No. 20-11318

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KATELYN EBNER, PRINCESS MBAMARA, AYOKUNLE ORIYOMI, and BRITTANY PENWELL
Plaintiffs-Appellants

v.

COBB COUNTY, GEORGIA
Defendant-Appellee

On Appeal from the U.S. District Court
for the Northern District of Georgia
Civil Action No. 1:17-cv-3722
Hon. Michael L. Brown

BRIEF OF PLAINTIFFS-APPELLANTS KATELYN EBNER, PRINCESS MBAMARA, AYOKUNLE ORIYOMI, AND BRITTANY PENWELL

Sean J. Young
Georgia Bar No: 790399
Kosha S. Tucker
Georgia Bar No: 214335
AMERICAN CIVIL LIBERTIES FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Tel: (678) 981-5295

Zack Greenamyre
Georgia Bar No: 293002
MITCHELL & SHAPIRO, LLP
3490 Piedmont Rd., Suite 650
Atlanta, GA 30305
Tel: (404) 812-4747

Attorneys for Plaintiffs-Appellants

Appeal No. 20-11318

Ebner, et al. v. Cobb County, Ga.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellants do not have a parent corporation and are not a publicly held corporation. Appellants are not aware of any publicly traded company or corporation that has an interest in the outcome of this case or appeal.

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Appellants submit this list, which includes the judge in the trial court and all attorneys, persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of this matter.

1. American Civil Liberties Union Foundation of Georgia, Inc. (counsel for Appellants)
2. Brown, Michael L., United States District Judge for the Northern District of Georgia.
3. Bruce, Lauren S. (counsel for Appellee)
4. Cobb County, Georgia (Appellee)
5. Dance, Deborah L. (counsel for Appellee)
6. Ebner, Katelyn (Appellant)
7. Greenamyre, Zack (counsel for Appellants)
8. Hollberg & Weaver, LLP (counsel for Appellee)
9. Mbamara, Princess (Appellant)
10. Mitchell & Shapiro, LLP (counsel for Appellants)

11. Murphree, Lauren J. (counsel for Appellee)

12. Oriyomi, Ayokunle (Appellant)

13. Rowling, Hugh William, Jr. (counsel for Appellee)

14. Snelling, Eddie, Jr. (counsel for Appellee)

15. Tucker, Kosha S. (counsel for Appellants)

16. Weaver, George (counsel for Appellee)

17. Young, Sean J. (counsel for Appellants)

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument because it would significantly aid this Court's decisional process in this factually unique roadside seizure case. This is not a routine Fourth Amendment roadside seizure case, where culpability is placed primarily on the arresting officer because of the officer's aberrant acts, and culpability is placed on the police department for failing to adequately train the officer.

Instead, in this case, culpability is placed squarely on the police department, not for failing to adequately train its officers, but for training its officers to do the wrong thing. Specifically, the Cobb County Police Department trains its officers to perform a series of six eye examinations to detect whether a driver is allegedly impaired by marijuana. Plaintiffs proffer an ophthalmologist's expert testimony, which shows, one-by-one, that these six eye examinations are no better at detecting marijuana impairment than "flip[ping] a coin." (Doc. 65-11 at 7.) The Cobb County Police Department might do a great job training its officers to flip the proverbial coin, but coin flips are not a reasonably trustworthy way of detecting marijuana impairment no matter how good an officer is at flipping them.

Oral argument can help show how basic Fourth Amendment principles apply to the unique facts of this case, and why Plaintiffs' expert testimony creates a genuine issue of material fact for trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes & Rules

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a 42 U.S.C. § 1983 action for deprivation of rights secured by the Fourth Amendment to the Constitution of the United States. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. The District Court entered a final judgment granting summary judgment to Defendants on March 9, 2020. (Doc. 83.) A notice of appeal was timely filed on April 3, 2020. (Doc. 85.)

STATEMENT OF THE ISSUES

In 2016 and on four separate occasions, Officer Tracy Carroll, a Cobb County Police Department ("CCPD") officer: (1) drew Plaintiffs' blood; (2) detained Plaintiffs at the Cobb County Adult Detention Center for between 8 to 24 hours; and (3) criminally prosecuted them, all for allegedly driving while impaired by marijuana. To survive constitutional scrutiny, each of these searches and seizures were required to be justified by probable cause. In each of these cases, Officer Carroll justified these actions on the basis of roadside eye examinations that CCPD trained him to perform. The six eye exams undisputedly performed on each Plaintiff looked at: (1) rebound dilation; (2) lack of convergence; (3) reddening of the conjunctiva; (4) eyelid tremors; (5) "Horizontal Gaze Nystagmus"; and (6) pupil size.

Central to this case is Plaintiffs' experts' testimony, which included an ophthalmologist who addressed each of these six eye examinations, explained why each of them are untrustworthy, and concluded that these eye exams, "individually and collectively," are no better than "flip[ping] a coin." (Doc. 65-11 at 5, 7.) Defendant's principal argument was that Plaintiffs used the wrong acronym to describe the eye examinations and other tests at issue in this case. "DRE" is the acronym that Plaintiffs and their expert primarily used to describe the tests, while Defendants protested that "ARIDE" and/or "SFST" were the correct acronym(s). (Doc. 60-1 at 3-4, 7-8; Doc. 71 at 1-3.)

The District Court granted summary judgment in favor of Defendants, appearing to agree with Defendant. The District Court credited the officer's statement that he "did not perform the . . . DRE . . . on any of the four Plaintiffs." (Doc. 83 at 17.) Thus, the District Court concluded, "The facts about the DRE protocol and its reliability (or lack thereof) are . . . immaterial to the Court's summary judgment determination." (*Id.* at 17.) The District Court did not mention that, acronyms aside, the ophthalmologist specifically attacked the underlying six eye examinations undisputedly performed on Plaintiffs. The District Court also did not mention that while the ophthalmologist's report attacked the "DRE," it defined "DRE" as including "the SFST and ARIDE program," the acronyms Defendant prefers. (Doc. 65-11 at 5.)

Thus, the issue on appeal is:

Did the District Court err in granting Defendant summary judgment by ignoring Plaintiffs' expert testimony about the untrustworthiness of the six eye examinations undisputedly conducted on the Plaintiffs, when such testimony is central to Plaintiffs' Fourth Amendment claims and sufficient to create a genuine issue of material fact?

STATEMENT OF THE CASE

This Fourth Amendment case is about whether six roadside eye examinations that the Cobb County Police Department ("Cobb County," "CCPD," or "Defendant") trains its officers to perform on drivers are not reasonably trustworthy in detecting alleged marijuana impairment. Plaintiffs claim—and Defendant does not dispute—that after they were pulled over for routine traffic stops, a CCPD officer performed six eye examinations and other roadside tests on each Plaintiff. On the basis of the results, the officer: (1) drew Plaintiffs' blood; (2) detained Plaintiffs at the Cobb County Adult Detention Center between 8 to 24 hours; and (3) initiated criminal prosecution against them and the DUI charges were ultimately dropped after the blood tests came back negative. Plaintiffs' primary expert witness is an ophthalmologist who testifies that these six eye examinations are not reasonably trustworthy and no better at detecting marijuana

impairment than "flip[ping] a coin." (Doc. 65-11 at 7.) Accordingly, Plaintiffs argue, there was no probable cause to justify these searches and seizures.

Course of Proceedings and Disposition in the Court Below

A. Plaintiffs' Fourth Amendment Claims

Plaintiffs Katelyn Ebner, Princess Mbamara, and Ayokunle Oriyomi filed their original Complaint against Defendant Cobb County and Officer Tracy Carroll on September 25, 2017 in the Northern District of Georgia. On October 23, 2017, Plaintiff Brittany Penwell was added to the case and an Amended Complaint was filed against the same Defendants, asserting claims under 42 U.S.C. § 1983 for violations of their Fourth Amendment rights against unlawful searches and seizures. (Doc. 9.) Plaintiffs' Fourth Amendment claims initially challenged the traffic stops, the blood draws, the unjustifiably prolonged detentions, and the criminal prosecutions. Plaintiffs sought monetary relief for themselves and did not seek class certification or injunctive relief. (*Id.*)

B. Defendants' Motion for Summary Judgment and Plaintiffs' Response

Defendants filed a motion for summary judgment on November 14, 2018. (Doc. 60.) Defendants' primary argument was that Plaintiffs used the wrong acronym when describing these tests, by calling the roadside examinations "DRE" ("Drug Recognition Expert Protocol") instead of the correct acronym(s): "ARIDE" ("Advanced Roadside Impaired Driving Enforcement") and/or "SFST" ("Standard

Field Sobriety Test"). (Doc. 60-1 at 3-4, 7-8; Doc. 71 at 1-3.) Because Plaintiffs attacked the "DRE," and the "DRE" was not technically performed on Plaintiffs, Defendants argued, all of Plaintiffs' attacks on the roadside exams are immaterial. (*Id.*) Defendants did not mention that "DRE" and "ARIDE" undisputedly include the six individual eye exams which Plaintiffs' expert witness attacked as untrustworthy,[1] or that "SFST" includes most of them.[2] Defendants did not mention the fact that Plaintiffs' expert attacked the "DRE" when referring to the six eye exams but defined "DRE" as including "the SFST and ARIDE program." (Doc. 65-11 at 5.)

Plaintiffs opposed summary judgment in relevant part by demonstrating that a genuine issue of material fact existed regarding the trustworthiness of the roadside exams that all parties agree were in fact conducted and then led to the searches and seizures challenged in this case. (Doc. 65 at 25.) Plaintiffs proffered an expert witness, Dr. Neil Adams, who is an ophthalmologist and researcher trained in pharmacology, who testified that the six specific eye exams administered

[1] For DRE, the relevant citations are Doc. 65-13 at 1, 13, 18, 25, 27, 28, 29, 36; Doc. 67-5 at 9. For ARIDE, the relevant citations are Doc. 65-12 at 1, 8, 31, 36, 60, 86-88, 168-169, 171; Doc. 60-4 at 5-9.

[2] For SFST, the relevant citations are Doc. 65-14 at 1, 30, 50, 184, 223; Doc. 60-4 at 5. As the citations demonstrate, the SFST includes four out of the six eye examinations (lack of convergence, reddening of the conjunctiva, Horizontal Gaze Nystagmus, and pupil size), and three of the remaining tests (walk and turn, one leg stand, finger-to-nose).

are based on flawed studies, do not detect marijuana, and amount to "flip[ping] a coin." (Doc. 65-11 at 7.)

As for Defendants' acronym arguments, Plaintiffs responded by explaining that the "DRE" versus "ARIDE" distinction is a "red herring" for purposes of this case, because both acronyms involve the same underlying roadside tests being challenged by Plaintiffs. (Doc. 65 at 27-30.) Plaintiffs pointed to their other expert witness, Josh Ott, a former police officer who both trained in the program and taught the program but has since left the force. Among other things, Ott agreed that the "SFST" was technically performed on Plaintiffs but argued that SFST was only validated to detect impairment by alcohol, not drugs. (*Id.* at 30-31.) Plaintiffs further argued that Officer Carroll himself testified that his DRE training informed his application of "ARIDE" on each Plaintiff. (*Id.* at 28 (citing Doc. 67-7 at 3 (when performing ARIDE, "you . . . can't unsee your [DRE] training").)

C. The District Court's Decision

The District Court granted summary judgment to Defendants on March 9, 2020. (Doc. 83.) Plaintiffs solely appeal the ruling as to Defendant Cobb County. (*Id.* at 39.) The District Court granted summary judgment as to Defendant Cobb County because: (1) there was no underlying constitutional violation, i.e., there was probable cause as a matter of law; and (2) there was no policy, both of which

are required to establish municipal liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). (Doc. 83 at 39.)[3]

The District Court's central finding as relevant to this appeal was its apparent agreement with Defendants' principal argument that Plaintiffs and their experts used the wrong acronym to describe the eye exams, i.e., that Plaintiffs incorrectly called the roadside exams the "DRE." (Doc. 83 at 16-17.) The District Court credited the officer's statement that he "did not perform the . . . DRE . . . on any of the four Plaintiffs." (*Id.* at 17.) So the District Court concluded, "The facts about the DRE protocol and its reliability (or lack thereof) are thus immaterial to the Court's summary judgment determination." (*Id.*)

The District Court did not mention Plaintiffs' ophthalmologist expert report anywhere. The District Court did not address Plaintiffs' argument that the proper acronym did not matter for purposes of this case because the roadside tests substantively challenged by Plaintiffs are included in both the "DRE" and

[3] It is not entirely clear which of the preceding 20 pages of the District Court's analysis, devoted to Defendant Carroll's qualified immunity, was relied upon to support the conclusion that there was no underlying constitutional violation. (Doc. 83. at 19-39.) Much of that portion of the order discusses whether there was a "clearly established" violation (i.e., "arguable probable cause," step two of the qualified immunity analysis), which is not the same as saying there was a violation (step one of the qualified immunity analysis). *See Lewis v. City of West Palm Beach, Fla.*, 561 F.3d 1288, 1291 (11th Cir. 2009). The only place Plaintiffs could discern as ruling that there was no underlying constitutional violation is in the first full sentence on page 39.

"ARIDE." The District Court did not address Ott's testimony that the "SFST" is only validated to detect alcohol and not drugs. The District Court did not mention Officer Carroll's testimony that the DRE influenced his application of the roadside tests to Plaintiffs. The District Court did not mention the fact that the ophthalmologist attacked the "DRE" when referring to the six eye exams but defined "DRE" as including "the SFST and ARIDE program." (Doc. 65-11 at 5.)

The District Court also found, in one sentence, "that Plaintiffs have failed even to plead adequately a formal or informal policy that could support liability against Defendant Cobb County." (*Id.* at 39.) The District Court did not discuss or address Paragraphs 47 to 60 of the Amended Complaint, which provided allegations to support Cobb County liability (Doc. 9 at 12-15), or any of the arguments Plaintiffs made in support of Cobb County liability from pages 37-43 of their opposition brief (Doc. 65 at 37-43).

Instead, the bulk of the District Court's decision appeared to focus principally on whether the traffic stops were justified and whether Officer Carroll was entitled to qualified immunity because there was "arguable probable cause." (Doc. 83 at 4-14; 20-33; 35-37.) Plaintiffs do not challenge these rulings on appeal or any of the District Court's reasoning to the extent they are construed to support these rulings.

D. This Appeal

On April 3, 2020, Plaintiffs filed the instant appeal solely with respect to Defendant Cobb County, who is now the only defendant in this case. Plaintiffs do not challenge the ruling with respect to the validity of the traffic stops themselves, and further clarify that they are not challenging the initial decision to arrest.

Instead, on appeal, only three of the Fourth Amendment claims are at issue, and only against Defendant Cobb County: the blood draws, prolonged detentions of 8 to 24 hours, and attendant criminal prosecutions, all of which resulted from the six eye exams undisputedly performed by the Cobb County police officer.

Statement of Facts

Below, Plaintiffs describe: (A) the eye examinations at issue on appeal and their trustworthiness; (B) the searches and seizures at issue on appeal; and (C) the relevant facts concerning Cobb County's policy, practice, and custom.

A. The Six Eye Examinations Central to this Appeal and Their Trustworthiness

In 2016, each on separate occasions, Plaintiffs Katelyn Ebner, Princess Mbamara, Ayokunle Oriyomi, and Brittany Penwell were pulled over for traffic violations (failure to maintain lane) and each arrested without a warrant for allegedly driving under the influence of marijuana. O.C.G.A. § 40-6-391(a)(2). (Doc. 60-9 at 8 (Ebner), 22 (Mbamara), 50 (Oriyomi), 35 (Penwell).) Each Plaintiff

was pulled over at around midnight. (Doc. 65-3 at 3 (Ebner); Doc. 65-4 at 2 (Mbamara); Doc. 65-5 at 3 (Oriyomi); Doc. 65-6 at 3 (Penwell).)

After Plaintiffs were stopped, Officer Carroll performed six separate roadside eye exams[4] on each Plaintiff to determine whether Plaintiffs were allegedly under the influence of marijuana.[5] (Doc. 60-9 at 7-8 (Ebner), 21-22 (Mbamara), 49-50 (Oriyomi) and 34-35 (Penwell).) The six eye examinations looked at the following:

(1) Rebound dilation;

(2) "Lack of convergence" when fixed on a close object (e.g., a finger);

(3) Reddening of conjunctiva (i.e., bloodshot eyes);

(4) Eyelid tremors;

(5) "Horizontal Gaze Nystagmus" (eyes' ability to track); and

(6) Abnormal pupil size.

(*Id.*) Officer Carroll concluded that each of the Plaintiffs' eyes allegedly exhibited rebound dilations (except Mbamara), lack of convergence, reddening of

[4] Cobb County's training materials use the term "eye examinations" when referring to these tests generally. (Doc. 65-12 at 25, 86-87; Doc. 65-14 at 11.)

[5] The relevant events for each Plaintiff were on different dates in 2016, though in each case, Officer Carroll performed the same tests and initiated the searches and seizures at issue in this case. For the sake of simplicity, all Plaintiffs are referred to together when the same relevant fact happened to all of them on each of their separate occasions.

conjunctiva, and eyelid tremors. (Doc. 60-9 at 7 (Ebner), 21 (Mbamara), 49 (Oriyomi) and 34 (Penwell).)

Officer Carroll also performed other tests on Plaintiffs, consisting of walk and turn, one leg stand, finger-to-nose, and the Modified Romberg Balance Test (where the person must estimate the length of 30 seconds with eyes closed, head tilted back and feet together). The results of those remaining tests for each Plaintiff were mixed. (Doc. 60-9 at 7-8 (Ebner), 21-22 (Mbamara), 49 (Oriyomi) and 34-35 (Penwell).)

According to Defendant, Officer Carroll was well trained to perform these tests. (*See generally* Doc. 60-5.)

Acronyms. There is an alphabet soup of acronyms in this case used to describe the tests performed on Plaintiffs. In the end, Plaintiffs contend that nomenclature is ultimately irrelevant for purposes of this appeal. As noted above, Defendant's primary argument was that Plaintiffs used the wrong acronym when referencing the roadside tests that were undisputedly performed on Plaintiffs. Defendant alleges that Plaintiffs incorrectly referred to these tests as "DRE" ("Drug Recognition Expert Protocol"), when they purportedly should have been referred to as "ARIDE" ("Advanced Roadside Impaired Driving Enforcement") and/or "SFST" ("Standard Field Sobriety Test"). (Doc. 60-1 at 3-4, 7-8; Doc. 71 at 1-3.)

It is undisputed that both the "DRE" and "ARIDE" involve all six of the eye examinations and the remaining tests listed above,[6] and that "SFST" includes most of them.[7]

Plaintiffs pause briefly to note that with respect to "SFST" in particular, some of the tests, i.e., the walk and turn, are well known in popular culture as "field sobriety tests" and they are generally associated with detecting alcohol impairment. In this case, however, Officer Carroll did not find probable cause to believe that Plaintiffs were impaired by alcohol, and Plaintiffs do not challenge the ability of any of field sobriety tests to detect *alcohol* impairment. Instead, as discussed below, Plaintiffs challenge the misuse of these tests to detect *marijuana* impairment, whatever term or acronym is used to describe them.

Plaintiffs' Experts. Plaintiffs' primary expert witness, Dr. Neil Adams, is an ophthalmology physician and researcher trained in pharmacology. Dr. Adams's

---

[6] For DRE, the relevant citations are Doc. 65-13 at 1, 13, 18, 25, 27, 28, 29, 36; Doc. 67-5 at 9. For ARIDE, the relevant citations are Doc. 65-12 at 1, 8, 31, 36, 60, 86-88, 168-169, 171; Doc. 60-4 at 5-9.

[7] For SFST, the relevant citations are Doc. 65-14 at 1, 30, 50, 184, 223; Doc. 60-4 at 5. As the citations demonstrate, the SFST includes four out of the six eye examinations (lack of convergence, reddening of the conjunctiva, Horizontal Gaze Nystagmus, and pupil size), and three of the remaining tests (walk and turn, one leg stand, finger-to-nose). Plaintiffs' opposition brief did say that the tests performed on Plaintiffs "are *not* part of the SFST protocol" (Doc. 65 at 28), which is true, but because ultimately the acronyms do not matter, this brief assumes that Defendant is correct that "SFST" was performed on Plaintiffs.

report framed his critiques as against the "DRE" method, though the report defined "DRE" as including "the SFST and ARIDE program." (*Id.* at 5.)

Dr. Adams testified that the six eye exams the officers are being trained to perform are based on flawed studies and amount to "flip[ping] a coin." (Doc. 65-11 at 7.) He opined that the eye examinations "do not indicate drug presence or impairment." (*Id.* at 5.) He then addressed each of the six eye exams mentioned above, one by one, and opined that these eye examinations do not, "individually or collectively," "indicate drug presence or impairment" (*id.*), as follows:

(1) **Rebound dilation**: "not an identifier of cannabis use or impairment," because it "is a normal phenomenon that occurs in nearly everyone." (*Id.* at 11);

(2) **Lack of convergence:** untrustworthy because "[c]onvergence insufficiency is a common disorder resulting in impairment of convergence," and the "[e]stimates of the incidence of convergence insufficiency in the general population is high in the adult population." (*Id.* at 10);

(3) **Reddening of conjunctiva:** "no evidence" that this is a "reliable sign[] of the presence of other drugs." (*Id.* at 11);

(4) **Eyelid tremors**: same (*id.*);

(5) **"Horizontal Gaze Nystagmus":** training materials defines nystagmus incorrectly and "does not teach [officers] to properly identify the presence or absence of nystagmus." (*Id.* at 8-9);

(6) **Abnormal pupil size:** based on training, officers cannot "properly determine pupil size," "properly classify pupil size within normal and abnormal range[]," or "distinguish between pupil size of physiologic and pathologic origin." (*Id.* at 11.)

Plaintiffs' second expert witness is Josh Ott. (*See generally* Docs. 65-7, 65-8, 65-9, 65-10.) Ott is a former police officer with the Roswell Police Department who, over the course of 12 years, was trained in the same exams and tests that Officer Carroll was. (*Compare* Doc. 65-7 at 19-21 (Ott's training in DRE, ARIDE, and SFST); *with* Doc. 60-4 at 3-11 (Carroll's training in DRE, ARIDE, and SFST).) Ott taught those tests as well. (Doc. 65-7 at 21.) Since leaving the force, he has concluded that sending officers to perform these roadside tests to detect marijuana impairment is "kind of [like] sending officers out blind to blindly apply the results of this test." (Doc. 67-5 at 5.) Ott criticized the tests included in SFST in particular because "the only thing that they have ever [been] validated . . . for is to indicate if somebody's a specific blood alcohol concentration or higher. They have never validated the test[s] to indicate any sort of impairment whatsoever or anything in relation to drugs." (Doc. 67-5 at 5; *see also* Doc. 65-7 at 13.)

With respect to acronyms, Ott testified that challenges to the "DRE" are essentially challenges to the roadside tests performed on Plaintiffs whatever acronym is used to describe them, because "all of the testing that's being used [roadside] are tests that come from the DRE protocols." (Doc. 67-5 at 4.) Moreover, he added, "if the actual [DRE] 12-step process, which is more in depth, shows a lot of unreliability, that would indicate that these tests that are done at the side of the road and less in depth would show even more unreliability." (*Id.* at 5.)

Each of the Plaintiffs was then arrested, i.e., handcuffed and placed into the police car. (Doc. 60-9 at 8 (Ebner), 22 (Mbamara), 50 (Oriyomi) and 35 (Penwell).) Each were charged for allegedly driving while impaired by drugs, i.e., for violating O.C.G.A. § 40-6-391(a)(2). (Doc. 60-9 at 9 (Ebner), 23 (Mbamara), 51 (Oriyomi) and 36 (Penwell).)

B. Searches and Seizures Based on Eye Exam Results

On the basis of the results of the eye exams and other tests, Plaintiffs: (1) had their blood drawn, (2) were detained at the Cobb County Adult Detention Center, and (3) were criminally prosecuted. Plaintiffs' Fourth Amendment claims are limited to these three searches and seizures.

Blood draw. After handcuffing Plaintiffs, Officer Carroll read each Plaintiff Georgia's "implied consent" notice, which required Plaintiffs to choose between giving up their driver's license for a year or have their blood drawn. O.C.G.A. § 40-5-67.1. (Doc. 60-9 at 8 (Ebner), 22 (Mbamara), 50 (Oriyomi) and 35 (Penwell).) This notice may only be read if there are "reasonable grounds to believe that the driver" committed a DUI, i.e., O.C.G.A. § 40-5-55(a) (referencing O.C.G.A. § 40-6-391, which is the DUI statute under which Plaintiffs were arrested). According to Officer Carroll, each Plaintiff "consented." (Doc. 60-9 at 8 (Ebner), 22 (Mbamara), 50 (Oriyomi) and 35 (Penwell).) According to Plaintiffs, they were compelled to do so under harrowing circumstances. (Doc. 65-3 at 7-12

(Ebner); Doc. 65-4 at 7-14 (Mbamara); Doc. 65-5 at 5-12 (Oriyomi); Doc. 65-6 at 8-13 (Penwell).) Officer Carroll transported Plaintiffs Ebner, Mbamara, and Oriyomi to a hospital to draw their blood, while Plaintiff Penwell was transported to a police station to draw her blood. (Doc. 60-9 at 8 (Ebner), 22 (Mbamara), 50 (Oriyomi) and 35 (Penwell).)

Prolonged detention. Officer Carroll then transported each Plaintiff to the Cobb County Adult Detention Center. (Doc. 60-9 at 8 (Ebner), 22 (Mbamara), 50 (Oriyomi) and 35 (Penwell).) Each Plaintiff, who had been stopped around midnight, "spent the night in jail," though Penwell "stayed in jail all night until late in the evening the next day." (Doc. 65-4 at 2, 14 (Ebner); Doc. 65-5 at 2, 14 (Mbamara); Doc. 65-6 at 2, 12 (Oriyomi); Doc. 65-6 at 3, 13 (Penwell).) For simplicity, this brief refers to this prolonged detention as being between 8 to 24 hours. CCPD officers generally do not detain drivers for this prolonged period of time solely because of a traffic violation. (Doc. 67-7 at 6; Doc. 67-9 at 4.)

Criminal prosecution. Officer Carroll formally initiated Plaintiffs' criminal prosecution when he issued Uniform Traffic Citations ("UTC") to Plaintiffs for driving under the influence of marijuana while in custody. (Doc. 60-4 at 17, 23, 29, 35.) The UTC's stated, specifically, that each Plaintiff was cited for driving under the influence of marijuana to the extent it was less safe to drive, in violation of O.C.G.A. § 40-6-391(a)(2). (Doc. 60-9 at 2, 16, 28, 43). The criminal prosecutions,

in addition to causing the harms noted above, caused one or more Plaintiffs to pay $1,300 in bail, hire a lawyer, and lose time from school and/or employment, among other harms. (Doc. 65-3 at 12-14 (Ebner); Doc. 65-4 at 14-16 (Mbamara); Doc. 65-5 at 12-13 (Oriyomi); Doc. 65-6 at 13-14 (Penwell).) The DUI charges were dismissed after the blood tests came back negative. (Doc. 60-10 at 3-4.)

C. Cobb County Police Department's Policy, Custom, or Practice

The following facts are related to whether Defendant Cobb County has a policy, custom, or practice that caused the Fourth Amendment violations in this case.

CCPD uses training materials for DRE, ARIDE, and SFST (Doc. 65-12, 65-13, 65-14), which as noted above includes the eye exams and other tests at issue in this case. "Training is provided through the Cobb County Police Academy." (Doc. 60-3 (Decl. of CCPD Deputy Chief) at 4.)

According to Defendant's own statement of undisputed facts, CCPD instructs its officers on "department policy" concerning "the U.S. Department of Transportation's National Highway Traffic Safety Association (NHTSA) [Standard Field Sobriety Tests (SFST)]." (Doc. 60-2 at 4.) CCPD further "provides the opportunity for training in NHSTA's . . . ARIDE curriculum." (*Id.* at 6.) CCPD also provides "specialized training to become a certified Drug Recognition Expert (DRE)." (*Id.* at 9.) CCPD has created a "CCPD DUI Task Force consist[ing] of

officers, some of whom are DRE certified, but all of whom are subject matter experts on the detection and evaluation of suspected DUI drivers." (*Id.* at 10.) The CCPD DUI Task Force "is assigned to those areas and times" where there has been a "high incidence of DUI driving." (*Id.* at 11.) CCPD requires all its officers to "maintain certification and participate in continued training throughout employment and in their subject matter specialties." (*Id.*)

CCPD "assigned" Officer Carroll "to the CCPD DUI Task Force." (Doc. 60-2 at 16.) Officer Carroll "was trained to administer, observe and document clues" from "Horizontal Gaze Nystagmus (HGN); 2) Walk and Turn; and 3) One-Leg Stand." (*Id.* at 18, 5.) Officer Carroll had "successfully completed the NHTSA ARIDE curriculum and was proficient in administering Pupil Size Observation, Lack of Convergence, and the Modified Romberg evaluations." (*Id.* at 18.)

Further, Officer Carroll "was trained that rebound dilation has been reported with person impaired by drugs that cause pupillary dilation; with cannabis being most common." (Doc. 60-2 at 19.) Officer Carroll was "trained that an officer might begin to suspect the presence of cannabis if lack of convergence was observed." (*Id.*) Officer Carroll "was instructed [that] a slow internal clock [assessed with the Modified Romberg Balance evaluation] and eyelid tremors are usually general indicators of cannabis consumption." (*Id.*) Officer Carroll was "trained" to "look for" other "'general indicators' of cannabis consumption such as

"reddening of the conjunctiva" and "eyelid tremors." (*Id.* at 20.) At the time of the incident, "Officer Carroll had successfully completed the NHTSA and . . . Drug Recognition Expert program and was a certified DRE." (*Id.*)

In 2017, CCPD "underwent a comprehensive assessment of policies, procedures, and practices related to . . . law enforcement standards and best practices." (*Id.* at 13-14.) The assessment "did not find policies in violation of the Constitution." (*Id.*)

STANDARD OF REVIEW

The scope of review is *de novo*. It asks whether, construing all facts and inferences in the light most favorable to Plaintiffs-Appellants as the nonmoving party, there are genuine issues of material fact that cannot be resolved as a matter of law. *Brent v. Ashley*, 247 F.3d 1294, 1298-99 (11th Cir. 2001).

SUMMARY OF ARGUMENT

What's in a name? Apparently, everything.

This Fourth Amendment case was supposed to be about the untrustworthiness of six roadside eye exams that Defendant Cobb County Police Department trains its officers to perform on drivers to determine whether they are allegedly impaired by marijuana. Plaintiffs' lead witness is an ophthalmologist, Dr. Neil Adams, who criticizes each of the six eye exams point by point and concludes that these eye exams, "individually or collectively," are so untrustworthy that they are no better than "flip[ping] a coin." (Doc. 65-11 at 5, 7.) The credibility of this expert testimony is the central dispute of material fact which a jury should be allowed to resolve. *See* Part I.

Instead, this case became a quiz on whether Plaintiffs used the right acronym to describe the roadside tests that everyone agrees were performed on Plaintiffs in this case. Defendant's leading argument for summary judgment was that because Plaintiffs and their experts used the wrong acronym when attacking the roadside tests, i.e., "DRE" instead of "ARIDE" and/or "SFST," they should lose as a matter of law. (Doc. 60-1 at 3-4, 7-8; Doc. 71 at 1-3.) The District Court appeared to agree. The District Court credited Officer Carroll's statement that he did not perform the "DRE" on Plaintiffs, then held that "[t]he facts about the DRE

protocol and its reliability (or lack thereof) are thus immaterial to the Court's summary judgment determination." (Doc. 83 at 17.)

This case is not about acronyms. It is about the trustworthiness of the six eye examinations that Plaintiffs' expert undisputedly attacked one by one, and that were undisputedly performed on Plaintiffs. The District Court failed to mention this, and in fact failed to mention Dr. Adams's expert report anywhere in the opinion. The District Court also ignored the fact that while Dr. Adams framed his critiques of the six eye examinations as against the "DRE" method, the report defined "DRE" as including "the SFST and ARIDE program." (*Id.* at 5.) *See* Part II.

Because Plaintiffs' expert reports create a genuine issue of material fact, the District Court's decision should be reversed.

ARGUMENT

Part I summarizes the elements of Plaintiffs' Fourth Amendment claims and explains why Plaintiffs' expert testimony creates a genuine issue of material fact for all claims. The key factual question is whether the six eye exams performed on Plaintiffs are a "reasonably trustworthy" basis to determine whether someone has been driving while impaired by marijuana. *Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004) (probable cause depends on whether relied upon information is "reasonably trustworthy").

Plaintiffs' primary expert witness criticizes each of the six eye exams point by point and concludes that these eye exams, "individually or collectively," are so untrustworthy that they are no better than "flip[ping] a coin." (Doc. 65-11 at 5, 7.) Thus, there is a genuine issue of material fact for a jury to resolve. Because summary judgment is reviewed *de novo*, this Court can reverse the District Court's decision for the reasons set forth in Part I alone.

Part II addresses the District Court's reliance on acronyms and demonstrates how the court's disregard of the ophthalmologist's point-by-point attack on the six eye exams undisputedly performed on Plaintiffs in this case was both illogical and erroneous. Namely, Plaintiffs demonstrate the error of the District Court's linchpin holding that "[t]he facts about the DRE protocol and its reliability (or lack thereof)

are thus immaterial to the Court's summary judgment determination." (Doc. 83 at 17.)

I. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO PLAINTIFFS' FOURTH AMENDMENT CLAIMS

Because the Cobb County Police Department's policies and training led Officer Carroll to believe that the eye exams and other roadside tests were reasonably trustworthy, each Plaintiff was subjected to: (A) a warrantless blood draw; (B) prolonged detention; and (C) criminal prosecution. Below, Plaintiffs discuss the relevant Fourth Amendment standards and explains why Plaintiffs' expert reports create a genuine issue of material fact as to each one. Plaintiffs also explain: (D) why there is genuine issue of material fact as to whether Cobb County's policy, practice, or custom caused the Fourth Amendment violations at issue in this case.

A. Plaintiffs' Expert Reports Create a Genuine Issue of Material Fact as to Plaintiffs' Blood Draw Claims

There is a genuine issue of material fact as to Plaintiff's blood draw claims, which allege that there was no probable cause to justify the blood draws. Dr. Adams's expert report demonstrates that each of the six eye exams performed on each Plaintiff was not reasonably trustworthy, and thus do not establish probable cause. Because Plaintiffs' expert testimony creates a genuine issue of material fact

on probable cause, summary judgment as to Plaintiffs' blood draw claims should be reversed.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The taking of a blood sample is a search. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016).[8]

The Fourth Amendment prohibits the government from drawing a person's blood without a warrant unless, at a minimum, there is "probable cause" to believe that the person has committed a crime justifying drawing blood.[9] *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2539 (2019). Thus, on this posture, Plaintiffs need only show that there is a genuine issue of material fact as to whether there was probable cause to justify the blood draw. Probable cause exists when the search "is objectively reasonable based on the totality of the circumstances." *Kingsland*, 382 F.3d at 1226. "This standard is met when 'the facts and circumstances within the

[8] For ease of reading, internal citation, alterations, and quotation marks are omitted unless they are relevant.

[9] There must also be "exigent circumstances" to justify a warrantless search or seizure but Plaintiffs do not argue lack of exigent circumstances. *Birchfield*, 136 S. Ct. at 2183.

officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.'" *Id.*

As applied to this case, the factual question is whether the information relied upon to justify the blood draw was "reasonably trustworthy" in terms of showing that Plaintiffs were allegedly driving "[u]nder the influence of [marijuana] to the extent that it is less safe for the person to drive." O.C.G.A. § 40-6-391(a)(2). Here, Plaintiffs' expert testimony, if believed by a jury, establishes that the six eye exams and other tests performed on Plaintiffs were not reasonably trustworthy in terms of detecting marijuana impairment. Statement of Facts ("SOF") Part A. Thus, summary judgment was inappropriate on Plaintiffs' blood draw claims. *See, e.g.*, *Kingsland*, 382 F.3d at 1231 (reversing grant of summary judgment where parties dispute whether "the information on which [the officer] based their [search]" was "less than 'reasonably trustworthy' under the circumstances").

Consent. Defendant argued below that Plaintiffs consented to the blood draws after they were read the "implied consent" notice under Georgia law and decided to give up their blood instead of losing their license for a year. (Doc. 60-1 at 25-26.) But lack of probable cause alone vitiates consent in the unique "implied consent" context for the following reasons.

"Deception invalidates consent when police claim authority they lack." *United States v. Spivey*, 861 F.3d 1207, 1213 (11th Cir. 2017). Under Georgia law, police officers only have the authority to read "implied consent" notices to drivers and force them to choose between two unpleasant options—give up blood or lose one's driver's license for a year—if there is an underlying probable cause for the DUI.[10] So if there is no underlying probable cause, then there is no underlying authority, and thus no consent. *See Cooper v. State*, 587 S.E.2d 605, 612 (Ga. 2003) (there is no "consent" for Fourth Amendment purposes under Georgia's "implied consent" statute if there was no probable cause authorizing the police to make drivers choose between giving up blood or their license for a year), *overruled on other grounds by Olevik v. State*, 806 S.E.2d 505 (Ga. 2017). When there is no probable cause, the officer has "completely misled [the driver], albeit unintentionally, about his implied consent rights, and any consent based upon the misrepresentation is invalid." *Id.*; *see also United States v. Vazquez*, 724 F.3d 15,

[10] *See* O.C.G.A. § 40-5-55(a) (requiring "reasonable grounds to believe that the driver" committed a DUI). The previous version of this statute permitted officers to require drivers to choose between having their blood drawn and losing their license for a year without probable cause, but the Georgia Supreme Court held that underlying probable cause must be established under the Fourth Amendment to justify forcing drivers to choose between these options. *Cooper v. State*, 587 S.E.2d 605, 612 (Ga. 2003), *overruled on other grounds by Olevik v. State*, 302 Ga. 228 (2017).

24 (1st Cir. 2013) ("a law enforcement officer's honest but mistaken claim of lawful authority to search invalidate[s] the [person's] consent").

Because lack of probable cause vitiates "consent" in the unique "implied consent" context, and Plaintiffs' expert testimony establishes lack of probable cause, there is also a genuine issue of material fact as to consent. In any event, whether "consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.'" *Gil as Next Friend of K.C.R. v. Judd*, 941 F.3d 504, 522 (11th Cir. 2019). Based on Plaintiffs' testimony about the harrowing circumstances of their midnight arrests, a reasonable juror could conclude that any "consent" was involuntary. *See* SOF Part B. (citing (Doc. 65-3 at 7-12 (Ebner); Doc. 65-4 at 7-14 (Mbamara); Doc. 65-5 at 5-12 (Oriyomi); Doc. 65-6 at 8-13 (Penwell)).

For these reasons, Plaintiffs' expert reports create a genuine issue of material fact as to whether Plaintiffs' blood draws were constitutional.

B. Plaintiffs' Expert Reports Create a Genuine Issue of Material Fact as to Plaintiffs' Prolonged Detention Claims

There is also a genuine issue of material fact as to Plaintiff's prolonged detention claims, which argue that their prolonged detentions at the Cobb County Adult Detention Center between 8 to 24 hours were not based on probable cause. Again, Dr. Adams's expert report demonstrates that each of the six eye exams

undisputedly performed on Plaintiffs were not reasonably trustworthy and thus do not establish probable cause. Because Plaintiffs' expert testimony creates a genuine issue of material fact on probable cause, summary judgment as to Plaintiffs' prolonged detention claims should be reversed.

Under the Fourth Amendment, every moment of detention must be independently justified by probable cause. *See Alcocer v. Mills*, 906 F.3d 944, 953 (11th Cir. 2018); *Barnett v. MacArthur*, 956 F.3d 1291, 1297 (11th Cir. 2020). Every moment of detention must also be justified by the practical necessity of that detention in light of the crime for which there is probable cause, e.g., a traffic violation. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *Rodriguez v. United States*, 575 U.S. 348, 357 (2015). There is no bright-line rule as to how many minutes or hours a police officer gets to detain someone for a particular crime, as practical necessity is dependent on the facts of each particular case. *See id.* ("[t]he reasonableness of a seizure . . . depends on what the police in fact do").[11]

[11] *Cf. Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (after a lawful arrest, the officer is allowed a "brief period . . . to take the administrative steps incident to arrest."); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 54 (1991) (holding that probable cause hearings must be held no more than 48 hours but detention less than 48 hours can be unconstitutional if "the arrested individual can prove that his or her

Here, even if there was probable cause for a traffic violation, that would not have justified detaining Plaintiffs for between 8 to 24 hours at the Cobb County Detention Center. SOF Part B. (citing (Doc. 67-7 at 6; Doc. 67-9 at 4)). For purposes of this case, only probable cause for a DUI could possibly justify that prolonged detention. Because Plaintiffs' expert testimony creates a genuine issue of material fact as to whether probable cause for a DUI existed, summary judgment was improper as to Plaintiffs' prolonged detention claims.

C. Plaintiffs' Expert Reports Create a Genuine Issue of Material Fact as to Plaintiffs' Malicious Prosecution Claims

Lastly, there is a genuine issue of material fact as to Plaintiff's malicious prosecution claims, which argue that Plaintiffs' criminal prosecutions were unconstitutional because they were based on the same six defective eye exam results that Plaintiffs' experts testify are not reasonably trustworthy. If a jury believes Plaintiffs' experts, Plaintiffs prevail on these claims for the reasons stated below. Accordingly, there is a genuine issue of material fact as to Plaintiffs' malicious prosecution claims, and summary judgment for those claims should be reversed.

To establish a federal malicious prosecution claim, a plaintiff must prove (1) the elements of the common law tort of malicious prosecution, and (2) a

---

probable cause determination was delayed unreasonably.").

violation of her Fourth Amendment right to be free from unreasonable seizures. *Wood v. Kesler*, 323 F.3d 872, 881 (11th Cir. 2003). To determine the "elements of the common law tort of malicious prosecutions" in Georgia, the Eleventh Circuit looks to Georgia and federal law. *See, e.g.*, *Uboh v. Reno*, 141 F.3d 1000, 1004 (11th Cir. 1998). In Georgia, the elements of the tort of malicious prosecution are "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to the plaintiff accused." *Wood*, 323 F.3d at 881-82. For simplicity, Plaintiffs treat the above element, a violation of the Fourth Amendment right to be free from unreasonable seizures, as the "fifth" element.

The most pertinent element in this case is the second one, which requires that the criminal prosecution be proceeded with "malice" and without probable cause. Under Georgia law, malice "may be inferred from the want of probable cause." *Fleming v. U-Haul Co. of Georgia*, 541 S.E.2d 75, 78 (Ga. App. 2000). Furthermore, if the criminal prosecution being challenged arises from two separate charges, e.g., a traffic violation and a DUI, probable cause as to one charge will not bar a malicious prosecution claim based on a second charge as to which probable cause was lacking. *See Kelly v. Curti*s, 21 F.3d 1544, 1557 (11th Cir. 1994). As

noted above, the expert reports create a genuine issue of material fact about probable cause as to the DUI.

The remaining elements are established. The first element requires that a criminal prosecution be instituted or continued. Under Georgia law, "[a] prosecution commences when a charging instrument, such as an accusation, indictment, or Uniform Traffic Citation ("UTC"), is issued and continues until there has been a final disposition of the case." *Bishop v. State*, 582 S.E.2d 571, 572 (Ga. App. 2003). A DUI charge "may be prosecuted in a . . . state court on a uniform traffic citation, which constitutes the accusation." *State v. Rustin*, 430 S.E.2d 765, 766 (Ga. App. 1993) (superseded by statute on other grounds as stated in *Switlick v. State*, 673 N.E.2d 323 (Ga. App. 2009)); O.C.G.A. §§ 40-13-1, 40-13-3, 17-7-71; *Boss v. State*, 262 S.E.2d 527 (Ga. App. 1979).

Here that element is met, because Officer Carroll issued UTC's to all four Plaintiffs when they were arrested, leading to the blood draws and prolonged detention, as well as the other harms arising from criminal prosecution. SOF Part B. (citing Doc. 60-4 at 17, 23, 29, 35).

The third element requires that the criminal proceeding be terminated in the plaintiff accused's favor, and it is undisputed that the DUI charges were dismissed for each Plaintiff after the blood tests came back negative. (Doc. 60-10 at 3-4.) The fourth element is satisfied because Plaintiffs testified about the aforementioned

damages resulting from the UTC's and continued criminal prosecution. SOF Part B. (citing Doc. 65-3 at 12-14 (Ebner); Doc. 65-4 at 14-16 (Mbamara); Doc. 65-5 at 12-13 (Oriyomi); Doc. 65-6 at 13-14 (Penwell)). The "fifth" element is proof of "a violation of her Fourth Amendment right to be free from unreasonable seizures." *Kingsland*, 382 F.3d at 1234. Here, as shown above, after Officer Carroll issued Plaintiffs UTC's, they were illegally searched and seized when law enforcement drew their blood without probable cause, and they were illegally seized when law enforcement continued to detain them between 8 and 24 hours without probable cause.

Because there is a genuine issue of material fact in particular with respect to the second element, malice and lack of probable cause, and because the rest of the elements are met, Plaintiffs' malicious prosecution claims should be allowed to proceed to trial.

D. There is a Genuine Issue of Material Fact as to Cobb County's Liability under *Monell*

Plaintiffs' claims on appeal are only brought against the Cobb County Police Department ("CCPD"). Based on the facts set forth above, SOF Part C., there is a genuine issue of material fact as to whether Officer Carroll's unjustifiable searches and seizures of Plaintiffs were all pursuant to CCPD's policies, practices, and/or customs sufficient to establish *Monell* liability.

Because the District Court emphasized that Officer Carroll was "well-trained" (Doc. 83 at 31; *see also* Doc. 60-5), Plaintiffs pause to clarify the nature of their *Monell* claim. Plaintiffs do not dispute that Officer Carroll was "well-trained" per se, only that he was "well trained" by CPPD to do the wrong thing. If these six eye examinations are so untrustworthy that they are no better than "flip[ping] a coin" (Doc. 65-11 at 5, 7), they remain untrustworthy no matter how good an officer is at flipping coins. By training its officers to perform eye exams that are not reasonably trustworthy, CCPD is liable.

"A municipality may be sued directly under § 1983 when one of its policies, practices, or customs is the source of the constitutional injury." *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020) (citing *Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 690 (1978)). Official policies of municipalities need not be written but must "establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986). An act pursuant to a "custom" "that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997). It must be shown "that the municipality was the 'moving force' behind the injury." *Id.*

Here, Plaintiffs have proffered evidence—drawn almost entirely from Defendant's own statement of undisputed facts—from which a reasonable juror could conclude that CCPD's policies, practices, and/or customs were the "moving force" behind the constitutional violations at issue in this case. SOF Part C. This is especially where, as here, the record evidence is construed in favor of Plaintiffs, as it must be at this stage of the proceeding.

First, a reasonable juror could find that CCPD trained officers, including Officer Carroll, on how to perform the six eye examinations that were specifically criticized by Dr. Adams and were undisputedly performed on Plaintiffs in this case. All training is provided through the Cobb County Police Academy. (Doc. 60-3 at 4.) CCPD used training materials for DRE (Doc. 65-13; Doc. 60-3 at 9), ARIDE (Doc. 65-12; Doc. 60-3 at 6), and SFST (Doc. 65-14; Doc. 60-3 at 4). As noted above, SOF Part A., DRE and ARIDE includes all of these six eye examinations and the remaining tests as well, and SFST includes most of them. Thus, the six roadside eye examinations that Officer Carroll performed were done pursuant to CCPD's training.

Second, a reasonable juror could find that CCPD's training misled Officer Carroll into confidently believing that these eye exams were a reasonably trustworthy basis to detect alleged marijuana impairment, further strengthening his subjective conclusion that there was probable cause as to all four Plaintiffs. For

example, CCPD's training taught Officer Carroll that "rebound dilation has been reported with person impaired by drugs that cause pupillary dilation; with cannabis being most common." (Doc. 60-2 at 19.) Dr. Adams testified, however, that rebound dilation is "not an identifier of cannabis use or impairment." (Doc. 65-11 at 11.) CCPD's training misled Officer Carroll into believing that "an officer might begin to suspect the presence of cannabis if lack of convergence was observed." (*Id*.) As Dr. Adams testified, lack of convergence is unreliable because "the incidence of convergence insufficiency in the general population is high in the adult population." (*Id.* at 10.) CCPD's training misled Officer Carroll into believing he should "look for" "reddening of the conjunctiva" and "eyelid tremors" because they are "general indicators of cannabis consumption." (*Id.* at 20.) As explained by Dr. Adams, there is "no evidence" that these features are a "reliable sign[] of the presence of other drugs." (Doc. 65-11 at 11.) Thus, a reasonable juror could conclude that Officer Carroll's mistaken conclusions regarding Plaintiffs' impairments were a natural consequence of CCPD's reliance on the flawed eye exams.

Third, a reasonable juror could find that CCPD continuously reinforces this training and relies on such continuous reinforcement when sending officers like Officer Carroll out into the field for DUI arrests. (Doc. 60-2 at 11 (CCPD requires that officers "maintain certification and participate in continued training

throughout employment and in their subject matter specialties")). CCPD depends on this reinforced training when assigning officers like Officer Carroll to focus on DUIs. This is evidenced by the CCPD DUI Task Force, which "consists of officers, some of whom are DRE certified, but all of whom are subject matter experts on the detection and evaluation of suspected DUI drivers" (*id.* at 10), who are specifically "assigned to those areas and times" where there has been a "high incidence of DUI driving" (*id.* at 11). Officer Carroll was one of the officers who, due to this training, was assigned to the CCPD DUI Task Force. (*Id.* at 16.)

The CCPD's continuous reinforcement of its training techniques arguably gave it the "force of law" within the department. *Bryan Cty.*, 520 U.S. at 404. At the very least, this reinforcement creates a genuine issue of material fact that should be decided by a jury. *See, e.g.*, *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1481 (11th Cir. 1991) (holding that a district court's decision to dismiss claims of municipal liability regarding racially discriminatory occurrences within a police department was "premature, at best").

For these reasons, there is a genuine issue of material fact as to whether CCPD's policies, practices, and/or customs caused the Fourth Amendment violations at issue in this case.

* * *

As established above, Plaintiffs' expert reports create a genuine issue of material fact for Plaintiffs' blood draw, prolonged detention, and malicious prosecution claims. Dr. Adams's report, if believed by a jury, establishes that the six eye examinations performed on Plaintiffs were not a reasonably trustworthy basis of detecting marijuana impairment, and so the results cannot justify the searches and seizures at issue. A reasonable jury could also find that the searches and seizures in this case were pursuant to Cobb County Police Department policies, practices, and/or customs. On *de novo* review, this Court should reverse the District Court's grant of summary judgment for these reasons.

II. THE DISTRICT COURT WRONGLY AND INEXPLICABLY IGNORED PLAINTIFFS' EXPERT TESTIMONY

As established in Part I, the core of Plaintiffs' Fourth Amendment claims is that the six eye examinations and other tests performed on Plaintiffs are not a reasonably trustworthy way to detect marijuana impairment. Plaintiffs' expert testimony creates a genuine issue of material fact because he specifically criticized each of the six eye examinations that were undisputedly performed on Plaintiffs and relied upon to justify the searches and seizures at issue in this case.

Yet the District Court inexplicably ignored Dr. Adams's entire report and did not mention any of its contents at all. The only clue as to why is found on page 17 of Doc. 83. "DRE" had been the acronym that Plaintiffs and the ophthalmologist mainly used when initially referring to the six eye exams

undisputedly performed on Plaintiffs. The District Court credited Officer Carroll's statement that he did not perform the "DRE" on Plaintiffs. (Doc. 83 at 17.) On that basis, the District Court concluded: "The facts about the DRE protocol and its reliability (or lack thereof) are thus immaterial to the Court's summary judgment determination." (*Id.*) The District Court did not go beyond the acronyms. The District Court did not discuss, for instance, the actual substance of Dr. Adams's report, such as his direct criticism of the six eye exams that were performed on Plaintiffs, none of which is impacted by which acronym is used to describe them.

Thus, the District Court appeared to agree with Defendant's leading argument, that because Plaintiffs used the wrong acronym when attacking the roadside tests, i.e., "DRE" instead of "ARIDE" and/or "SFST," Plaintiffs supposedly attacked the wrong thing and should lose as a matter of law. (Doc. 60-1 at 3-4, 7-8; Doc. 71 at 1-3.)

The District Court's reasoning was flawed for multiple independent reasons. In sum, the District Court ignored critical parts of the factual record that undermine, or render irrelevant, Defendant's fixation on acronyms.

A. Plaintiffs' Expert Attacked the Six Eye Examinations That Were Undisputedly Performed on Plaintiffs

First, the District Court failed to mention the fact that Dr. Adams criticized each of the six eye examinations undisputedly performed on Plaintiffs, point by point, and concluded that these eye exams, "individually or collectively," are so

untrustworthy that they are no better than "flip[ping] a coin." (Doc. 65-11 at 5, 7.) None of Dr. Adams's opinion was dependent upon acronyms. That is sufficient to create a genuine issue of material fact. Yet the District Court's reasoning fails to even discuss these basic facts, and this alone demonstrates that the District Court was wrong.

B. The District Court Ignored Witness Testimony That Undermined Defendant's Wrong-Acronym Argument

Even if acronyms mattered in this case, which they don't, the District Court failed to discuss any of the witness testimony that directly undermines Defendant's wrong-acronym argument. Testimony from Defendant's own witnesses and from both of Plaintiffs' experts all show that attacks framed as being against the "DRE" are still relevant even if the "DRE" was not technically performed on Plaintiffs. The District Court ignored all of them.

Officer Carroll. Officer Carroll himself testified that even if "DRE" was not technically performed on Plaintiffs, DRE training necessarily influenced the way he performed the roadside tests. When asked about the influence of DRE training on the ARIDE roadside test, Officer Carroll testified, "I think that [ARIDE] is a—I don't want to use the term 'side effect' of the DRE program, because the DRE program . . . teaches you a process that you would do after people are arrested. But . . . you also can't unsee your training." (Doc. 67-7 at 3.) When asked whether he was "still using [DRE] training" "even if you weren't doing the

entire DRE evaluation as part of your investigation," he responded, "I don't think that it's possible . . . I can't see an instance where you would unsee what you've . . . been exposed to. . . . I could try to come up with a scenario when that—but it's—it's terribly difficult." (*Id.* at 3-4.)

None of this evidence was discussed by the District Court. Instead, the District Court construed in Defendant's favor Officer Carroll's statement that DRE was not performed on Plaintiffs (Doc. 83 at 17), while ignoring the parts of Officer Carroll's own testimony that undermine Defendant's wrong-acronym argument by demonstrating that attacks on the "DRE" *are* attacks on Officer Carroll's roadside examinations. On summary judgment, courts are to construe all facts and inferences in favor of the nonmoving party. *Brent v. Ashley*, 247 F.3d 1294, 1298-99 (11th Cir. 2001). The District Court did the exact opposite.

Cobb County's Rule 30(b)(6) Witness. Even Cobb County's designated Rule 30(b)(6) witness (and thus Cobb County itself) took little stock in acronyms for the same reason Officer Carroll gave. He admitted that DRE training inevitably influences ARIDE and SFST, testifying, "Now, is it feasible that [Carroll's] going to use his DRE training to see certain things? Absolutely, just like he's going to use his ARIDE training, like he's going to use his standardized field sobriety training." (Doc. 67-9 at 4.) The District Court also ignored this testimony.

Josh Ott. The District Court also failed to mention the testimony of Josh Ott, even though he testified that acronyms don't matter for purposes of attacking the reliability of the roadside exams performed on Plaintiffs. Ott explained that even if the roadside exams are not technically "DRE", attacks on the "DRE" are relevant because the roadside exams are all substantively based on "DRE". (Doc. 67-5 at 3, 4 (officers "us[e] [their] training, knowledge, and experience as a DRE to help [them] make side-of-the-road decisions. Additionally, all of the testing that's being used [roadside] are tests that come from the DRE protocols. . . . No, the [DRE] was not done. But the tests that are used in that [DRE] evaluation and the same standards to grade those tests was used to help formulate the opinion as to whether or not an arrest should be made.").)

Moreover, Ott testified that attacks on the "DRE" are especially relevant because if the DRE is flawed, and ARIDE is derived from DRE, that makes ARIDE even more unreliable. (*Id.* at 5 ("if the actual [DRE] 12-step process, which is more in depth, shows a lot of unreliability, that would indicate that these tests that are done at the side of the road and less in depth would show even more unreliability.").) As for SFST, Ott did not deny that SFST tests were performed on Plaintiffs but testified that it is irrelevant because SFST has only been validated to detect alcohol, not drugs. (Doc. 67-5 at 5.)

Ott's testimony is backed by over a decade of training in these roadside exams (including DRE, ARIDE, and SFST), and Ott even taught courses on it. (Doc. 65-7 at 19-21.) The District Court ignored it.

Dr. Neil Adams. Finally, Plaintiffs' primary expert witness, Dr. Adams, explained that he used "DRE" as a shorthand which also included "ARIDE" and "SFST," the acronyms that Defendant prefers. Specifically, Dr. Adams's report attacked the "DRE Evaluations," which he explicitly defined as including "ARIDE" and "SFST". (Doc. 65-11 at 5 ("Following analysis . . . of the DRE program, . . . the SFST, and the ARIDE program, collectively referred to herein as the 'DRE Evaluation', I opine that DRE Evaluations . . . do not indicate drug presence or impairment.").) This was also ignored, even though it would appear to nullify Defendant's entire acronym argument.

For these reasons, it was improper for the District Court to completely ignore Dr. Adams's expert report when granting summary judgment.

CONCLUSION

Dr. Adams's expert report attacked, as not reasonably trustworthy, the six eye examinations that were undisputedly performed on Plaintiffs to justify their Fourth Amendment searches and seizures. He concluded that these eye exams, "individually or collectively," are so untrustworthy that they are no better than "flip[ping] a coin." (Doc. 65-11 at 5, 7.) Coin flips are not a reasonably trustworthy

way of detecting marijuana impairment no matter how "well trained" an officer is at flipping coins.

This, in addition to the factual dispute over *Monell* liability, suffices to create a genuine issue of material fact. The District Court's decision granting Defendant summary judgment should therefore be reversed.

Respectfully submitted this 10th day of June, 2020

/s/ Sean J. Young

Sean J. Young
Georgia Bar No: 790399
Kosha S. Tucker
Georgia Bar No: 214335
AMERICAN CIVIL LIBERTIES FOUNDATION OF GEORGIA, INC.
P.O. Box 77208
Atlanta, GA 30357
Tel: (678) 981-5295
syoung@acluga.org
ktucker@acluga.org

Zack Greenamyre
Georgia Bar No: 293002
MITCHELL & SHAPIRO, LLP
3490 Piedmont Rd., Suite 650
Atlanta, GA 30305
Tel: (404) 812-4747
zack@mitchellshapiro.com

CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of Federal Rule of Appellate Procedure 32(a) because, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 32-4, this document contains 9,825 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman

This 10th day of June, 2020.

/s/ Sean J. Young
Sean J. Young
American Civil Liberties Union Foundation of Georgia, Inc.

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I, Sean J. Young, do hereby certify that I have filed the foregoing Brief electronically with the Court's CM/ECF system with a resulting electronic notice to all counsel of record on June 10, 2020. I further certify that upon receiving notification from the Court that the electronic version of the Brief has been accepted and docketed, one true and correct paper copy of the Brief will be sent via first-class mail to counsel of record.

Dated: June 10, 2020

/s/ Sean J. Young
Sean J. Young
American Civil Liberties Union
Foundation of Georgia, Inc.

Counsel for Plaintiffs-Appellants