E. SHARON SANFORD,	)	
	)	
Plaintiff/Appellant,	)	Appeal No.
	)	01-A-01-9606-CV-00251
v.	)	
	)	
METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY; CORY McCLELLAN individually, and in his official capacity; and CHARLES STEVENS, individually, and in his official capacity;	)	Davidson Circuit
	)	No. 93C-260
	)	
	)	
	)	
	)	
	)	
	)	
	)	
Defendants/Appellees.	)	

COURT OF APPEALS OF TENNESSEE

MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR DAVIDSON COUNTY

AT NASHVILLE, TENNESSEE

THE HONORABLE BARBARA N. HAYNES, JUDGE

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AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

Plaintiff/appellant, E. Sharon Sanford, appeals numerous decisions made by the Circuit Court for Davidson County. During the proceedings, the court dismissed two defendants, dismissed Mrs. Sanders' constitutional deprivation claim, and ordered defendant/appellee, the Metropolitan Government of Nashville and Davidson County ("Metro"), to pay twenty percent of Mrs. Sanders' discretionary costs. In its final judgment, the court allocated the fault between the parties. Mrs. Sander's contends that the court erred in making each of these decisions. The facts out of which this matter arose are as follows.

On 31 January 1992, two Metro police officers responded to a "shots fired" call on Harlan Drive in Davidson County. The following persons lived on Harlin Drive: Mrs. Sanford and her son, Jamie Sanford, lived at 3010 Harlin Drive; Mr. Joel Dickerson lived across the street from Mrs. Sanford at 3011 Harlin Drive; Mrs. Margie George lived two houses down from Mr. Dickerson at 3015 Harlin Drive; and Mrs. Ezell, Ms. Michelle Tompkins, and Ms. Nikki Fenstermacher lived next door to Mrs. Sanford at 3008 Harlin Drive.

Mr. Dickerson and Mrs. Sanford were friends. On 31 January 1992, Mr. Dickerson was angry because of an incident which occurred between him and his girlfriend, Deborah Beasley. Mrs. Sanford attempted to calm down Mr. Dickerson who had been drinking. Shortly after midnight on 1 February 1992, Mr. Dickerson no longer appeared upset or angry so Mrs. Sanford went home. Twenty to thirty minutes after returning home, Mrs. Sanford heard gunshots. Mrs. George also heard the shots and called Mrs. Sanford. Mrs. Sanford told Mrs. George that Mr. Dickerson was drunk and was firing a gun. Mrs. George called 911. She reported that her neighbor was firing a gun and that another neighbor had informed her of what was happening. Thereafter, the 911 dispatcher put out a shots fired in progress call and reported that there was a drunk male at 3011 Harlin Drive. A few minutes later, Mrs. Ezell called 911. She reported seeing a man step out of his front door and fire two or three shots into the ground. The dispatchers did not dispatch this information to the officers.

Officer Cory McClellan was the first officer on the scene. As he drove down Harlin

Drive, he passed Mr. Dickerson's home and Mrs. George flagged him down. Mrs. George informed Officer McClellan that the man he was looking for was inside 3011 Harlin Drive and that he had fired nine shots. Thereafter, Officer McClellan parked on the street between Mr. Dickerson's and Mrs. George's residences. Sergeant Lonnie Stevens arrived shortly thereafter and parked in front of Mr. Dickerson's house. At that time, Mrs. Sanford stood at her storm door watching the house across the street. Neither officers questioned Mrs. Sanford or the other neighbors before proceeding and neither officer used their emergency lights or sirens when approaching the scene.

Without discussing a plan, the officers approached Mr. Dickerson's front door with their guns drawn. Mr. Dickerson's front door was open, but his storm door was closed. The lights were on in the living room. The officer looked through the storm door into Mr. Dickerson's living room. No one was in the living room, but there was a phone cord stretched from the kitchen to the hallway. The officers heard a voice coming from the hallway which they described as loud and angry. The evidence later revealed that Mr. Dickerson was arguing with Ms. Beasley on the phone.

The officers entered the house without announcing their presence. They later explained that they did not announce their presence because they feared there might be someone inside who was in danger. While in the living room, Sergeant Stevens heard Mr. Dickerson say "I've got something for your a--" and heard a gun cylinder snap shut. Mr. Dickerson then exited the bedroom and walked toward the living room with a gun in one hand and the phone in the other. Sergeant Stevens ducked into the kitchen, and Mr. Dickerson passed by without seeing Sergeant Stevens. As Mr. Dickerson walked to the front door, he stated "I'm going to get you, m----- f-----." In the same instance, Officer McClellan went out the front door. Mrs. Sanford contended that Mr. Dickerson may have been checking for an intruder or simply walking to the front door when he walked through the living room. Metro, however, claimed that Mr. Dickerson was chasing Officer McClellan out of the house. After exiting the house, Officer McClellan jumped down off the porch and sought cover at the corner of the house. Sergeant Stevens remained in the kitchen.

Metro insisted that Mr. Dickerson raised his gun after the storm door closed behind him and that the officers fired simultaneously at that time. Mrs. Sanford claimed that Mr. Dickerson's

arms remained at his side as he came through the storm door. She also claimed that Sergeant Stevens began to fire at Mr. Dickerson as he tried to go out the door. Finally, Mrs. Sanford claimed that Officer McClellan began firing after Mr. Dickerson came out the front door and raised his hand holding the gun.

Mr. Dickerson was fatally wounded. Officer McClellan fired nine shots, and Sergeant Stevens fired four shots. A total of nine shots hit Mr. Dickerson. Sergeant Stevens actions resulted in one wound, and Officer McClellan's actions resulted in eight. One of the bullets shot from Sergeant Stevens' gun traveled across the street, through Mrs. Sanford's storm door, and into her living room where it struck her in the face below her lip. The shot shattered Mrs. Sanford's lower jaw, blew a hole in her gum, and knocked out many of her teeth.

On 28 January 1993, Mrs. Sanford filed a complaint. She named the Metropolitan Police Department, the Metropolitan Government of Nashville and Davidson County, and both officers in their individual and official capacities as defendants. Mrs. Sanford stated causes of action for negligence per se, common law negligence, intentional tort, and deprivation of constitutional rights. She claimed compensatory damages of $1,000,000.00. Defendants responded by filing a motion to dismiss or for summary judgment as to the entire complaint.

On 24 May 1994, the trial court dismissed Mrs. Sanford's constitutional deprivation claim. In response, Mrs. Sanford filed a motion to reconsider, a motion for an interlocutory appeal, and a notice of appeal. The trial court later denied both motions. On 23 January 1995, this court entered an order dismissing Mrs. Sanford's appeal for lack of a final judgment. On 21 June 1994, defendants Officer McClellan and Sergeant Stevens in their official and individual capacities filed a motion to dismiss. The court filed an opinion on 15 July 1994 and dismissed both defendants from the lawsuit. Metro then filed its answer. As affirmative defenses, it alleged that Mr. Dickerson was the proximate cause of Mrs. Sanford's injuries and that Mrs. Sanford was comparatively more at fault than Metro.

The case continued at the trial level. On 9 December 1994, Metro filed a motion for

summary judgment. On 6 February 1995, the court entered an ordering granting summary judgment as to all counts except count II, common law negligence. On 11 October 1995, Metro amended its answer. It added specific allegations that Mrs. Sandford and Mr. Dickerson were guilty of comparative negligence. The trial court entered its findings of fact and conclusions of law on 16 January 1996. The trial court stated:

> The Court considers and compares the negligence, if any, on part of all the parties involved: Metro Government, by and through police Officers McClellan and Stevens; Dickerson, the deceased: and Mrs. Sanford, the plaintiff. See McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992).
>
> The Court concludes that the deceased Dickerson was the greatest contributor to the unfortunate injuries to the plaintiff caused by his intentional, wilful, wanton, and grossly negligent conduct. However, the Court also finds that fault should be apportioned to the law enforcement officers acting on behalf of and in the line of duty with the Metropolitan Government as well as the plaintiff.
>
> In comparing the respective acts of negligence of the police officers and the plaintiff to that of the deceased, the Court finds that the intentional, reckless, wilful and wanton conduct of the deceased, Dickerson, was the overwhelming cause and a proximate cause of the unfortunate injuries to the plaintiff. See Turner v. Jordan, No. 01-A-01-9411-CV00544, No. 93C-1611 (Tenn. Ct. App. Aug. 30, 1995). However, the Court must compare the conduct of Mr. Dickerson to the fault of the other parties.
>
> The Officers negligently violated the following Metropolitan Police Department Guidelines.
>
> > (1)"...no form of deadly force shall be used which would pose a substantial risk to innocent bystanders." Metropolitan Police Department Guidelines Exhibit 47, Page 8, section B4;
> > (2) Deadly force should not be used, absent exigent circumstances"...until such time as [subject] demonstrates unwillingness to voluntarily comply with directions, advice or warnings, incidental to his arrest." Exhibit 47, P. 10, section 11.500(d);
> > (3) Deadly force "shall be used only as a last resort, and all other reasonable means have failed or would appear futile." Exhibit 47, Page 11, section 11.502(b).
>
> The officers violated these guidelines in apprehending the deceased Dickerson, and the plaintiff's injuries proximately resulted from their negligence.
>
> Officers McClellan and Stevens had a duty to exercise reasonable care in the performance of their duties as police officers. They had a duty to conduct a reasonable investigation and inquiry under the circumstances before entering the premises of Dickerson unannounced. There were no exigent circumstances that required the immediate entry into the home without first ascertaining important facts such as the probability, or lack thereof, of other persons being present in the house.
>
> The Court finds that the police officers should have adopted a plan for their own safety and the safety of bystanders. (The Court finds that the method of entry was in conformity with a narcotics raid where spoilation of evidence or destruction of evidence is an overriding consideration, as opposed to a shots fired call; the Court finds that particularly Officer Stevens, the Senior police officer, was a long time reputable member of the Vice squad who had just been transferred to the Patrol division prior to this

incident and his and Officer McClellan's actions in entering the house comport to a drug raid).

The Court is of the opinion the situation dictated the police procedure for hostage situations: securing the area, getting backup in place, and then announcing their presence and ordering the subject outside. This procedure was fairly well dictated by the situation for the safety of all concerned including themselves.

Officer McClellan and Officer Stevens also had a window of opportunity to secure the area from possible harm to bystanders such as the plaintiff. They should have ordered the bystanders inside their homes and maintained further protection as opposed to omitting to do anything relative to the bystanders who also included Mrs. George.

The Court further finds that the police officers and the plaintiff are guilty of common law negligence for failing to exercise ordinary care under the circumstances which proximately caused the plaintiff's injuries.

The Court also finds that the plaintiff was negligent and should have taken steps to insure her own safety. Her failure to shut her own door and take further actions to protect herself was a proximate cause of her injuries. She had already tried to calm Mr. Dickerson and knew first hand that he was very angry, intoxicated, and had fired his gun. In fact, the plaintiff warned Mrs. George not to let her husband go to Mr. Dickerson's house due to his dangerous propensities and the risk of being shot.

In arriving at the resulting percentages of fault, the court also takes into consideration elements of sudden emergency and intervening causation. Eaton v. McLain, 891 S.W.2d 587 (Tenn. 1994). The Court finds that the essential elements of sudden emergency, pled by the police officers, are not completely present. Furthermore, the party asserting the sudden emergency doctrine must be free of fault in creating the emergency in whole or in part. Kowalski v. Eldridge, 765 S.W.2d 746, 749 (Tenn. Ct. App. 1988). There is also the question of the independent intervening acts of the deceased, Dickerson, that occurred after the entry of the police officers into the home. The Court is of the opinion the complete elements of independent causation are absent because the gravamen of the situation was continuous and unbroken. Moreover, there is no requirement that a cause, to be regarded as the proximate cause of an injury, be the sole cause, the last act, or the one nearest to the injury, provided it is a substantial factor in producing the end result. McClenahan v. Cooley, 806 S.W.2d 767, 775 (Tenn. 1991).

Nevertheless, in considering the totality of fault the court does inculcate those existing components of sudden emergency and independent intervening cause which are factually present in this case, and the court does convert those into elements into degrees of fault, just as it did in comparing wilful and wanton, and grossly negligent conduct to common law negligence. See Turner v. Jordan, No. 01-A-01-9411-CV00544, No. 93C-1611 (Tenn. Ct. App. Aug. 30, 1995), Eaton v. McLain, 891 S.W.2d 587 (Tenn. 1994).

Therefore, the Court finds the total amount of the plaintiff's damages to be $250,000.00. However, the Court apportions fault among the parties in the following percentages:

> 75% is apportioned to the deceased, Joel "Buster" Dickerson.
> 20% is apportioned to the Metropolitan Government of Nashville, by and through its Officers, Cory McClellan and Charles Stevens.
> 5% is apportioned to the plaintiff, Sharon Sanford.

Mrs. Sanford filed a motion to amend the judgment due to a mathematical error. She also filed a motion for discretionary costs. The court entered an order of judgment on 22 February 1996.

In the order, the court incorporated its earlier findings and conclusions and corrected its mathematical error. In a separate order, the court awarded Mrs. Sanford twenty percent of her discretionary costs.

I. Comparative Fault

On appeal, Mrs. Sanford presented five issues, the first of which was: "Did the trial court err as a matter of law in its allocation of fault . . . when the actions of Metro's officers primarily, if not solely, caused Mrs. Sanford's injuries?"

The Tennessee Supreme Court adopted a modified comparative fault system in ***McIntyre v. Balentine***, 833 S.W.2d 52, 57 (Tenn. 1992). Under this system, a defendant is liable for the percentage of the plaintiff's damages attributable to the negligence of the defendant, so long as the plaintiff is less than fifty percent at fault. In ***Eaton v. McLain***, 891 S.W.2d 587 (Tenn. 1994), the court clarified the issue of how to allocate fault. The fact finder is to apportion fault based on "all the circumstances of the case" which include such factors as:

> (1) the relative closeness of the causal relationship between the conduct of the defendant and the injury to the plaintiff; (2) the reasonableness of the party's conduct in confronting a risk, such as whether the party knew of the risk, or should have known of it; (3) the extent to which the defendant failed to reasonably utilize an existing opportunity to avoid the injury to the plaintiff; (4) the existence of a sudden emergency requiring a hasty decision; (5) the significance of what the party was attempting to accomplish by the conduct, such as an attempt to save another's life; and (6) the party's particular capacities, such as age, maturity, straining, education, and so forth.

Eaton, 891 S.W.2d at 592 (footnotes omitted). The court did not intend its list to include all the factors, but realized that courts would need to expand the list in the future. ***Id.*** at 593.

The comparative fault system focuses on the party's relative fault and not on the theoretical underpinnings of the different causes of actions. ***See Whitehead v. Toyota Motor Corp.***, 897 S.W.2d 684, 687-93 (Tenn. 1995) (holding comparative fault principles apply to strict products liability); ***see also Owens v. Truckstops of Am.*** 915 S.W.2d 420, 430-33 (Tenn. 1996). This court has held that a trial court should compare the negligence of a psychiatrist whose patient attacked a nurse to the intentional acts of the patient because such an apportionment of liability "supports the

policy espoused in ***McIntyre*** that liability should be proportionate to fault." ***Turner v. Jordan,*** No. 01-A-01-9411-CV-00544, 1995 WL 512957, at *8 (Tenn. App. 30 August 1995), *perm. app. granted* (9 Sept. 1996); ***see Prince v. St. Thomas Hospital,*** No. 01-A-01-9604-CV-00184, slip op. at 10-11 (Tenn. App. 1 Nov. 1996). In other states that have adopted comparative negligence, there is a split of authority over whether courts should compare the reckless or gross negligence of one party to the ordinary negligence of another for the purpose of apportioning fault. The majority appears to favor comparison. *Application of Comparative Negligence in Action Based on Gross Negligence, Recklessness, or the Like,* 10 A.L.R. 4th 946 (1981).

In ***Eaton,*** the supreme court noted that in formulating the list of factors to consider when apportioning fault in general they relied heavily upon the Uniform Comparative Fault Act ("the Act"). ***Eaton***, 891 S.W.2d at 592 n.14. It is the opinion of this court that the factors listed in the Act and used in ***Eaton*** also apply when apportioning fault between one negligent actor and one grossly negligent or reckless actor. In its definition of "fault," the Act states that fault "includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability." Unif. Comp. Fault Act, § 1(b), 12 U.L.A. 127 (1996). The comment to section one indicates that the definition of fault covers "all degrees and kinds of negligent conduct without the need of listing them specifically." ***Id.*** Following our review of this record and the numerous factors we are of the opinion that fault was not properly apportioned in this case.

A. Mrs. Sanford

Metro contends Mrs. Sanford was negligent because she stood in her living room looking out her storm door. We can not agree. Under all the circumstances, we believe it is reasonable for a person to watch what is happening when the police arrive to arrest a man who has been disturbing the peace. The evidence is that both Michelle Tompkins and Nikki Fenstermacher were looking out their storm door at the same time.

In order for the court to allocate fault to Mrs. Sanford, Metro had to satisfy its burden by

establishing that she "failed to exercise reasonable care under the circumstances." ***Doe v. Linder Constr. Co.,*** 845 S.W.2d 173, 178 (Tenn. 1992).

> Negligence consists in a failure to provide against the ordinary occurrences of life, and the fact that the provision made . . . is insufficient as against an event such as might happen once in a life time . . . does not make out a case of actionable negligence.

Illinois Cent. R.R. Co. v. Nichols, 173 Tenn. 602, 613, 118 S.W.2d 213, 217 (1938). Here, it was not foreseeable to a person such as Mrs. Sanford that a policeman in a neighbor's home across the street would shoot her. Even though she knew that Mr. Dickerson had been shooting his gun, she had no reason to believe he was shooting at anyone or that he would try to shoot her because they were friends. In addition, Mrs. Sanford had no idea that the police would start shooting or that they would fire in the direction of her home. The police officers admitted that they gave no warning to Mrs. Sanford or to any of the other neighbors that they might begin shooting. We do not believe that a reasonable person, under all the circumstances, would have expected a shoot out to occur. Negligence is determined by foresight, not hindsight, and there is no negligence if the injury "could not have been reasonably foreseen." ***Doe***, 845 S.W.2d at 178.

B. Mr. Dickerson

Mrs. Sanford also contends "the trial court erred as a matter of law by concluding that Mr. Dickerson's actions were the overwhelming cause of Mrs. Sanford's injuries, when in fact his actions either were not the proximate cause of her injuries, or a remote cause."

Prior to the officers' arrival, Mr. Dickerson was shooting his gun into the ground to scare his girlfriend, Deborah Beasley, who he was speaking to on the phone. He did not fire any shots after the police arrived. There is no doubt that the actions of Mr. Dickerson, which resulted in the police being called to the scene, were irresponsible, grossly negligent, and reckless. We are of the opinion, however, they were too remote to require the allocation of seventy-five percent of the fault.

When apportioning fault, the fact finder should initially take into account "the relative closeness of the causal relationship between the conduct of the defendant and the injury to the

plaintiff." ***Eaton***, 891 S.W.2d at 592. This factor is derived from the doctrine of remote contributory negligence, the principles of which have been merged into our new fault system and are to be considered when apportioning fault. ***Id.*** at 592 & n.9.

Under our law before the adoption of comparative fault, remote contributory negligence was "that which is too far removed as to time or place, or causative force, to be a direct or proximate cause of the accident." ***Arnold v. Hayslett***, 655 S.W.2d 941, 945 (Tenn. 1983) (citing ***Street v. Calvert***, 541 S.W.2d 576, 585 (Tenn. 1976)). "Remote cause" of an injury was defined as "that which may have happened and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened." ***See Barnes v. Scott***, 35 Tenn. App. 135, 151, 243 S.W.2d 133, 140 (1950). Here, Mr. Dickerson did not injure the plaintiff and his negligence would not have resulted in any injury to her if not for the negligent actions of the police officers. Because the causal relationship between Mr. Dickerson's conduct and Mrs. Sanford's injuries is tenuous at best, any percentage of fault attributable to him is minimal. We are of the opinion that the maximum of fault to be assigned to Mr. Dickerson under all the circumstances is not more than twenty percent.

C. Metro

Mrs. Sanford argues that the trial court erred as a matter of law by allocating only twenty percent of the fault against Metro because it primarily caused Mrs. Sanford's injuries. We agree.

Here, the police officers, to a large degree, created a situation which led to Mrs. Sanford being shot. They improperly entered Mr. Dickerson's home with their guns drawn, without investigating the circumstances or announcing their presence in any way. We are also of the opinion that Sergeant Stevens negligently fired his gun at Mr. Dickerson despite having no idea of what was beyond his target. Sergeant Stevens fired directly at Mrs. Sanford's home which was illuminated at the time.

1. Immunity

"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 in certain enumerated circumstances. Tenn. Code Ann. 29-20-205 (1980). We find none of the exceptions to the rule applicable here. Despite Metro's arguments, the discretionary function exception to the rule removing immunity is not applicable because Sergeant Stevens and Officer McClellan were not policy makers for the Metropolitan Police Department. Under the planning-operational test adopted by the supreme court, only decisions that rise to the level of planning or policy making are considered discretionary. ***Bowers v. City of Chattanooga***, 826 S.W.2d 427, 430 (Tenn. 1992).

The fact that the officers responding to the call on Harlan Drive exercised discretion is irrelevant. The court in ***Bowers*** explained that "discretionary function immunity does not automatically attach to all acts involving choice or judgment." ***Id.*** The supreme court described the planning-operational test as follows:

> [D]ecisions that rise to the level of planning or of policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity.

Id. at 430. ***Bowers*** goes on to elaborate on the distinction between planning decisions and operational acts as follows:

> [A] decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is preforming an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not "discretionary functions" within the meaning of the Tennessee Governmental Tort Liability Act.

Id. at 431. Here, Metro is not protected by any discretionary function immunity. The facts establish that these officers were preforming operational functions, both when they initially went into Mr. Dickerson's home and later when they shot at him striking Mrs. Sanford.

2. Negligence

Both Sergeant Stevens and Officer McClellan had a duty to use due care in the

performance of their duties. They had an express duty to investigate the situation upon their arrival on the scene, to knock and announce their presence, and to fire their weapons, if necessary, in such a way as not to injure innocent bystanders. The officers breached their duty of care by going into Mr. Dickerson's home without investigating and by violating the knock and announce rule. Further, Sergeant Stevens breached his duty when he fired his gun in the direction of Mrs. Sanford's home.

Police officers are required by state and federal law to knock and announce their presence "[b]efore an officer may make a forced entry into an occupied residence, the officer must give 'notice of his authority and purpose'." ***State v. Lee,*** 836 S.W.2d 126, 128 (Tenn. Cr. App. 1991). "This requirement mandates that officers (a) identify themselves as law enforcement officials and (b) explain the purpose of their presence . . . ." ***Id.*** When the officers violated the knock and announce rule, they created a dangerous situation which resulted in Mrs. Sanford's injuries. The only recognized exceptions to the knock and announce rule are:

> (1) the persons within already know of the officers' authority and purpose; (2) the officers have a justifiable belief that someone within is in imminent peril of bodily harm; or (3) the officers have a justified belief that those within are aware of their presence and are engaged in escape or the destruction of evidence.

United States v. Francis, 646 F.2d 251, 258 (6th Cir. 1981); ***accord Hall v. Shipley***, 932 F.2d 1147, 1152 (6th Cir. 1991). As the trial judge noted "[t]here was no exigent circumstances that required the immediate entry into the home . . . ."

Here, the officers' pretext for entering Mr. Dickerson's home was that they believed there might be someone inside in danger. This belief was not justified. The officers had no information or evidence that anyone else was inside Mr. Dickerson's home or that another person was in danger. A slight investigation on the officers' part would have revealed that Mr. Dickerson was alone. The officers had no legal excuse for neglecting to knock and announce. Hearing a loud and angry voice coming from within Mr. Dickerson's home did not provide the officers with a justifiable belief that someone else was inside given that the single voice was coming from the direction in which a telephone cord was stretched. Even if we assume that the officers had good reason to believe that someone else was inside with Mr. Dickerson, they heard no cries for help, moans, or sounds of a struggle that would have suggested that the second person was in "imminent peril of bodily harm."

The Metropolitan Police Department's policy allowing an officer to "break open any outer or inner door of a dwelling house or other structure" is limited to the following circumstances:

> (1) He has identified himself and stated his authority and purpose;
> (2) He has been refused admittance;
> (3) There is no alternative means readily available to secure the arrest except to enter such place by force.

We note, if announcing his presence would endanger the officer's life, such an announcement is not required. Here, the officers did not identify themselves and did not seek admittance. They had an alternative means of dealing with Mr. Dickerson. Specifically, they could have called to him from behind cover and demanded he come out with his hands up. Under these circumstances, this would have been a safer alternative than the officers' unannounced entry which precipitated an armed confrontation. The trial judge concluded that the officers negligently violated a number of Metropolitan Police Department guidelines. They used excessive force in violation of the Department's use of force policy providing that "a member shall not cause or allow force to be used upon or against any person until such time as that person demonstrates unwillingness to voluntarily comply with directions, advice, or warnings, incidental to his arrest." The officers here gave Mr. Dickerson no opportunity whatsoever to comply or to give himself up before entering his home with their guns drawn. The officers also violated their duty under the police department's guidelines to use deadly force "only as a last result, after all other reasonable means have failed or would appear futile." They utilized no other means whatsoever to arrest Mr. Dickerson before entering his home with their guns drawn.

Police officers are taught that when they approach a house where a suspect is armed, they should take cover and first try to get the suspect outside the house. The reason police officers are taught to issue verbal challenges from positions of cover when confronting armed individuals is to keep the situation from escalating into violence. Another reason is that situations where officers confront armed individuals are not always what they seem. When an officer announces themselves and orders the subjects to surrender, he is able to buy time in which to better ascertain the suspect's identity and intentions and to avoid the unnecessary use of deadly force.

Here, the improper unannounced entry into Mr. Dickerson's home by the police officers endangered the lives of not only the police officers but also of Mr. Dickerson and of innocent citizens in the area. The trial court concluded that the method of entry was "in conformity with a narcotics raid where spoilation of evidence or destruction of evidence is an overriding consideration, as opposed to a shot's fired call." Had the officers utilized proper procedures and stayed outside the home, they may not have felt the need to shoot at Mr. Dickerson.

In addition, Sergeant Stevens breached his duty of care to Mrs. Sanford and other neighbors in the area by firing at Mr. Dickerson's back when he had no idea what was beyond his target. Before violating a cardinal rule of firearm safety, to be sure of your target and what is beyond it, Sergeant Stevens had to have a reasonable belief that Officer McClellan's life was in danger. Here, the evidence reveals he did not have such a belief. He had no idea where Officer McClellan was and began shooting at Mr. Dickerson's back before he knew if Mr. Dickerson posed any threat to his partner.

The officers owed a duty of care to Mrs. Sanford and Mr. Dickerson's other neighbors. They breached that duty by escalating a misdemeanor disturbance call into a gun battle. Even though they were clearly operating in a heavily populated residential area, they made no attempt to warn any of the residents of a potential shoot out. They made no attempt to move residents in the possible line of fire to a safe area. They merely went into Mr. Dickerson's home without any regard for the possible consequences to innocent residents of that immediate vicinity. When we review the officers' actions in light of the facts set forth in ***Eaton***, we are persuaded that the majority of the fault in this case should have been assessed against Metro.

II. Findings of Fact

Mrs. Sanford's second issue was "[d]id the evidence preponderate against certain of the trial court's findings of fact." We are of the opinion that some of the facts found by the trial court are not supported by the evidence. On appeal, we review the trial court's findings of fact de novo upon the record of the trial court accompanied by a presumption that the findings are correct "unless

the preponderance of evidence is otherwise." Tenn. R. App. P. 13(d)(1996).

The trial court found that Mr. Dickerson yelled "I am going to get your a--" in the direction of the police officers in his living room. The only evidence in this record is that the threat was made to Mr. Dickerson's girlfriend and was directed to the telephone receiver he had in his hand. Sergeant Stevens testified that at the time he did not think Mr. Dickerson was aware of the officers' presence in his home and thought the threat was directed to someone else. Thus, the evidence preponderates against the trial court's finding.

The trial court found that Mr. Dickerson ran to his front door with a gun in one hand and a telephone in the other and was discarding the telephone as he ran. The photographs taken after the shooting show that the phone cord was wrapped around a glass and metal shelf near Mr. Dickerson's front door. The telephone which was not disturbed from the time of the shooting until the photographs were taken could not have become wrapped around the shelf merely by being discarded. It appears that Mr. Dickerson threw the phone down possibly when Sergeant Stevens began shooting at him.

The preponderance of the evidence is also against the trial court's finding that Sergeant Stevens did not start shooting until Mr. Dickerson was outside on his front porch with the storm door almost completely closed behind him. The moment Mrs. Sanford was shot Mr. Dickerson had just reached the inside of his door. Sergeant Stevens admitted that he began shooting as Mr. Dickerson got to the door, not after Mr. Dickerson had already gone out the door and it shut behind him.

We are also of the opinion that the preponderance of the evidence is against the trial court's finding that "it is not clear which officer actually fired first." It is true that Officer McClellan could not identify the sequence of the shots having never heard any of the shots Sergeant Stevens fired. However, the circumstances taken as a whole establish that Sergeant Stevens began shooting first. Sergeant Stevens acknowledges that he began shooting as Mr. Dickerson got to the door and that the other shots he heard began afterwards.

III. Constitutional Deprivation Claim

Mrs. Sanford's third issue is "[d]id the trial court err in dismissing Mrs. Sanford's constitutional claims."

At the outset, we must determine the appropriate standard of review. To explain, in their motion, defendants requested the court dismiss the constitutional claim based on either Rule 12.02(6) or Rule 56. In addition, defendants attached the affidavits of Officers McClellan and Stevens to the motion. It is well settled in this state that a trial court converts a Rule 12.02(6) motion into a summary judgment motion when the trial court considers matters outside the pleadings. Tenn. R. Civ. P. 12.02 (West 1996). In this case, however, the trial court's order reveals that the court did not consider matters outside the pleadings. Instead, the order clearly states that the court relied on the motions and the arguments in support thereof and nothing more.[1] Thus, this court must determine whether defendants correctly asserted that the court should dismiss Mrs. Sanford's claim pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure.

In her complaint, Mrs. Sanford alleged:

> 30. All of the defendants [except McClellan and Stevens, individually], who, under color of any statute, ordinance, regulation, custom, or usage of Tennessee subjected Sanford, a citizen, to the deprivation of her rights and privileges secured by the state and federal Constitutions and laws, are liable to Sanford pursuant to 42 U.S.C. § 1983, of the Federal Civil Rights Act.

As to the constitutional claims, Mrs. Sanford alleged that the officers violated her Eighth and Fourteenth Amendment rights.

It is the opinion of this court that Mrs. Sanford failed to articulate a claim under the Eighth Amendment. "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." ***Ingraham v. Wright***, 430 U.S. 651, 671 n.40, 97 S. Ct. 1401, 1412 n.40, 51 L. Ed. 2d 711, 730 n.40 (1977).

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[1] The federal courts have held that the federal rules allow courts to consider oral and written arguments. 27A Fed. Pro. L. Ed. §62:508 (1996).

Such was not the case here. Thus, the court properly dismissed her claim based on a violation of the Eighth Amendment.

Mrs. Sanford also asserted that Metro violated her Fourteenth Amendment Due Process rights by failing to properly train the officers. It is the opinion of this court that Mrs. Sanford stated a cause of action and that there are genuine issues of material fact.

As a starting point, we must establish the contours of the claim. It is well settled that a party may not bring an action pursuant to section 1983 against a municipality on the basis of respondeat superior. ***Monell v. Dep't of Soc. Servs.***, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611, 638 (1978). Thus, any constitutional claim alleged by Mrs. Sanford against Metro based solely on the actions of Officers McClellan and Stevens must fail. ***Id.*** This is not to say that a municipality cannot be liable to a citizen because of the actions of its employees. Instead, a municipality will be liable, assuming a constitutional violation, only when the "execution of a government's policy or custom . . . inflicts the injury . . . ." ***Id.*** at 2037-38. In addition, the municipal policy must be "the moving force of the constitutional violation. . . ." ***See id***. at 2038. When faced with an issue similar to that here, the Supreme Court elaborated on its decision in ***Monell***. The Supreme Court held that a municipality may be liable if it has a policy or custom of failing to train its employees and if that failure to train causes a deprivation of constitutional rights. ***Canton v. Harris***, 489 U.S. 378, 387, 109 S. Ct. 1197, 1205,103 L. Ed. 2d 412, 425-26 (1989). Moreover, a municipality's failure to train an employee becomes a policy or custom for the purposes of section 1983 when the failure evidences a deliberate indifference to the rights of the public. ***Id.*** at 1205. Thus, in order to state the claim contemplated by Mrs. Sanford, a party must allege: 1) the deprivation of a constitutional right; 2) the existence of a municipality policy or custom, i.e., the failure to train evidences a deliberate indifference to the rights of the public; and 3) the existence of a causal link between the deprivation of rights and the policy or custom.[2]

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[2] Mrs. Sanford also made other allegations regarding Metro's policies. These were as follows:

> 35. Defendant's applied the Police Department's law, custom or policy regarding use of a firearm in an unconstitutional manner.
>
> . . . .
>
> 43. Defendant Police Department's failure to adequately discipline its officers is a policy and/or custom of the municipality.

We must immediately disregard paragraph 35 because it implies that the employees' improper application of the

Mrs. Sanford properly alleged a cause of action. First, she alleged that there was a violation of her Fourteenth Amendment rights. Next, she alleged that the failure to adequately train the officers was a policy or custom and that the failure to properly train the officers evidenced a deliberate indifference. Finally, she alleged that the policy or custom of failing to properly train the officers caused her injuries. Thus, Mrs. Sanford stated a claim for relief under section 1983.

It is the opinion of this court that Metro's arguments in their motion and their brief are without merit. Metro focussed on the actions of the officers and argued that the actions were an insufficient basis for a section 1983 claim. If this were a respondeat superior claim, we would agree with Metro that the actions of the officers are of critical importance to the determination of the issues. Nevertheless, this case does not turn on the actions of the officers. Instead, the focus here is on the actions of Metro in failing to provide adequate training if such be the case. Thus, Metro's argument is without merit.

Therefore, it is the opinion of this court that the trial court erred when it dismissed Mrs. Sanford's constitutional deprivation claim for failure to state a claim. Although Mrs. Sanford's claim survives, we note that she has a heavy burden of proof in this case. ***See Canton***, 109 S. Ct. at 1205-06.

IV. The Dismissal of Officers McClellen and Stevens

At the time the trial court dismissed the officers, it had entered orders dismissing all of Mrs. Sanford's claims except count II, common law negligence. Thus, the dismissal of the officers as to the dismissed claims was not even necessary because they were dismissed as parties when the

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policy or custom caused the injuries, not the proper application of the policy or custom. In addition, the allegation in paragraph 43 and Mrs. Sanford's discussion of this allegation in her brief misstates the law. In support of the allegation Mrs. Sanford cites ***Grandstaff v. City of Borger, Texas***, 767 F.2d 161 (6th Cir. 1985) and ***Turpin v. Mailet***, 619 F.2d 196 (2d Cir. 1980). Neither of these cases, however, support the proposition that the failure to discipline is a policy or custom for the purposes of a § 1983 action. Instead, the failure to discipline is evidence of an acceptance of the prior conduct. In ***Grandstaff***, the court concluded that the failure to discipline an officer was evidence of the municipality's policy or custom of dangerous recklessness. ***Grandstaff***, 767 F.2d at 170. It did not find nor did the plaintiff contend that the failure to discipline was itself a policy or custom. ***Id.*** Likewise, in ***Turpin***, the plaintiff used the failure to discipline as evidence of a policy to harass the deceased. ***Turpin***, 619 F.2d at 202-03.

claims were dismissed. In addition, the officers were immune from liability under count II pursuant to Tennessee Code Annotated section 29-20-310(b) because Tennessee Code Annotated section 29-20-205 removed the government's immunity. Thus, the trial court properly dismissed the officers as parties to count II of the complaint. Now, however, this court has determined that the trial court erred when it dismissed Mrs. Sanford's constitutional deprivation claim. Moreover, this court is of the opinion that the officers' motion to dismiss failed to state a proper basis for dismissal absent the dismissal of the claim itself. Thus, it is the opinion of this court that the decision of the trial court dismissing the officers should be reversed.

V. Conclusion

The judgments of the trial court dismissing Mrs. Sanford's constitutional claim and the officers and the judgment of the trial court assessing fault are reversed. On remand, the trial court shall enter an order assessing Mr. Dickerson with twenty percent of the fault and the Metropolitan Government with eighty percent of the fault. Costs on appeal are taxed to the defendants. The cause is remanded to the trial court for further necessary proceedings including the proper assessment of damages and a hearing on the merits of the section 1983 claim.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

_____
HENRY F. TODD, PRESIDING JUDGE,
MIDDLE SECTION

_____
BEN H. CANTRELL, JUDGE