UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

GLENN WHITING and ARD PROPERTIES, *Plaintiffs*, v. CHRIS TREW, in his individual capacity and in his official capacity as City Attorney for the City of Athens, SETH SUMNER, in his individual capacity and in his official capacity as City Manager for the City of Athens, and CITY OF ATHENS, TENNESSEE, *Defendants*.	)	Case No. 3:20-cv-54 Judge Travis R. McDonough Magistrate Judge Debra C. Poplin

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MEMORANDUM OPINION

Before the Court is the Defendants' motion for summary judgment (Doc. 84). For the following reasons, the motion is **GRANTED IN PART** and **DENIED IN PART**.

I. SUMMARY JUDGMENT

A. Background

This case involves two plaintiffs: Glenn Whiting and ARD Property Management ("ARD Properties" or "the Trust"). (Doc. 159, at 1.) There are three Defendants: the City of Athens, Tennessee ("the City"), Athens City Manager Seth Sumner, and Athens City Attorney Chris Trew. (*Id.*) Plaintiffs have sued Sumner and Trew in both their individual and official capacities. (*Id.*)

The conflict between these parties centers around a property at 213 Pope Avenue, Athens, Tennessee, ("the Pope Avenue building" or "the Pope Avenue property"). Donald

Ammerman and Carol Ammerman purchased the Pope Avenue property in December 2003, and conveyed it to the Trust in January 2004. (Doc. 86, at 196–99.) The recorded owner of the Pope Avenue property, Plaintiff ARD Properties, is a common-law irrevocable trust, created for the purposes of holding commercial real estate. (*Id.* at 186–201.) The Trust documents identify Donald Ammerman, Carol Ammerman, and Connie Ammerman as trustees. (*Id.* at 186–95.) The Trust documents also list Glenn Whiting as a potential successor trustee in the event of the death of the first or second trustee—Donald or Carol Ammerman. (*Id.* at 189.) Glenn Whiting is Connie Ammerman's husband and Donald and Carol Ammerman's son-in-law. (Doc. 149, at 87.) Carol Ammerman passed away in 2015. (*Id.*) Whiting avers that he has served as a trustee for ARD Properties since that time. (Doc. 149, at 2.) Connie Ammerman also avers that Whiting is, and was at all time relevant to his claims, a beneficiary of the Trust. (Doc. 149, at 64.)

The conflict between the parties began when a car was stolen from the Pope Avenue property in February 2018. (Doc. 92, at 39.) Jerry Brown, a car salesman from Riceville, Tennessee, had purchased the car on February 10, 2018, from Cash Express in Athens, and had permission from the Ammermans to store it at the Pope Avenue property until he could pick it up. (Doc. 92, at 41–51.) Whiting testified that he owned the stolen vehicle, but it was not titled in his name, and has stated, "the car [was] tied up between myself and Jerry Brown." (Doc. 156, at 15; Doc. 149, at 75.) Whiting was dissatisfied with the Athens Police Department's handling of the investigation and began complaining about it to City officials and at City Council meetings starting in April 2018. (Doc. 149, at 1.) In addition to not investigating the car theft to the extent he wanted, the City had approved construction on an awning on one of Whiting's buildings, but Sumner later ordered that the construction work cease to investigate whether the

awning would comply with City codes. (Doc. 149, at 33–39, 43–44, 47.) The City ultimately decided that the work would comply and allowed the construction to continue. (*Id.* at 48.) Whiting avers that in summer 2019, "an Athens Police Officer told me to move my truck from a location where I, and other building owners, had regularly parked in order to perform maintenance on my building. The Officer informed me that he was ordered to tell me to move my truck." (*Id*. at 1–2.) In July 2019, Whiting informed City officials that he was planning to put up a sign on a building in downtown Athens that he manages ("the Jackson Street building") criticizing the City for its investigation of the vehicle theft and provided them with a copy of the content he planned to write on the sign. (Doc. 149, at 1, 6–7.)

The Pope Avenue building has a long history of complaints and violations against it.[1] Former Athens Codes Enforcement Officer Gail Petitt sent notices of codes violations to ARD Properties in January 2015, and again in April 2016, and testified that the property was "an ongoing problem" throughout her employment with the City. (Doc. 88, at 1; Doc. 90, at 1; Doc. 92, at 82.) Matthew Gravely was hired as a new Codes Enforcement Officer for the City in 2017. (Doc. 92, at 87.) In May and June 2018, Gravely received complaints from neighbors about the Pope Avenue property creating safety hazards. (*Id.* at 1–12.) In February 2019, Gravely cited the property for codes violations again, and he received another neighbor complaint. (*Id.* at 25.) In response to the complaints, Gravely inspected the building on May 21, 2019. (Doc. 86, at 49–73.) The next day, an unfit-structure notice was mailed to ARD

[1] Plaintiffs filed motions in limine (Docs. 141–143) to exclude emails and other records of complaints from neighbors, which are described in this paragraph. The Court references the complaints in this paragraph to provide background, but this evidence does not affect the outcome of the Court's order on Defendants' motion for summary judgment. Accordingly, the Court **RESERVES RULING** on Plaintiffs' motions in limine (Docs. 141–143) to exclude this evidence.

Properties which required the owners to secure the property or submit a plan to bring it up to code. (Doc. 92, at 28.) No one followed up on the notice. (*Id.* at 94.)

On August 2, 2019, less than a month after Whiting notified the City of the sign he planned to post on the Jackson Street Building, the City issued a complaint to determine whether the Pope Avenue Building was unfit for use and to set a condemnation hearing for August 30, 2019. (Doc. 86, at 44–45.) When Donald Ammerman received the notice, he called City Attorney Trew. (Doc. 92, at 110.) Trew testified he does not remember the specifics of the conversation, and Donald Ammerman testified that he got the impression from Trew that he did not need to attend the hearing and that the City was willing to work with him on repairing the property. (*Id.* at 66–67, 110–14.) When the condemnation hearing occurred, no representative of ARD Properties attended. (*Id.* at 118.) Trew acted as City Attorney at the hearing and prosecuted the action on behalf of the City. (*Id.* at 107.) Gravley testified regarding his inspection of the Pope Avenue Property and its condition, and photographs of the property and the report of codes enforcement were introduced into evidence. (*Id.* at 118–25; Doc. 86, at 49–73.) Gravley's testimony that the property was unfit for use was uncontested. (Doc. 92, at 120–25.)

Whiting met with Trew on September 4, 2019, to discuss the stolen-vehicle investigation and his planned sign. (Doc. 149, at 16–22.) Whiting avers that

> [d]uring a meeting between myself and Mr. Trew, Mr. Trew informed me that if I proceeded with my plans to put a message on the downtown building, then there were other 'variables' that I had not considered. Trew informed me that by putting up my planned sign I would be in violation of the terms of a Federal grant. Trew intended this statement to imply a threat to report me to Federal authorities if I posted my sign. Trew also specifically mentioned the Pope Street building and implied that if I proceeded, the City would move forward regarding that building.

(*Id.* at 92.) Trew testified that his statements were not threats but rather a courtesy— "I probably told him the decision had already been made that that structure was going to have to be demolished [] 'if you guys are not going to do something with it. Don't make us do that.'"[2] (*Id.*)

On September 25, 2019, Sumner, sitting as the administrative hearing officer, issued an order finding that the Pope Avenue building was unfit for human occupation or use and ordering that it be removed or demolished. (Doc. 86, at 6–7.) Several days later, Whiting went forward with posting his sign on the Jackson Street building, which read:

> WITNESS CALLS ME TO TELL ME ABOUT CAR BEING STOLEN OUT OF OUR BUILDING. CALLED 911 WAS TOLD WOULDN'T STOP ROBBERY UNTIL WE PROVE OWNERSHIP? WITNESS CONFRONTS THIEVES THEY RAN FOR THE CAR AND TOOK OFF. ATHENS P.D. STILL REFUSING TO GET INVOLVED? CAR FOUND DAMAGED AND RADIO STOLEN. A.P.D. REFUSING TO TALK TO WITNESSES OR FINGERPRINT MET WITH CHIEF COUCH AND SETH SUMNER WHO PROMISED TO INVESTIGATE. WELL OVER A YEAR LATER, KEY WITNESSES STILL NOT QUESTIONED. MAYOR BURRIS REFUSES TO ALLOW ME TO SPEAK AT CITY COUNCIL ABOUT CAR. IS THIS THE LEADERSHIP WE WANT? TIME FOR CHANGE!

(Doc. 92, at 38.)

Donald Ammerman received a copy of the condemnation order on October 4, 2019. (Doc. 86, at 74.) Anthony Casteel, Director of Community Development for the City, and Eugene McConkey, a building inspector in Casteel's department, both testified they are unaware of any other building in the City subject to condemnation proceedings that has ever been demolished, besides the Pope Avenue building. (Doc. 149, at 41–42, 49.) Every other building they testified about was rehabilitated and still stands today. (*Id.*) There are photos in the record of other buildings in the City that appear to be in disrepair that are still standing and

[2] Whiting recorded a portion of this meeting and the recording was produced in discovery. However, the partial transcript of the meeting does not include the portion of the meeting discussing the Pope Avenue building condemnation proceedings. (*See* Doc. 149, at 71–79.)

have not been subjected to any condemnation proceedings. (*Id.* at 103–05, 108–12.) Although Tennessee law provides that a property owner aggrieved by an order related to a municipal slum clearance ordinance may file a writ of certiorari in Chancery Court, *see* Tennessee Slum Clearance and Redevelopment Act, Tenn. Code Ann. § 13-21-101, *et seq*., ARD Properties did not appeal the condemnation order.

The City's former Chief of Police Cliff Couch testified before the City Council that he believes, in matters unrelated to Whiting's dispute with the City, Sumner has used his position as City Manager to retaliate against others. In late November 2020, then-Chief Couch tried to locate one of the police department surveillance cameras. (Doc. 149, at 140.) Couch approached the detective who normally manages the cameras, who told him that he did not have them because Sumner, several months prior, told the detective to turn the police department's surveillance cameras over to him. (*Id.*) Couch then called Sumner to ask for the cameras back. (*Id.*) Sumner said he had never taken them. (*Id.*) Couch, believing someone was lying to him about missing police department property, approached the District Attorney General ("DA") for guidance. (*Id.* at 140–41.) The DA told Couch to report the cameras missing and that his office would investigate the matter. (*Id.*) After Couch made the report, the cameras reappeared in the police department under what seemed to him to be suspicious circumstances, and the Mayor asked to take over the investigation from the DA. (*Id.* at 141.) After the investigation was complete, Couch was summoned to a meeting at the DA's office with the Mayor, Sumner, and Trew, and Couch was told the information found during the investigation would be presented to the City Council. (*Id.*) On August 10, 2021, Couch testified before the City Council that Sumner retaliated against him for reporting the missing cameras:

> Since the meeting, I've been harassed and retaliated against in numerous ways. While many of these issues set forth are minor or even petty, it's clear that issues

were being framed so as to blame me for things that were either out of my control or simply hadn't occurred.

Before long, the City Manager started removing authority from me as Police Chief. Decisions about the department that normally fell under the Police Chief were now handled by the City Manager. The most blatant act of retaliation dealt with an MTAS Comprehensive Management Review. Prior to the incident with the cameras, MTAS was already working with the City to do staffing studies on both the police and fire departments. These studies were meant to examine call volume and determine how many employees each department needs.

Shortly after this meeting we had at the DA's office, the MTAS law enforcement consultant advised me he'd also be conducting an environmental study of the police department. An environmental study is also known as a Comprehensive Management Review. It involves consultants interviewing department employees to let them evaluate their Chief.

The MTAS consultant told me that the study had been ordered by the City Manager. He also confirmed that the police department was the only department such a study was ordered for, despite the fact that a staffing study was being done for the fire department, just like the police department. In fact, no such studies have been ordered for any other department. There has certainly been no such study ordered for the City Manager or for the City as a whole.
. . .

There are approximately 120 employees at the City of Athens. I'm the only department head or employee that's been subjected to this. A few days after the study was released, the City Manager emailed all the police department employees directly to offer them copies of the study. It was all clearly done to ensure that my professional reputation was slandered and to further undermine my ability to run the police department.

(*Id.* at 143–44.)

Couch went on to testify that Sumner had previously tried to influence him to use the police department to retaliate against or harass other individuals when there was no legal or ethical basis to do so:

Well before any of this happened, on August 28, 2020, I had a long conversation with Mayor Perkinson in which I detailed my concerns about numerous unethical things that were taking place. I discussed incidents in which the City Manager had entered crime scenes during active investigations.

At that time the Mayor tried to frame the situation as a personal degreement [sic] that we needed to sit down about. I then pointed out two different incidents in

which the City Manager tried to make me inappropriately use the police department to help embarrass or criminally charge Council Member Dick Pelley, despite there being no grounds to do so.

At that point the Mayor admitted that these issues were a problem. I did not report these incidents to him because I had a personal [] disagreement or because I like drama. I did it because I'm a police officer and I have a duty to do so. Nevertheless, the issues weren't addressed.

This wasn't the first time I've found it necessary to report things such as this. On July 16th, 2020, I reported to Mayor Burris that the City Manager was attempting to force me to have the police department investigate Councilman Pelley, even though it was very clear to me that no such investigation was merited. I had also discussed the incident with the City Attorney, who agreed that there didn't seem to be cause for a police investigation.

…

Even before that, on June 25th, 2020, I went to the City Attorney and advised him of my concerns that the City Manager was attempting to influence law enforcement investigations. I didn't do this because I didn't like the City Manager. I did it because I'm a police officer and I had a duty to do so in order to protect the sanctity of what the police department is supposed to do.

On May 3rd, 2020, a man held a car show in Regional Park without permission. The police department shut down the show and initiated an investigation to see if criminal charges were applicable. The City Manager repeatedly pressured me to press charges against the man and even contacted the District Attorney about the case.

The pressure became more insistent as the days went by and the suspect criticized the City on social media. After a few days, the investigating officer requested to be removed from the case because he felt it had become political. I took over the investigation myself and had to resolve it in a way that ensured no unlawful charges were pressed.

Just yesterday, the City Manager ordered me to give him all documentation about a miscellaneous report that a citizen filed against him. If he or I or any other member of the police department's chain of command are the subject of a complaint, we should recuse ourselves of any involvement at all. Instead, he ordered me, in writing, to send him everything related to the report so he could conduct a, quote, "administrative review" of the case in which someone was making allegations against him.

In the 10 years I've spent as a Police Chief, I've never heard of a City Manager conducting an administrative review of a police case, before yesterday. In fact, I'd never heard the term before.

(*Id.* at 145–48 (errors in original).) About two months later, Couch was fired from his position as Chief of Police. (Doc. 169, at 6.)

Plaintiffs filed the complaint in this action on February 6, 2020, (Doc. 1), and filed their second amended complaint on October 15, 2021. (Doc. 159.) In their second amended complaint, Plaintiffs assert claims against Defendants for: (1) First Amendment Retaliation in violation of 42 U.S.C. § 1983, (2) Declaratory and Injunctive Relief Pursuant to Tenn. Code Ann. §§ 29-14-100, *et seq.*, and 28 U.S.C. §§ 2201, *et seq*., and (3) Deprivation of Due Process in violation of 42 U.S.C. § 1983. (*Id.* at 20–23.) Defendants have moved for summary judgment on Plaintiffs' claims (Doc. 84), and their motion is ripe for the Court's review.

B. Standard of Law

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court views the evidence in the light most favorable to the nonmoving party and makes all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis Inc*., 253 F.3d 900, 907 (6th Cir. 2001).

The moving party bears the burden of demonstrating that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). The moving party may meet this burden either by affirmatively producing evidence establishing that there is no genuine issue of material fact or by pointing out the absence of support in the record for the nonmoving party's case. *Celotex*, 477 U.S. at 325. Once the movant has discharged this burden, the nonmoving party can no longer rest upon the allegations in the pleadings; rather, it must point to specific facts supported by evidence in the

record demonstrating that there is a genuine issue for trial. *Chao v. Hall Holding Co., Inc*., 285 F.3d 415, 424 (6th Cir. 2002).

At summary judgment, the Court may not weigh the evidence; its role is limited to determining whether the record contains sufficient evidence from which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). A mere scintilla of evidence is not enough; the Court must determine whether a fair-minded jury could return a verdict in favor of the non-movant based on the record. *Id.* at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). If not, the Court must grant summary judgment. *Celotex*, 477 U.S. at 323.

C. Analysis

i. Qualified Immunity

In moving for summary judgment, Sumner and Trew argue that they are entitled to qualified immunity. (*See* Doc. 85, at 32–33.) The doctrine of qualified immunity "shields governmental officials from monetary damages as long as their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sumpter v. Wayne Cnty.*, 868 F.3d 473, 480 (6th Cir. 2017) (internal quotation marks omitted). In deciding whether a defendant is entitled to qualified immunity at the summary-judgment stage, the Court employs a two-part test, which may be conducted in either order. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). The Court must determine whether the facts, viewed in the light most favorable to the plaintiff, show that the official violated a constitutional right. *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2012). Also, if a constitutional right was violated, the Court must determine whether the right was clearly established at the time the violation occurred. *Id.* The plaintiff bears the burden of "satisfy[ing] both inquires in order

to defeat the assertion of qualified immunity." *Sumpter*, 868 F.3d at 480; *see also Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009) ("Plaintiff must show both that, viewing the evidence in the light most favorable to her, a constitutional right was violated and that the right was clearly established at the time of the violation. . . . If plaintiff fails to show either that a constitutional right was violated or that the right was clearly established, she will have failed to carry her burden.").

"[T]o overcome qualified immunity, the clearly established law must be specific enough to put a reasonable officer on notice that the conduct at issue was unconstitutional." *Brown v. Lewis*, 779 F.3d 401, 417 (6th Cir. 2015). "The doctrine of qualified immunity gives government officials breathing room to make reasonable but mistaken judgments" and "protects all but the plainly incompetent or those who knowingly violate the law." *Kent v. Oakland Cnty.*, 810 F.3d 384, 395 (6th Cir. 2016) (quoting *Stanton v. Sims*, 571 U.S. 3, 5 (2013)). The Sixth Circuit has emphasized that "this inquiry must be undertaken in light of the specific context of the case, not as a broad proposition." *Clemente v. Vaslo*, 379 F.3d 482, 490 (6th Cir. 2012). "The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. But, "there need not be a case with the exact same fact pattern or even 'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Goodwin v. City of Painesville*, 781 F.3d 314, 325 (6th Cir. 2015) (quoting *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005)). "The law is clearly established when the plaintiff can point to 'cases of controlling authority in his jurisdiction at the time of the incident,' or 'a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.'" *Kent*, 810 F.3d at 395 (quoting *Wilson v. Layne*, 526 U.S. 603,

617 (1999)). The relevant principles, however, should be defined at a "high 'degree of specificity.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam)). "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id*.

In this case, Whiting asserts that the City violated his First Amendment by retaliating against him through a "campaign of harassment" that included Sumner and Trew arranging for: (1) the police to refuse to interview witnesses about Whiting's stolen car; (2) the City to halt work on Whiting's awning; (3) the police to order Whiting to cease using a parking location he had used for years; (4) the condemnation of the Pope Avenue building; and (5) Whiting to be absent at the condemnation hearing. (Doc. 147, at 5–6.)

As the Court finds in Section I.C.iii, *infra*, there are disputed issues of material fact as to whether Sumner and Trew violated Whiting's constitutional rights. Principally, there is an issue of fact as to whether there was probable cause to condemn the Pope Avenue building, and, if so, whether the officials nonetheless typically exercise their discretion not to condemn buildings, even when they have probable cause to do so.[3] *See Nieves v. Bartlett*, 139 S.Ct. 1715, 1727 (2019) ("Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so."); *Scott v. Tempelmeyer*, 867 F.3d 1067, 1072 (8th Cir. 2017) (applying the probable-cause doctrine, which can defeat a claim of retaliatory

[3] There is record evidence that similarly-situated buildings were not condemned, and, even if they were, they were never demolished. (Doc. 149, at 41–42, 49; 103–05, 108–12.)

arrest, to hold it was not clearly established that a retaliatory condemnation supported by probable cause violated rights).

Nonetheless, Sumner and Trew are entitled to qualified immunity because, even if they did violate Whiting's constitutional rights, those rights were not clearly established. Generally, there is a constitutional right to be free from frivolous condemnation. *See e.g., Arnett v. Myers*, 281 F.3d 552, 560 (6th Cir. 2002) ("[T]he removal and destruction of the Arnetts' duck blinds constitutes more than de minimis adverse action, and if it is true that this action was taken in retaliation for Mr. Arnett's criticism of the TWRA, it is enough to chill or deter persons of ordinary firmness from exercising their First Amendment rights in the future."); *Rolf v. City of San Antonio*, 77 F.3d 823, 828 (5th Cir. 1996) ("Accepting as true all well pleaded allegations, reasonable public officials would have understood that their actions [seeking allegedly frivolous condemnation of appellants' property as a result of their political speech] violated appellants' clearly established constitutional right to be free from retaliation for exercising their first amendment right to free speech.")

However, these cases do not demonstrate that Sumner and Trew violated a clearly established right in this case because the evidence does not establish that the City lacked probable cause to initiate the condemnation proceedings. In *Scott*, the Eighth Circuit considered whether the mayor and city attorney were entitled to qualified immunity when they condemned the plaintiff's motel that had been cited for fire and safety code violations. *Scott*, 867 F.3d at 1069. Even assuming the officers were motivated in part by retaliation for plaintiff's protected speech, the Eighth Circuit held that the officers were entitled to qualified immunity. *Id.* at 1071."It was [] not clearly established at the time of the inspection and condemnation that Scott had a right under the First Amendment to be free from a regulatory enforcement action—directed

by Tempelmeyer and implemented by Mitchell—that was supported by probable cause." *Id.* The Court finds the Eighth Circuit's reasoning in *Scott* instructive, particularly given the factual similarities to this case. *Id.*

To support the proposition that Sumner and Trew violated a clearly established right, Plaintiffs would need to show that, under these facts, the condemnation was entirely frivolous and that the officials did not have probable cause to condemn the Pope Avenue building. *See id.*; *see also Adams v. Silva*, 983 F.2d 1065, 1992 WL 392722, at *2 (6th Cir. Dec. 22, 1992) (unpublished table opinion) (holding district courts should not deny officers qualified immunity solely on the basis that there is a question of fact as to probable cause). Plaintiffs have not done so. Absent such a showing, or a showing that cases of controlling authority or consensus of persuasive precedent hold that a regulatory enforcement action supported by probable cause can nonetheless violate an individual's First Amendment rights, the rights violated in this case have not been clearly established. *See Kent*, 810 F.3d at 395. Whiting has not pointed to any such authority or consensus, and the Court has not found it through independent research.[4]

[4] Plaintiffs' argument fails to satisfy their burden to show that any right violated by Sumner or Trew was clearly established. Plaintiffs cite one case, *Glasson v. Louisville*, 518 F.2d 899, 904 (6th Cir. 1975), to support that Sumner and Trew violated a clearly established right. *Glasson* is a single case that has been explicitly overruled by the Sixth Circuit, on the grounds that it was based on the earlier good-faith defense for government actors, rather than the objective qualified immunity test announced in *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). *See Bible Believers v. Wayne Cnty., Mich.*, 805 F.3d 228, 251 (6th Cir. 2015) (overruling *Glasson*, 518 F.2d 899). Further, *Glasson* is not factually analogous to Whiting's situation, so he has not satisfied his burden to show that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See Clemente*, 379 F.3d at 490. Based on *Glasson*, a reasonable government officer would know it is illegal to destroy or bar the political speech of a peaceful protestor who was complying with all applicable time, place, and manner regulations. 518 F.2d at 901–05. The *Glasson* precedent, would not, however, put Sumner or Trew on notice that it would be illegal engage in any of the activities about which Whiting complains. (*See* Doc. 147, at 5–6.)

Accordingly, Sumner and Trew are entitled to qualified immunity on Whiting's § 1983 claims based on violations of his constitutional rights.

ii. Municipal Liability

The City next moves for summary judgment, arguing that there is insufficient evidence to impose municipal liability based on Sumner and Trew's actions. A local governmental entity is a "person" within the meaning of 42 U.S.C. § 1983 and, therefore, may be subject to liability for § 1983 claims. *See Ford v. Cnty. of Grand Traverse*, 535 F.3d 483, 495 (6th Cir. 2008); *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690 (1978). A municipal defendant, however, is only liable "if a custom, policy, or practice attributable to the municipality was the moving force behind the violation of the plaintiff's constitutional rights." *Gohl v. Livonia Pub. Schs. Sch. Dist.*, 836 F.3d 672, 685 (6th Cir. 2016) (quoting *Heyerman v. Cnty. of Calhoun*, 680 F.3d 642, 648 (6th Cir. 2012)).

In this case, there is a genuine issue of material fact as to whether Sumner and Trew's retaliatory actions were attributable to a City "custom, policy, or practice." *See Gohl*, 836 F.3d at 685; (Doc. 149, at 140–50). Then-Chief Couch testified that Sumner took retaliatory actions against him for reporting the missing police department cameras and asked the Chief to pursue retaliatory actions, including baseless criminal charges, against others. (Doc. 149, at 140–50.) Couch's testimony detailing numerous incidents of Sumner seeking retaliation raises a genuine dispute of material fact as to whether retaliation for exercising constitutional rights to free speech was a "custom, policy, or practice" of the City. [5] *See Ryan v. City of Detroit*, 977 F. Supp. 2d

[5] The evidence relating to former-Chief Couch's testimony and subsequent alleged acts of retaliation by the City are subject to a motion in limine filed by Defendants. (Doc. 169). The basis for this motion in limine is that these acts of possible retaliation happened *after* Plaintiff's claim arose. (*Id.* at 11.) The Sixth Circuit has held that, "[t]o show deliberate indifference, Plaintiff 'must show *prior instances* of unconstitutional conduct demonstrating that the County

738, 747 (E.D. Mich. 2013) (quoting *Monell,* 436 U.S. at 691) (citing *Cellini v. City of Sterling Heights,* 856 F. Supp. 1215, 1220 (E.D. Mich. 1994) ("The policy need not be formal; an informal policy or 'custom' can exist, 'even though such a custom has not received formal approval through the body's official decisionmaking channels.'")

Even without Couch's testimony, there is still a factual dispute as to whether the condemnation of the Pope Avenue building, if the jury finds it to be retaliatory, amounts to a "custom, policy, or practice" because of Sumner's role as City Manager, a position with policy-making authority for the City. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."). Sumner acted as the administrative hearing officer, a final policymaker for the City, when he issued the order finding that the Pope Avenue

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has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury.'" *Plinton v. Cnty. of Summit*, 540 F.3d 459, 464 (6th Cir. 2008) (quoting *Fisher v. Harden,* 398 F.3d 837, 849 (6th Cir. 2005)) (emphasis added). Defendants cite this holding to support the notion that a "custom, policy, or practice" of constitutional-rights violations, giving rise to municipal liability under *Monell v. Department of Social Services*, can only be established by evidence of *prior instances* of violations. *See* 436 U.S. 658, 690 (1978). However, the Sixth Circuit's holding in *Plinton* pertains only to a subset of municipal-liability cases, that is, failure-to-train cases. *See* 540 F.3d at 464. "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Municipal liability for failure to train employees requires a showing that the municipality's failure to train amounts to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)). Prior instances of violations are required to show deliberate indifference, that the City was on notice of violations, but turned a blind eye. But deliberate indifference is not an element required to establish *Monell* liability for a City's "custom, policy, or practice" of First Amendment retaliation. Defendants do not cite and the Court's independent research has not revealed a case supporting the proposition that a City's "custom, policy, or practice" of First Amendment retaliation can only be shown by retaliatory acts taken *prior* to the one at issue in the case. (*See* Doc. 169.) Indeed, when a city has a "custom, policy, or practice" that violates constitutional rights, it implies that the violations are ongoing or continuous, including subsequent actions. Accordingly, the Court will **DENY** Defendants' motion in limine (Doc. 169) to the extent that it would exclude regarding Sumner's subsequent retaliatory acts.

building was unfit for human occupation or use and ordering that it be removed or demolished. (Doc. 86, at 6–7.) Under these facts, a reasonable jury could find that the single instance of retaliatory condemnation amounted to a City policy because Sumner had final policy-making authority to issue the condemnation decision. *See Pembaur*, 475 U.S. at 480 ("No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy.")

The City alternatively argues that, "[b]ecause the City cannot be held liable under *Monell* unless there is liability for an individual actor, the City is entitled to summary judgment upon a grant of immunity to the individual Defendants." (Doc. 155, at 5.) However, the Sixth Circuit has held, "[u]nder the law of this circuit, a municipality may not escape liability for a § 1983 violation merely because the officer who committed the violation is entitled to qualified immunity." *Garner v. Memphis Police Dep't*, 8 F.3d 358, 365 (6th Cir. 1993).[6]

[6] More recently, however, the Sixth Circuit stated, "[i]t is an open question in this circuit 'whether a municipality's liability under § 1983 is predicated on first finding that an individual officer or employee is also liable.'" *Nichols v. Wayne Cnty., Mich.*, 822 F. App'x 445, 459 (6th Cir. 2020), *cert. denied*, 141 S. Ct. 2716 (2021) (quoting *Rayfield v. City of Grand Rapids*, 768 F. App'x 495, 511 n.12 (6th Cir. 2019) (noting conflicts in Sixth Circuit caselaw). The Second Circuit has squarely held that, "the entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is [] irrelevant to the liability of the municipality." *Askins v. Doe No. 1*, 727 F.3d 248, 254 (2d Cir. 2013). Their reasoning is that, under *Monell*, a municipality may only be liable when an officer, for whom it is responsible, violates the plaintiff's rights. *Id.* But qualified immunity can apply even when an officer *did* violate the plaintiff's rights if those rights were not clearly established at the time of the violation. *Id.* Because the basis for the Court's finding that qualified immunity applies to Sumner and Trew is because the rights were not clearly established, the municipality could still be liable if they did, ultimately, violate Plaintiffs' rights under the *Askins* court's reasoning. *See id.* *Garner* is still controlling precedent, and it is more analogous this case than the other Sixth Circuit cases giving rise to the conflicts. *See Rayfield*, 768 F. App'x at 511 n.12. Because of this, and because the

iii. First Amendment Retaliation

The City next argues that it is entitled to summary judgment on Whiting's First Amendment retaliation claim because Plaintiffs have not supported a prima facie case of First Amendment retaliation. (Doc. 85, at 15–23.) "To prevail on their retaliation claim, Plaintiffs must establish (i) that they were engaged in constitutionally protected conduct; (ii) that Defendants' adverse action caused them to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that conduct; and (iii) that the adverse action was motivated at least in part as a response to the exercise of their constitutional rights." *Lucas v. Monroe Cnty.*, 203 F.3d 964, 973 (6th Cir. 2000).

a. Protected Activity

Defendants argue that ARD Properties cannot demonstrate that it engaged in any protected activity or speech, so the Court should grant summary judgment on ARD Properties' claim. (Doc. 85, at 15–16.) There is no evidence in the record that the Trust itself engaged in any speech, but Plaintiffs argue that ARD Properties' claims can still go forward because Whiting is a trustee and "[i]t is well understood that entities speak through their agents." (Doc. 147, at 11.) However, trustees are not agents of the trust estate. *Harvey ex rel. Gladden v. Cumberland Tr. & Inv. Co.*, 532 S.W.3d 243, 266 (Tenn. 2017) (citing Restatement (Second) of Trusts § 8 Trust and Agency (1959) (quoting 76 Am. Jur. 2d *Trusts* § 10 (2005); *Taylor v. Mayo*, 110 U.S. 330, 334–35 (1884)) ("An agency relationship is distinct from a trust relationship. . . . In a trust relationship, [] the trustee acts in its own name." (internal citations and quotations omitted)). Plaintiffs cite no cases supporting the proposition that a

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Court finds the Second Circuit's reasoning in *Askins* persuasive, the Court finds the application of qualified immunity to the individual defendants in this case does not defeat Plaintiffs' claims against the City.

trustee can speak for the trust, and the Court has found none.[7] Similarly, Plaintiffs cite no record evidence to support the proposition that the Trust itself, rather than Whiting engaged in any protected activity. (*See* Doc. 147, at 11–12.) Therefore, the Court will grant Defendants' motion for summary judgment on ARD Properties' First Amendment retaliation claim.

Defendants admit, however, that Plaintiff Whiting engaged in protected activity when he "expressed his displeasure with the adequacy of the investigation" into the car stolen from the Pope Avenue building. (Doc. 85, at 16 ("[F]or purposes of this motion alone, the Defendants do not dispute that such statements could constitute a protected activity, but the burden is on the

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[7] In fact, it is not clear to the Court whether, under Tennessee law, trusts have the capacity to sue or be sued. In *Khan v. Regions Bank*, the Court of Appeals of Tennessee wrote:

> "In most jurisdictions, a trust . . . cannot sue or be sued in its own name, and therefore, the trustee, rather than the trust, is the real party in interest in litigation involving trust property." 76 Am. Jur. 2d Trusts § 601 (West 2018). In Tennessee, for example,
>
> > [a] claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding *against the trustee in the trustee's fiduciary capacity*, whether or not the trustee is personally liable for the claim.
>
> Tenn. Code Ann. § 35-15-1010(d) (2015); *see also* Rest. (Third) of Trusts § 105 (West 2012) (listing Tennessee as one of the many states which have adopted this "now-prevalent doctrine").

Khan v. Regions Bank, 572 S.W.3d 189, 195 (Tenn. Ct. App. 2018). However, in *Elm Children's Educational Trust v. Wells Fargo Bank, N.A.*, the Court of Appeals of Tennessee held that a non-attorney trustee may not represent a trust in Tennessee courts. *Elm Children's Educ. Tr. v. Wells Fargo Bank, N.A.,* 468 S.W.3d 529, 533 (Tenn. Ct. App. 2014). While the precise issue of whether a trust can sue was not before the court in *Elm Children's*, the case could be read to imply that trusts can sue in their own name in Tennessee courts. *See id.* Accordingly, the Court will decline to grant summary judgment on the basis that the trust cannot sue in its own name, but nonetheless grants summary judgment to Defendants on the trust's claims on the grounds that it did not engage in protected speech.

Plaintiffs to identify when the specific comments alleged to give rise to retaliation were made.").) Whiting identified his protected activities as the occasions when he spoke about the inadequacy of the City's handling of the stolen-car investigation and when he posted his sign on the Jackson Street building. (Doc. 147, at 4–5.) "Political speech is at the core of First Amendment protections." *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016). Therefore, it is undisputed that Whiting engaged in protected activity when he complained of the inadequacy of the police investigation, both at City Council meetings and on the Jackson-Street-building sign.[8]

b. Sufficiently Serious Action to Deter an Ordinary Person

To support his retaliation claim, Whiting must next show that the City's adverse actions "would likely chill a person of ordinary firmness from continuing to engage in that constitutionally protected activity." *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998). Defendants concede that condemning a structure in retaliation against the owner of the structure would deter an ordinary person from continuing his protected activities. (Doc. 85, at 17.) However, they argue, Whiting was not the owner of the Pope Avenue building, not a trustee, and had no ownership interest in the property, so he cannot establish standing to bring this suit because he suffered no injury, much less that the condemnation would chill a person of ordinary firmness from continuing protected activity.

Where a trust owns property, "[t]he trustee holds legal title and[,] in that sense, owns the property, holding it for the benefit of the beneficiary who owns the equitable title." *Myers v.*

[8] Defendants also argue that the statute of limitations bars Plaintiffs from relying on any allegation of actions that occurred prior to February 6, 2019. While certain events relevant to this case, such as the car theft, occurred before February 2019, all of the alleged retaliatory actions occurred after February 2019, including and especially the condemnation order, so the statute of limitations is not a basis to grant summary judgment to Defendants.

Myers, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994). The trust documents name Whiting as a potential successor trustee in the event of the death of original trustees Donald or Carol Ammerman. (Doc. 86, at 189.) Carol Ammerman passed away in 2015. (Doc. 149, at 87.) Whiting averred that he has served as a trustee for ARD Properties since that time. (Doc. 149, at 2.) Connie Ammerman also averred that Whiting is, and was at all time relevant to his claims, a beneficiary of the Trust. (Doc. 149, at 64.) Because Whiting has shown a factual dispute as to whether he held legal title to the Pope Avenue building as a trustee, he has satisfied his burden to show standing at this stage in the litigation

Further, "retaliation for the exercise of constitutional rights is itself a violation of the Constitution." *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)); *see also Hines v. Gomez,* 108 F.3d 265, 269 (9th Cir. 1997) ("[T]he injury asserted is the retaliatory accusation's chilling effect on [Plaintiff's] First Amendment rights . . . We hold that [his] failure to demonstrate a more substantial injury does not nullify his retaliation claim."), *cert. denied,* 524 U.S. 936 (1998). It is undisputed the Donald and Connie Ammerman, Whiting's father-in-law and wife, respectively, were trustees of ARD Properties. (Doc. 85, at 4–5.) Even if Whiting was not a trustee of the Pope Avenue property, he can still establish standing because the chilling effect on Whiting's exercise of his constitutional rights is, itself, an injury sufficient to confer standing as long as it is "distinct and palpable." *See Thaddeus-X*, 175 F.3d at 394. Surely, when an individual's close family members hold ownership interests in a structure, and that structure is condemned in retaliation for his exercise of constitutional rights, the chilling-effect injury is concrete and palpable—the government did not merely threaten abstract hypothetical action, but took clear action injuring the family members' ownership interests. *See id.* Therefore, the chilling effect in this case is a sufficiently

concrete injury to confer standing as to Whiting's claims. To find otherwise would create the absurd result that if the government would like to retaliate without legal consequence against an individual for exercising his constitutional rights, it can do so simply by injuring the individual's close family and loved ones, rather than the individual himself.

c. Causal Connection

The last element Whiting must show to support his retaliation claim is "that the adverse action was motivated at least in part as a response to the exercise of their constitutional rights." *Lucas*, 203 F.3d at 973. "It is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019). "Circumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals, is appropriate." *Thaddeus-X*, 175 F.3d at 399.

Whiting has raised a genuine issue of material fact as to whether retaliatory motive was the cause of the condemnation and demolition of the Pope Avenue building. There is record evidence that similarly-situated buildings were not condemned, and even if they were, they were never demolished. (Doc. 149, at 41–42, 49; 103–05, 108–12.) There is also direct evidence of the retaliatory motive causing the condemnation and demolition. (Doc. 149, at 2, 92.) Whiting averred in his March 19, 2021, affidavit:

> During a meeting between myself and Mr. Trew, Mr. Trew informed me that if I proceeded with my plans to put a message on the downtown building, then there were other 'variables' that I had not considered. Trew informed me that by putting up my planned sign I would be in violation of the terms of a Federal grant. Trew intended this statement to imply a threat to report me to Federal authorities if I posted my sign. Trew also specifically mentioned the Pope Street building and implied that if I proceeded, the City would move forward regarding that building.

(*Id.* at 92.) Whiting reiterated this averment in his September 20, 2021 declaration[9] that Trew told him during his September 4, 2019, meeting that if he put up the planned sign, then the City would "have to do something about the Pope building." (Doc. 149, at 2.) This meeting was set to discuss the sign Whiting planned to put on the Jackson Street building, it occurred five days after the initial condemnation hearing but before Sumner issued the condemnation order, and Trew testified that in the same meeting about Whiting's planned sign to speak out against the City government, he brought up the condemnation. (Doc. 149, at 21.) Trew testified that it was not meant as a threat but rather a courtesy and phrased his statement as, "I probably told him the decision had already been made that that structure was going to have to be demolished [] 'if you guys are not going to do something with it. Don't make us do that.'" (*Id.*) However, given the timing, the fact that no similarly-situated building had been demolished, and Whiting's testimony that there was a direct threat, a reasonable jury could conclude that the building was condemned and demolished because of the retaliatory motive for Whiting's protected activities.

[9] Defendants argue that the September 20, 2021, declaration should not be considered under the sham-affidavit doctrine. (Doc. 155, at 9.) "It is accepted that 'a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity.'" *Trs. of Plumbers & Steamfitters Loc. Union No. 43 Health & Welfare Fund v. Crawford*, 573 F. Supp. 2d 1023, 1034 (E.D. Tenn. 2008) (quoting *Cleveland v. Policy Mgmt. Sys. Corp.,* 526 U.S. 795, 806 (1999)). Defendants do not, however, cite any prior sworn statement made by Whiting that contradicts his September 2021 affidavit; instead, they only seek exclusion on the basis that the declaration is "self-serving." While the self-serving nature of the affidavit may undermine the credibility of the evidence, the Court's role at summary judgment is not to weigh the evidence, rather only to determine if there are issues of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."); *cf. Hoffner v. Bradshaw*, 622 F.3d 487, 500 (6th Cir. 2010) ("This self-serving affidavit carries little weight, especially in light of the copious evidence in the record to contradict it.").

Accordingly, Whiting has raised a genuine issue of material fact on all elements of his First Amendment retaliation claim against the City, so the Court will **DENY IN PART** Defendant's motion for summary judgment (Doc. 84) on this claim.[10]

iv. Fourteenth Amendment Due Process

Defendants argue that the Court should grant summary judgment on Plaintiffs' procedural due process claim because, among other reasons, they failed to exhaust their remedies under state law, specifically, by appealing the condemnation decision to the Chancery Court. (Doc. 85, at 33.) In response, Plaintiffs conceded that their due process claim must be dismissed as a matter of law. (Doc. 147, at 1.) Accordingly, the Court will **GRANT IN PART** Defendants' motion for summary judgment (Doc. 84) with respect to Plaintiffs' due process claim.

[10] The Supreme Court recently held that in retaliatory-arrest claims, the existence of probable cause generally defeats the causation element. *Nieves*, 139 S. Ct. at 1723. However, the Supreme Court also carved out an exception to that doctrine—"where officers have probable cause to make arrests, but typically exercise their discretion not to do so," probable cause will not defeat the claim. *Id.* at 1727 (quoting *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953–55 (2018)). Defendants argue that Whiting has not supported a causal connection because the City had probable cause to condemn the Pope Avenue property, citing the City's records of complaints, police reports, citations, notices, and violations involving the Pope Avenue property, and Donald Ammerman's own admission that the property had fallen into disrepair. (*See* Doc. 87, at 1–220; Doc. 88, at 1–41; Doc. 89, at 1–42; Doc. 90, at 1–24; Doc. 93, at 1–30; Doc. 156, at 9.) Even assuming the retaliatory-arrest doctrines in *Nieves* apply to a retaliatory-regulatory-enforcement proceeding, Whiting has raised a genuine issue of material fact as to whether the exception applies, *i.e.*, under these circumstances, the City typically exercises its discretion *not* to enforce or pursue condemnation and demolition. *See Nieves*, 139 S. Ct. at 1727. City officials testified they are unaware of any other building in the City that has ever been condemned to demolition. (Doc. 149, at 41–42, 49.) Other buildings in extreme disrepair were rehabilitated and still stand. (*Id.*) Other buildings in the City that appear to be in dangerous disrepair have not been subjected to any condemnation proceedings. (*Id.* at 103–05, 108–12.)

v. Declaratory and Injunctive Relief

Defendants argue that the Court should grant summary judgment on Plaintiffs' declaratory and injunctive relief claims because they are predicated on violations of Whiting's constitutional rights. (Doc. 85, at 23–24.) Because, Defendants argue, Plaintiffs' First Amendment retaliation and due process claims could not survive summary judgment, the declaratory and injunctive relief claims should also be dismissed. (*Id.*) However, the Court has denied in part Defendants' motion for summary judgment with respect to Whiting First Amendment retaliation claim, so his declaratory and injunctive relief claims predicated on that retaliation can also go forward. *See* Section I.C.iii., *supra*. Therefore, the Court will **DENY IN PART** Defendants' motion for summary judgment (Doc. 84) on Whiting's declaratory and injunctive relief claims. Because the Court found that ARD Properties' First Amendment retaliation claim could not survive summary judgment, however, the Court will **GRANT IN PART** Defendants' motion with respect to ARD Properties' declaratory and injunctive relief claims.

II. MOTION TO EXLCUDE

Also before the Court is the Plaintiffs' motion to strictly limit Defendants' expert Leslie Phillip Sellers's opinions to rebuttal facts and evidence. (Doc. 83.) Sellers's expert testimony was timely disclosed by the deadline for disclosure of rebuttal expert testimony but was not disclosed before the deadline for expert testimony that "any party seeks to use to meet its burden of proof." (*See* Doc. 83-1, at 3; Doc. 38.) "The scope of rebuttal testimony lies within the discretion of the district court." *United States v. Askanazi*, 14 F. App'x 538, 540 (6th Cir. 2001). Plaintiffs ask that the Court "strictly limit" Sellers's testimony to rebuttal only, but there is nothing contained in Sellers's expert that is beyond the scope of rebutting Plaintiffs' expert's

testimony. Plaintiffs' expert, James Efaw, opines on the current value, replacement value, costs of repair, income potential, and the extent of the disrepair of the Pope Avenue building. (Doc. 149, at 24–31.) Sellers only opines on the same matters in his report. (Doc. 86, at 106–84.) Sellers may have gone into more detail than Efaw on some points or used different data to come to his conclusions, but that does not remove those conclusions from the scope of rebuttal testimony. (*See id.*) Further, Plaintiffs were not prejudiced by the fact that Defendants did not disclose Sellers's testimony by the initial deadline because the Court later extended discovery, giving Plaintiffs ample opportunity to depose Sellers. (*See* Doc. 113.) Accordingly, Plaintiffs' motion (Doc. 83) is **DENIED** to the extent it asks the Court to exclude any portion of Sellers's expert report from consideration on the Defendants' motion for summary judgment and trial. If, at trial, Plaintiffs find Sellers's testimony to be beyond the scope of a rebuttal opinion or his expert report, the Court will entertain such objections.

III. CONCLUSION

For these reasons, the Court **GRANTS IN PART** Defendants' motion for summary judgment (Doc. 84) with respect to all claims against individual Defendants Sumner and Trew, all claims brought by Plaintiff ARD Properties, and Plaintiffs' procedural due process claim, and these claims are **DISMISSED WITH PREJUDICE**. The Court will **DENY IN PART** Defendants' motion for summary judgment (Doc. 84) with respect to Whiting's First Amendment retaliation and declaratory and injunctive relief claims.

SO ORDERED.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE