REL: August 23, 2019

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2019

2180284

Dorothy McDonald

v.

Robert Keahey and Foster Wrecker Service, Inc.

Appeal from Jefferson Circuit Court
(CV-17-901042)

HANSON, Judge.

Dorothy McDonald appeals from a judgment entered against her, and in favor of Robert Keahey and Foster Wrecker Service, Inc. ("Foster"), by the Jefferson Circuit Court ("the trial

court"). For the following reasons, we affirm in part, reverse in part, and remand.

Facts and Procedural History

The basic facts of this case are undisputed. In late 2016, McDonald, a resident of the City of Center Point ("Center Point"), had two inoperable vehicles parked in the driveway of her home.[1] McDonald's driveway runs alongside the front lawn of the home, and dips down below the front elevation of the house to a parking area next to the home. Both vehicles were parked at the bottom of McDonald's driveway and next to her house. The driveway was not fenced or gated, but the area where the vehicles were located was bounded on two sides by the home and a retaining wall.[2]

On November 9, 2016, Keith Evans, the code-enforcement manager for Center Point, entered McDonald's property to inspect the vehicles, which he claimed he had seen on a

[1]The vehicles were a 2002-model Chevrolet Camaro and a 1984-model Buick Regal; both were owned by McDonald. The vehicles had deflated tires, were covered in sap and dirt, and lacked current license plates. There is no dispute that the vehicles were not operational, although McDonald had plans to repair the vehicles.

[2]The pictures included in the record on appeal are of poor quality. For example, the pictures also indicate that there may be an entryway into the home from the parking area.

previous patrol, and to determine whether they violated Center Point municipal ordinance § 44-66.[3] That ordinance prohibits a property owner from parking "junked, abandoned or nonoperational motor vehicles" on private property if they are readily visible from a public place or surrounding private property. The ordinance provides, in part:

> "No person in charge of or in control of any premises, whether as owner, lessee, tenant, occupant, or otherwise shall allow any partially dismantled, wrecked, junked, discarded or otherwise non-operable motor vehicles, of any kind or type, to remain on such property longer than seven days after being cited by a city official or his designated representative and the responsible person notified to act in such a way as to solve the problem to the satisfaction of the governing authorities."

The ordinance defines "nonoperable" as "being unable to be legally operated on public streets and roadways, such as having flat tires, jacked up or resting on stands, boxes, barrels, with pieces and/or parts missing, including expired license tag and/or decals."

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[3]Evans and Keahey both testified that the vehicles were visible from the street. McDonald offered testimony to the contrary. Photographs of the vehicles and residence included in the record indicate that the vehicles would have been at least partially visible from the street and certainly would have been visible from the neighboring property.

Although McDonald was not at home at the time of Evans's inspection, her ex-husband, ~~Byron Steele~~, was present. Steele ordered Evans to leave the property. Evans then called Keahey, a Jefferson County sheriff's deputy assigned to the Center Point area, and reported that Steele was interfering with his attempt to inspect the vehicles. Keahey traveled to McDonald's home and met with Steele.[4] Ultimately, Evans completed the inspection of the vehicles and issued a "notice of violation(s) and order to correct violation(s)," which notice he left at McDonald's home.[5] The notice described the violation and stated that the vehicles were to be "removed immediately." The notice further provided that "[i]f you fail to correct this violation, [Center Point] may elect to correct the violation itself."

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[4]An incident report prepared by Keahey stated that, once Keahey informed Steele that he had an outstanding warrant with a neighboring municipal police department, Steele went inside McDonald's house.

[5]Evans testified that he posted notices on both vehicles and on the front door of McDonald's house, and submitted photographs evidencing this fact. Steele testified that Evans gave the notice to him. McDonald testified that she did not receive the notice, but she did state that Steele had informed her that an inspector had come about the vehicles.

On December 2, 2016, Keahey returned to McDonald's house. Upon finding that the two inoperable vehicles remained in McDonald's driveway, he telephoned Foster, a towing company under contract to provide towing services to Center Point, and requested that that company remove the vehicles. Foster towed the vehicles to its facility. Keahey provided McDonald with a card containing Foster's contact information and instructed her to contact Foster regarding her vehicles. After Foster determined that the redemption date for McDonald to reclaim the vehicles had expired, it sold the vehicles.

On March 14, 2017, McDonald commenced this action against Center Point, Foster, and Keahey ("the defendants").[6] McDonald asserted various state-law tort claims against the defendants, including claims of conversion, negligence, and detinue. Further, she sought injunctive relief prohibiting the sale or disposal of one of the vehicles, which vehicle, she alleged, was still in Foster's possession. Finally, she asserted a count under the provisions of § 32-13-4, Ala. Code

[6]McDonald also named Wayne Plunkett, a former Center Point employee, as a defendant. The trial court dismissed Plunkett as a defendant on the ground that McDonald did not timely obtain service on Plunkett. That decision is not challenged on appeal.

1975, contesting the sale of her vehicles. In addition to injunctive relief, McDonald sought an award of compensatory damages in the amount of $100,000 and an award of punitive damages in the amount of $300,000.

Each of the defendants separately moved to dismiss McDonald's claims. Keahey argued that, because he was a deputy sheriff, all the claims against him were due to be dismissed under the doctrine of State-agent immunity. Center Point moved to dismiss the claims against it on the basis that the claims for injunctive relief were moot or, alternatively, did not comply with Rule 65, Ala. R. Civ. P.; that it was immune from liability for intentional torts; that it could not be liable for the acts of Keahey or Foster; that § 32-13-4 was not applicable; and that, because it did not have possession of the vehicles, detinue was not a legally cognizable claim against it. Foster filed a motion to dismiss arguing that it had no liability to McDonald because it had been merely acting on the instruction of Keahey pursuant to its agreement with Center Point and because, it claimed, it had complied with all applicable notice requirements with regard to the towing and sale of the vehicles.

On September 15, 2017, McDonald filed her first amended complaint, adding two civil-rights claims against the defendants pursuant to 42 U.S.C. § 1983. McDonald alleged that the defendants, while acting under color of state law, had violated her rights under the Fourth and Fourteenth Amendments to the United States Constitution. Keahey and Foster moved to dismiss the amended complaint, contending that they were protected from the § 1983 claims by the doctrine of qualified immunity. Foster also claimed it was entitled to absolute quasi-judicial immunity. Center Point contended that the claims against it were due to be dismissed because McDonald could not establish a claim of municipal liability under § 1983. McDonald subsequently filed a second amended complaint that added a trespass claim against the defendants.

On October 16, 2017, the trial court issued orders dismissing all the claims asserted against the defendants in McDonald's original complaint. On April 16, 2018, the trial court issued an order dismissing all of McDonald's remaining state-law claims against Keahey and Foster but denying Keahey's and Foster's motions to dismiss the § 1983 claims. As to those claims, the trial court determined that additional

discovery was necessary, and it ordered that the parties would be permitted to conduct limited discovery "narrowly tailored to addressing the question of when notice was issued to [McDonald] regarding the automobiles made the subject of this case." Also on April 16, 2018, the trial court dismissed all pending claims against Center Point, and it amended that order on April 19, 2018, to certify the judgment in favor of Center Point as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P.

On July 20, 2018, Keahey and Foster each filed separate summary-judgment motions directed to the § 1983 claims. Both of those defendants contended that McDonald's claims were barred by the doctrine of qualified immunity and that McDonald had not established any constitutional violations sufficient to support her § 1983 claims. The motions were supported by affidavits and other attached evidentiary submissions. McDonald responded to the summary-judgment motions, likewise submitting affidavits and other documentary evidence in opposition to the motions. On October 17, 2018, the trial court granted Keahey's and Foster's summary-judgment motions and entered a final judgment disposing of all of McDonald's

claims. McDonald appealed the judgment to the Alabama Supreme Court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975. This court dismissed the appeal as it pertained to the judgment entered in favor of Center Point because the appeal of that judgment was undisputedly untimely.[7]

Standard of Review

In her principal brief, McDonald challenges only the propriety of the summary judgment as it relates to the § 1983 claims against Keahey and Foster; she does not discuss the dismissals of the state-law claims or controvert any of the various theories Foster and Keahey had asserted in support of their contention that the state-law claims against them were due to be dismissed. Consequently, any argument that the trial court erred in dismissing the state-law claims has been waived on appeal. Surginer v. Roberts, 231 So. 3d 1117, 1127 (Ala. Civ. App. 2017) (quoting Gary v. Crouch, 923 So. 2d 1130, 1136 (Ala. Civ. App. 2005)) ("'[T]his court is confined in its review to addressing the arguments raised by the

[7]This court called for letter briefs as to whether McDonald's appeal of the judgment as to Center Point was timely. In response, McDonald conceded that her appeal of the judgment in favor of Center Point was not timely.

parties in their briefs on appeal; arguments not raised by the parties are waived.'"); Soutullo v. Mobile Cty., 58 So. 3d 733, 739 (Ala. 2010) ("[T]he failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment[] results in an affirmance of that judgment.").[8] Therefore, our review in this case is limited to the correctness of the summary judgment in favor of Keheay and Foster on McDonald's § 1983 claims.

> "'Summary judgment is appropriate only when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Rule 56(c)(3), Ala. R. Civ. P., Young v. La Quinta Inns, Inc., 682 So. 2d 402 (Ala. 1996). A court considering a motion for summary judgment will view the record in the light most favorable to the nonmoving party, Hurst v. Alabama Power Co., 675 So. 2d 397 (Ala. 1996), Fuqua v. Ingersoll-Rand Co., 591 So. 2d 486 (Ala. 1991); will accord the nonmoving party all reasonable favorable inferences from the evidence, Fuqua, supra, Aldridge v. Valley Steel Constr., Inc., 603 So. 2d 981 (Ala. 1992); and will resolve all reasonable doubts

[8]McDonald attempted to raise certain arguments pertaining to the dismissed state-law claims in her reply brief. This court, however, need not consider issues raised for the first time in a reply brief. See Chancellor v. White, 34 So. 3d 1270, 1273 (Ala. Civ. App. 2008).

> against the moving party, Hurst, supra, Ex parte Brislin, 719 So. 2d 185 (Ala. 1998).
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> "'An appellate court reviewing a ruling on a motion for summary judgment will, de novo, apply these same standards applicable in the trial court. Fuqua, supra, Brislin, supra. Likewise, the appellate court will consider only that factual material available of record to the trial court for its consideration in deciding the motion. Dynasty Corp. v. Alpha Resins Corp., 577 So. 2d 1278 (Ala. 1991), Boland v. Fort Rucker Nat'l Bank, 599 So. 2d 595 (Ala. 1992), Rowe v. Isbell, 599 So. 2d 35 (Ala. 1992).'"

Ex parte Turner, 840 So. 2d 132, 135 (Ala. 2002) (quoting Ex parte Rizk, 791 So. 2d 911, 912-13 (Ala. 2000)). Furthermore, an appellate court will "'review the validity of a qualified immunity defense de novo.'" Ex parte Hugine, 256 So. 3d 30, 45 (Ala. 2017) (quoting Volkman v. Ryker, 736 F.3d 1084, 1089 (7th Cir. 2013), citing in turn Elder v. Holloway, 510 U.S. 510, 516 (1994)).[9]

Analysis

[9]McDonald's brief is erroneously styled as a "petition for writ of mandamus" and cites to the mandamus standard of review. This proceeding is, however, an appeal following the entry of a final judgment. Thus, the more stringent standard of review applicable to a petition for a writ of mandamus is not applicable.

In order to be entitled to relief under § 1983, McDonald must demonstrate that the actions of Keahey and Foster (1) occurred "under color of state law" and (2) resulted in the deprivation of a constitutional or federal statutory right. In this case, McDonald asserts that Keahey and Foster were acting under the color of state law when they removed her vehicles from her driveway and that the seizure and sale of her vehicles constituted an unreasonable seizure[10] in violation of the Fourth Amendment and also violated her due-process rights guaranteed by the Fourteenth Amendment.[11] Keahey and Foster deny that McDonald was deprived of any constitutional right and further contend that they are immune from McDonald's § 1983 claims. We discuss each issue, in turn.

"Under Color of State Law"

[10]McDonald has not argued that the November 9, 2018, inspection of the vehicles constituted an unreasonable search under the Fourth Amendment. We also note that McDonald does not challenge the facial validity of the Center Point ordinance.

[11]For the first time on appeal, McDonald argues that the sale of her vehicles also constituted an excessive fine in violation of the Eighth Amendment. Our review, however, is limited to the evidence and arguments considered by the trial court, and we "'cannot consider arguments raised for the first time on appeal.'" Shankles v. Moore, 205 So. 3d 1253, 1258 (Ala. Civ. App. 2016) (quoting Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992)).

As to the color-of-state-law prong, we may safely conclude that Keahey -- a deputy sheriff assigned to provide law-enforcement services to Center Point -- was unquestionably operating under color of state law. Foster, on the other hand, is a private towing company. Nevertheless, McDonald has alleged that Foster was acting under color of state law.

Actions of an ostensibly private organization or individual are, under certain circumstances, treated as state action. The United States Supreme Court has stated that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)). In order to prove that a private party working for the government is a state actor, a plaintiff must demonstrate "pervasive entwinement" between the two entities surpassing that of a mere contractual relationship. McCarthy v. Middle Tennessee Elec. Membership Corp., 466 F.3d 399, 412 (6th Cir. 2006) (noting that "the existence of a contract alone does not

rise to the level of 'pervasive entwinement'"). The question of "pervasive entwinement" is a "'necessarily fact-bound inquiry.'" Brentwood Acad., 531 U.S. at 298 (quoting Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982)).

We recognize that there are opinions from various federal courts holding that a private towing company does not act under color of state law. See, e.g.,Partin v. Davis, 675 F. App'x 575, 586-87 (6th Cir. 2017) (not reported in Federal Reporter); Carmen Auto Sales III, Inc. v. City of Detroit, No. 16-12980, March 15, 2018 (E.D. Mich. 2018)(not reported in Federal Supplement); but see Smith v. Insley's Inc., 499 F.3d 875, 880 (8th Cir. 2007). Foster, however, has at no time asserted that it is not a state actor,[12] and, although this court may affirm a summary judgment for any legitimate reason supported by the record, Evans v. Waldrop, 220 So. 3d 1066, 1073 (Ala. Civ. App. 2016), the facts as contained in the record on appeal in this case are not sufficiently developed to permit analysis as to whether there was a "pervasive entwinement" between Foster and the undisputed state actors.

[12]Indeed, seemingly to the contrary, Foster argues that it is due quasi-judicial immunity -- an issue this court will discuss separately later in this opinion.

Accordingly, we view the question whether Foster was acting under color of state law when it towed and later disposed of McDonald's vehicles as an unresolved issue of fact and, thus, as not a proper basis to affirm the judgment entered in favor of Foster.[13]

Deprivation of a Constitutional Right

To prevail on her § 1983 claims, McDonald must also show that the claimed state action resulted in the deprivation of a constitutional or federal statutory right. To that end, McDonald asserts that Keahey's and Foster's actions in removing the two vehicles from her property and the subsequent disposal of those vehicles violated her right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and her right to procedural due process as guaranteed by the Fourteenth Amendment. We discuss each claimed right, in turn.

Fourth Amendment

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

[13]We, of course, make no comment on the ultimate merits of the question whether Foster was acting under color of state law.

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

U.S. Const. amend. IV.[14] The Fourth Amendment has been held to apply to the actions of municipal officials who seize private property to abate a nuisance. Soldal v. Cook Cty., 506 U.S. 56, 61-62 (1992); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978); Camara v. Municipal Court of San Francisco, 387 U.S. 523, 534 (1967); Conner v. City of Santa Ana, 897 F.2d 1487, 1490 (9th Cir. 1990). The United States Supreme Court has explained that "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). To determine whether a seizure violates the Fourth Amendment, the relevant inquiry is one of reasonableness -- "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable." Florida v. Jimeno, 500 U.S. 248, 250 (1991).

Ordinarily, a seizure of personal property has been viewed by the Supreme Court as "per se unreasonable within the

[14]The Fourth Amendment is applicable to the states. See Ker v. California, 374 U.S. 23, 30-31 (1963).

meaning of the Fourth Amendment unless it is accomplished pursuant to a judicial warrant issued upon probable cause and particularly describing the items to be seized." United States v. Place, 462 U.S. 696, 701 (1983). Nevertheless, a warrant is not required to establish the reasonableness of all government searches and seizures. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995). For example, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). Thus, "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." Oliver v. United States, 466 U.S. 170, 181 (1984). Likewise, the "plain view" doctrine permits the warrantless seizure of an object when an officer is lawfully located in a place from which the object can be plainly viewed, the officer has a lawful right to access the object, and the incriminating character of the object is immediately apparent. United States v. Smith, 459 F.3d 1276, 1290 (11th Cir. 2006).

Nevertheless, "when it comes to the Fourth Amendment, the home is first among equals," Florida v. Jardines, 569 U.S. 1,

6 (2013), and the United States Supreme Court has been reluctant to expand the scope of exceptions to the warrant requirement when the search and seizure involves intrusion into the home. See Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. United States Dist. Ct. for the E. Dist. of Michigan, S. Div., 407 U.S. 297, 313 (1972)) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"); see also Ex parte Kennedy, 486 So. 2d 493, 496 (Ala. 1986) (noting that "a warrantless seizure in a home is subject to greater scrutiny than is a similar seizure in a public place"). As the United States Supreme Court has recently explained:

> "The Court already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home. .... For instance, under the plain-view doctrine, 'any valid warrantless seizure of incriminating evidence' requires that the officer 'have a lawful right of access to the object itself.' Horton v. California, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); see also id., at 137, n. 7, 110 S.Ct. 2301 ('"[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure"'); G.M. Leasing Corp. v. United States, 429 U.S. 338, 354, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977) ('It is one thing to seize without a warrant property resting in an open area ..., and it is quite another thing to effect a warrantless seizure of property ... situated on private premises

> to which access is not otherwise available for the seizing officer'). A plain-view seizure thus cannot be justified if it is effectuated 'by unlawful trespass.' Soldal v. Cook County, 506 U.S. 56, 66 113 S.Ct. 538, 121 L.Ed. 2d 450 (1992). Had [the officer] seen illegal drugs through the window of [the defendant's] house, for example, assuming no other warrant exception applied, he could not have entered the house to seize them without first obtaining a warrant.
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> "Similarly, it is a 'settled rule that warrantless arrests in public places are valid,' but, absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant, even when they have probable cause. Payton v. New York, 445 U.S. 573, 587-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). That is because being '"arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home."' Id., at 588-589, 100 S.Ct. 1371 (quoting United States v. Reed, 572 F.2d 412, 423 (C.A. 2 1978))."

Collins v. Virginia, 584 U.S. __, ___, 138 S. Ct. 1663, 1672 (2018).

Importantly, the Fourth Amendment protection provided to the home also applies to the area immediately surrounding one's home, "often referred to as the curtilage." Ex parte Maddox, 502 So. 2d 786, 788 (Ala. 1986); see also Oliver, 466 U.S. at 180. The curtilage is considered to be "'part of the home itself for Fourth Amendment purposes.'" Jardines, 569 U.S. at 6 (quoting Oliver, 466 U.S. at 180). "'The protection

afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.'" Collins, 584 U.S. at __, 138 S. Ct. at 1670 (quoting California v. Ciraolo, 476 U.S. 207, 212-13 (1986)). Applying these principles, the United States Supreme Court recently concluded in Collins that a warrantless search of a motorcycle parked within a semi-enclosed driveway was an unreasonable intrusion into the curtilage of the home that violated the Fourth Amendment. The Court concluded that "searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage." 584 U.S. at __, 138 S. Ct. at 1672.

In the present case, we are not entirely convinced from the limited facts in the record that McDonald has established as a matter of law that her vehicles were within the curtilage of her home. See, e.g., United States v. Dunn, 480 U.S. 294, 300 (1987) (providing four factors -- to be applied on a case-by-case basis -- to determine whether an area is within the

curtilage of a home); but see Rogers v. State, 543 So. 2d 719, 720 (Ala. Crim. App. 1988) ("A driveway is considered within the curtilage of a residence."). In Collins, the United States Supreme Court held that a motorcycle that was parked in a partially enclosed driveway in an area that abutted the house and that was beyond the point where a visitor would turn off to follow a pathway leading to the front door was within the curtilage of the home. 584 U.S. at __, 138 S. Ct. at 1670-71. We recognize that the description of the area found to be within the curtilage of the home in Collins bears marked similarities with the parking area where McDonald's vehicles were located. We, therefore, conclude that, from the record before us, there is at the very least a question of fact as to whether the vehicles were within the curtilage of McDonald's home.

Furthermore, the curtilage question is a material one. If the vehicles were within the curtilage of the home, then the warrantless seizure would be subject to the heightened scrutiny afforded invasions into the sanctity of the home -- such as if the vehicles had been parked in McDonald's living room. (See Collins, 584 U.S. at __, 138 S. Ct. at 1671.

Thus, unless some recognized exception to the warrant requirement applies, the warrantless intrusion into the curtilage of McDonald's home to seize her vehicles was unquestionably a violation of the Fourth Amendment. 584 U.S. at __, 138 S. Ct. at 1675 (holding that, unless an exception to the warrant requirement applied, search of vehicle in curtilage of home violated Fourth Amendment). To this end, Keahey and Foster have cited no viable exception to the warrant requirement. Although Keahey mentions an "automobile exception"[15] to generally applicable Fourth Amendment principles in his brief to this court, that argument is conclusively foreclosed by Collins. 584 U.S. at __, 138 S. Ct. at 1675 ("[T]he automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein."). Moreover, although the plain-view doctrine may form the basis for probable cause to obtain a search warrant, it did not provide the basis for a warrantless entry into the curtilage of McDonald's home for the purpose of seizing her vehicles. 584 U.S. at __, 138 S.

[15]The "automobile exception" generally allows a police officer to search a motor vehicle without a search warrant. See California v. Carney, 471 U.S. 386 (1985).

Ct. at 1675 ("The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant ...."). Nor does the "community caretaking" exception,[16] also cited by Keahey, justify the seizure of the inoperable vehicles because there is no evidence in the record suggesting that Keahey believed that the vehicles posed an immediate threat to public health or safety or that they were related to any other exigent circumstances justifying a warrantless intrusion onto McDonald's property. See Gould v. Symons, No. 01-CV-10026, Sept. 4, 2002 (E.D. Mich 2002) (not reported in Federal Supplement) (rejecting argument that community-caretaking function justified warrantless seizure of plaintiff's truck pursuant to a municipal ordinance prohibiting storage of junk vehicles).

Although not addressed by Keahey and Foster, it is important to note that, in the context of the enforcement of

[16]The "community caretaking" doctrine recognizes that police have a special role in combating and preventing hazards and aiding those in distress that extends beyond their role in criminal-law-enforcement activities. Thus, for example, police may impound a vehicle that presents a traffic hazard. See United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991).

nuisance ordinances, a prescribed administrative process may provide a constitutionally adequate substitute for a warrant. Indeed, a number of federal circuit courts have held that the warrantless abatement of a public nuisance was nonetheless reasonable under the Fourth Amendment when it was accompanied by an adequate administrative procedure. See, e.g., Embassy Realty Invs., Inc. v. City of Cleveland, 572 F. App'x 339, 344-45 (6th Cir. 2014) (not published in Federal Reporter) (city's warrantless entry and demolition of improvements was not a violation of Fourth Amendment when the demolition followed an administrative hearing subject to judicial review); Santana v. City of Tulsa, 359 F.3d 1241, 1244-45 (10th Cir. 2004) (removal of discarded computer parts from plaintiff's backyard was reasonable when plaintiff had been given notice of the planned abatement and did not avail himself of established administrative appeal procedures); Fouts v. County of Clark, 76 F. App'x 825, 826 (9th Cir. 2003) (not published in Federal Reporter) (warrantless seizure of inoperative vehicles did not violate Fourth Amendment when county's abatement order was reviewed and affirmed by state court); Freeman v. City of Dallas, 242 F.3d 642 (5th Cir.

2001)(en banc) (holding that judicially issued warrant was not necessary to seize and destroy plaintiff's dilapidated buildings when city's nuisance-abatement administrative scheme involving two hearings and the possibility of judicial review established superfluity of the warrant requirement); Braden v. County of Lake, 25 F. App'x 513, 515 (9th Cir. 2001) (not published in Federal Reporter) (preseizure process afforded to plaintiff was sufficient to render warrantless seizure of vehicles located outside of curtilage reasonable); but see Conner v. City of Santa Ana, 897 F. 2d at 1491-92 (holding that warrantless seizure of plaintiff's automobiles under nuisance ordinance was violation of Fourth Amendment notwithstanding the preseizure administrative process provided to plaintiff).

For example, in Freeman, the City of Dallas ("the City") served notices on the owners of two vacant, deteriorated apartment houses that the structures violated the municipal building code and warned them to repair or demolish the structures. When the code violations were not corrected, the City referred the matter to an administrative board charged with determining whether property-condition reports filed by

City inspectors violated the City's building codes. The board conducted a hearing pursuant to established procedures and standards. The owners were given notice of the hearing and permitted to present evidence and witnesses. Following the hearing, the board ordered the structures to be demolished and sent notice to the owners informing them of their right to appeal from the decision to a state court. The owners did not appeal. When the owners failed to demolish the structures within the time provided by the board, the City demolished the structures.

In determining that the warrantless demolition of the structures was not an unreasonable seizure under the Fourth Amendment, the court in Freeman stated that the fundamental question was one of reasonableness, "a question decided by balancing the public and private interests at stake." 242 F.3d at 652. It noted that "[r]egulation of nuisance properties is at the heart of the municipal police power" but that "a city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards." Id. at 652-53. The Freeman court recognized a well-defined administrative procedure had preceded abatement

and stated that "[t]hat these standards comport with due process suggests the Fourth Amendment reasonableness" of the City's actions. Id. at 653. The court further noted that, as vacant apartment properties, the structures were not subject to the same degree of privacy protection as nonbusiness property. The Freeman court concluded:

> "The ultimate test of reasonableness is fulfilled in this case by the City's adherence to its ordinances and procedures as a prelude to ordering the landowners to abate their nuisance structures. The Supreme Court originally extended an administrative warrant requirement to civil investigations because 'the basic purpose of [the Fourth] Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasion by government officials.' Camara [v. Municipal Ct. of San Francisco], 387 U.S. [523,] 528, 87 S. Ct a[1727,] 1730 [(1967)] (emphasis added); see also Marshall[v. Barlow's, Inc.], 436 U.S. [307,] 312, 98 S. Ct. [1816,] 1820 [(1978)]. Whatever else the City's enforcement of its municipal habitation code might be, it is sufficiently hedged about by published standards, quasi-judicial administrative proceedings, and flexible remedies that it is not arbitrary. ... The Fourth Amendment was not violated here."

242 F.3d at 653-54 (footnote omitted).

The facts in Freeman stand in stark contrast to those of this case. Here, Center Point's code-enforcement officer, Evans, unilaterally determined that McDonald's vehicles were in violation of the ordinance, and he issued a notice

informing McDonald of the violation and ordering her to immediately abate the violation. McDonald, however, was not notified of any process for challenging that determination, and, indeed, as Keahey concedes, the ordinance provides no such procedure. Even more, the decision to abate the nuisance was made solely by Keahey. He provided no further notice to McDonald of his decision to abate the nuisance, and McDonald did not have an opportunity to object to, or to appeal from, his decision. Nor is there any argument or evidence that the vehicles posed a danger warranting immediate abatement. Most importantly for Fourth Amendment purposes, McDonald's vehicles were seized from her home, and potentially from within the curtilage of the home, meaning that, unlike in Freeman, McDonald's privacy interests were directly at issue. In short, there was no adequate preseizure administrative or judicial process that might, under the facts of this case, have rendered the seizure of McDonald's vehicles reasonable under the Fourth Amendment.

McDonald's vehicles were seized from her home without a warrant or constitutionally adequate administrative process. Thus, we conclude that McDonald presented substantial evidence

that the seizure of her two vehicles violated her Fourth Amendment right to be free from unreasonable searches and seizures.

Procedural Due Process

Next, we address McDonald's claim that the seizure of her vehicles also constituted a violation her Fourteenth Amendment right to procedural due process. The Fourteenth Amendment prohibits states from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. As a general rule, due process requires that "individuals must receive notice and an opportunity to be heard before the Government deprives them of property." United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993); see also Humane Soc'y of Marshall Cty. v. Adams, 439 So. 2d 150, 152 (Ala. 1983) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Furthermore, "[t]he constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." Fuentes v. Shevin, 407 U.S. 67, 80 (1972). Thus, due process generally requires that the state afford a party threatened with a deprivation of property a process involving predeprivation notice and access to a tribunal in which the merits of the deprivation may be fairly challenged. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).[17]

Here, there is no dispute that Evans delivered a notice that McDonald's vehicles were in violation of Center Point's nuisance ordinance.[18] The notice set forth the specific

[17]There are some situations in which a postdeprivation hearing will satisfy due process. See, e.g., Zinermon v. Burch, 494 U.S. 113, 128 (1990); Board of Regents of State Colls. v. Roth, 408 U.S. 564, 569 n.7 (1972). This does not appear to be one of those situations.

[18]McDonald testified that she did not personally receive the notice. Due process, however, does not require that a party actually receive the notice. Rather, "due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Jones v. Flowers, 547 U.S. 220, 226 (2006) (quoting Mullane v. Central Hanover

municipal ordinance for which a violation had been found, the reason for the violation, and contact information for the Center Point Inspections Department. The notice did not provide time for McDonald to correct the violation. Rather, it stated that the vehicles were to be "removed immediately." The notice further provided that, if no action was taken to correct the violation, "the City [could] elect to correct the violation itself."

Furthermore, there does not appear to have been any preseizure process by which McDonald could have challenged the determination that her vehicles violated § 44-66 or Keahey's decision to abate that violation. It is undisputed that the notice did not provide McDonald with any information on how she might challenge or seek review of the determination that her vehicles violated Center Point ordinance § 44-66. Indeed, the ordinance provides no procedure for obtaining a hearing or for appeal.[19] Moreover, the decision to abate the nuisance

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Bank & Trust Co., 339 U.S. 306, 314 (1950)).

[19]Foster argues that Center Point municipal ordinance § 46-47 provided a procedure by which McDonald could have requested a hearing. The provisions of that ordinance, which provides restrictions on the parking of vehicles, do not apply to violations of ordinance § 46-66. Ordinance § 46-47(f)(2) provides, in part, that "[t]he person(s) to whom the notice is

appears to have been left solely in the hands of Keahey, who, upon noticing that the vehicles remained in McDonald's driveway, simply called Foster to tow the vehicles without any further notice or procedure.

Again, the facts of this case stand in contrast to cases in which courts have found that the seizure of private property complied with due process. For example, in Ashe v. City of Montgomery, 754 F. Supp. 2d 1311 (M.D. Ala. 2010), the City of Montgomery received complaints about junk vehicles parked in Ashe's yard. The city inspector found the complaints to be valid and placed a sign on Ashe's property and mailed a written notice to his home address advising him that his property was in violation of municipal law and giving him 10 days to bring his property into compliance. After a reinspection found the nuisance had not been abated, a second notice was sent to Ashe informing him that a public hearing

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directed ... may file a written request for hearing before the city council or its designee prior to the compliance date provided in the notice to remove for the purpose of contesting the existence of the nuisance as provided by this section" (emphasis added). Here, the alleged nuisance was not "provided by" § 46-47, and the time for compliance as stated by the notice was "immediately." Nor did the notice provided to McDonald comply with the notice provisions under § 46-47(f)(1). Certainly, the notice provided to McDonald did not inform her that she could seek a hearing under § 46-47(f)(2).

would be held before the city council and instructing him on how to file objections to the proceedings. A public hearing was held by the city council, and a resolution was adopted declaring Ashe's property a public nuisance subject to abatement. Ultimately, a private contractor was hired by the City of Montgomery to remove the vehicles and other personal property from Ashe's property. Based on these facts, the court in Ashe concluded that the City of Montgomery's actions in abating the nuisance had not violated Ashe's right to due process and entered a summary judgment against Ashe on his § 1983 claim asserting such a violation.

The City of Montgomery's junk-car ordinance was again at issue in K & D Automotive, Inc. v. City of Montgomery, 150 So. 3d 752 (Ala. 2014). In K & D, following a notice-and-hearing procedure similar to that in Ashe, the city removed a number of vehicles from a business premises in order to abate a declared nuisance. The business and its owner sued the city, contending, among other things, that their due-process rights had been violated. Relying on Ashe, the trial court entered a summary judgment in favor of the city on the due-process claims. On appeal, the Alabama Supreme Court affirmed the

summary judgment except as it related to vehicles towed by the city that had not been present on the property until after the hearing and the adoption of the resolution ordering abatement. With regard to the violation-of-due-process claims directed to those particular vehicles, our supreme court reversed the summary judgment, the main opinion[20] observing that "it cannot be said that [the plaintiffs] were given notice and an opportunity to be heard regarding the status of those vehicles." 150 So. 3d at 768.

Here, McDonald was not given an opportunity to be heard regarding whether her vehicles violated Center Point municipal ordinance § 44-66 or the decision to abate the violation of that ordinance by removing her vehicles. Accordingly, on the record before us, we conclude that there was substantial evidence that the seizure of McDonald's vehicles violated her right to due process under the Fourteenth Amendment.

Qualified Immunity

[20]K & D was an opinion in which only four Justices concurred; Chief Justice Moore concurred in the result. We note, however, that Chief Justice Moore's special writing concurring in the result expresses no disagreement with the rationale underlying the main opinion's decision to reverse the summary judgment as to the due-process claim.

Having concluded that there was substantial evidence that the seizure of McDonald's vehicles violated her Fourth Amendment right to be free from unreasonable seizures and her Fourteenth Amendment right to procedural due process, we turn to the question of potential immunity. Our supreme court has summarized the doctrine of qualified immunity as follows:

> "The doctrine of qualified immunity generally shields government officials who are performing discretionary functions from liability for civil damages unless their conduct violates 'clearly established statutory or constitutional rights.' Ex parte Madison County Bd. of Education, 1 So. 3d 980, 990 (Ala. 2008). The United States Supreme Court has recently described the doctrine as follows:
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> > "'"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U.S. 731, 743 [131 S.Ct. 2074, 2085] (2011)(quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal

> reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987)(citation omitted).'

"Messerschmidt v. Millender, 565 U.S. 534, 546, 132 S.Ct. 1235, 1244-45, 182 L.Ed. 2d 47 (2012).

"This Court has recognized a two-part test to determine whether a public official is entitled to qualified immunity in a § 1983 action:

> "'In deciding whether a public official ... is entitled to qualified immunity in a § 1983 action, this Court employs the following two-step analysis:
>
> > "'"'1) The defendant public official must first prove that 'he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.'
> >
> > "'"'2) Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions 'violated clearly established constitutional law.'"'"'

"Ex parte Sawyer, 876 So. 2d 433, 439 (Ala. 2003)(quoting Couch v. City of Sheffield, 708 So. 2d 144, 155 (Ala. 1998), quoting in turn Roden v. Wright, 646 So. 2d 605, 610 (Ala. 1994)). The

> second prong is satisfied if the plaintiff proves that '"(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation."' Townsend v. Jefferson Cnty., 601 F.3d 1152, 1158 (11th Cir. 2010) (quoting Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1264 (11th Cir. 2004))."

Ex parte Ruffin, 160 So. 3d 750, 755-56 (Ala. 2014).

Both Keahey and Foster contend that they are entitled to qualified immunity. As an initial matter, we address whether Foster, as a private party, is entitled to assert a qualified-immunity-defense.[21] The United States Supreme Court has recognized that, under some circumstances, qualified immunity may be available to private actors sued under § 1983. Filarsky v. Delia, 566 U.S. 377 (2012). Whether a private actor is entitled to qualified immunity, however, requires an inquiry into a number of factors, including the nature and function of the employment, as well as historical and policy considerations for extending qualified immunity into a particular area. See Filarsky, 566 U.S. at 393-94 (addressing those factors and concluding that private attorney hired by a municipal fire department to conduct an administrative

[21]We note that the issue whether a private actor is entitled to qualified immunity is distinct from whether a private party is a state actor for purposes of a § 1983 claim. See Jensen v. Lane Co., 222 F.3d 570, 576 (9th Cir. 2000).

investigation was entitled to qualified immunity); Richardson v. McKnight, 521 U.S. 399 (1997) (looking to the history and purposes of government-employee immunity and determining that private prison guards acting pursuant to a government contract could not assert qualified immunity to § 1983 claims); Wyatt v. Cole, 504 U.S. 158, 168 (1992) (noting that rationales behind qualified immunity "are not transferable to private parties"). In this case, however, Foster has made only a conclusory declaration that it is entitled to qualified immunity. It has not supplied this court, or the trial court, with any cases, arguments, or facts indicating that a private towing company operating under a municipal towing contract is protected by qualified immunity, and the record is barren of information that would permit this court to conduct the kind of inquiry required by Filarsky and its progeny. Accordingly, on the record before us, we cannot conclude that Foster is entitled to qualified immunity as a matter of law.

To determine whether Keahey is entitled to qualified immunity, our analysis is more straightforward. First, for the sake of our analysis, we assume that Keahey was performing a "discretionary function" at the time he directed the removal

of McDonald's two vehicles from her driveway.[22] Having determined that Keahey was exercising a discretionary function, the burden shifted to McDonald to show that Keahey's actions violated a "clearly established" constitutional right. Stated another way, the question becomes "'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Groh v. Ramirez, 540 U.S. 551, 563 (2004) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)). In our view, McDonald has met that burden.

As explained above, it is settled law that, absent some exception, a warrantless search and seizure within the home is a violation of the Fourth Amendment. Indeed, in Groh, the United States Supreme Court expressly recognized that "[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

[22]There appears to be no dispute that the Jefferson County sheriff's office has been granted the power to enforce Center Point's codes and ordinances by virtue of a law-enforcement-services agreement between it and Center Point. See § 11-102-1 et seq., Ala. Code 1975. Thus, enforcement of Center Point ordinance § 46-66 was within Keahey's job duties as a Jefferson County sheriff's deputy assigned to provide law-enforcement services to Center Point. See Center Point municipal ordinance § 44-66 ("This section may be enforced by an appropriate law enforcement officer ....").

unconstitutional." 540 U.S. at 564. Likewise, the law is clearly established that the curtilage is "part of the home itself for Fourth Amendment purposes." Oliver, 466 U.S. at 180. Furthermore, although there is authority that the seizure of property for the purpose of abating a public nuisance may be deemed reasonable for Fourth Amendment purposes if accompanied by adequate administrative procedures, see, e.g., Freeman, supra, here there were no such procedures. We think it should have been clear to Keahey that, absent some exigent circumstance, he could not seize private property from the curtilage of a home without a warrant.

Likewise, with regard to procedural due process, the law is also "clearly established" that notice and an opportunity to be heard must be given before a property owner is deprived of property. See, e.g., Loudermill, 470 U.S. at 542 (quoting Boddie v. Connecticut, 401 U.S. 535, 542 (1971)) (emphasis in Boddie) ("'The root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'"); K & D, 150 So. 3d at 768 (reversing summary judgment on procedural-due-process claim when plaintiff was

not given notice and an opportunity to be heard before vehicles were towed from property to abate nuisance). Here, Keahey should have been aware that McDonald was due some minimal process before the removal of her vehicles from outside her home, and, because Keahey was the official who made the decision to abate the nuisance, he was in the unique position to know that she had not had an opportunity to be heard. Accordingly, we conclude that, based on the record before us, Keahey did not establish that he was entitled to qualified immunity as a matter of law.

Quasi-Judicial Immunity

Finally, we address Foster's assertion that it is entitled to absolute quasi-judicial immunity. In the context of a § 1983 claim, quasi-judicial immunity has been described as follows:

> "Absolute quasi-judicial immunity derives from absolute judicial immunity. Turney v. O'Toole, 898 F.2d 1470, 1474 (10th Cir. 1990). Judges are absolutely immune from civil liability under section 1983 for acts performed in their judicial capacity, provided such acts are not done in the '"clear absence of all jurisdiction."' Stump v. Sparkman, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105, 55 L.Ed. 2d 331 (1978)(quoting Bradley v. Fisher, 13 Wall. 335, 351, 20 L.Ed. 646 (1872)); see Pierson v. Ray, 386 U.S. 547, 553-54, 87 S.Ct. 1213, 1217-18, 18 L.Ed. 2d 288 (1967). Nonjudicial officials are

> encompassed by a judge's absolute immunity when their official duties 'have an integral relationship with the judicial process.' Ashbrook v. Hoffman, 617 F.2d 474, 476 (7th Cir. 1980). Like judges, these officials must be acting within the scope of their authority. See Property Management & Invs., Inc. v. Lewis, 752 F.2d 599, 603 (11th Cir. 1985) (corporate receiver protected by judicial immunity in executing orders of appointing judge because complaint did not allege that he acted outside his authority). Thus, we determine the absolute quasi-judicial immunity of a nonjudicial official through a functional analysis of the action taken by the official in relation to the judicial process."

Roland v. Phillips, 19 F.3d 552, 555 (11th Cir. 1994).[23]

Here, we need not determine whether Foster, as a private company, is entitled to assert quasi-judicial immunity, see Rodriguez v. Providence Community Corrections, Inc., 191 F. Supp. 3d 758 (M.D. Tenn. 2016) (private for-profit company contracted to administer probation services not entitled to quasi-judicial immunity), because the immunity defense fails for a more fundamental reason -- Foster and Keahey were undisputedly not enforcing a judicial order to remove the vehicles from McDonald's home. Accordingly, Foster is not entitled to quasi-judicial immunity.

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[23]Our supreme court has recognized that quasi-judicial immunity for the purposes of § 1983 actions may be narrower than quasi-judicial immunity as applied to state-law claims. D.A.R. v. R.E.L., 272 So. 3d 1030, 1044-45 (Ala. 2018).

Conclusion

For the reasons set forth above, we conclude that McDonald has presented substantial evidence that the warrantless seizure of her vehicles from her driveway constituted a violation of her clearly established Fourth Amendment right to be free from unreasonable seizures and her Fourteenth Amendment right to procedural due process. Likewise, we conclude that Keahey and Foster were not entitled to a summary judgment based on qualified immunity or quasi-judicial immunity. Thus, as to McDonald's § 1983 claims alleging a violation of her Fourth Amendment and Fourteenth Amendment rights, we reverse the summary judgment entered in favor of Keahey and Foster, and remand the case for further proceedings consistent with this opinion. In all other respects, the judgment of the trial court is affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Thompson, P.J., and Moore and Donaldson, JJ., concur.

Edwards, J., concurs in the result, without writing.