IN THE SUPREME COURT OF TENNESSEE

KIMBERLY JONES-MBUYI, *Plaintiff-Appellant,* v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and JAMES LEGGETT, *Defendants-Appellees*.	§ § § § § § § § § § §	Case No.: _____ Court of Appeals Case No. M2023-00706-COA-R9-CV Davidson County Circuit Court Case No. 22C2323

PLAINTIFF'S APPLICATION FOR PERMISSION TO APPEAL FROM DENIAL OF RULE 9 APPLICATION

ON APPEAL BY PERMISSION OF THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

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III. INTRODUCTION

This Application—on appeal by permission of the trial court—presents two questions for review:

1. Should Tennessee common law continue to adhere to *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity?

2. Does the existence of an order of protection create a special duty under Tennessee law?

Answering the first question affirmatively will pretermit review of the second question presented. For the reasons detailed below, however, this Court should accept review of both questions.

This case arises out of the wrongful death of Michaela Carter, an order of protection holder who was murdered by her estranged husband ten minutes after Metro police abandoned her. Ms. Carter's murder resulted in an internal Metro Office of Professional Accountability investigation that sustained multiple policy violations for "Deficient or Inefficient Performance of Duties" and identified multiple failures during Metro's response to Ms. Carter's 911 call, resulting in one of the responding officers being suspended.[1] Under these facts, Metro maintains that it enjoys immunity from suit because the "Plaintiff's claim is barred by the public duty doctrine."[2]

In February of this year, one of this Court's Justices wrote that: "In

[1] Ex. 1, OPA Report, Bates No. 464–466.
[2] Ex. 2, Answer to Pl.'s Amended Compl. at 11.

a future case, I hope we can look squarely at whether we should continue to adhere to *Ezell*, limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity." *See Lawson v. Hawkins Cnty.*, 661 S.W.3d 54, 70 (Tenn. 2023) (Kirby, J. concurring). This case presents precisely that question for review.[3] Specifically, the trial court has granted the Plaintiff permission to appeal the following question: "Should Tennessee common law continue to adhere to *Ezell v. Cockrell,* 902 S.W.2d 394 (Tenn. 1995), limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity?"[4]

Because only this Court may answer this important question of law and public interest, the Plaintiff seeks its review of it. This Court also *should* accept review. It should do so, first, because this case presents an important and pressing issue of law that has a critical effect on public safety and governments' monetary incentives not to act negligently. It should do so, second, because this Court's decision in *Ezell*—which was undergirded by raw judicial policymaking that is statutorily unmoored, *see id.* at 397–401 ("A number of public policy considerations have been advanced to explain and support adoption of the public duty doctrine. . . . Another policy consideration justifying recognition of the public duty doctrine is that police officials often act and react in the milieu of criminal

[3] Ex. 3, May 4, 2023, Order Granting Permission to Appeal, at 1–2.
[4] *Id.*

activity . . . . We think that on balance, the State is better served by a policy that both protects the exercise of law enforcement discretion and provides accountability for failure to perform a duty.")—is grievously wrong and violates the constitutional separation of powers. As Justice Kirby has observed, this Court also is

> [N]ot bound to follow common law precedent, particularly where there have been changes in the law, *Five Star Exp., Inc. v. Davis*, 866 S.W.2d 944, 949 (Tenn. 1993), changing conditions, *Metro. Gov't of Nashville v. Poe*, 215 Tenn. 53, 383 S.W.2d 265, 277 (1964), or where the precedent proves unworkable, *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 263 (Tenn. 2015) (citing *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991)). Though adhering to past decisions is the preferred course, "[o]ur oath is to do justice, not to perpetuate error." *Rye*, 477 S.W.3d at 263 (quoting *Montgomery v. Stephan*, 359 Mich. 33, 101 N.W.2d 227, 229 (1960)).

Lawson, 661 S.W.3d at 70 (Kirby, J., concurring).

Third and finally, this Court should accept review because this Court's recent decision in *Lawson* creates a dangerous "Catch-22 for plaintiffs" who are victims of law enforcement negligence—a bind that precludes recovery in all but the rarest cases and justifies prompt review in its own right. *See id.* at 69. *See also id.* at 70 ("our holding may provide impetus to reconsider *Ezell*."). Further, only this Court can remedy this error and overturn *Ezell*, which faithful adherence to statutory text and respect for the separation of powers require.

Although answering the first question presented by this appeal affirmatively would pretermit the second, the trial court certified—and the Plaintiff seeks review of—a second question as well: whether the

existence of an order of protection creates a special duty under Tennessee law. Tenn. Code Ann. § 36-3-611 provides that law enforcement "shall arrest" an order of protection violator under specified circumstances. *See id.* Notably, Section 36-3-611 is also "the only" statute *in the entire Tennessee Code* that supplants an officer's discretion and mandates an arrest. *See* Tenn. Op. Att'y Gen. No. 01-119 (July 27, 2001) ("The only instance in which a law enforcement officer's discretion in making an arrest is supplanted by statutory obligation is found at Tenn. Code Ann. § 36-3-611, which mandates that a law enforcement officer arrest anyone suspected of violating an order of protection if the violator has been served with the order of protection or otherwise has acquired actual knowledge of it. . . . [T]his is the only example where, by statute, an officer does not have discretion about whether to make an arrest.").

The central purpose of Section 36-3-611 is "to prevent domestic abuse by arresting violators prior to the victim's being harmed." *See* Tenn. Op. Att'y Gen. No. 06-094 (May 22, 2006). *See also* Tenn. Code Ann. § 36-3-618 ("the general assembly intends that the official response to domestic abuse shall stress enforcing the laws to protect the victim and prevent further harm to the victim"). The Tennessee Attorney General has also instructed—repeatedly—that the duty established by Section 36-3-611 is mandatory. *See, e.g.,* Tenn. Op. Att'y Gen. No. 14-101 (Nov. 26, 2014) ("A law-enforcement officer with proper jurisdiction who has verified that an order of protection is in effect and who has reasonable cause to believe that the respondent has violated or is in violation of the order is required to arrest the respondent without a warrant."); Tenn. Op.

Att'y Gen. No. 06-094 (May 22, 2006) ("Tenn. Code Ann. § 36-3-611 clearly authorizes, and in fact requires, arrest without a warrant if the statutory requirements have been met.").

With this context in mind, this Application seeks review of whether the existence of an order of protection creates a special duty under Tennessee law. The Plaintiff contends that the answer is yes. By contrast, Metro—and the trial court below—say the answer is no. Because this question, too, presents an important question of law bearing upon public safety, and because Metro requires prompt resolution of this question so that it will know not to abandon future order of protection recipients—including those, like Ms. Carter, who are instructed by courts to "call the police and let them know" in the event of a violation[5]—and leave them to be murdered by their abusers before making an arrest, this Court should accept review of the second question presented by this Application as well.

For all of these reasons, as to both questions presented, the Plaintiff's Application should be **GRANTED**.

[5] *See* Ex. 4, Order of Protection Hearing Tr. at 8:3–6.

IV. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(1) FILING STATEMENT

The order of the Tennessee Court of Appeals denying the Plaintiff's Rule 9 application to appeal by permission of the trial court was entered on May 24, 2021. *See Jones-Mbuyi v. The Metropolitan Government of Nashville and Davidson County, et al.*, Case No. M2023-00706-COA-R9-CV (Ex. 28). No petition to rehear was filed thereafter.

Accordingly, this Application having been filed within 30 days of the order of the Tennessee Court of Appeals denying the Plaintiff's Rule 9 application to appeal by permission of the trial court, the Plaintiff's Rule 11 application is timely filed. *See* Tenn. R. App. P. 9(c) ("An appeal from the denial of an application for interlocutory appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in Rule 11, with the exception that the application shall be filed within 30 days of the filing date of the intermediate appellate court's order; the application shall be entitled 'Application for Permission to Appeal from Denial of Rule 9 Application.'").

V. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(2) STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

This Application presents two questions for review, both by permission of the trial court[6]:

1. Should Tennessee common law continue to adhere to *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity?

2. Does the existence of an order of protection create a special duty under Tennessee law?

[6] *See* Ex. 3, May 4, 2023 Order Granting Permission to Appeal, at 1–2.

VI. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(3) STATEMENT OF THE FACTS RELEVANT TO THE QUESTIONS PRESENTED FOR REVIEW

The Plaintiff's lawsuit arises out of the wrongful death of Michaela Carter, an order of protection holder who was murdered by her estranged husband—Defendant James Leggett—ten minutes after police abandoned her. Ms. Carter's murder resulted in an internal Metro Office of Professional Accountability investigation that sustained multiple policy violations for "Deficient or Inefficient Performance of Duties" and identified multiple failures during Metro's response to Ms. Carter's 911 call, resulting in one of the responding officers briefly being suspended.[7]

Given Metro's deficient emergency response—which included failing to offer Ms. Carter shelter in violation of policy, followed by responding officers filing a supplemental report, after her death, falsely asserting that Ms. Carter had "refused" shelter[8]—Ms. Carter's mother, Plaintiff Kimberly Jones-Mbuyi, has sued the Defendant Metropolitan Government of Nashville and Davidson County for negligence resulting in Ms. Carter's wrongful death.[9] Metro admits "that James Leggett

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[7] *See* Ex. 1, OPA Report, Bates No. 464–466.

[8] Ex. 1 at 22–23, Bates Nos. 482–483 ("During the investigation, a form 117 (domestic violence supplement report) had been filled out along with an offense report on behalf of the victim. On the form 117 it stated that counseling and shelter were offered in addition to prosecution. . . . The investigator watched the body camera footage of Herman and Hess but found no mention of counseling offered to Ms. Carter while explaining the complaint card. Hees himself did not offer Ms. Carter counseling or programs per policy. Hees was asked if her offered Ms. Carter shelter. Hees stated he did not offer Ms. Carter shelter. . . . Hees stated those things should have been offered to Ms. Carter per policy. Herman stated during his interview that he did not offer Ms. Carter a shelter or a safe place."); *id.* at 77, Bates No. 537 (supplement report falsely reporting that Ms. Carter "Refused" shelter).

[9] *See* Ex. 5, Amended Compl.

attacked Michaela Carter with a liquor bottle in July 2021."[10] Metro further admits that, after Leggett assaulted her, "Ms. Carter obtained an order of protection against James Leggett" the same day.[11]

It is similarly undisputed that, "[o]n August 16, 2021, the Davidson County Circuit Court held a final hearing on Ms. Carter's Petition for Order of Protection. Following that hearing, Ms. Carter's Petition was granted. As such, a final order of protection issued against Defendant Leggett."[12] The transcript from Ms. Carter's final order of protection hearing also reflects that the case concluded with the following colloquy on the record:

> THE COURT: He can't contact you in any way. If he does try to contact you directly, call the police and let them know that he's violated this order. All right?
>
> [MS. CARTER]: Uh-huh.[13]

All agree, too, that "Ms. Carter's final order of protection took effect that same day, August 16, 2021[,]" and that "[t]he order was made effective for one year."[14] Metro also admits that:

> Ms. Carter's order of protection against Defendant Leggett ordered Defendant Leggett, among other things: (1) to have no contact with Ms. Carter, either directly or indirectly, including by phone or text message; and (2) to stay away from Ms. Carter's home. . . . It further ordered that Defendant Leggett could not have, receive, or attempt to receive

[10] *See* Ex. 2, Answer to Amended Compl. at ¶ 1.
[11] *See id.*; *id.* at ¶ 26.
[12] *See* Ex. 5, Amended Compl. at ¶ 27; Ex. 2, Answer to Amended Compl. at ¶ 27 ("Admitted upon information and belief.").
[13] *See* Ex. 4, Order of Protection Hearing Tr. at 8:3–6.
[14] *See* Ex. 5, Amended Compl. at ¶ 28; Ex. 2, Answer to Amended Compl. at ¶ 28 ("Admitted upon information and belief.").

firearms.[15]

Following entry of Ms. Carter's final order of protection against James Leggett, the Parties agree that "Leggett was released from custody in November 2021."[16] They also agree that, on November 15, 2021, "Ms. Carter and her mother called 911[,]"[17] that "Ms. Carter told MNPD officers that Leggett had called her several times[,]"[18] and that "Ms. Carter told MNPD officers that someone had seen Leggett near a family member's apartment."[19] The audio recording of the Plaintiff's first 911 call[20] and the corresponding ECC Incident Detailed Reports[21] confirm these events. Metro further admits that:

> [A]t Ms. Carter's request, Metropolitan Nashville Police Department ("MNPD") officers verified an order of protection. It is admitted that an MNPD report attached as an exhibit to the Complaint reflects that Ms. Carter informed officers that she had been told that Defendant Leggett "was walking around [a family member's] apartment building with a gun." It is admitted that Ms. Carter described the contents of text messages to MNPD officers. It is admitted that Ms. Carter showed her phone to a MNPD officer while describing these messages.[22]

Metro admits, too, that Ms. Carter stated that she was "interested in prosecuting" Leggett.[23] Metro's own OPA report would later determine

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[15] *See* Ex. 5, Amended Compl. at ¶ 29 (internal citations omitted); Ex. 2, Answer to Amended Compl. at ¶ 29 ("Admitted upon information and belief.").
[16] Ex. 2, Answer to Amended Compl. at ¶ 31.
[17] *Id.* at ¶ 35.
[18] *Id.* at ¶ 36.
[19] *Id.* *See also* Ex. 1, OPA Report, at Bates No. 480–481.
[20] Ex. 6, Audio Recording of First 911 Call.
[21] Ex. 7, ECC Incident Reports.
[22] Ex. 2, Answer to Amended Compl. at ¶ 7.
[23] *See* Ex. 5, Amended Compl. at ¶ 40; Ex. 2, Answer to Amended Compl. at ¶ 40.

that—following Ms. Carter's murder—the responding officers also falsely reported that Ms. Carter had "Refused" both counseling and shelter, neither of which the officers had ever offered Ms. Carter in violation of policy.[24]

Under these circumstances, Tenn. Code Ann. § 36-3-611(a) mandates that:

> (a) An arrest for violation of an order of protection issued pursuant to this part may be with or without warrant. Any law enforcement officer **shall arrest the respondent without a warrant** if:
>
> > (1) The officer has proper jurisdiction over the area in which the violation occurred;
> >
> > (2) The officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection; and
> >
> > (3) The officer has verified whether an order of protection is in effect against the respondent. If necessary, the police officer may verify the existence of an order for protection by telephone or radio communication with the appropriate law enforcement department.

See id. (emphasis added).

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[24] Ex. 1 at 22–23, Bates Nos. 482–483 ("During the investigation, a form 117 (domestic violence supplement report) had been filled out along with an offense report on behalf of the victim. On the form 117 it stated that counseling and shelter were offered in addition to prosecution. . . . The investigator watched the body camera footage of Herman and Hess but found no mention of counseling offered to Ms. Carter while explaining the complaint card. Hees himself did not offer Ms. Carter counseling or programs per policy. Hees was asked if her offered Ms. Carter shelter. Hees stated he did not offer Ms. Carter shelter. . . . Hees stated those things should have been offered to Ms. Carter per policy. Herman stated during his interview that he did not offer Ms. Carter a shelter or a safe place."); *id.* at 77, Bates No. 537 (supplement report falsely reporting that Ms. Carter "Refused" counseling and shelter).

Metro admits that this statute says what it says.[25] The obligations imposed by Tenn. Code Ann. § 36-3-611(a) notwithstanding, though, "MNPD officers left Ms. Carter's home after confirming that Defendant Leggett was not there" without investigating further or attempting to arrest him[26]—something that Metro denies it had any obligation to do.[27] The Parties also agree that Leggett then showed up, kicked in the door, and shot and killed Ms. Carter "approximately ten minutes after MNPD officers left."[28] This fact, too, is confirmed by the recording of the excruciating 911 call that captured Ms. Carter's murder.[29]

During the early stages of litigation in this case, this Court issued its opinion in *Lawson v. Hawkins Cnty.*, 661 S.W.3d 54. Following this Court's decision in *Lawson*—and in keeping with Justice Kirby's invitation to reconsider *Ezell*—the Plaintiff moved to file an Amended Complaint.[30] As relevant to this appeal, the Plaintiff sought to add a declaratory judgment claim and sought a declaration: "(1) of her right to recover for a claim of negligence under Tenn. Code Ann. § 29-20-205 without regard [to] the public duty doctrine; and (2) that the public duty doctrine is overruled."[31] As grounds for that relief, the Plaintiff's proposed amended complaint alleged as follows:

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[25] *See* Ex. 5, Amended Compl. at ¶ 41; Ex. 2, Answer to Amended Compl. at ¶ 41 ("Admitted that Tenn. Code Ann. § 36-3-611(a) contains the language attributed to it in Paragraph 41.").
[26] *See* Ex. 5, Amended Compl. at ¶ 43; Ex. 2, Answer to Amended Compl. at ¶ 43.
[27] *See* Ex. 5, Amended Compl. at ¶¶ 86–87; Ex. 2, Answer to Amended Compl. at ¶¶ 86–87.
[28] *See* Ex. 5, Amended Compl. at ¶ 44; Ex. 2, Answer to Amended Compl. at ¶ 44.
[29] *See* Ex. 8, Audio Recording of Second 911 Call.
[30] *See* Ex. 9, Pl.'s Mot. for Leave to Amend.
[31] *See* Ex. 10, Pl.'s Proposed Amended Compl.

107. Tenn. Code Ann. § 29-20-205 provides that: "[i]mmunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except" for specified exceptions. *See id.*

108. The public duty doctrine is not among those specified exceptions.

109. Indeed, the public duty doctrine is not reflected anywhere in the text of the Governmental Tort Liability Act.

110. The plain meaning of Tenn. Code Ann. § 29-20-205 does not permit—let alone compel—application of the public duty doctrine.

111. The public duty doctrine is incompatible with the GTLA's unambiguous text, it is outmoded, and it should be overruled.

112. The purported justifications for the public duty doctrine—including assumptions that "[i]nternal disciplinary policies, criminal sanctions, and in the case of publicly elected law enforcement officials, ouster proceedings" are sufficient to redress tortious misconduct, *see Ezell v. Cockrell*, 902 S.W.2d 394, 401 (Tenn. 1995)—are ridiculous; they always were; and even in the exceedingly rare instances when such remedies are utilized, they uniformly leave tort victims without a monetary recovery.

113. Tennessee's continued application of the public duty doctrine after the enactment of the GTLA constituted raw, explicit, unapologetic, and fundamentally improper judicial policy-making. *See id.* ("We think that on balance, the State is better served by a policy that both protects the exercise of law enforcement discretion and provides accountability for failure to perform a duty.").

114. The Tennessee Supreme Court is not bound to perpetuate error, and it is

> [N]ot bound to follow common law precedent,

> particularly where there have been changes in the law, *Five Star Exp., Inc. v. Davis*, 866 S.W.2d 944, 949 (Tenn. 1993), changing conditions, *Metro. Gov't of Nashville v. Poe*, 383 S.W.2d 265, 277 (Tenn. 1964), or where the precedent proves unworkable, *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 263 (Tenn. 2015) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).
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> *Lawson v. Hawkins County,* No. E2020-01529-SC-R11-CV, 2023 WL [2033336] (Tenn. Feb. 16, 2023) (Kirby, J., concurring).
>
> 115. The public duty doctrine should be overruled.
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> 116. For the foregoing reasons, the Plaintiff seeks a declaration, pursuant to Tenn. Code Ann. § 29-14-102(a) and Tenn. Code Ann. § 29-14-103: (1) of her right to recover for a claim of negligence under Tenn. Code Ann. § 29-20-205 without regard [to] the public duty doctrine; and (2) that the public duty doctrine is overruled.[32]

In response, Metro opposed allowing the Plaintiff to assert this additional claim or any of the allegations set forth above.[33] As grounds, Metro insisted that the claim was futile because "[t]here is but one Supreme Court in Tennessee[,]" and thus, no lower court could grant the Plaintiff relief.[34] Following a hearing, the trial court denied the Plaintiff leave to amend her complaint to add her desired declaratory judgment claim, reasoning that: "The proposed amendment is futile because the [Circuit] Court lacks authority to grant the requested relief; that is, this Court does not have authority to overrule Tennessee Supreme Court

[32] *Id.* at 18–20.
[33] *See* Ex. 11, Metro Resp. in Opp. to Mot. for Leave to Amend.
[34] *See id.* at 2.

precedent as set forth in *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995)."[35]

The trial court agreed that *this* Court could grant the relief that the Plaintiff had requested, though. Thus, after the Plaintiff applied for permission to appeal,[36] the trial court granted the Plaintiff leave to seek an interlocutory appeal, finding that "the applicable factors identified in Tennessee Rule of Appellate Procedure 9(a) weigh in Plaintiff's favor as set forth in her Application" for permission to appeal.[37]

The trial court also granted the Plaintiff permission to appeal a second, related question concerning the special duty exception to the public duty doctrine and order of protection holders. As relevant to that question, the Parties dispute two central matters:

First, the Plaintiff has asserted that "[t]he 'existence of an order of protection' gives rise to [] a special duty to protect under Tennessee law."[38] Metro does not unqualifiedly admit this allegation. Instead, Metro has "[a]dmitted that *Matthews v. Pickett County.*, 996 S.W.2d 162 (Tenn. 1999) addresses a special duty exception in the context of the specific facts at issue in that case" but "[d]enied that the Metropolitan Government is liable under *Matthews v. Pickett County*."[39]

Second, the Plaintiff has asserted that: "Ms. Carter's order of protection required the Metropolitan Government to arrest Defendant Leggett under the circumstances that preceded Ms. Carter's death."[40]

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[35] *See* Ex. 12, Order Granting in Part and Denying in Part Mot. for Leave to Amend Compl.
[36] Ex. 13, Pl.'s App. for Permission to Appeal.
[37] Ex. 3, May 4, 2023, Order Granting Permission to Appeal.
[38] *See* Ex. 5 at ¶ 66.
[39] *See* Ex. 2, Answer to Amended Compl. at ¶ 66.
[40] *See* Ex. 5 at ¶ 78.

Metro denies this assertion without qualification.[41] As grounds, Metro has argued that, notwithstanding the duty imposed by Tenn. Code Ann. § 36-3-611(a), the statute only requires Metro to act when an order of protection violator is in an officer's "presen[ce]."[42]

On January 27, 2023, the Plaintiff moved for partial judgment on the pleadings as to, among other things, Metro's duty of care.[43] Metro opposed the Plaintiff's motion,[44] and following a hearing,[45] the Court entered an order denying it.[46]

The Plaintiff then timely moved for permission to appeal both questions presented in this Application.[47] In support of her Application, the Plaintiff asserted that interlocutory review was warranted because: (1) appellate review would prevent needless, expensive, and protracted litigation over whether the public duty doctrine applies and whether Metro's special duty is established under the largely undisputed facts here; (2) if appellate review concludes that the public duty does not apply or that a special duty is established here as a matter of law, then substantial litigation and discovery expenses will be avoided; and (3) there is a significant need to develop a uniform body of law on the issue, given inconsistent orders on the question presented and the uncertainty of the continued viability of the public duty doctrine. *See* Ex. 13, Pl.'s App. for Permission to Appeal, at 6–12. *Also compare Acree ex rel. Acree*

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[41] *See* Ex. 2, Answer to Amended Compl. at ¶ 78 ("Denied.").
[42] *See* Ex. 14, Feb. 10, 2023 Hearing Tr. at 29:10–16.
[43] Ex. 15, Pl.'s Mot. for Partial J. on the Pleadings.
[44] Ex. 16, Def.'s Resp. to Pl.'s Mot. for Partial J. on the Pleadings.
[45] Ex. 14, Feb. 10, 2023 Hearing Tr.
[46] Ex. 17, Feb. 22, 2023 Order.
[47] Ex. 13, Pl.'s App. for Permission to Appeal.

v. Metro. Gov't of Nashville & Davidson Cnty., No. M2019-00056-COA-R3-CV, 2019 WL 7209601, at *8, n.5 (Tenn. Ct. App. Dec. 27, 2019) (characterizing *Matthews v. Pickett County.*, 996 S.W.2d 162, 163 (Tenn. 1999), as "holding the issuance of an order of protection created a special duty"); *with Jones v. Union Cnty., TN*, 296 F.3d 417, 429 (6th Cir. 2002) (holding, contrarily, that: "In *Matthews*, it was not the mere existence of the order of protection that created the special relationship."); *with Wells v. Hamblen Cnty.*, No. E2004-01968-COA-R3CV, 2005 WL 2007197, at *7 (Tenn. Ct. App. Aug. 22, 2005) (holding that the special duty identified in *Matthews* was "largely"—though not entirely—attributable to "the relationship created by the protective order and by the plaintiff's reliance on that order[.]"). The Plaintiff further asserted that, if the Plaintiff is correct about the proper way to construe *Matthews*, then Defendant Metro, in particular, requires prompt clarity on the matter so that the Metropolitan Police Department will know not to abandon future order of protection recipients—including those, like Ms. Carter, who have been instructed by courts to "call the police and let them know" in the event of a violation—and leave them without protection before making an arrest: a harm that the Plaintiff asserts is irreparable, severe, probable, and irremediable.[48]

Metro filed a response in opposition to the Plaintiff's application for permission to appeal,[49] to which the Plaintiff replied.[50] The Plaintiff's

[48] Ex. 13, Pl.'s App. for Permission to Appeal at 8.
[49] Ex. 18, Def.'s Resp. in Opp'n to Pl.'s App. for Permission to Appeal.
[50] Ex. 19, Pl.'s Reply in Supp. of Pl.'s App. for Permission to Appeal.

Application came before the trial court for hearing on April 4, 2023.[51] Finding "that the applicable factors identified in Tennessee Rule of Appellate Procedure 9(a) weigh in Plaintiff's favor as set forth in her Application[,]" the trial court entered an order granting the Plaintiff permission to appeal both questions on May 4, 2023, and it stayed further proceedings pending the conclusion of interlocutory review.[52]

Following entry of the trial court's order granting the Plaintiff permission to seek an appeal of both questions presented, the Plaintiff filed a timely application for permission to appeal in the Court of Appeals.[53] The case was docketed as Case No.: M2023-00706-COA-R9-CV. The Court of Appeals denied the Plaintiff's Application on May 24, 2023.

While review before the Court of Appeals was pending, the Plaintiff applied to this Court to assume jurisdiction. The Court of Appeals then denied review. Thus, on June 5, 2023, this Court entered an order stating:

> On May 12, 2023, Appellant Kimberly Jones-Mbuyi filed in the Court of Appeals an application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 9. On May 16, 2023, Appellant filed in this Court a motion to assume jurisdiction pursuant to Tennessee Code Annotated section 16-3-201(d) and Tennessee Supreme Court Rule 48, which allow this Court to assume jurisdiction over a pending, but undecided, appeal. On May 24, 2023, the Court of Appeals denied Appellant's application for permission to appeal. Accordingly, Appellant's motion to assume jurisdiction is DENIED as moot, without prejudice to the filing of an

[51] Ex. 20, Tr. of Apr. 4, 2023 Hearing.
[52] Ex. 21, May 4, 2023 Order Granting Permission to Appeal, at 1–2.
[53] Ex. 22, Plaintiff's Tenn. R. App. P. 9(c) Application to Appeal by Permission.

application for permission to appeal from the denial of the Rule 9 application pursuant to Rule 9(c) and Rule 11 of the Tennessee Rules of Appellate Procedure.[54]

This timely Application followed.

VII. TENNESSEE RULE OF APPELLATE PROCEDURE 11(b)(4) STATEMENT OF THE REASONS SUPPORTING REVIEW

This Court should grant review of the Plaintiff's Application under Tennessee Rule of Appellate Procedure 11(a). Here, three of Rule 11's four factors are met. In particular, review is warranted given:

1. The need to secure uniformity of decision, *see infra* at 25–29; and

2–3. The need to secure settlement of important questions of law and questions of public interest, *see infra* at 30–36.

1. THE NEED TO SECURE UNIFORMITY OF DECISION

A. This Court should settle the status of the public duty doctrine.

With the exception of Retired Justice Lyle Reid (whose judicial service ended in 1998), the only living Justice to weigh in on the continuing viability of Tennessee's common law public duty doctrine following the General Assembly's enactment of the Governmental Tort Liability Act—in a concurrence, because the issue has not otherwise been directly presented this century—has called for the doctrine to be reexamined. *See Lawson*, 2023 WL 2033336 at *12 (Kirby, J., concurring). Based on Justice Kirby's (correct; wise; proper; needed) invitation to consider overruling the public duty doctrine in "a future

[54] Ex. 23, Tennessee Supreme Court's Jun. 5, 2023 Order Denying Mot. to Assume Jurisdiction.

case" where the question is presented, the continuing viability of the doctrine is thus uncertain until a future case settles it. *See id.* ("In a future case, I hope we can look squarely at whether we should continue to adhere to *Ezell*, limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity.").

This case—involving an egregious cascade of fatal MNPD negligence after a member of the judiciary instructed the Plaintiff's daughter that: "If he does try to contact you directly, call the police and let them know that he's violated this order. All right?"[55]—is that future case. Accordingly, this Court should grant the Plaintiff's Application and permit review of the precise question that Justice Kirby has appropriately called upon this Court to answer. Doing so will allow this Court to develop a uniform body of law on a critical issue of constitutional law that has long divided it. *See, e.g., Cooper v. Rutherford Cnty.*, 531 S.W.2d 783, 792 (Tenn. 1975) (Henry and Brock, JJ., dissenting) ("This is the first Tennessee case to draw a distinction between 'corporate' and 'public' duties. . . . What a tangled web we have woven to protect and promote an unjust rule of law. All we can say with certainty is that in Tennessee today a city or county is answerable for ordinary negligence in the discharge of its corporate functions, but in its governmental capacity its employees are free to shoot fleeing misdemeants, in the back (*Coffman*); its fire department is free to fail to answer fire alarms (*Irvine v. Chattanooga*, 101 Tenn. 291, 47 S.W. 419 (1898)); its police department

[55] *See* Ex. 4, Order of Protection Hearing Tr. at 8:3–6.

may commit assault and battery (*Combs v. City of Elizabethton*, 161 Tenn. 363, 31 S.W.2d 691 (1930)); it is free to employ a mentally ill chief of police and is unanswerable when he shoots a citizen without provocation (*Bobo v. City of Kenton*, 186 Tenn. 515, 212 S.W.2d 363 (1948). . . . I condemn sovereign immunity. . . I would condemn this legal monstrosity to the oblivion which it so richly deserves."). As the trial court determined, dispensing with the public duty doctrine at this early juncture in proceedings will also "prevent needless, expensive, and protracted litigation" and "result in a net reduction in the duration and expense of the litigation if the challenged order is reversed[.]"[56] *See* Tenn. R. App. P. 9(a)(2).

B. <u>This Court should resolve the divergence of lower court authority regarding its decision in *Matthews v. Pickett County*, 996 S.W.2d 162, 163 (Tenn. 1999).</u>

In *Matthews v. Pickett County.*, 996 S.W.2d 162, 163 (Tenn. 1999), this Court accepted interlocutory review of the following certified question: "'May the existence of an order of protection give rise to a 'special duty' to protect[?]'" Upon review, this Court held that "under the facts of this case that the special duty exception to the public duty doctrine is applicable." *Id. See also id.* at 165 ("The deputies had a duty to arrest Winningham if there were reasonable cause to believe that Winningham had violated the order of protection.").

In a recent decision, a Panel of the Court of Appeals summarized this Court's decision in *Matthews* as "holding [that] the issuance of an order of protection created a special duty[.]" *See Acree ex rel. Acree*, 2019

[56] Ex. 21, May 4, 2023 Order Granting Permission to Appeal, at 1–2.

WL 7209601, at *8, n.5. By contrast, the U.S. Court of Appeals for the Sixth Circuit has construed *Matthews* differently. *See Jones v. Union Cnty., TN*, 296 F.3d 417, 429 (6th Cir. 2002) ("In *Matthews*, it was not the mere existence of the order of protection that created the special relationship."). A different Panel of the Court of Appeals has also reached what can be fairly characterized as a middle-ground view, holding that the special duty identified in *Matthews* was "largely"—though not entirely—attributable to "the relationship created by the protective order and by the plaintiff's reliance on that order[.]" *Wells v. Hamblen Cnty.*, No. E2004-01968-COA-R3-CV, 2005 WL 2007197, at *7 (Tenn. Ct. App. Aug. 22, 2005).

Against this backdrop, the Tennessee Attorney General's Office has provided its own guidance to Tennesseans regarding law enforcement's duties to order of protection holders. In particular, it has explained that:

> The only instance in which a law enforcement officer's discretion in making an arrest is supplanted by statutory obligation is found at Tenn. Code Ann. § 36-3-611, which mandates that a law enforcement officer arrest anyone suspected of violating an order of protection if the violator has been served with the order of protection or otherwise has acquired actual knowledge of it. . . . [T]his is the only example where, by statute, an officer does not have discretion about whether to make an arrest.

See Tenn. Op. Att'y Gen. No. 01-119 (July 27, 2001). Noting that Section 36-3-618's central purpose is "to prevent domestic abuse by arresting violators prior to the victim's being harmed[,]" *see* Tenn. Op. Att'y Gen. No. 06-094 (May 22, 2006); *see also* Tenn. Code Ann. § 36-3-618 ("the general assembly intends that the official response to domestic abuse

shall stress enforcing the laws to protect the victim and prevent further harm to the victim"), the Attorney General has also instructed—repeatedly—that the duty established by Section 36-3-611 is mandatory. *See, e.g.,* Tenn. Op. Att'y Gen. No. 14-101 (Nov. 26, 2014) ("A law-enforcement officer with proper jurisdiction who has verified that an order of protection is in effect and who has reasonable cause to believe that the respondent has violated or is in violation of the order is required to arrest the respondent without a warrant."); Tenn. Op. Att'y Gen. No. 06-094 (May 22, 2006) ("Tenn. Code Ann. § 36-3-611 clearly authorizes, and in fact requires, arrest without a warrant if the statutory requirements have been met.").

Given this context, review is warranted to determine whether the existence of an order of protection gives rise to a special duty to protect under Tennessee law. Appellate review of—and clarity regarding—this important question will prevent needless, expensive, and protracted litigation over whether Metro's special duty is established under the materially undisputed facts at issue in this case. Additionally, if appellate review concludes that a special duty is established here as a matter of law, then substantial litigation and discovery expenses will be avoided. *See* Tenn. R. App. P. 9(a)(2) (considering "the need to prevent needless, expensive, and protracted litigation" and "whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed."). There is also a significant need to develop a uniform body of law on the issue, given inconsistent lower court orders on the question presented, *see supra* at 27–28 (noting three inconsistent appellate rulings), as well as conflicting

guidance from the Tennessee Attorney General, *see id.* at 28–29. *See also* Tenn. R. App. P. 9(a)(3) (considering "the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts").

2–3. THE NEED TO SECURE SETTLEMENT OF IMPORTANT QUESTIONS OF LAW AND QUESTIONS OF PUBLIC INTEREST.

Review should also be granted to secure settlement of important questions of law and questions of public interest. Indeed, given the practical effect of this Court's recent decision in *Lawson* on an already critical area of law that drives a wide range of governmental behavior, this may be the most important public interest case this Court has been called upon to adjudicate since it last weighed in on the viability of the public duty doctrine three decades ago.

"The public duty rule and the doctrine of sovereign immunity [] share common justifications for their existence." *Ezell v. Cockrell*, No. 01A01-9304-CV-00192, 1994 WL 8295, at *5 (Tenn. Ct. App. Jan. 12, 1994), *aff'd*, 902 S.W.2d 394 (Tenn. 1995) (Koch, J., dissenting). They function to provide "general[]" immunity to governments that prevent them from being sued. *See Lawson*, 661 S.W.3d at 59. By the same token, Tennessee's constitutional separation of powers "empowers the legislature to 'waive the protections of sovereign immunity,' by providing that '[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct[.]'" *See id.* (cleaned up) (quoting Tenn. Const. art. I, § 17). That is what happened when the General Assembly enacted the Governmental Tort Liability Act, which both: (1) expressly authorizes suits for negligence absent specified

exceptions *that do not include the public duty doctrine*, *see* Tenn. Code Ann. § 29-20-205; and (2) "occupies the entire field of local governmental liability and applies to all local governmental entities except those that exempted themselves from the Act prior to January 1, 1975[,]" *see Ezell*, 1994 WL 8295, at *9, *aff'd*, 902 S.W.2d 394 (Koch, J., dissenting).

Until recently, this Court's adherence to the public duty doctrine notwithstanding the GTLA created hurdles that were difficult to clear but surmountable, given that claims involving recklessness that also charged negligence could proceed. Now, though, in nearly all cases of law enforcement negligence, this Court's recent decision in *Lawson* creates what Justice Kirby has correctly observed is "a Catch-22 for plaintiffs." *See Lawson*, 661 S.W.3d at 69. In particular, following *Lawson*, nearly all plaintiffs are still required to allege recklessness to bring their claims within a reachable exception to the public duty doctrine. Upon doing so, though, their claims will instantly become non-cognizable under the GTLA based on *Lawson*'s rule that only "ordinary negligence" is actionable. *See id.* at 57 ("We hold that the Act removes immunity only for ordinary negligence."). The longer this situation persists, the longer victims of government negligence—victims whom the Tennessee General Assembly *specifically enacted the GTLA to ensure would be compensated*—will be left without a meaningful way to recover for preventable wrongful deaths and catastrophic injuries. As Justice Kirby has observed, this state of affairs alone also warrants this Court's prompt review of the first question presented here. *See id.* at 70 ("our holding may provide impetus to reconsider *Ezell*.") (Kirby, J., concurring).

Notably, in several recent cases, at least four of this Court's current members have gone out of their way—sometimes repeatedly—to emphasize that "[i]t is not the role of this Court to substitute its own policy judgments for those of the legislature." *See State v. Gentry*, 538 S.W.3d 413, 420 (Tenn. 2017) (citing *Frazier v. State*, 495 S.W.3d 246, 249 (Tenn. 2016)); *see also State v. Booker*, 656 S.W.3d 49, 92 (Tenn. 2022) (Bivens, J., and Page, C.J., dissenting) ("this Court has long recognized that it is the distinct job of the legislature to make policy decisions"); *Coffman v. Armstrong Int'l, Inc.*, 615 S.W.3d 888, 910 (Tenn. 2021) (Lee, J., dissenting) ("Neither the majority nor the dissent attempts to make policy because that is the role of the Legislature."); *McClay v. Airport Mgmt. Servs., LLC*, 596 S.W.3d 686, 709 (Tenn. 2020) (Lee, J., dissenting) ("It goes without saying that this Court does not make policy—that is for the legislature."). That matters here, because as *Ezell* itself stated several times, this Court's adherence to the public duty doctrine was borne of raw—and unhidden—judicial policymaking. *See Ezell*, 902 S.W.2d at 397–401 ("A number of public policy considerations have been advanced to explain and support adoption of the public duty doctrine. . . . Another policy consideration justifying recognition of the public duty doctrine is that police officials often act and react in the milieu of criminal activity . . . . We think that on balance, the State is better served by a policy that both protects the exercise of law enforcement discretion and provides accountability for failure to perform a duty."). For that reason alone, *Ezell's* affront to the constitutional separation of powers merits prompt correction.

Review of the first question presented by this Application is also especially appropriate in this specific case. Among other asserted justifications for its holding, *Ezell* determined that the public duty doctrine should persist based in part on the theory that existing democratic mechanisms—as opposed to litigation—will ensure faithful performance of official duties and accountable government. *Id.* at 401 ("Finally, public forms of redress, other than civil actions, exist in Tennessee, as in most other states, to insure that officers who fail to faithfully perform their duties are accountable. Internal disciplinary policies, criminal sanctions, and in the case of publicly elected law enforcement officials, ouster proceedings, are alternative forms of redress."). There has never been any evidence that such tools—all of which deny victims of negligence compensation for the harm they suffered—actually result in the proactive policy improvements that are necessary to ensure meaningful redress, though. Thus, even where—as here—serious failures by government officials have been specifically identified,[57] an officer's loss of two vacation days (and nothing more) after his failures got a domestic violence victim who needed protection killed just minutes after he abandoned her falls well short of what anyone would consider an acceptable "form[] of redress." *Id.*

By contrast, there is abundant evidence that *litigation*—and its potential to impose monetary costs for negligence—actually *does* motivate meaningful governmental reform. Once again, this case—and other recent, documented instances where Metro's policy changes were

[57] *See* Ex. 1, OPA Report, Bates No. 464–466.

directly tied to lawsuits filed against it[58]—also presents the clearest possible example.

Here, the Plaintiff has identified two specific policy changes that she desires, both of which will help future order of protection holders from being murdered as her daughter was.[59] Presented with those changes, Metro indicated that it was optimistic that they could be implemented.[60] Even so, it asserted that the changes were not "worth continuing to pursue" unless the Plaintiff first agreed to reduce her demand and settle her claim.[61] If there is a clearer example of litigation—and its threat of money damages—motivating a government entity to take action that it otherwise would not consider, it is hard to imagine what it would be.

The issue is also an urgent one. Ensuring that negligent harms may be remedied through money damages creates important incentives not to behave negligently. Governments—like other litigants—respond to those incentives, some of which will help prevent people from being killed. After *Lawson*, though, those incentives have dissipated.

Once more, this case presents the clearest possible example. Perceiving that *Ezell*'s public duty doctrine ensures that there is no risk of liability even under the extraordinary circumstances presented here—a case where Metro's own Office of Professional Accountability has identified multiple failures and substantial policy violations[62]—Metro

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[58] *See* Ex. 24, May 11 Notice of Filing, Ex. 2 (WPLN Article: "Waffle House Shooting Settlement Could Mean Changes for Nashville's Department of Emergency Communications.").
[59] *See* Ex. 25, May 11 Notice of Filing, Ex. 3.
[60] *Id.*
[61] *Id.*
[62] *See generally* Ex. 1, OPA Report.

has insisted that police departments may sit on their hands and allow order of protection victims to be killed without fear of any meaningful consequences because the public duty doctrine renders Metro immune.

That approach is dangerous. *Ezell*'s wrongheaded approach notwithstanding, Metro has affirmative obligations to order of protection holders that it is not currently fulfilling—an approach that seriously endangers them, potentially fatally. As a result, as noted above, Metro requires prompt resolution of the important issue presented here so that it will know not to abandon future order of protection holders and leave them to be murdered by their abusers.

The same is true of the second question presented. If the Plaintiff is correct about the proper way to construe *Matthews*, then Metro, in particular, requires immediate clarity on the matter. Put directly: if Metro is wrong that police departments have no duty to order of protection holders, may sit on their hands, and may neglect even to attempt to arrest order of protection violators unless they happen to be in an officer's "presen[ce][,]"[63] then Metro has affirmative obligations to order of protection holders that it is not currently fulfilling. As a result, Metro requires prompt resolution of this important issue as well so that it will know not to abandon future order of protection recipients and leave them in harm's way without protection. And while Metro has discounted this harm as an impermissible consideration,[64] it is not, *see* Tenn. R. App. P. 9(a) (noting that the Rule 9 factors "neither control[] nor fully

[63] *See* Ex. 14, Feb. 10, 2023 Hearing Tr. at 29:10–16.
[64] *See* Ex. 18, Def.'s Resp. in Opp'n to Pl.'s App. for Permission to Appeal, at 3.

measur[e] the courts' discretion"), and it is a harm that is properly characterized as being irreparable, severe, probable, and irremediable. *See* Tenn. R. App. P. 9(a)(1) (considering "the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective[.]"). The trial court, for its part, has also agreed with that assessment. *See* Ex. 21, May 4, 2023 Order Granting Permission to Appeal, at 1; Ex. 20, Tr. of April 4, 2023 Hearing, at 18:15–18 ("the Court will grant the request for the reasons stated in the motion.").

4. METRO'S CONTRARY CLAIMS ARE MERITLESS.

Metro has also raised several additional arguments in opposition to review that this Application has not yet addressed. Each is unpersuasive.

First, as to the first question presented here, Metro insists that this case does not carry any particular importance, that "there is no need for meaningful reform here[,]" and that "[t]he Metropolitan Government takes its obligations to order of protection holders seriously."[65] Setting aside the (serious) reasons to doubt the genuineness of Metro's asserted commitment to order of protection holders, *see, e.g.,* Ex. 25, May 11 Notice of Filing, Ex. 3 (asserting that policy changes were not "worth continuing to pursue" unless the Plaintiff first agreed to reduce her demand and settle her claim), Metro misses the point. The issue presented here is not

[65] *See* Ex. 26, Metro's Response in Opposition to Plaintiff's Motion to Assume Jurisdiction, at 8.

important just to this case or even just to order of protection holders. Instead, because this Court's decision in *Lawson* creates "a Catch-22 for plaintiffs" that prevents virtually any victim of law enforcement negligence anywhere in Tennessee from recovering due to the impossibility of alleging only simple negligence and recklessness simultaneously, *see Lawson*, 661 S.W.3d at 69, it is important to *every* victim of law enforcement negligence in the entire state. Review—and prompt review, at that—of the first question presented by this Application is accordingly vital to ensure that governmental negligence is deterred in Tennessee, rather than immunized. As noted above, undoing Tennessee's dangerous and outmoded public duty doctrine will also incentivize negligent government entities like Metro to stop behaving negligently, and it will prevent irreparable injury—including saving lives—in the process. *See* Tenn. R. App. P. 9(a)(1) (considering "the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective[.]"). The Plaintiff's Application should be granted accordingly.

<u>*Second*</u>, Metro complains that the Plaintiff's effort to secure this Court's review "should be recognized for what it is: procedural gamesmanship employed to fast track her case."[66] To the extent Metro is confused about the Plaintiff's goals here, the Plaintiff will specify them directly: She seeks a maximum recovery for her daughter's wrongful death, and she hopes to secure that recovery promptly. Metro's apparent

[66] *See id.* at 12.

confusion about these facts—and its perception that seeking appellate review that may help the Plaintiff achieve her goals is akin to game-playing—also says more about its disrespect for order of protection victims and the way that Metro views citizens who are killed by its negligence than it does anything else.

Third, Metro insists that "allowing Plaintiff to appeal legal disputes on a piecemeal basis serves no efficiency function."[67] This is nonsense, and the trial court rightly rejected the claim. Interlocutory review should be accepted here for the same reason that interlocutory review of a similar certified question was accepted in *Matthews v. Pickett County*, 996 S.W.2d 162. In particular, there is no need for litigation and discovery about whether Metro had a legal duty to Ms. Carter (or whether, notwithstanding that duty, Metro is immune from suit under the public duty doctrine) if the public duty doctrine is overruled entirely or Metro's special duty to Ms. Carter is established as a matter of law.

Fourth, as to the Plaintiff's special duty question, Metro claims that the Plaintiff "seeks review of a ruling on a pleading that no longer legally exists."[68] This is wrong. The Plaintiff's Application seeks review of *a question of law* (not a pleading). In particular, it asks: Does the existence of an order of protection create a special duty under Tennessee law? That question also arises from *an order* (also not a pleading), which remains the law of this case regardless of any subsequent amendment. *See State v. Reed*, No. E2019-00771-CCA-R3-CD, 2020 WL 5588677, at *13 (Tenn.

[67] *See id.*

[68] *See* Ex. 27, Metro's Answer to Plaintiff's Tenn. R. App. P. 9(c) Application to Appeal by Permission, at 6.

Crim. App. Sept. 18, 2020) (favorably citing authority that "it is the practice to treat each successive decision as establishing the law of the case and depart from it only for convincing reasons") (cleaned up), *no app. filed*.

As Metro is aware, the admitted facts giving rise to the trial court's adverse order were materially unchanged between the Parties' filing of amended pleadings. With this context in mind, Metro's apparent insistence that—to be able to seek interlocutory review—the Plaintiff needed to file a duplicative and law-of-the-case-precluded motion for judgment on the pleadings after amending her complaint is curious, particularly for a litigant who professes to oppose the Plaintiff's Application on efficiency grounds. Metro's claim on the matter should be rejected accordingly.

Fifth, Metro disputes any divergence of authority regarding this Court's decision in *Matthews*, *contra Acree ex rel. Acree*, 2019 WL 7209601, at *8, n.5 (characterizing *Matthews* as holding—in direct opposition to the position that Metro advocates here—that "the issuance of an order of protection created a special duty"). Barring that, Metro insists that "*Matthews* and § 36-3-611 are not interchangeable," and that "[t]hough Plaintiff spills much ink over Tenn. Code Ann. § 36-3-611, it was not at issue in the trial court and is not relevant to whether interlocutory appeal should be granted."[69]

Metro misrepresents that Tenn. Code Ann. § 36-3-611 "was not at

[69] Ex. 26, Metro's Answer to Plaintiff's Tenn. R. App. P. 9(c) Application to Appeal by Permission, at 12.

issue in the trial court," though. *Compare id., with* Ex. 15 at 3 (seeking partial judgment on the pleadings in part on the basis that "under these circumstances, Tenn. Code Ann. § 36-3-611(a) also mandates that those who obtain orders of protection must be protected"). Metro's evident misreading of *Matthews*—and the danger that that misunderstanding creates for order of protection holders—also merits review in its own right. Notwithstanding Metro's perception of the matter, *Matthews* and Tenn. Code Ann. § 36-3-611 are intertwined, and *Matthews* emphasized the provisions of Tenn. Code Ann. § 36-3-611 repeatedly in support of its decision as a result. *See Matthews*, 996 S.W.2d at 164 ("Tennessee Code Annotated § 36–3–611 authorized a warrantless arrest of Winningham under these circumstances"); *id.* ("Both the order of protection in this case and Tenn. Code Ann. § 36–3–611 mandated that the deputies arrest Winningham"); *id.* at 165 ("The deputies had a duty to arrest Winningham if there were reasonable cause to believe that Winningham had violated the order of protection.") (citing Tenn. Code Ann. § 36–3–611).

VIII. CONCLUSION

For the foregoing reasons, the Plaintiff's Application should be granted, and this Court should accept review of both certified questions. The Plaintiff's Appendix of exhibits in support of this Application follows below.

Respectfully submitted,

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IX. APPENDIX

Pursuant to Tenn. R. App. P. 9(d), the Plaintiff has appended an "an appendix containing copies of: (1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal" that includes the following documents:

1. Exhibit 1, OPA Report.

2. Exhibit 2, Defendant Metropolitan Government's Answer to Plaintiff's First Amended Complaint.

3. Exhibit 3, Order Granting Permission to Appeal.

4. Exhibit 4, Transcript of Final Order of Protection Hearing.

5. Exhibit 5, Plaintiff's First Amended Complaint.

6. Exhibit 6, Audio Recording of First 911 Call.

7. Exhibit 7, ECC Incident Reports.

8. Exhibit 8, Audio Recording of Second 911 Call.

9. Exhibit 9, Plaintiff's Motion for Leave to Amend Complaint.

10. Exhibit 10, Plaintiff's Proposed First Amended Complaint.

11. Exhibit 11, Defendant Metropolitan Government's Motion in Opposition to Plaintiff's Motion for Leave to Amend Complaint.

12. Exhibit 12, Order Granting in Part and Denying in Part Plaintiff's Motion for Leave to Amend Complaint, which is the order appealed from.

13. Exhibit 13, Plaintiff's Application for Permission to Appeal.

14. Exhibit 14, Transcript of Feb. 10, 2023, Hearing on Plaintiff's Motion for Partial Judgment on the Pleadings.

15. Exhibit 15, Plaintiff's Memorandum in Support of Plaintiff's

Motion for Partial Judgment on the Pleadings.

16. Exhibit 16, Defendant Metro. Gov't of Nashville and Davidson County's Response to Plaintiff's Motion for Partial Judgment on the Pleadings.

17. Exhibit 17, the Circuit Court's Feb. 22, 2023, Order denying Plaintiff's Motion for Partial Judgment on the Pleadings, which is the order appealed from.

18. Exhibit 18, Metro's Response in Opposition to Plaintiff's Application for Permission to Appeal Interlocutory Orders.

19. Exhibit 19, Plaintiff's Reply to Defendant's Response to Plaintiff's Application for Permission to Appeal Interlocutory Orders.

20. Exhibit 20, Transcript of Apr. 4, 2023, Hearing on Plaintiff's Application for Permission to Appeal Interlocutory Orders.

21. **Exhibit 21, Circuit Court's May 4, 2023, Order, which includes the trial court's statement of reasons**.

22. Exhibit 22, Plaintiff's Tenn. R. App. P. 9(c) Application to Appeal by Permission.

23. Exhibit 23, Tennessee Supreme Court's Jun. 5, 2023 Order Denying Mot. to Assume Jurisdiction.

24. Exhibit 24, May 11 Notice of Filing, Ex. 2 (WPLN Article: "Waffle House Shooting Settlement Could Mean Changes for Nashville's Department of Emergency Communications.").

25. Exhibit 25, May 11, 2023 Notice of Filing Exhibit 3 (correspondence between the parties concerning policy changes).

26. Exhibit 26, Metro's Response in Opposition to Plaintiff's Motion to Assume Jurisdiction

27. Exhibit 27, Metro's Answer to Plaintiff's Tenn. R. App. P. 9(c) Application to Appeal by Permission.

28 Exhibit 28, Court of Appeals Order Denying Plaintiff's Tenn. R. App. P. 9(c) Application to Appeal by Permission.

X. CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Under Tennessee Supreme Court Rule 46, § 3.02 and Tennessee Rule of Appellate Procedure 11(a), this brief contains 9,054 words pursuant to § 3.02(a)(1)(a) excluding excepted sections, as calculated by Microsoft Word; it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3); and the argument in this Application does not exceed 50 pages.

By: /s/ Daniel A. Horwitz
Daniel A. Horwitz

XI. CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2023, a copy of the foregoing was served via the Court's e-filing system upon:

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