IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

WILLIAM MURPHY, individually and as guardian ad litem on behalf of A.T. and K.M.; and TANISHA MURPHY,	:	
Plaintiffs,	:	
v.	:	**C.A.No. 21-415-CFC**
STATE OF DELAWARE, JUSTICES OF THE PEACE; THE HONORABLE ALAN DAVIS, in his official capacity only as Chief Magistrate of the Justices of the Peace; CONSTABLE JAMAN BRISON, individually and in his official capacity as a Constable of the Justices of the Peace; CONSTABLE HUGH CRAIG, individually and in his official capacity as a Constable of the Justices of the Peace; CONSTABLE GERARDO HERNANDEZ, individually and in his official capacity as a Constable of the Justices of the Peace; and KENNETH STANFORD,	:	
Defendants.	:	

PLAINTIFFS' ANSWERING BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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NATURE AND STAGE OF THE PROCEEDINGS

The 63-page, 432-paragraph, 17,274-word Complaint was filed on March 23, 2021. Defendants filed their Motion on August 5, 2021. This is Plaintiffs' Answering Brief.

SUMMARY OF THE ARGUMENT

1. Defendants violated 20 requirements of the Americans with Disabilities Act.

2. Defendants violated more than 350 years of law under the Fourteenth and Fourth Amendments.

STATEMENT OF FACTS

A. The Murphy Family. Plaintiff William Murphy ("Plaintiff" or "Murphy") is the legally blind father of co-Plaintiffs Tanisha Murphy, an adult, and K.M. and A.T., both minors. (Compl. ¶¶ 15-18,29-32).

B. Their Home. On November 15, 2020, Murphy and Tanisha signed a lease to rent a home from defendant Stanford. Murphy and his minor daughters moved in shortly thereafter. (¶¶ 41-71).

C. Defendants Come to Their Home to Evict Viola Wilson. On February 11, 2021, in the midst of a winter snowstorm, the three armed, uniformed and badged constable defendants came to Plaintiff's home and announced they were

there to evict Viola Wilson. (¶¶ 129-30,138-41,123-26,131,136,170-71).

1. They Conclude Murphy is Legally Blind. Upon answering the door, the constables observed and concluded that Plaintiff was legally blind. (¶¶ 137,366-69,319,370-91,132).

2. Murphy Explains He Is Not Viola Wilson. Plaintiff explained he was not Viola Wilson and they acknowledged the same. (¶¶ 138-41). They were told the only persons living there were he and his two young daughters and that his own beloved wife was dead, her ashes just inside the door. (¶¶ 127,143, 145-46,163,172,187,282-86).

D. Murphy Produces the Very Legal Document Entitling Him to Occupancy and Possession – His Lease – and Other Documentary Evidence. Murphy explained he had been living in his home for months and produced his fully executed lease to the constables, who accepted and read it several times and then took it back to their car to read again. Plaintiff offered to produce additional written documentation – including paperwork from the State of Delaware, and electric, utility and internet bills – further establishing his legal right to be there but was refused. (¶¶ 142-66,181,319).

1. The Constables Accuse Murphy of Being a Liar and a Fraud. Despite much corroborative evidence (¶¶ 152-53,127,129-30,138-43,145-51,164-

66,187,181), the constables told Plaintiff he was "a liar, a thief and a fraud" and his lease was not valid because it "was neither notarized nor 'watersealed,'" none of which are required under Delaware law. (¶¶ 155-58; see also 25 Del.C. Chapters 51-59).

E. The Constables Throw the Murphy Family Out of their Home. The constables gave the Murphy family 15 minutes and then threw them out, stating their only option was to go file a lawsuit after the fact. (¶¶ 176,144,128,168-69, 188,170-74). In doing so, the constables "enforced" (¶ 5) and acted "pursuant to a policy or practice" of the Justices of the Peace defendant. (¶ 160).[1]

1. Defendants' "Evict First, Ask Questions Later" Policy or Practice. The existence of defendants' "evict first, ask questions later" policy or practice was pled in the Complaint, (¶¶ 5,160,167,321, 342,352,391,399), and defined as –

> a policy or practice of the defendant Justices of the Peace, during the pandemic and state of emergency in the State of Delaware, to always "evict first, and ask questions later" whenever there is a challenge to an eviction Order on the day of the eviction, despite

[1] Defense claims of good faith and blind reliance on a court order are factually disputed and false. (Cf. ¶¶ 184-85; Ex. A at ¶¶ 18-33). The defense neglects to note that the constables' own written statements detail they called their supervisor who ordered them to evict despite Plaintiff's blindness and lack of notice, and instead make him file a lawsuit to figure it all out later - i.e. - ordered compliance with the policy the defense now denies exists.

> whatever proof and evidence a tenant has that the eviction command is improper and illegal.

(¶ 160). It contains "no exception or reasonable accommodation for legal, logical, ... or other reasons." (¶ 167).[2]

F. The Family Received No Pre-Deprivation Notice or Opportunity to Be Heard. No pre-deprivation notice, hearing before a disinterested decisionmaker or any other opportunity to be heard was given. (¶¶ 190-92,332-41).

G. One Constable Defendant Admitted They Were Breaking the Law. One constable defendant admitted he knew they were acting illegally and breaking the law by throwing a blind man out of his home, without notice, without a hearing, all the while knowing they had the wrong person. (¶¶ 184-85).

H. The Murphy Family Are Homeless and Without Their Possessions For 13 Days. After being rendered homeless with none of their possessions, Murphy made his way to the courthouse that same day and filed an emergency lawsuit. Seven long days of homelessness later, an emergency hearing was convened where a judge recognized the metaphysical fact that Murphy is not Viola Wilson, had a valid lease and was entitled to regain possession or terminate the

[2] A fair reading of the totality of the Complaint also reveals a practice of non-compliance with the extensive requirements of Title II.

same. Despite electing the latter, because of the harsh winter weather conditions, another six long days of homelessness passed before the family could finally return and retrieve their personal possessions. (¶¶ 193-219).

ARGUMENT

I. STANDARD OF REVIEW.

A. The Basics. Under Rule 12(b)(6), a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 (3d Cir. 2016).

B. Matters Outside the Pleadings. Defense efforts to expand the record must be rejected. (See OB at 5 n.3).[3] First, the J.P. Court opinion was cited in the Complaint to demonstrate its collateral estoppel effect on Counts VI and VIII against the now settled landlord defendant. (See ¶¶ 407-08,426-27,214-15). It is not "integral" to any claim against the moving defendants.[4]

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[3] If the Court disagrees, the appropriate Rule 56(d) declaration is attached.

[4] See Hartig Drug Co. Inc. v. Senju Pharm. Co., 836 F.3d 261, 273-74 (3d Cir. 2016) (a document was not "integral" because, *inter alia*, it "did not form a basis for any of the claims" against the moving defendant); Charles S. Fax, When Is a Motion to Dismiss Not a Motion to Dismiss?, American Bar Association (July 25, 2013), www.americanbar.org/groups/litigation/publications/litigation-news/civil-procedure/when-is-a-motion-to-dismiss-not-a-motion-to-dismiss/ (last visited on Aug. 28, 2021) ("I recently asked a federal judge whether there were any particular procedural points that lawyers routinely misunderstood. 'Yes,' he answered immediately ... He suggested that a primer on the subject might be useful. Here it is ... An 'integral' document ... is not simply one that contains

Second, the Third Circuit has long held that whether another court opinion can be considered depends on "the particular circumstances of a case."[5] Here, the Opinion was written by an employee of one defendant, the supervisee of another, and co-worker of three more, and so must be disregarded as 'interested' under any interpretation of the word.[6]

II. THE ADA & REHAB ACT WERE VIOLATED.

A. Introduction. The sheer number of violations of the ADA and Rehab Act here is staggering. Equally staggering are the number of defense statements running afoul of: (1) the statutes themselves; (2) the exhaustively detailed implementing regulations created by the U.S. Department of Justice found in 28 C.F.R. Chapter 35;[7] (3) the USDOJ's formal Title II Technical Assistance Manual for State and Local Governments on how to interpret the "Effective

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information utilized in the complaint. Rather, the document must be integral to the claim itself.").

[5] Funk v. Commissioner, 163 F.2d 796, 801 (3d Cir. 1947); see Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 426-27 (3d Cir. 1999).

[6] See, e.g. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 151 (2000); Hill v. City of Scranton, 411 F.3d 118, 129 n.16 (3d Cir. 2005); id. at 131 n.22; Shotzberger v. State of Del. Dep't. of Corr., 2004 WL 758354, *2 (D.Del. Jan. 30, 2004).

[7] See Helen L. v. DiDario, 46 F.3d 325, 331-32 (3d Cir. 1995) (these were specifically authorized by Congress in multiple overlapping ways and are entitled to Chevron deference).

Communication" requirement (Jan. 2014) ("Manual");[8] and numerous other USDOJ publications written to help defendants avoid violating the ADA's clear mandates.[9] The Third Circuit's recent words are *apropos* given the state's legal overreach, "[t]he demands of the federal Rehabilitation Act or ADA do not yield to state laws that discriminate against the disabled; it works the other way around." Gibbs v. City of Pittsburgh, 989 F.3d 226, 230 (3d Cir. 2021) (internal brackets omitted).

The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Included in Congress's findings of fact was that the ADA was specifically intended to remedy "the discriminatory effects

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[8] www.ada.gov/effective-comm.pdf (last visited on Sept. 2, 2021). See Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 123 (3d Cir. 1998) (technical assistance manuals entitled to deference); Yeskey v. Com. of Pa. Dep't of Corr., 118 F.3d 168, 171 n.5 (3d Cir. 1997) (relying on the Title II Manual).

[9] These include: (1) "ADA Best Practices Tool Kit for State and Local Governments" (2007), www.ada.gov/pcatoolkit/toolkitmain.htm ("Tool Kit") (last visited on Sept. 3, 2021); and (2) "ADA Update: A Primer for State and Local Governments, An illustrated guide to help State and local government officials understand the requirements of the 2010 ADA regulations" (2015), www.ada.gov /regs2010/titleII_2010/titleII_primer.pdf ("Primer") (last visited on Sept. 4, 2021). The USDOJ strongly encourages state and local judiciaries to rely on this guidance and the Technical Manuals, see 28 C.F.R. Pt. 35, App. A, § 35.160, as Delaware courts have done. See Young v. Red Clay Consol. Sch. Dist., 122 A.3d 784, 859 n.76 (Del.Ch. 2015).

of ... communication barriers," "failure to make modifications to existing ... practices" and the "relegation [of the disabled] to lesser services, ... [and] benefits." Id. at (a)(5). It is one of the most comprehensive civil rights laws ever enacted and in the 31 years since, Congress regularly overrules court decisions limiting its broad remedial sweep.

B. State Courts Are Covered. "Title II coverage ... is not limited to 'Executive' agencies, but includes activities of the legislative and judicial branches of State and local government." 28 C.F.R. Pt. 35, App. B, § 35.102. Due to the sheer number of formal complaints received about state court systems defying the requirements of effective communication, the USDOJ specifically -

> cautions public entities that without appropriate auxiliary aids and services, [disabled] individuals are denied an opportunity to participate fully in the judicial process, and denied benefits of the judicial system that are available to others.

Id. at App. A, § 35.160;[10] see id. ("The Department consistently interprets [§§ 35.130(a) and 35.160] to require effective communication in courts ... and with law enforcement officers.").

C. Defendants Violated the ADA. Once the three Constable defendants realized Murphy was blind and totally unaware of any legal proceedings directed to taking his home from him, the ADA required them to stand down, full stop,

[10] This confirms additional facts in the Complaint. (See ¶¶ 374-75,382-83).

since they knew they were dealing with a disabled person. There is no more reasonable accommodation that can be made under such circumstances yet this was not done. (See also ¶¶ 372-87).

By representative example alone, no reasonable accommodations were provided at all, much less "in a timely manner," when there was no offer of a "communication assessment," nor were the mandatory "appropriate auxiliary aids" – such as "brailled materials" or a "qualified reader" – provided at any, much less "no cost," so as to "effectively" convey "complex" "legal documents," all while Mr. Murphy was illegally forced to rely on, at best, forbidden advice from "a minor child," or a companion adult, about this same "complex" legal document, naming a stranger, not himself, that a host of armed law enforcement officers at his front door were yelling required him to be forced from his home.

D. The Law. To state a claim under Title II, a plaintiff must demonstrate: "(1) he is a qualified individual; (2) with a disability; (3) who was excluded from participation in or denied the benefits of the services, programs or activities of a public entity,[11] or was subjected to discrimination by any such entity; (4) by

[11] It applies to everything a public entity does. See, e.g. 42 U.S.C. § 12132; 28 C.F.R. § 35.102(1); 28 C.F.R. Pt. 35, App. B, § 35.102.

reason of his disability." Haberle v. Troxell, 885 F.3d 170, 178 (3d Cir. 2018).[12]

1. Failure to Make a Reasonable Accommodation is Defined as Discrimination. Importantly, and again, overt prejudice towards those with disabilities is not required. Instead -

> discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities.

Id. at 180; see Berardelli, 900 F.3d at 116 ("Title[] II ... define[s] discrimination to include the failure to make 'reasonable modifications.'"); 28 C.F.R. § 35.130(b)(7)(i).

2. General Prohibitions - 28 C.F.R. § 35.130 - Services Must Be "As Effective" and "Equal To" Those Provided to the Sighted. § 35.130(b)-(i) "establish the general principles for analyzing whether any particular action of the public entity violates [the non-discrimination] mandate." 28 C.F.R. Pt. 35, App. B, § 35.130.

a. Only Discriminatory "Effect" is Required. Neither discriminatory animus nor intent are required. Instead, the "effect" of a

[12] In Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 114-18 (3d Cir. 2018), the court exhaustively addressed the interplay between the ADA and Rehab Act and held they apply the same substantive liability standard, differing only in reach and remedy.

government action on a disabled person, by itself, establishes liability. See, e.g. 28 C.F.R. §§ 35.130(b)(3)(ii) and (i), (b)(1)(iii), (iv), (i) and (ii). The ADA prohibits not just "blatantly exclusionary" acts, but "policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate." 28 C.F.R. Pt. 35, App. B, § 35.130 (quoting Alexander v. Choate, 469 U.S. 287, 297 (1985) (the words and intent of Congress would ring hollow if legislation "could not rectify the harms resulting from action that discriminated by effect as well as by design")).

b. The Basics. The ADA is violated when:

(1). the state fails "to make reasonable modifications in policies, practices, or procedures" when necessary to avoid discrimination. 28 C.F.R. § 35.130(b)(7)(i).

(2). a service to the blind "is not as effective in affording equal opportunity to obtain the same result[or] to gain the same benefit" as that provided to the sighted. Id. at (b)(1)(iii).

(3). an "opportunity to ... benefit from the ... service ... is not equal to that afforded to" the sighted. Id. at (b)(1)(ii).

(4). the state "provide[s] different ... benefits, or services to" the blind "than is provided to others." Id. at (b)(1)(iv).

(5). it "[d]en[ies] a" blind person "the opportunity to ... benefit from the aid, benefit, or service." Id. at

(b)(1)(i).

(6). "methods of administration" have the "effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program" as to blind persons. Id. at (b)(3)(ii).

(7). the state "appl[ies] ... criteria that ... tend to screen out an individual with a disability ... from fully and equally enjoying any service" provided by the public entity. Id. at (b)(8). This "prohibits policies that unnecessarily impose ... burdens on individuals with disabilities that are not placed on others." 28 C.F.R. Pt. 35, App. B, § 35.130.

3. Specific Requirements - 28 C.F.R. § 35.160 - "Effective Communications." Public entities are required to:

(1). ensure their "communications" with disabled persons "are as effective as communications with others." 28 C.F.R. § 35.160(a)(1); see 28 C.F.R. Pt. 35, App. A, § 35.160 (exhaustively addressing this requirement); Manual at 1 (must be "equally effective").

(2). "furnish appropriate auxiliary aids and service when necessary" to give the disabled "an equal opportunity" to benefit from the service. 28 C.F.R. § 35.160 (b)(1); see 28 C.F.R. Pt. 35, App. A, § 35.160 (exhaustively addressing this requirement); id. at App. B, § 35.160 (same); Manual at 5 ("The ADA places responsibility for providing effective communication ... directly on

covered entities").[13]

(3). provide a blind person with a "[q]ualified reader; taped text; audio recording; Brailled materials" or similar materials. 28 C.F.R. § 35.104; see 28 C.F.R. Pt. 35, App. A, § 35.104; Manual at 2-4; see id. at 1 ("must provide").

(4). ensure the "qualified reader" is "skilled in reading the language and subject matter," 28 C.F.R. Pt. 35, App. A, § 35.104, such that they can "effectively, accurately, and impartially" read and convey the content including "any necessary specialized vocabulary." 28 C.F.R. § 35.104; accord Manual at 2.

(5). provide aid "in a timely manner, and in such a way as to protect the privacy and independence" of the disabled person." 28 C.F.R. § 35.160(b)(2).

(6). take into account the "context," "complexity," "nature," among other things, of the communication. 28 C.F.R. § 35.160(b)(2); see 28 C.F.R. Pt. 35, App. A, § 35.160 (exhaustively addressing this requirement); id. at App. B, § 35.160 (same); Manual at 1, 4 (same). As the USDOJ has made clear, "legal document[s]" are considered "complex." Manual at 4; see Primer at 7.

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[13] The USDOJ "strongly advises public entities that they should first inform the individual with a disability that the public entity can and will provide auxiliary aids and services, and that there would be no cost for such aids or services." 28 C.F.R. Pt. 35, App. A, § 35.160; see id. (the "Department strongly encourages public entities to do a communication assessment of the individual with a disability when the need for auxiliary aids and services is first identified...."). There is "a continuing obligation" to assess and reassess "the auxiliary aids and services it is providing." Id.

> **(7).** consider the "number of people involved" as well as the "importance" of the issue being communicated. 28 C.F.R. Pt. 35, App. B, § 35.160; id. at App. A, § 35.160.

They are banned from "rely[ing] on an adult" or "a minor child" with the disabled person to "facilitate the communication." 28 C.F.R. § 35.160(c)(2) and (3); see 28 C.F.R. Pt. 35, App. A, § 35.160 (exhaustively addressing this requirement). Defendants violated all of these provisions.

E. Interrelated Protections. To be clear, the ADA would have been violated even if the notice of eviction had Plaintiff's name on it, rather than Viola Wilson's, since it was not in braille. As it did not, our facts are several steps removed from bare minimum legality due to the additional due process and state procedural violations - such as service and notice. (See ¶¶ 374-80,221-64). Indeed, the Third Circuit has previously held that the denial of state law procedural protections and the similar denial of due process protections to a person with a disability violates that person's rights under Title II of the ADA. See Geness v. Cox, 902 F.3d 344, 361-63 (3d Cir. 2018).

F. Trailing Issues. All four Plaintiffs may invoke the protections of the ADA because of their relationship and known association with blind Murphy that

is at the crux of this case.[14]

The claims that Delaware: has not received or benefitted from federal funding are premature and incorrect;[15] and cannot be sued for damages, declaratory or injunctive relief are patently incorrect and rely on cases predating the Supreme Court's holding that Congress properly abrogated the State's Eleventh Amendment immunity,[16] and the full panoply of damages and remedies are available.[17]

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[14] See 28 C.F.R. § 35.130(g) (requiring "a relationship or association" with a disabled person); 28 C.F.R. Pt. 35, App. B, § 35.130 ("The individuals covered ... are any individuals who are discriminated against because of their known association with an individual with a disability ... This protection is not limited to those who have a familial relationship with the individual who has a disability. Congress considered, and rejected, amendments that would have limited the scope of this provision to specific associations and relationships."); 28 C.F.R. § 35.160(a)(2) (defining "companion" to include a "family member, friend or associate" of a disabled person).

[15] (See, e.g. news.delaware.gov/2020/07/01/gov-carney-ag-jennings-dsha-delaware-judiciary-announce-joint-effort-on-foreclosure-eviction-prevention/).

[16] See, e.g. 42 U.S.C. § 12202; Tennessee v. Lane, 541 U.S. 509, 531 (2004) (because the "unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination," holding "Title II unquestionably is valid § 5 legislation" properly abrogating the state's Eleventh Amendment immunity from damages); U.S. v. Georgia, 546 U.S. 151, 158-59 (2006); 42 U.S.C. § 2000d-7; Haybarger v. Lawrence Cty. Adult Prob. & Parole, 551 F.3d 193 (3d Cir. 2008).

[17] See, e.g. 42 U.S.C. § 12133; 29 U.S.C. § 794a; 28 C.F.R. § 35.178; 28 C.F.R. Pt. 35, App. B, § 35.178.

III. THE FOURTEENTH AMENDMENT VIOLATION.

This is "an essential principle: Individual freedom finds tangible expression in property rights. At stake in this ... case[is] the security and privacy of the home and those who take shelter within it." U.S. v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993).

A. The Basics. Plaintiffs have the predicate liberty and property interests in their home to trigger Fourteenth Amendment procedural due process protections. (¶¶ 328-31,1-4).

The process due is a matter of federal law and has been exhaustively addressed. (¶¶ 7-8, 332-41). Briefly, the "core of due process is the right to notice and a meaningful opportunity to be heard." LaChance v. Erickson, 522 U.S. 262, 266 (1998). The "root requirement" is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (emphasis added). "[T]his rule has been settled for some time now." Id. The governing test is set forth in Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The Supreme Court has held that the mere "loss of kitchen appliances and household furniture [i]s significant enough to warrant a predeprivation hearing." James Daniel, 510 U.S. at 54. If seizing a person's toaster requires such a hearing, so does seizing their home. This is because the "right to maintain control over his

home, and to be free from governmental interference, is a private interest of historic and continuing importance." Id. at 53-54. (Accord ¶¶ 1-8). This is an easy case because Plaintiffs were given no predeprivation protections whatsoever.

B. Black Ink Defense Claims.

1. Plaintiff is not Viola Wilson. It is well-established under Delaware law that service upon the wrong person is "a nullity." Furek v. Univ. of Del., 594 A.2d 506, 513 (Del. 1991); see, e.g. Pritchett v. Clark, 5 Del. 63, 67 (Del. 1848).

2. Both this Court and the Third Circuit have long held that the "technical niceties of service" matter and failure to comply with them, even when there is actual notice, is "inexcusable," Ayres v. Jacobs & Crumplar, P.A., 1995 WL 704781, *4 (D.Del. Nov. 20, 1995), and "fatal." Ayres v. Jacobs & Crumplar, P.A., 99 F.3d 565, 569 (3d Cir. 1996). Delaware law is the same. See Showell v. Div. of Family Servs., 971 A.2d 98, 102 (Del. 2009) ("a party's actual knowledge of a lawsuit does not excuse a failure to give statutorily mandated notice.").

IV. THE FOURTH AMENDMENT VIOLATION.

A home eviction is a seizure which triggers Fourth Amendment analysis. Soldal v. Cook County, Ill., 506 U.S. 56, 61 (1992). The twenty-four bullet points addressing objective unreasonableness of evicting the wrong person are plausibly

set forth in the Complaint. (¶ 319). Add to them one more - the eviction violated the plain terms of the ADA. It cannot be objectively reasonable to act contrary to long and clearly established federal law. See U.S. v. Herrera, 444 F.3d 1238, 1246 n.9 (10th Cir. 2006) ("an officer's legal mistakes will not preclude a Fourth Amendment violation ... a failure to understand the law by the very person charged with enforcing it is not objectively reasonable.") (internal punctuation omitted).

V. THE REMAINING DEFENSE CLAIMS.

A. Eleventh Amendment Issues.

1. Individual Constables. The constable defendants are sued in their individual capacities (¶¶ 10,23-25) and do not receive immunity. See Melo v. Hafer, 912 F.2d 628, 634-35 (3d Cir. 1990).

2. Official Capacity Defendants and § 1988. Official capacity defendants are proper for an award of fees and costs. See, e.g. Missouri v. Jenkins, 491 U.S. 274, 279-84 (1989), Helfrich v. Com. of Pa., 660 F.2d 88, 90 (3d Cir. 1981); see also Balas v. Taylor, 567 F.Supp.2d 654, 666 (D.Del. 2008) (the individual capacity defendant must also be sued officially for Jenkins to apply).

Similarly, they are necessary for purposes of injunctive relief within the purview of paragraphs B-C, J and N of Plaintiff's plea for relief. See generally

Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 n.10 (1989) ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'").

3. Ex parte Young. The existence of a detailed, ongoing policy or practice which violates federal law is properly in the Complaint and is clearly within the scope of Ex parte Young as the defense concedes (OB at 12-13), yet the defense simply denies a policy exists (OB at 13), an inherent disputed fact.

As to standing, despite efforts to move back to Salisbury, Maryland, Plaintiffs continue to live in Delaware and be subjected to the state's ongoing evict first, ask questions later policy like a sword of Damocles hanging over their heads. Other relief sought – such as a declaratory judgment that their legal rights were violated, reparative injunction for a letter of apology and an award of attorneys fees and costs under 42 U.S.C. § 1988 – all are proper under the case law, separate and apart from damages awards against the individual defendants under § 1983 and the State under the ADA.

4. Monell. Monell analysis does not apply to states.

B. Judicial Immunity Does Not Apply. The defendant Chief Magistrate is not sued for any judicial actions taken whatsoever but rather only in his official

capacity for purposes of various forms of injunctive and other relief. (See ¶ 22). For example, the Third Circuit has held that in a case against the President Judge of the Pennsylvania Court of Common Pleas arising from a state court policy that violated the Sixth Amendment rights of litigants, there is no Eleventh Amendment or judicial immunity bar to an award of attorneys fees under 42 U.S.C. § 1988. Morrison v. Ayoob, 627 F.2d 669, 672-73 (3d Cir. 1980).

C. A Practice That Violates a Policy. Despite defense suggestions to the contrary (OB at 11, 2-3), Third Circuit law is clear that an informal practice that violates a law or formal policy still subjects a defendant to liability.[18]

D. Qualified Immunity. In U.S. v. Lanier, 520 U.S. 259 (1997), the Supreme Court explained that –

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful ... The easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages ... liability.

Id. at 271 (internal punctuation omitted); accord Schneyder v. Smith, 653 F.3d

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[18] See Porter v. City of Phila., 975 F.3d 374, 383 (3d Cir. 2020); Estate of Roman v. City of Newark, 914 F.3d 789, 798 (3d Cir. 2019); Hill v. Borough of Kutztown, 455 F.3d 225, 246 (3d Cir. 2006); Sample v. Decks, 885 F.2d 1099, 1116 (3d Cir. 1999); City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 131 (1988); Adela v. City of Wildwood, 790 F.2d 1063, 1067 (3d Cir. 1986).

313, 330 (3d Cir. 2011); see Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 377 (2009).

Ours is such a case. It has been clearly established since:

- 1644 - that a man's home is his castle. (See ¶¶ 1-8).
- 1908 - "all systems of law established by civilized countries" require at bare minimum: notice, opportunity to be heard and personal jurisdiction. Twining v. State of N.J., 211 U.S. 78, 110-11 (1908) (overruled on other grounds by Malloy v. Hogan, 378 U.S. 1 (1964)); accord Am. Land Co. v. Zeiss, 219 U.S. 47, 71 (1911); Standard Oil Co. of Indiana v. State of Missouri ex inf. Hadley, 224 U.S. 270, 287 (1912); see also Mathews, 424 U.S. at 333. As the Supreme Court stated 36 years ago, "this rule has been settled for some time now." Loudermill, 470 U.S. at 542.
- 1989 - that a seizure must be objectively reasonable under the circumstances. Graham v. Connor, 490 U.S. 386, 388 (1989).

Additionally, the violation of twenty separate provisions of the ADA is key. The Third Circuit recently recognized the importance of a defendant's violation of an independent law to the clearly established inquiry. In E. D. v. Sharkey, 928 F.3d 299 (3d Cir. 2019), the Court observed "[t]hat [defendant's] conduct was illegal [under a statute] renders E.D.'s [legal] right ...so obvious that it could be deemed clearly established even without materially similar cases." Id. at 308 (internal punctuation omitted). In other words, because the underlying actions were illegal, it was properly considered under the clearly established analysis.

E. Supplemental Jurisdiction is Proper. Because the Court has

jurisdiction over the federal claims above, it also should address this related state claim. Finally, the Delaware Supreme Court has held that a remedy is available for violation of Article I, Section 6. See Dorsey v. State, 761 A.2d 807, 820-21 (Del. 2000).

CONCLUSION

Defendants' motion should be denied.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Chief Judge Connolly's Standing Order dated November 6, 2019, I certify, based on the word-counting function of my word processing system (Word Perfect X4), that this brief complies with that Standing Order, in that the brief is prepared in a 14-point, proportional format (Times New Roman) and contains 5,000 words or fewer, to wit, no more than 4,996 words.

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