International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 8 – May 8, 2020

Copyright: Annotations to State Codes are not Protectible Works of Authorship, Placing Georgia Code Annotated in the Public Domain

Georgia v. Public.Resource.Org, Inc., No. 18–1150, 590 U.S. ___ (2020).

Affirming the Eleventh Circuit—which had reversed the lower court, — the Supreme Court holds that annotations to the Georgia Code are effectively produced by lawmakers, who cannot be "authors" for purposes of the Copyright Act, meaning that Lexis, which contracts with the State to license and distribute the annotated code, cannot not prevent the annotated version from being placed in the public domain.

The Copyright Act grants monopoly protection for "original works of authorship." 17 U. S. C. §102(a). Under the "government edicts" doctrine, officials empowered to speak with the force of law cannot be the authors of the works they create in the course of their official duties.

The sole official code for the State of Georgia is the Official Code of Georgia Annotated (OCGA). It includes the text of every current Georgia statute, as well as a set of non-binding annotations that appear beneath each statutory provision. These typically include summaries of judicial opinions construing the provision and applicable state attorney general opinions, as well as a listing of relevant law review articles and other reference materials.

The OCGA is assembled by the Code Revision Commission (Commission), a state entity comprised primarily of legislators, funded through legislative branch

appropriations, and staffed by the Office of Legislative Counsel. The annotations in the current OCGA were produced by Matthew Bender & Co., Inc., a division of the LexisNexis Group (Lexis), under a work-for-hire agreement with the Commission, which specifies what the annotations must include in exacting detail. The agreement also states that any copyright in the OCGA vests in the State of Georgia, acting through the Commission. Lexis has exclusive rights to license the OCGA, subject to certain pricing limitations and on the condition that they provide a non-annotated version to the public for free.

Public.Resource.Org (PRO), a nonprofit dedicated to facilitating public access to government materials, posted the OCGA online and distributed copies, asserting that it was in the public domain. The Commission sent PRO various cease-and-desist letters, and then sued PRO for copyright infringement. PRO responded by seeking a declaratory judgment that the OCGA, including the annotations, fell in the public domain.

The district court sided with the Commission, holding that the annotations were eligible for copyright protection because they had not been enacted into law. The Eleventh Circuit reversed, finding that the annotations were "sufficiently law-like" to invoke the government edicts doctrine and rejecting the Commission's copyright assertion.

In a 5-4 opinion, the Supreme Court agreed with the Circuit, and denied copyright protection. Under the government edicts doctrine, originally applied to court decisions and judges' opinions, "no one can own the law." For purposes of the Copyright Act, judges cannot be the "author[s]" of "whatever work they perform in their capacity" as lawmakers; similarly, because legislators, like judges, have the authority to make law, it follows that they, too, cannot be "authors." And the prohibition applies to whatever work legislators perform in their capacity as legislators, including explanatory and procedural materials they create in the discharge of their legislative duties.

Georgia argued that excluding the OCGA annotations from copyright protection conflicted with the text of the Copyright Act, noting that §101 lists "annotations" among the kinds of works eligible for copyright protection. As the Court pointed out, however, that provision refers only to "annotations . . . which . . . represent an original work of authorship." The annotations are prepared by a legislative body that cannot be deemed the "author" of the works it creates in its official capacity.

The opinion divided along unusual lines. Chief Justice Roberts wrote for the majority, being joined with Justices Gorsuch, Kavanaugh—and Kagan and Sotomayor. His opinion ended with the following:

> Instead of examining whether given material carries "the force of law," we ask only whether the author of the work is a judge or a legislator. If so, then whatever work that judge or legislator produces in the course of his judicial or legislative duties is not copyrightable. That is the framework our precedents long ago established, and we adhere to those precedents today.

DISSENT: Justices Thomas, Alito, Breyer and Ginsburg dissented. Justice Thomas, joined by Justice Alito, challenged the majority's reading of seminal early cases on the government edicts doctrine and separated the intellectual process required in creating annotations from the lawmakers' underlying legal and legislative activities. He cited the fact that nearly half of our states employ a similar construct as Georgia's, portending more challenges to follow:

> [A]after straining to conclude that the Georgia Code Revision Commission (Commission) is an arm of the Georgia Legislature, ante, at 9–10, the majority concludes that Georgia cannot hold a copyright in the annotations that are included as part of the Official Code of Georgia Annotated (OCGA). This ruling will likely come as a shock to the 25 other jurisdictions—22 States, 2 Territories, and the District of Columbia—that rely on arrangements similar to Georgia's to produce annotated codes. See Brief for State of Arkansas et al. as Amici Curiae 15, and App. to id., at 1. Perhaps these jurisdictions all overlooked this Court's purportedly clear guidance. Or perhaps the widespread use of these arrangements indicates that today's decision extends the government edicts doctrine to a new context, rather than simply "confirm[ing]" what the precedents have always held.

Justice Ginsburg was joined by Justice Breyer. She wrote in part:

> Not all that legislators do, however, is ineligible for copyright protection; the government edicts doctrine shields only "*works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties*." Ante, at 9 (emphasis added). The core question this case presents, as I see it: Are the annotations in the Official Code of Georgia Annotated (OCGA) done in a legislative capacity? The answer, I am persuaded, should be no.

LINK

Jails: County's "Keep on Person" Policy Allowing Detainees to Retain Medications did not Constitute Deliberate Indifference

Andrews v. Wayne County, No. 19-1992 (6th Cir. May 4, 2020).

Affirming the lower court, the Sixth Circuit finds no constitutional violation in a County's "Keep on Person" medication policy after a pretrial detainee committed suicide.

On June 5, 2014, the Canton, Ohio Police Department received a 911 call from Jacob (Andrews). Andrews stated that Angela White (White), his fiancé, physically attacked

him after he got into bed and poked him in the chest with a kitchen knife. Police arrested White. Later that morning, Andrews brought White's medications to her at the police department. White was charged with felony assault with a dangerous weapon. A preliminary hearing was scheduled. White was transferred to Wayne County's Jail (Jail), with her six medications: (1) Klonopin, (2) oxygen, (3) Sumatriptan, (4) Verapamil, (5) Toradol, and (6) Lexapro.

During the intake questionnaire, White admitted that she had attempted to harm herself or commit suicide in the past but was neither thinking of harming herself nor had suicidal thoughts. White was then cleared for housing in the general prison population and referred for a medical and a mental evaluation. R.N. Raymond Carnill (Carnill) evaluated White shortly thereafter, producing his own history and assessment, without reviewing the intake form. Carnill noted that White had bad cluster headaches and was taking medications for anxiety. He also noted her mood as anxious. Carnill verified White's prescriptions. Carnill filled out a referral form directing that White be seen by the psychiatric social worker and that the on-call psychiatrist be contacted. He reported that White's chief complaint was anxiety and depression, she was taking Lexapro and Klonopin, and she denied being suicidal or homicidal.

In his deposition testimony, Carnill said he did not admit her to the mental health unit because in the two hours he spent with her, White did not show any psychotic behavior, suicidal ideation, or psychiatric distress. He placed her in a special housing unit, the infirmary, so she could access her oxygen tank as needed.

On June 7, White was found sitting on the floor of her cell with traces of vomit on her face. White said she did not feel well. A nurse went to White's cell, evaluated her, and said she needed to contact the doctor. Shortly afterward, White repeatedly told the deputy on duty that she took too many pills. Another nurse came to White's aid. White was on the floor but still talking and remained conscious. EMS arrived and transported her to Detroit Receiving Hospital, where she was pronounced dead the next day. An autopsy deemed the cause of death as Verapamil toxicity and the manner of death as suicide.

Andrews, as personal representative of the estate of Angela White, sued the County under Section 1983, alleging that its "Keep on Person" (KOP) Policy--which allows detainees to retain medications which they will require in incarceration--as well as its failure to train its personnel in suicide assessment policies were deliberately indifferent to White's serious medical needs. The district court granted the County's motion for summary judgment, holding that the facts did not establish municipal liability.

The Sixth Circuit affirmed, holding that the district court did not err in granting summary judgment to the County on Andrews' official policy claim and failure to train claim.

A pretrial detainee does not have a general constitutional right to receive a suicide screening or to be placed on suicide watch unless manifesting a strong likelihood of committing suicide. The County would be liable only if Andrews' injury was caused by

the implementation of its custom or policy, or if the County's failure to train employees amounted to deliberate indifference to Andrews' constitutional rights. As to the former, Andrews was required to identify the injurious policy, connect the policy to the municipality itself and show that the particular injury was incurred because of the execution of that policy.

White was allowed to keep 45 pills on her person pursuant to the County's KOP program. .In 2012, only patients housed on the mental health unit were excluded from participating in the KOP program; the KOP program prior to that time would have precluded any inmate on psychotropic medication from participating in the self-administration program. Had White been detained before 2012, she would not have been allowed to keep any drugs with her, because she was taking two psychotropic medications, Klonopin and Lexapro.

The Court rejected Andrews' argument that the KOP Policy was "clearly constitutionally defective and just as plainly caused [White's] death." It found that the KOP Policy was not defective on its face and the County provided an adequate reason for changing the policy. The Court concluded there was no genuine issue of fact regarding the constitutionality of the KOP policy and its application to White.

The Court also rejected Andrews' argument that the County's failure to train its employees in suicide risk assessment showed deliberate indifference. In suicide cases, a duty is imposed on municipalities to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable. Where the risk is clear, the municipality has a duty to take reasonable steps to prevent the suicide. The Court found no evidence of deliberate indifference towards White: any purported failure or lack of specific suicide risk assessment training did not cause White to commit suicide. Given the absence of an unconstitutional act, the County could not be held liable.

LINK

Religion: Kentucky's COVID-19-Based Prohibition Against In-Church Worship is Upheld

Maryville Baptist Church, Inc. v. Beshear, no. 20-cv-5427 (6th Cir. May 2, 2020).

The Sixth Circuit reverses in part a lower court refusal to grant a church's motion for restraining order against the Kentucky Governor's orders which did not include churches as "essential services," enjoining the state from taking action against drive-in church services.

On March 19, 2020, Kentucky Governor Andy Beshear (Beshear) issued an order prohibiting "[a]ll mass gatherings," "including, but not limited to, community, civic, public, leisure, faith-based, or sporting events." That order excepted "normal operations at airports, bus and train stations, . . . shopping malls and centers," and "typical office environments, factories, or retail or grocery stores where large numbers of people are present, but maintain appropriate social distancing."

A second order, issued on March 25, 2020, required organizations that are not "life-sustaining" to close. Religious organizations were not "life-sustaining" entities, except when they function as charities by providing "food, shelter, and social services." Laundromats, accounting services, law firms, hardware stores, and many other entities were allowed as life-sustaining.

On April 12, 2020 Maryville Baptist Church (Church) held a drive-in Easter service. Congregants parked their cars in the church's parking lot and listened to a sermon over a loudspeaker. Kentucky State Police arrived in the parking lot and issued notices to the congregants that their attendance at the drive-in service amounted to a criminal act. The officers recorded congregants' license plate numbers and sent letters to vehicle owners requiring them to self-quarantine for 14 days or be subject to further sanction.

The Church objected, arguing that the orders and enforcement actions violate congregants' rights under the Kentucky Religious Freedom Restoration Act (KRFRA) and the Free Exercise provisions of the First and Fourteenth Amendments-- the orders prohibit its members from gathering for drive-in and in-person worship services regardless of whether they meet or exceed the social distancing and hygiene guidelines in place for permitted commercial and other non-religious activities.. It sought a temporary restraining order to block further enforcement, which the district court denied.

The Church moved a preliminary injunction pending appeal at the Sixth Circuit, a posture which the State's Attorney General supported via amicus brief. Stating that time was of the essence, because "The case will become moot just over three Sundays from now, May 20, when the Governor has agreed to permit places of worship to reopen," the Circuit took the appeal. It applied the traditional four-factor analysis when evaluating whether to grant a stay pending appeal, including likelihood of success on the merits; irreparable injury to moving party absent the stay; likelihood of substantial injury to other parties if stay is granted; and interest of the public.

The KRFRA states "Government shall not substantially burden" a person's "right to act . . . in a manner motivated by a sincerely held religious belief . . . unless the government proves by clear and convincing evidence" that it "has used the least restrictive means [to further] a compelling governmental interest in infringing the specific act." One of KRFRA's goals, as with many similar statutes in other states, is to impose strict scrutiny on laws that burden sincerely motivated religious practices.

Applying KRFRA, it was clear that the orders substantially burdened Church members' religious expression. The question was whether Governor Beshear's orders were "the

least restrictive means" of achieving his public health interests. As the Circuit put it “That’s a difficult hill to climb, and it was never meant to be anything less.” The way the orders treated comparable religious and non-religious activities suggested that they were not the least restrictive way of regulating the churches. “How are in-person meetings with social distancing any different from drive-in church services with social distancing?” the Circuit asked. It noted that, on the same Easter Sunday that officers informed congregants they were violating criminal laws by sitting in their cars in a parking lot, hundreds of cars were parked in grocery store parking lots less than a mile from the church.

While the Governor denied that the ban applied to drive-in worship services, and the district court seemed to think so as well, the language in the orders said otherwise. By their terms, they applied to "[a]ll mass gatherings," "including, but not limited to, . . . faith-based . . . events."

The Governor's orders also likely "prohibited the free exercise" of "religion." While laws of general applicability which happen to interfere with religious exercise will often survive, as more exceptions are added to the “general” law, the more suspect it becomes: "At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny."

The Circuit held that the Governor's orders had “several potential hallmarks of discrimination.” For one, it prohibited "faith-based" mass gatherings by name—but the court accepted the Governor’s argument against disparate treatment: the orders listed many other group activities, and he had to mention faith groups by name because there are many of them, they meet regularly, and their ubiquity poses material risks of contagion.

The problem lay with the orders’ exceptions. Many of the secular “life sustaining” activities allowed posed comparable public health risks to worship services. The illogical differentiation among activities “[did] little to further these goals and do much to burden religious freedom.” As the Circuit saw it, “The Commonwealth has no good answers. While the law may take periodic naps during a pandemic, we will not let it sleep through one.”

The Circuit acknowledged that the Church might use Zoom services—but did every congregant have the necessary technology to make that work? The bottom line was health risk, and the Church was willing to abide by the same social distancing and other restrictions imposed on “essential” enterprises. “Risks of contagion turn on social interaction in close quarters; the virus does not care why [people] are there.”

The Sixth Circuit found a likelihood of success and irreparable harm with respect to the Church’s challenge to the ban on drive-in services. But “the balance is more difficult

when it comes to in-person services." The Circuit declined to extend the injunction to in-person worship:

> We realize that this falls short of everything the Church has asked for and much of what it wants. But that is all we are comfortable doing after the 24 hours the plaintiffs have given us with this case. In the near term, we urge the district court to prioritize resolution of the claims in view of the looming May 20 date and for the Governor and plaintiffs to consider acceptable alternatives. The breadth of the ban on religious services, together with a haven for numerous secular exceptions, should give pause to anyone who prizes religious freedom. But it's not always easy to decide what is Caesar's and what is God's—and that's assuredly true in the context of a pandemic.

The Governor was enjoined from enforcing, during the pendency of the appeal, prohibitions against drive-in worship at the Church, so long as its ministers and congregants adhered to the public health requirements mandated for "life-sustaining" entities.

LINK

Reproductive Rights: State's Emergency Order Temporarily Barring All Abortions Must Yield to Women's Constitutional Rights

Adams & Boyle, P.C. v. Slatery, No. 20-5408 (6th Cir. April 24, 2020).

Affirming the lower court, the Sixth Circuit upholds an injunction barring a Governor's emergency order from temporarily banning all abortions, purportedly to save PPE; however the district court's injunction was limited to categories of women for whom a short-term delay posed an extraordinary risk or inconvenience.

In response to the COVID-19 pandemic, on April 8, 2020, the Governor of Tennessee (Governor) issued Executive Order 25 (EO-25) to "all healthcare professionals and healthcare facilities in the State of Tennessee," requiring that they "postpone surgical and invasive procedures that are elective and non-urgent," at least until April 30 in order to preserve personal protective equipment (PPE) for emergency and essential needs and prevent community spread of COVID-19 through non-essential patient-provider interactions.

"Elective and non-urgent procedures" were defined as those that could be delayed until the expiration of EO 25 because they were not required to provide life sustaining treatment, to prevent death or risk of substantial impairment of a major bodily function, or prevent rapid deterioration or serious adverse consequences to a patient's physical

condition if the surgical or invasive procedure was not performed, as reasonably determined by a licensed medical provider.

EO 25 conflicted with the constitutional right of Tennessee women to receive a "medication abortion" within the first 11 weeks from her last menstrual period, receive a "procedural abortion" within the first 20 weeks (by aspiration or a dilation and evacuation), or travel to a state with more lenient abortion requirements.

Adams & Boyle, P.C.; Memphis Center for Reproductive Health; Planned Parenthood of the Greater Memphis Region; Planned Parenthood of Tennessee and North Mississippi; Knoxville Center for Reproductive Health; and Dr. Kimberly Looney (collectively, Plaintiffs) interpreted EO-25 as barring the performance for any procedural abortions between April 8 and April 30 (and potentially beyond that), enforceable by criminal sanction. Plaintiffs temporarily canceled all procedural abortions scheduled for that period, fearing that EO-25 would cause their patients to lose their constitutional right altogether, or at least impose an "undue burden" on that right as well as cause them (the providers) to face criminal prosecution if they attempted to help their patients procure a procedural abortion.

On April 17, the federal district court granted Plaintiffs' request for a preliminary injunction, immediately enjoining the State from enforcing EO-25 as applied to procedural abortions. The district court emphasized that because EO-25 was likely to last beyond April 30, and because "delaying a woman's access to abortion even by a matter of days can result in her having to undergo a lengthier and more complex procedure that involves progressively greater health risks . . . or can result in her losing the right to obtain an abortion altogether," the Plaintiffs were likely to succeed on the merits of their constitutional claim, under the *Casey* "undue burden" test. The district court noted that the State presented no evidence that any appreciable amount of PPE would actually be preserved if EO-25 was applied to procedural abortions. Furthermore, making women travel out-of-state for abortion only increased the risks of person-to-person transmission of COVID-19, in contradiction to the EO-25's purpose.

The State appealed, leading the Sixth Circuit to review the now-familiar criteria for an injunction; the movant must demonstrate: (1) the likelihood of success on the merits (2) the likelihood that they will suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that the injunction is in the public interest.

The Circuit found that Plaintiffs were likely to succeed on the merits. Depending on the stage of a woman's pregnancy, EO-25 functioned not just as a "delaying regulation," a matter generally reviewed under *Casey's* undue burden standard, but also as an outright ban on pre-viability abortion. Furthermore, it was uncertain that EO-25 would end on April 30, which made the burden of "planning ahead" for a time-sensitive procedure like abortion much more difficult.

The court also held that EO 25 would cause irreparable harm to Plaintiffs and the women they represent: Plaintiffs risked criminal prosecution and women seeking abortions would be deprived of long-held constitutionally protected rights, potentially in a time frame that would eliminate their very ability to have an abortion. In contrast, the court found that any backlash the Governor would suffer from having one small part of a limited-duration executive order enjoined was minimal. Furthermore, as the district court observed, it is always in the public interest to prevent violation of constitutional rights.

However, the Circuit agreed with the State's argument that the order was overbroad because the district court failed to limit injunctive relief to the three categories of patients identified as particularly at risk by the Plaintiffs: women who would (1) in the good-faith professional judgment of the provider, likely lose their ability to obtain an abortion in Tennessee; (2) likely be forced to undergo a lengthier and more complex abortion procedure (including being forced to undergo a D&E procedure instead of an aspiration procedure); or (3) likely be forced to undergo a two-day procedure if their procedures were delayed until after April 30, 2020. The Court also denied the State's request for a stay pending appeal as moot.

To the extent that patients could safely delay their procedural abortions past EO-25's [April 30] expiration date, Plaintiffs were required to comply with EO-25 and delay those particular procedures.

LINK

Search: Decedent had Expectation of Privacy in Stairwell and Landing in Duplex; No Qualified Immunity for Warrantless Entry

Hicks v. Scott, no. 19-cv-3410 (6th Cir. May 1, 2020).

Reversing in part, the Sixth Circuit holds that officers committed an unlawful entry when, without a warrant, consent or exigent circumstance, they passed through an unlocked exterior door of a duplex and climbed stairs to a landing with unmarked doors where they subsequently shot and killed a man who appeared with a rifle.

On a night in June 2015, officers from the City of Cincinnati (City) Police Department went to a three-story dwelling after being told by complainants that Quandivier Hicks (Quandivier), believed to live there, had threatened to kill the complainants as he drove by earlier that evening. Hearing a voice from the upper unit that they deduced was Quandivier's, they decided to approach. An exterior door at the side of the building led to a staircase going to the upstairs unit. The door was closed. It had two deadbolt locks, both clearly visible, and metal security bars, and lacked a knocker, bells, or nameplates.

The door had been left unlocked; when officers knocked, it swung open. Three officers entered without announcing their presence. They ascended the stairs to a second-floor landing with four doors, none of which had locks, numbers, knockers, or nameplates. An officer knocked “at least twice” on one of the doors, whereupon she heard someone descending a stairway.

As the stairway door opened, she “saw the barrel of a rifle pointed at [her] face.” One officer reached for the barrel of the rifle and another fired. Quandivier was hit in the chest and collapsed instantly. Officers immediately radioed for paramedics. One attempted to apply handcuffs before providing aid, but “the amount of blood gushing from Quandivier’s wound and mouth prevented him from properly securing Quandivier’s hands.” When another voice was heard coming from upstairs, that officer secured the third floor, detaining another person. Soon thereafter, Quandivier died at the scene.

In June 2016, Ruby Hicks (Hicks), the executor of Quandivier’s estate, sued three officers and the City under § 1983 for unlawful entry, excessive force, and deliberate indifference to a serious medical need, as well as state-law claims for wrongful death and battery. The district court entered summary judgment in the officers’ favor based on qualified immunity, which undermined the municipal liability claim, leading to summary judgment for the City.

Hicks appealed. The Sixth Circuit affirmed except as to unlawful entry. It found the district court erred in holding that Quandavier lacked an objectively reasonable expectation of privacy in the foyer, stairwell, and second-floor landing of the duplex’s rear unit. It also found this right was clearly established.

The defendants did not contest that they entered without a warrant, without consent and without exigent circumstances, contending that no “search” occurred because Quandivier had no reasonable expectation of privacy in any of the invaded areas.

Traditionally, a person claiming Fourth Amendment protection was required to have a “legitimate expectation of privacy” in the targeted area. The expectation had to be both subjective—believed by the person asserting the right—and also objective--“one that society is prepared to recognize as ‘reasonable’.”

In recent years, however, the Supreme Court has revived a “property-based” approach to Fourth Amendment searches. This analysis need not assess the complainant’s expectations; instead, the physical intrusion itself is “enough to establish that a search occurred.” Under a property-based approach to Fourth Amendment searches, no location receives greater protection than a person’s home. Here, the district court erred in assuming that the areas intruded upon by the officers were distinct from Quandavier’s apartment. Both his uncle and girlfriend had stated that police went into Quandavier’s “house” and that that no portion of the unit was accessible to the public or shared with the First Floor Apartment. There was no documentary or testimonial evidence to support the view that these areas were anything other than interior portions of the rear apartment unit.

Even accepting defendants' contested characterization of the landing area as an extended corridor leading to a self-contained apartment on the third floor, the Circuit held that Quandivier had a reasonable expectation of privacy:

> We have long held that tenants of multioccupancy structures have a reasonable expectation of privacy in "common areas . . . not open to the general public." A tenant in a twelve-unit apartment building, for instance, has a reasonable expectation of privacy in a locked common area leading to multiple units. The same is true of an unlocked basement shared by the seven tenants of a duplex: it is expected that only the "tenants and landlord" will frequent such an area. It is only when a tenant should expect that members of the general public will pass through a common space—i.e., persons other than the landlord, co-tenants, and their invited guests—that she loses her reasonable expectation of privacy in that space. (citations omitted).

Viewing the evidence in a light most favorable to Hicks, Quandavier had a reasonable expectation of privacy in the interior corridor. It led to only one apartment: his. The exterior door—hardly visible from the street—was at the end of a narrow alley, and Quandavier had taken affirmative steps to exclude the public and maintain his privacy: he normally locked the door with multiple deadbolts, rebuffed prying eyes with a privacy curtain, and fortified the glass with security bars. The lack of a doorbell and knocker could also support the inference that he had no interest in admitting strangers.

Although the defendants contended that the unlocked door divested Quandavier of any reasonable expectation of privacy, intervening acts unknown to the sole user of an area cannot independently nullify an otherwise justified expectation of privacy. See, e.g., *United States v. Kimber*, 395 F. App'x 237, 247–48 (6th Cir. 2010) (holding that lock on common hallway door broken by other tenants did not undermine plaintiff's reasonable expectation of privacy).

The Sixth Circuit found that the defendants did not execute a permissible search under the Fourth Amendment. The district court had not reached the second prong of the qualified immunity analysis—whether the officers should have known that they had entered a private residence. This was a question of fact, requiring denial of summary judgment on the wrongful entry qualified immunity question.

> As the Supreme Court has recognized, "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." That conclusion is no different if the door to a private residence is unlocked or even ajar. See, e.g., United States v. McClain, 444 F.3d 556, 563–64 (6th Cir. 2005) (assuming that an open door did not justify warrantless entry into a home).

Defendants pointed to the fact that, based on their experience, homes in the area were often divided into multiple apartment units accessible through one or more shared entrances. While the Circuit acknowledged that "[a] jury could find these facts

persuasive and determine that the defendants' mistake was reasonable," that issue required further analysis; reversal and remand was warranted. Denial of immunity to the officers meant that the City could also be liable, requiring reversal on that issue as well.

The Circuit affirmed as to all other counts except the state law wrongful death issue. The officers' use of deadly force was objectively reasonable, and they had not exhibited deliberate indifference to Quandivier's medical state. But because qualified immunity had been denied on the lawful entry claim, statutory immunity was unavailable for the Ohio wrongful death claim in so far as that claim was based on the warrantless entry. Reversed in part and remanded.

LINK