defendants' Statement of Material Undisputed Facts." On April 12 the court entered an order continuing the motion for summary judgment and set a deadline for Mr. Davidson to file a motion to compel production of the documents and have it heard.[2]

Mr. Davidson filed a motion to compel on April 19 requesting production of "certain documents provided to [Defendants'] attorneys by Deputy Attorney General Steve Hart, which documents he produced in response to Plaintiff's Subpoena Duces Tecum, but because General Hart thought they were subject to the attorney-client privilege, he did not provide copies to Plaintiff's Counsel."[3] Defendants filed a response to the motion on May 21 asserting that the documents requested "were not produced by the Office of the Attorney General on the basis of one or more of the following legal theories: 1) that the documents are work product of the attorney(s) involved; 2) that the documents contain privileged attorney-client communications; and 3) that the documents are protected by the deliberative process." Mr. Davidson filed a reply to Defendants' response on July 16 asserting that documents did not fall within either of the three privileges asserted by Defendants.

A hearing on the motion to compel was held on July 20, during which the documents in question were filed with the court under seal for an in camera inspection. On July 26 the court issued its order that Defendants produce two of the letters and that the remainder were privileged under either the attorney client privilege, the deliberative process privilege, or

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[2] The order recited that the court, while preparing for oral argument on the motion, noticed "references in the plaintiff's papers to possible important evidence ("Documents") that ha[ve] been withheld by the defendants on the grounds of privilege." After noting that Mr. Davison identified certain documents in his response to the motion that could provide additional facts regarding the retaliation claim, the court continued the hearing to allow Mr. Davidson the opportunity to seek production of the documents "because one of the defendants' summary judgment arguments is that the plaintiff's claims are so *de minimus* as to not rise to the level of being constitutional violations under 42 U.S.C. § 1983, the Court needs to have any and all evidence before it in order to rule effectively."

[3] The documents being sought were identified in an August 16, 2011 letter to Mr. Davidson's counsel from Steve Hart, Special Counsel to the Office of the Attorney General, responding to a subpoena *duces tecum* issued in connection with Mr. Davidson's request for production of documents.

both. On July 27 Defendants filed a motion for a stay of the court's July 26 order, to alter or amend the order, or in the alternative for permission to appeal; the court granted the motion, ruling that two documents which the court had ordered produced were also privileged from disclosure.

Mr. Davidson filed a supplemental memorandum in opposition to the motion for summary judgment on September 19. The summary judgment hearing was held on September 21 and the court granted the motion on October 3. Mr. Davidson filed a notice of appeal on October 19.

On appeal Mr. Davidson contends that the trial court erred in holding that the documents which he sought to discover were privileged and, therefore, not subject to production and in granting summary judgment on his claim of retaliation for the exercise of his First Amendment rights. Mr. Davidson also raises the issue of whether the deliberative process privilege is recognized under Tennessee law.

II. DISCUSSION

A. PRIVILEGES

The documents for which production was sought in the motion to compel were:

> 1. Notes of Deputy Legal Counsel Steve Elkins re: meeting with Legal Counsel Robert Cooper on 7/13/05;
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> 2. Notes of Deputy Legal Counsel Steve Elkins re: meeting and telephone calls on 6/29/05- including contacts and consultations with the Tennessee Attorney General's Office;
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> 3. Notes of Deputy Legal Counsel Steve Elkins re: meeting on 7/14/05, including Steve Elkins and members of the Tennessee Attorney General's Office;
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> 4. Notes of Deputy Legal Counsel Steve Elkins of telephone call with Thad Watkins, General Counsel for Department of General Services (on 7/14/05);
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> 5. Notes and edits of Legal Counsel Robert Cooper and Deputy Legal Counsel Steve Elkins re: Implementation of Procedures for the Use of Public Areas of the Tennessee State Capitol;

6. (7/14/2005) Implementation of Procedures for the Use of Public Areas of the Tennessee State Capitol; and

7. Notes of Deputy Legal Counsel Steve Elkins re: meeting on 7/25/05, "Independent policy analysis".

In the July 26, 2012 Memorandum and Order, the court discussed the various privileges asserted and ordered Defendants to produce documents 1 and 4; it held that items 2, 3, 5, 6, and 7 were protected by the deliberative process privilege and that documents 2 and 3 were also protected by the attorney-client privilege. On July 27, pursuant to Defendants' motion, the court amended the July 26 order and held that documents 1 and 4 were also protected by the attorney-client and deliberative process privileges.[4] Mr. Davidson complains that the court's rulings in this regard "inappropriately prevented [him] from obtaining relevant documents from non-party recipients of Tenn. R. Civ. P. 45.02 subpoenas."[5]

Decisions regarding pretrial discovery are inherently discretionary; accordingly, we review such decisions under the abuse of discretion standard. *Culbertson v. Culbertson*, 393 S.W.3d 678 (Tenn. Ct. App. 2012). In so doing, we review the underlying factual findings using the preponderance of the evidence standard and review the lower court's legal

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[4] The court stated in its order: "The problem is that counsel did not assert the privileges of attorney-client and deliberative process as to documents 1 and 4. The Court, therefore did not have those privileges asserted as a basis to deny production . . . . Now that defendants have notified the Court that they are asserting these privileges, the Court shall construe their July 27, 2012 motion as one to amend their previous papers. With that amendment before the Court, it is authorized to alter the July 26, 2012 Memorandum and Order."

[5] Mr. Davidson served interrogatories and a request for production of documents on Defendant Cooley; he subsequently served a request for production of documents on Attorney General Robert Cooper and a subpoena *duces tecum* on Highway Patrol Captain Lee Chaffin. Mr. Hart responded to the request for production served on General Cooper in a letter to Mr. Davidson's counsel advising:

> General Cooper does not have possession of any personal documents that are responsive to the Request. The accompanying documents and the privileged documents described below were contained within the files of the Office of the Governor's Legal Counsel and are now in the possession of the Attorney General. As noted herein, for some of these documents from the files of the Office of the Governor's Legal Counsel appropriate privileges are being asserted, including work product, attorney-client communications, and deliberative process privileges.

Mr. Hart provided Mr. Davidson's counsel with Capital security assignments, addendums to post instructions, capitol security log forms, and memos. The fact that the information was requested from non-parties does not affect our analysis of this issue.

determinations *de novo* with no presumption of correctness. *Id*.; see also Tenn. R. App. P. Rule 13(d). Further, as noted by the *Culbertson* court:

> When a discovery dispute involves the application of a privilege, the court's judgment should be guided by the following three principles. First, Tennessee's discovery rules favor discovery of all relevant, non-privileged information. Second, even though privileges do not facilitate the fact-finding process, they are designed to protect interests and relationships that are regarded as sufficiently important to justify limitations on discovery. Third, while statutory privileges should be fairly construed according to their plain meaning, they need not be broadly construed.

Culbertson, 393 S.W.3d at 683 (quoting *Powell v. Cmty. Health Sys., Inc*., 312 S.W.3d 496, 504 (Tenn. 2010)).

1. DELIBERATIVE PROCESS PRIVILEGE

The deliberative process privilege protects "the confidentiality of conversations and deliberations among high government officials" and "ensures frank and open discussion and, therefore, more efficient government operations." *Swift v. Campbell*, 159 S.W.3d 565 (Tenn. Ct. App. 2004) (citing *United States v. Weber Aircraft Corp*., 465 U.S. 792, (1984)). Mr. Davidson contends that Tennessee has not adopted such a privilege and, therefore, the trial court and this court are without authority to adopt it "according to the plain language of Tenn. R. Evid. 501."

In *Swift* we considered whether the deliberative process privilege shielded an assistant attorney general's records related to a case involving a prisoner on death row. A petition had been filed to secure the documents pursuant to Tenn. Code Ann. § 10-7-505; the defendant's motion to dismiss the petition on the grounds of the work product doctrine, the law enforcement investigative privilege, the deliberative process privilege, and Tenn. R. Crim. P. 16(a)(2) was granted by the trial court. On appeal, we affirmed the dismissal on the ground that the documents were not subject to disclosure in accordance with Tenn. R. Crim. P. 16(a)(2). With respect to the deliberative process privilege argument, we stated:

> We have no doubt that there exists a valid need to protect the communications between high government officials and those who advise and assist them in the performance of their duties. *United States v. Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090, 3106, 41 L.Ed. 2d 1039 (1974). However, an assistant district attorney general preparing to defend a conviction in state court is not the sort of official to whom the privilege applies.

Although we did not specifically hold that Tennessee recognizes such privilege in the manner in which Mr. Davidson seeks, we opined:

> Whether the "deliberative process privilege" may be invoked depends on the government official or officials involved. We have no doubt, for example, that the Governor may properly invoke this privilege, should he or she care to, in meetings with staff or cabinet members.

Id.

In *Coleman v. Kisber*, 338 S.W.3d 895 (Tenn. App. Ct. 2010), a petition had been filed to obtain documents from the Commissioner of Revenue and the Commissioner of Economic and Community Development related to the administration of the Tennessee Small Business Investment Company Credit Act, Tenn. Code Ann. § 4-28-101, *et seq*. In their response to the petition, the defendants asserted that the documents were confidential and privileged in accordance with the tax information and tax administration information exceptions at Tenn. Code Ann. § 67-1-1702, the "ECD exception" at Tenn. Code Ann. §4-3-730 (c), and the deliberative process privilege. The trial court denied the petition on the ground that the ECD exception applied, found that the tax information and tax administration exception did not apply, and declined to apply the deliberative process privilege. We reversed the trial court's decision that the tax administration information and tax information exceptions did not apply and, on that alternative ground, affirmed the denial of the petition; our consideration of other issues presented in the appeal were pretermitted. With respect to the deliberative process privilege, however, we noted:

> [T]he trial court found that Tennessee had not adopted the Deliberative Process Privilege and that the Commissioners raised this as an issue on appeal. Because we have decided this case on another ground, we do not find it necessary to address this issue. However, our opinion should not be interpreted as an affirmance of the trial court's finding on this issue.

Id. at 909.

As is apparent from these cases, this Court has implicitly recognized the existence of the deliberative process privilege, a recognition with which we agree. As noted in *Swift v. Campbell*, there is a "valid need" that the advice high governmental officials receive be protected from disclosure. The officials who are able to claim the privilege are those vested with the responsibility of developing and implementing law and public policy, many times requiring that differing and various interests and viewpoints be considered. In this context, the privilege recognizes the official's relationship with trusted advisors as a relationship

which is fundamental to the process of deliberating toward the result and which is sufficiently important to justify a limitation on the "need to develop all relevant facts in the adversary system [which] is both fundamental and comprehensive." *Nixon*, 418 U.S. at 709. The deliberative process privilege is a common law privilege which, pursuant to Tenn. R. Evid. 501, can be asserted to prevent the production of a document and the trial court did not err in considering Defendants' claim of the privilege.[6]

The trial court held with respect to Defendants claim of the privilege that:

> [I]t is clear from the Court's in camera review of the text of the documents that they come within the privilege. The Court finds from its in camera inspection that the text of the documents establishes that they are communications between high government officials and those who advise and assist them in the performance of their official duties. Moreover, many of the documents contain no facts, only deliberations, and in the few documents that arguably contain mixed fact/opinion information, the possible facts are so inextricably intertwined with deliberative text that production must be denied.

We have reviewed the material for which the privilege was sought and agree with the trial court's findings. The trial court did not abuse its discretion in ruling that the deliberative process privilege applied to documents.

2. ATTORNEY CLIENT PRIVILEGE

As an initial matter, we address Mr. Davidson's contention in his brief on appeal that the Defendants did not assert the attorney-client privilege. As noted earlier, supra footnote 5, the privileges were asserted in a letter from Mr. Hart to Mr. Davidson's counsel. In

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[6] Tenn. R. Evid. 501, Privileges Recognized Only as Provided, states:

> Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:
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> (1) Refuse to be a witness;
>
> (2) Refuse to disclose any matter;
>
> (3) Refuse to produce any object or writing; or
>
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

addition, the attorney-client privilege was asserted in Defendants' Response to Plaintiff's Motion to Compel.[7]

The attorney-client privilege encourages full and frank communication between an attorney and client by sheltering these communications from disclosure. *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Grp. Trust, et al.*, 209 S.W.3d 602, 615–16 (Tenn. Ct. App. 2006) (citing Tenn. Code Ann. § 23-3-105).[8] The attorney-client privilege, however, is not absolute, and does not encompass all communications between an attorney and a client. *Id*. at 616 (citing *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992)). [W]hether the attorney-client privilege applies to any particular communication is necessarily question, topic and case specific. *Bryan*, 848 S.W.2d at 80. To invoke the protection of the attorney-client privilege, the burden is on the client to establish the communications were made pursuant to the attorney-client relationship and with the intention that the communications remain confidential. *State ex rel. Flowers*, 209 S.W.3d at 616 (citing *Bryan*, 848 S.W.2d at 80).

With respect to the claim of the attorney-client privilege the trial court held:

> As to documents 2, 3, 5, 6, and 7, the defendants objected to their production on the grounds of the attorney-client privilege. The Court sustains the objection as to documents 2 and 3. From the in camera inspection of the documents, linked with the facts testified to by Attorney Elkins in his June 18, 2012 affidavit in paragraph 7, identifying that the defendants were present when the documents were created, the Court finds that documents 2 and 3 concern facts which the attorney was informed by the client. This is an essential element of the attorney-client privilege and must be established by the party invoking the privilege. *Reed v. Baxter*, 134 F.3d 355–356 (6th Cir.

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[7] In their response Defendants stated:

> The documents were not produced by the Office of the Attorney General on the basis of one or more of the following legal theories: 1) that the documents are work product of the attorney(s) involved; 2) that the documents contain privileged attorney-client communications; and 3) that the documents are protected by the deliberative process privilege.

[8] Tenn. Code Ann. § 23-3-105, Attorney-client privilege, states:

> No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person's injury.

> 1998). This element, however, is not established as to documents 5, 6, and 7. Neither the documents themselves nor the Elkins' affidavits establish the facts contained therein came from the client. The Court, therefore, overrules the defendants' attorney-client privilege objection as to documents 5, 6, and 7.

We have likewise considered the attorney-client privilege in our review of the documents at issue, as well as the affidavits Mr. Elkins.[9] The affidavits attest to the fact that the documents for which production was not ordered were maintained and /or prepared by Mr. Elkins in his capacity as Deputy Legal Counsel to Governor Bredesen and pursuant to his responsibilities in that capacity[10]; that the documents specifically relate to his analysis of questions presented to him by the Governor as well as related issues surrounding the protest at the Capitol; and reflect counsel given the Governor and the Governor's advisors in that regard. We agree with the trial court's findings in this regard and hold that the court did not abuse its discretion in ruling that the documents were covered by the attorney-client privilege.

3. Other Related Matters

Defendants' objection to production of the documents on the basis of the work product privilege was overruled by the trial court, as was Mr. Davidson's invocation of the crime-fraud exception to the attorney-client privilege; neither party raises an issue with respect to the court's rulings on appeal. In any event, our holding that the documents are covered by the deliberative process privilege and the attorney-client privilege renders moot any issue relating to the work product privilege or the crime-fraud exception to the attorney-client privilege.

B. Summary Judgment Analysis

Summary judgment is an appropriate vehicle for resolving a case where a party can show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04; see also Tenn. Code Ann.

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[9] In addition to the June 18, 2012 affidavit referenced by the trial court, Mr. Elkins submitted a Supplemental Affidavit on July 24.

[10] Mr. Elkins attests that his responsibilities included advising members of Governor Bredesen's staff, including Mr. Cooley.

§ 20-16-101.[11] The moving party may meet this burden by either: (1) affirmatively negating an essential element of the non-moving party's claim; or (2) showing that the non-moving party will not be able to prove an essential element at trial. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8–9 (Tenn. 2008). If the moving party's motion is properly supported, "[t]he burden of production then shifts to the nonmoving party to show that a genuine issue of material fact exists." *Id*. at 5 (citing *Byrd v. Hall*, 847 S.W.2d 208, 215(Tenn. 1993)). The non-moving party may accomplish this by:

> (1) pointing to evidence establishing material factual disputes that were overlooked or ignored by the moving party; (2) rehabilitating the evidence attacked by the moving party; (3) producing additional evidence establishing the existence of a genuine issue for the trial; or (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P. Rule 56.06.

Martin v. Norfolk S. Ry. Co., 271 S.W.3d 76, 84 (Tenn. 2008) (citations omitted).

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield*, 181 S.W.3d 283, 288 (Tenn. 2005); *BellSouth Adver. & Publ. Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc*., 49 S.W.3d 281, 284 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp*., *Inc.*, 970 S.W.2d 435, 437 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn.1997). Accordingly, we review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc*., 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc*., 15 S.W.3d 83, 88 (Tenn. 2000). We consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, and afford that party all reasonable inferences. *Draper*, 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc*., 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). "If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn from that fact, the motion must be denied." *Byrd*, 847 S.W.2d at 215.

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[11] Tenn. Code Ann. § 20-16-101, applicable to summary judgments, was enacted by 2011 Tenn. Pub. Acts. Ch. 498, became effective July 1, 2011 and is applicable to cases filed on or after that date.

In order to succeed on a claim of retaliation for the exercise of First Amendment rights, a plaintiff must establish: (1) that the plaintiff was engaged in a constitutionally protected activity; (2) that the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of the plaintiff's constitutional rights. *Davidson v. Bredesen*, 330 S.W.3d 876, 887 (Tenn. Ct. App. 2009) (citing *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998).

Mr. Davidson alleged in the amended complaint that certain actions of Defendants, specifically harassment of himself and others, denial of water and food, and confiscation of his clothing, "were carried out in retaliation for Plaintiff's protected conduct and therefore amount to a deprivation of Plaintiff's civil rights under color of law and entitle him to damages . . . ." In support of their motion for summary judgment Defendants relied upon Mr. Davidson's response to the following interrogatory:

> Describe in complete detail all damages you have suffered as a result of the allegations contained within the Amended Complaint for Declaratory Relief and Damages for Deprivation of Federal Civil Rights Under Color of Law. Include in your answer the method by which you calculated those damages, the dates and times you allege the damages occurred and the names and addresses of all possible witnesses to said damages. Please also include in your answer a summary of the expected testimony of each of the potential witnesses.

Mr. Davidson's response to the interrogatory was six and a half pages; we will refer to the salient portions of the response as we discuss each individual claim.[12]

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[12] Mr. Davidson asserts on appeal that the Defendants did not present "any affidavit from any person present during the protests and under the control of the Defendants, such as a State Trooper or Capitol police officer, attesting that Plaintiff was *not* denied food and water during the sit-in, that his clothing was *not* removed from him, or that he was *not* deprived of sleep by police or troopers rousing him to see 'whether [he] was all right'" and that, as a consequence, the court erred in granting summary judgment. In making this argument, Mr. Davidson misconstrues the evidentiary requirements to support a motion for summary judgment. Tenn. R. Civ. P. 56.04 allows a moving party to rely on "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" to show that there is no genuine issue as to any material fact. Defendants' reliance on Mr. Davidson's answer to the interrogatory to meet their initial burden is sufficient to comply with the rule.

1. HARASSMENT OF OTHERS

The trial court held that Mr. Davidson's claim relative to the alleged harassment of other protestors failed as a matter of law.[13] Mr. Davidson does not assign error to the trial court's ruling on this particular matter.

A § 1983 action is entirely personal to the direct victim of the alleged constitutional tort; therefore only the victim or the victim's representative(s) may prosecute the claim. *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000). Mr. Davidson's use of these alleged incidents to support his contention that Defendants retaliated against him for exercising his First Amendment rights is misplaced because he is not a direct victim of the alleged harassment. For that reason, Mr. Davidson's claim regarding the alleged harassment of others was properly dismissed.

2. HARASSMENT

The trial court held that Mr. Davidson's claim for harassment by verbal abuse failed as a matter of law and that his claim regarding sleep deprivation was *de minimus*.

The portions of the interrogatory answer pertinent to Mr. Davidson's claim that he was harassed by Defendants in retaliation for his participation in the protest stated:

> We were repeatedly accused by Capitol police and/or state troopers of being "paid agitators" and not TennCare beneficiaries at risk of being disenrolled. This was not true. None of the sit-in protestors to my knowledge was a paid outside agitator. . . . Yet on more than one occasion, the Governor made public announcements to this effect which further encouraged the harassment by Capitol police and/or state troopers. This additional harassment by the Governor was intended to publicly attack my (our) credibility with the public, the Governor's staff, and the police, and further contributed to my fear, anxiety, and mental distress.

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[13] Mr. Davidson asserted that he witnessed Capitol police and/or state troopers harass his co-protestors by threatening them with physical harm and directing racial slurs at them. Furthermore, Mr. Davidson contended that Defendant Cooley had a "confrontational meeting" with four protestors in which he "shouted at them so vigorously that he spit on them."

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> There was a period of about one week during the demonstration where the Capitol Hill police on night duty would play the television and radio exceptionally loud so as to disrupt what little sleep we (I) could get on the marble floor of the Capitol Building. If we did fall asleep, an officer would wake us up and ask if we were "all right." This sleep deprivation was harassment which caused me fear, frustration, and anxiety.

The answer does not support the allegation that either of Defendants harassed Mr. Davidson by calling him a "paid agitator" or by depriving him of sleep during the nights he slept at the Capitol after hours; neither is there any fact asserted to support the allegation that either Defendant ordered the Capitol police and/or state troopers to accuse him of being a paid agitator and deprive him of sleep by playing the television and radio loudly and waking him up. This was sufficient to negate an essential element of Mr. Davidson's claim, i.e., that he suffered an adverse action, harassment, as a result of his participation in the sit-in demonstration, and requiring him to produce evidence of the same.

As part of his response to the motion, Mr. Davidson amended his interrogatory answer and filed a document styled Plaintiff's Sworn Response in Opposition to Defendants' Statement of Material Undisputed Facts. In the amended interrogatory answer, he did not assert any additional facts relative to his claim of verbal abuse or deprivation of sleep. In his response to the statement of material facts Mr. Davidson admitted the following statement, which was the only statement relative to the harassment claim: "One of Plaintiff's claims is that he was accused of being a 'paid outside agitator.'"

The material relied upon by Mr. Davidson does not establish an issue of fact as to the allegations that Defendants verbally abused him or deprived him of sleep because of his participation in the protest. Mr. Davidson does not state any fact in his amended interrogatory answer or in his response to the statement of undisputed facts to support his allegation that Defendants harassed him in any manner. Rather, his contention regarding the amount of sleep he received is centered around a time at which the Capitol is closed to the public.[14] Other material in the record, e.g., the procedures in effect for use of the public areas of the Capitol, the post instructions for officers assigned to the Capitol, and memoranda to and from those officers, provide context for the actions of those responsible for operation of

[14] The hours of operation for the public area of the Capitol are from 8:00 a.m. to 4:30 p.m. daily, except for Saturdays, Sundays, and holidays.

the Capitol, including insuring the safety of the protestors. The failure of Mr. Davidson to produce evidence to establish a genuine issue of fact, that any action which he alleges was taken against him was taken in retaliation for his participation in the protest, supports the grant of summary judgment.[15]

3. DENIAL OF FOOD AND WATER

The trial court held that there was no issue of fact relative to Mr. Davidson's claim that he was denied food and water during the protest in retaliation for the exercise of his First Amendment rights.[16] The following portion of Mr. Davidson's interrogatory answer relates to the alleged denial of access to food and water:

> At various times I was denied adequate access to food and water. On weekends we were allowed to bring in enough food for only one meal for the 6-9 hour period. On the weekends, if one of us left the building to get food, he or she, would not be allowed to re-enter the Capitol until 8:00 a.m. the following Monday. . . . On one occasion, when I attempted to bring in extra food for myself from the outside, it was confiscated by the Capitol Hill police. I did not attempt to do it again for fear of being barred from the sit-in demonstration.
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> . . . I paid for my own food and bottled water everyday I was there . . . .

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[15] We agree with the trial court that Mr. Davidson's claim that there was one week during the protest during which he was deprived of sleep was *de minimus*. The protest extended for seventy-seven days and Mr. Davidson was present for forty-two of those days. As is clear from the materials in the record, the Department of Safety and the Department of General Services, charged with the responsibility of maintaining operations in the Capitol, were addressing a situation—persons who had camped out in the Capitol building as an act of protest—for the first time. As acknowledged in *Thaddeus-X v. Blatter*, not every action taken rises to the level for which the Constitution is concerned. *Thaddeus-X v. Blatter*, 175 F.3d 378, 396 (6th Cir. 1999) (". . . every action, no matter how small, is constitutionally cognizable . . . [t]here [is], of course, a *de minimus* level of imposition with which the Constitution is not concerned."). The allegation that for one week Defendants took action that deprived him of sleep in retaliation for his participation in the protest, even if taken as true, does not constitute a constitutional violation.

[16] Mr. Davidson does not allege that there was a duty on the part of Defendants or the State to supply him with food or water, and we hold that there was no such duty.

> After 4:00 p.m. each day and on weekends, we were denied access to water outside of the restroom. Public water fountains did not work because of some remodeling work that was in progress . . . . [O]n the weekends, we had to rely upon commercial bottled water. We were restricted to no more than two 12-ounce bottles of commercial water apiece for the weekends. Additional water or food, except for peanut butter crackers, was denied to us on weekends.

The response to the interrogatory acknowledges that he was not denied food or water during his protest but, rather, that there were restrictions on the amount which he could possess: the wording in the response is that he was denied "adequate access to food and water."

There was no rule governing the manner in which food was to be brought to the Capitol or consumed under the circumstances presented. Section II C.9 of the Procedures for Use of Public Areas: Tennessee State Capitol provides that "Food and beverages shall not be served in the public areas inside the Capitol without the approval of the State Capitol Commission (see Section II B 6). Food and beverages must be consumed on the area approved for an event." Mr. Davidson does not state and we find no evidence in our review of the record that Mr. Davidson or his fellow protesters were in compliance with the procedures relative to the service or consumption of food in the Capitol building. Considered in this context, the acknowledgment that he was allowed to bring in food and water negates an essential element of his claim, thereby requiring him to produce evidence establishing a genuine issue of material fact that the defendants denied him food and water in retaliation for his participation in the protest.

In the amended interrogatory response Mr. Davidson added the following statement relative to the alleged deprivation of food and water:

> When denied proper food over the weekends, by the following Monday morning, I would be fatigued, light-headed, and giddy.

In his response to the statement of undisputed facts, Mr. Davidson gave several qualified admissions and one denial; the pertinent answers regarding food and water are as follows:

> 5. The protestors were allowed to bring in food on the weekends.
>
> **RESPONSE:** Admitted only that Plaintiff and his co-protestors were permitted to bring in enough food for the meal for a 6-9 hour period out of the

48-hour weekend. The denial of sufficient food for the 2-day weekend was an attempt by Defendants to disrupt the sit-in protest and aggravate the medical conditions of Plaintiff and his co-protestors.

6. “Extra” food was confiscated a single time from the Plaintiff as he attempted to bring it in the Capitol building.

RESPONSE: Admitted; however, this incident and the threat of being barred from participating in the sit-in protest prevented Plaintiff from attempting to bring additional food into the Capitol Hill Building on weekends.

7. Other than the time described in number 6, above, food was not confiscated from Plaintiff on any other occasion.

RESPONSE: Admitted; however, food had been confiscated from other co-protestors on other occasions in the presence of Plaintiff.

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12. Every day Plaintiff was at the Capitol during the protest he paid for his own food and bottled water.

RESPONSE: Admitted, any food or bottled water Plaintiff consumed at the sit-in protest was paid for by him . . . . It does not mean that Plaintiff had adequate food and water over the weekends.

13. Plaintiff had food and water every day he was at the Capitol as a protestor.

RESPONSE: Denied that Plaintiff had enough food during the weekends because of Defendants’ directive that enough food for only one meal per person could be brought in on the weekends.

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18. Water was always available to Plaintiff during the protest via water bottles he had purchased or in the restrooms.

RESPONSE: Admitted that Plaintiff had to rely on bottled water after 4:00 p.m. on weekdays and all day on weekends. However, Plaintiff and other

protestors were limited to two-12 ounce bottles of commercial water apiece for the weekends.

19. According to the rules and regulations in place at the time of the protest, food and beverages were not served in the public areas inside the Capitol without the approval of the State Capitol Commission.

RESPONSE: Admitted that the Procedures for Use of Public Areas: Tennessee State Capitol published on August 6, 2001, were in effect during the sit-in protest . . . . The rules and regulations provide that food and beverages could be consumed in designated areas with written permission of the State Capitol Commission . . . . Plaintiff and his co-protestors were permitted to eat and drink in designated areas, but the amount of food was arbitrarily limited to enough for one (1) meal on weekends . . . .

The material produced by Mr. Davidson in his response to the motion fails to establish a genuine issue of material fact that he suffered an adverse action—the denial of food and water—because of his participation in the protest. Mr. Davidson admits that Procedures for Use of Public Areas: Tennessee State Capitol published on August 6, 2001 were in effect during the time of the protest; he also admits that he had access to water in the restrooms and bottled water on weekdays and that he was allowed to bring in food and water on the weekends. Mr. Davidson has failed to assert any fact which would establish a genuine issue of material fact that the enforcement of the rules was in retaliation for the exercise of his First Amendment rights; summary judgment on this issue was proper.[17]

4. CONFISCATION OF CLOTHING

The portion of the interrogatory answer relative to Mr. Davidson's claim that his clothing was confiscated in retaliation for his participation in the protest is as follows:

On several occasions, Capitol police and/or state troopers confiscated my few extra clothes (including underwear and socks).

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[17] As with Mr. Davidson's claim relative to the alleged deprivation of sleep, the claim that extra food he sought to bring into the Capitol on one weekend was confiscated is *de minimus*. The claim that he was denied extra food, even if true, does not rise to the level of a constitutional violation.

In this response Mr. Davidson does not state that either Defendant ordered the confiscation or even that they were aware of the alleged action, rather, he states that his clothing was confiscated by Capitol police and/or state troopers. This response was sufficient to negate an essential element of Mr. Davidson's case—that the Defendants took an adverse action against him by taking his clothing in retaliation for the exercise of his First Amendment rights.

In his amended interrogatory response Mr. Davidson did not add any facts relative to the confiscation of his clothing. In his response to the statement of undisputed facts, Mr. Davidson admitted the following statement, which was the only statement relative to the claim that his clothes were confiscated: "Plaintiff's clothes (socks and underwear) were confiscated several times by Capitol police and/or state troopers."

This material, produced by Mr. Davidson to establish the a genuine issue of material fact that he was retaliated against by Defendants by having his clothing confiscated, is insufficient. He does not state that Defendants confiscated his clothing and does not produce evidence that Defendants ordered or knew that his clothing had been confiscated. He gives none of the circumstances surrounding the taking of his clothing which would present an issue of fact that the clothing was taken in retaliation for his participation in the protest rather than as actions the Capitol police took as they performed their responsibilities.[18] Summary judgment on this issue was proper.[19]

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[18] Section II B. 14 of the Procedures for Use of Public Areas: Tennessee State Capitol provide that "To enhance security and public safety, security officers may insect packages and briefcases suspected of concealing items or contraband and items being brought into the State Capitol building which are suspected to be capable of destructive or disruptive use within the building." In addition, certain of the procedures called for routine maintenance of the public areas of the Capitol and for any activity to be cognizant of the fact that the Capitol is "a working Capitol where various agencies carry out their government responsibilities" and that "[p]ublic use of the Capitol shall not interfere with any legislative session or the conduct of public business by agencies of the State which normally occupy and use the Capitol and shall not affect the safety and well-being of the individuals conducting the work of these agencies."

[19] In addition, for the reasons set forth previously with respect to the claims of deprivation of sleep and confiscation of extra food, we agree with the trial court's ruling that this claim is *de minimus.*

III. CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

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RICHARD H. DINKINS, JUDGE