No. W2022-00514-COA-R3-CV

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

TERRY RAINWATERS, ET AL.,
Plaintiffs-Appellees,

v.

TENNESSEE WILDLIFE RESOURCES AGENCY,
BOBBY WILSON, ED CARTER, and KEVIN HOOFMAN,
Defendants-Appellants.

ON APPEAL FROM THE JUDGMNET OF THE
BENTON COUNTY CIRCUIT COURT

BRIEF OF DEFENDANTS-APPELLANTS

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ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in ruling that a justiciable controversy exists, when Defendants have not entered on Plaintiffs' properties since September 2018.
2. Assuming there is a justiciable controversy, whether the trial court erred in holding Tenn. Code Ann. §§ 70-1-305(1) and (7) facially unconstitutional, when circumstances clearly exist under which the statute would be valid.
3. Assuming there is a justiciable controversy, whether the trial court also erred in declaring that Defendants conducted unconstitutional searches of Plaintiffs' properties under Tenn. Code Ann. §§ 70-1-305(1) and (7), when the affected areas of Plaintiffs' properties are not constitutionally protected and when any searches conducted were not unreasonable.
4. Alternatively, whether the trial court erred in failing to dismiss the claim for damages against one individually named defendant, when sovereign immunity bars such claims.

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STATEMENT OF THE CASE

Plaintiffs, Terry Rainwaters and Hunter Hollingsworth, filed this action in Benton County Circuit Court on April 14, 2020, against the Tennessee Wildlife Resources Agency (TWRA); Ed Carter, the agency's then-executive director; and Kevin Hoofman, an officer of the agency. (I, 1.)[1] Plaintiffs challenged the constitutionality of Tenn. Code Ann. § 70-1-305, both facially and as applied to alleged searches conducted on their properties. (I, 1.)

The TWRA was created for the management, protection, propagation, and conservation of wildlife within the State. *See* Tenn. Code Ann. § 70-1-301. And TWRA officers have authority to enforce all laws relating to wildlife under Tenn. Code Ann. § 70-1-305, which provides, in pertinent part:

> The executive director of the wildlife resources agency has the power to:
>
> (1) Enforce all laws relating to wildlife, and to go upon any property, outside of buildings, posted or otherwise, in the performance of the executive director's duties;
>
> . . .
>
> (7) Designate employees of the agency, officers of any other state or of the federal government who are full-time wildlife enforcement personnel, to perform the duties and have the powers as prescribed in this section except subdivision (9)[.]

Plaintiffs alleged that these provisions violate their rights under article I, section 7, of the Tennessee Constitution, which provides that

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[1] Amended complaints were filed on May 14 and September 10, 2020; the September 2020 amended complaint added Bobby Wilson, who became the agency's executive director in May 2020, as a defendant. (I, 22, 44.)

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"people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures." (I, 45-46, 61-64.) Plaintiffs further alleged that the TWRA and its officers violated those rights by: (1) entering their properties on numerous occasions to enforce and/or investigate violations of wildlife laws without a warrant or consent; and (2) installing surveillance cameras on their properties without a warrant or consent. (I, 44-45, 61-64.) Plaintiffs sought declaratory and injunctive relief against the TWRA and Bobby Wilson, Ed Carter, and Kevin Hoofman in their individual capacities. (I, 44, 64.) Plaintiffs also sought nominal damages against Defendant Carter. (I, 64.)

Defendants moved to dismiss the complaint in May 2020, arguing that: (1) the claims against the TWRA are barred by sovereign immunity, (2) Plaintiffs failed to state a claim for injunctive and declaratory relief; and (3) Plaintiffs failed to state a claim entitling them to money damages. (XII, 1-2.) Defendants' motion was denied in its entirety on September 22, 2020. (XII, 34-37.)

The parties filed cross-motions for summary judgment in May 2021, which were heard by a three-judge panel pursuant to Tenn. Code Ann. § 20-18-101. (I, 83; VII, 1022; VIII, 1269.) In an order entered on March 22, 2022, the panel granted summary judgment to Plaintiffs, and (with one exception) denied summary judgment to Defendants. (XI, 27.) The panel held that: (1) Tenn. Code Ann. §§ 70-1-305(1) and (7) "authorize unreasonable warrantless searches in violation of Article I, Section 7 of the Tennessee Constitution," and are therefore facially unconstitutional; (2) Plaintiffs had sufficient standing to bring their facial constitutional challenge; (3) a justiciable controversy exists, sufficient to allow Plaintiffs

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to obtain declaratory relief; (4) Plaintiffs are entitled to one dollar in nominal damages from Defendant Carter; and (5) Plaintiffs are not entitled to injunctive relief. (XI, 21-22, 24, 26-28.) The panel declined to address Plaintiffs' as-applied challenge to the statute, deeming it "[had] already concluded that [the statutory provisions] are facially unconstitutional." (XI, 21.)[2] Accordingly, the panel declared § 70-1-305(1) unconstitutional;[3] declared TWRA's warrantless searches under §§ 70-1-305(1) and (7) unconstitutional; and declared that "such searches of Plaintiffs' properties were unconstitutional and unlawful." (XI, 27.)

Defendants now appeal to this Court.

STATEMENT OF THE FACTS

Plaintiffs' Properties

Plaintiffs Rainwaters and Hollingsworth own real property in Camden, Tennessee. (I, 44.) Plaintiff Rainwaters owns or leases a total of four parcels, the largest being a 136-acre parcel on Lower Big Sandy River Road. (II, 159; VIII, 1220; XI, 3.) He maintains two houses on this property—one in which he resides with his son, and one that he rented to long-term tenants from 2016 to 2020. (II, 159; VIII, 1221; XI, 3.) In addition to residing on the property, Mr. Rainwaters uses this property to farm and hunt. (I, 49.) There is a farming shed near the rental house,

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[2] Chief Judge Donald Parrish issued a partial concurrence and dissent, in which he noted that he would hold Tenn. Code Ann. §§ 70-1-305(1) and (7) unconstitutional as applied to Plaintiffs and would grant injunctive relief. (XI, 29-35.)

[3] The panel did not declare § 70-1-305(7) unconstitutional, because "[a]bsent the offending subsection 305(1), subsection 305(7) creates no issue." (XI, 27.)

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where Mr. Rainwaters stores and repairs his farming equipment. (VIII, 1221; XI, 3.) Mr. Rainwaters hunts on the northern portion of the property. (V, 732, 746-47; VIII, 1167, 1221; XI, 49.) There is a gravel path that leads to this northern portion of the property, and a gate at the entrance to the gravel path. (V, 761-62; VIII, 1167.)[4] There is a "No Trespassing" sign on the gate; there is also a "No Trespassing" sign at the northern end of the path. (II, 159; V, 761-62, 782; VIII, 1167, 1222; XI, 4.)

Mr. Rainwaters also owns a 69-acre parcel on Liberty Road, which he uses for farming and hunting. (VIII, 1120-21, 1224.) The Liberty Road parcel is fenced all the way around[5] and has a gate at the entrance with a "No Trespassing" sign on the gate. (VIII, 1222; XI, 4.)

Mr. Rainwaters leases a 123-acre parcel on Harmon Creek Road; he leases this property from his brother, and he uses it for hunting. (VIII, 1223; XI, 4.) This property has a gate at its entrance with a "No Trespassing" sign on the gate. (VIII, 1223; XI, 4.) He also leases a 20-acre parcel immediately to the north of his 136-acre parcel on Lower Big Sandy River Road; he leases this property from the Sandy River Hunting Club,[6] and he uses it for hunting. (VIII, 1223; XI, 4.) This 20-acre

[4] This gravel path is about one mile long and extends from the rental house to the back of the property, where it abuts the Sandy River Hunting Club. (V, 744-46, 771.)

[5] The record does not reflect when the fence was installed, so it is unknown whether the property was fenced all the way around at the time TWRA officers entered this property on September 1, 2016. (I, 117.)

[6] The Sandy River Hunting Club is a private hunting association that owns 150 acres of property immediately to the north of Mr. Rainwaters'

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property is behind a gate with a "No Trespassing" sign posted on it, and fencing extends a dozen yards from either side of the gate. (VIII, 1224; XI, 4.)

Mr. Rainwaters has a hunting license and occasionally allows his son and other family members to hunt, either alone or with friends, on his properties. (VIII, 1224-25; XI, 4.)

Plaintiff Hollingworth owns approximately 93-acres of rural property along the Big Sandy River. (I, 51; II, 171; VIII, 1226-27; XI, 6.) The property consists of two parcels: a 71.1-acre parcel in Benton County, and an adjoining 21.4-acre parcel in Henry County. (II, 171; VIII, 1227; XI, 6.) No one resides on the property. (I, 51; VIII, 1168; XI, 6.) The property has a mix of fields, woods, and waters that Mr. Hollingsworth uses for recreational activities, such as hunting, fishing, camping, and farming. (VIII, 1168, 1227; XI, 6.) There is a gate at the entrance to the property, and the gate has a "No Trespassing" sign. (II, 171; VIII, 1168, 1229; XI, 7.)

Mr. Hollingsworth has had a hunting license for most of his life; however, his hunting privileges were suspended in November 2019 for three years. (VIII, 1172, 1227, 1262.)

TWRA's Actions

TWRA officers entered Plaintiffs' properties on numerous occasions during the two-year period between September 2016 and September 2018. Most of these entries, however, involved the investigation of

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property on Lower Big Sandy River Road. (VIII, 1223; XI, 4.) The only way to access the hunting club's property is by using the gravel path that runs through Mr. Rainwaters' property. (VIII, 1223-24; XI, 4.)

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federal wildlife violations and/or occurred in conjunction with then-active federal investigations by the U.S. Fish and Wildlife Service.

TWRA officers entered Plaintiffs' properties relying solely on their state-law authority on four occasions: December 21, 2016, and November 7, November 14, and December 10, 2017. (VIII, 1150.) TWRA officers did not have Plaintiffs' consent or a warrant for any of these entries. (VIII, 1247-48, 1253-54.) When TWRA officers enter property pursuant to their authority under state law, specifically, Tenn. Code Ann. § 70-6-101[7] and § 70-1-305, they are in areas where hunting activity is currently taking place or in areas where it appears hunting activity has occurred in the past. (IV, 576-78; VII, 1043; VIII, 1115-17, 1173-74.)

Entries on Plaintiffs' properties by TWRA officers as part of federal investigations occurred on September 1, 2016; September 1, November 15, November 20, November 24, November 30, December 12, December 15, December 21, and December 24, 2017; and January 5, January 10,[8]

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[7] Tennessee Code Annotated § 70-6-101(a) provides in part:

> The executive director or the officers of the wildlife resources agency, or officers of any other state or of the federal government who are full-time wildlife enforcement personnel designated by the executive director, shall enforce all laws now enacted or that may hereafter be enacted for the propagation and preservation of all wildlife in this state, and shall prosecute all persons, firms and corporations who violate any of such laws.

[8] Plaintiffs alleged that this January 10, 2018 entry occurred on March 7, 2018, based on a photograph produced by Defendants in discovery; although the photograph is labeled "3-7-2018," the file properties indicate the photograph was taken January 10, 2018. (I, 121; VIII, 1266.)

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and September 2, 2018. (I, 117-21; IV, 515, 547-48; V, 650-51, 715-16, 721-22, 752-55, 757-58; VI, 815-17; VII, 1007-21, 1047-50; VII, Ex. H DEF000173, DEF000174; IX, 1299.)[9] When making *these* entries, TWRA officers were acting as agents of the U.S. Fish and Wildlife Service—pursuant to the Memorandum of Agreement between the TWRA and the U.S. Fish and Wildlife Service—and not pursuant to their authority under Tenn. Code Ann. §§ 70-1-305 and 70-6-101. (VII, 1047-50.)

Cameras were placed on Plaintiffs' properties as part of these federal investigations. In November 2017, Defendant Kevin Hoofman, an officer with the TWRA, assisted the U.S. Fish and Wildlife Service with investigations pertaining to hunting violations under the Migratory Bird Treaty Act; these investigations involved Plaintiff Hollingsworth's 93-acre parcel and the 20-acre parcel Plaintiff Rainwaters leases from the Sandy River Hunting Club. (VII, 1007-21, 1047-50; VIII, 1170.) While assisting with these investigations, Defendant Hoofman was acting as an agent of the U.S. Fish and Wildlife Service pursuant to his federal commission resulting from the Memorandum of Agreement between the TWRA and the U.S. Fish and Wildlife Service. (VII, 1047-50.) Cameras owned by the U.S. Fish and Wildlife Services were installed on these properties in conjunction with the investigation by the U.S. Fish and Wildlife Services. (VII, 1007-21, 1047-50; VIII, 1168-70; XI, 5, 8.)

No cameras have been placed on property owned by Plaintiff Hollingsworth since November 30, 2017, and no cameras have been

[9] Officers also did not have Plaintiffs' consent or a warrant for any of these entries. (VIII, 1247-48, 1253-54.)

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placed on property owned by Plaintiff Rainwaters since December 2017. (VIII, 1171; XI, 5, 8.) It is the practice of the TWRA to place trail cameras on private property only when requested by the landowner or when assisting the U.S. Fish and Wildlife Services with a federal investigation. (VIII, 1172-73; XI, 11.)

STANDARD OF REVIEW

When analyzing the constitutionality of a statute, this Court reviews the issue *de novo* with no presumption of correctness. *Hughes v. Tennessee Bd. of Prob. & Parole*, 514 S.W.3d 707, 712 (Tenn. 2017). When a court considers a constitutional challenge, it "begins with the presumption that an act of the General Assembly is constitutional." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009) (internal quotation marks omitted); *see Vogel v. Wells Fargo Guard Servs.*, 937 S.W.2d 856, 858 (Tenn. 1996). The Tennessee Supreme Court has stated that "[its] charge is to uphold the constitutionality of a statute wherever possible." *Waters*, 291 S.W.3d at 882. A court must "indulge every presumption and resolve every doubt in favor of the statute's constitutionality." *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003).

A trial court's ruling on a motion to dismiss and motion for summary judgment is also reviewed de novo with no presumption of correctness. *Jones v. Allman*, 588 S.W.3d 649, 654 (Tenn. Ct. App. 2019); *Woodruff by and through Cockrell v. Walker*, 542 S.W.3d 486 (Tenn. Ct. App. 2017). A motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6) challenges only the legal sufficiency of the complaint—not the strength of the plaintiff's proof. *Crews v. Buckman Labs. Int'l, Inc.,* 78 S.W.3d 852, 857 (Tenn. 2002). A motion to dismiss should be granted "when it appears

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that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

To prevail on a motion for summary judgment, the moving party who does not bear the burden of production at trial must either (1) affirmatively negate an essential element of the nonmoving party's claim, or (2) show that the nonmoving party cannot prove an essential element of its claim at trial. *Rye v. Women's Care Ctr. of Memphis*, 477 S.W.3d 235, 264 (Tenn. 2015). If the moving party satisfies its initial burden of production, the burden shifts to the nonmoving party to establish the existence of a disputed, genuine issue of material fact. *Id.* at 265. "The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier or fact to find in favor of the nonmoving party." (*Id.*) Summary judgment should be granted if the nonmoving party's evidence is insufficient to establish a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04.

ARGUMENT

I. No Justiciable Controversy Exists that Would Allow Plaintiffs to Obtain Declaratory Relief.

The trial court incorrectly held that a justiciable controversy exists that would allow Plaintiffs to obtain declaratory relief. (XI, 23-24.) No TWRA officer has entered either Plaintiff's property since September 2018, and Plaintiffs' speculative fear of a future entry does not create a justiciable controversy.

To maintain an action for declaratory judgment, a justiciable controversy must exist. *Parks v. Alexander*, 608 S.W.2d 881, 891-92

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(Tenn. Ct. App. 1980). "If the controversy depends upon a future or contingent event or involves a theoretical or hypothetical set of facts, the controversy is not justiciable under the Tennessee Declaratory Judgments Act." *Id*. at 892. The Declaratory Judgment Act "deals only with present rights that have accrued under presently existing facts. It gives the [c]ourt no power to determine future rights or possible controversies in anticipation of events that may not occur." *West v. Carr*, 370 S.W.2d 469, 475 (Tenn. 1963).

The undisputed facts show that there is no current or continuing controversy—nor was there any extant controversy when Plaintiffs filed this action in April 2020 or when the trial court rendered its decision in March 2022. Defendants acknowledge that TWRA officers entered Plaintiffs' properties relying solely on their state-law authority on four occasions: December 21, 2016, and November 7, November 14, and December 10, 2017. (VIII, 1150.) TWRA officers entered Plaintiffs' properties on other occasions, as part of a federal investigation, but no TWRA officer has entered either Plaintiff's property in this federal capacity since September 2, 2018. (IV, 515, 547-48; V, 650-51, 715-16, 721-22, 752-55, 757-58; VI, 815-17; VII, 1007-21, 1047-50; VII, Ex. H DEF000173, DEF000174; VIII, 1168-71; IX, 1299; XI, 5, 8.) The trial court itself noted that "[t]he undisputed facts demonstrate Defendants have not entered any of [Mr. Rainwaters'] properties since December 10, 2017, or [Mr. Hollingsworth's] properties since September 2, 2018." (XI, 23.)

Plaintiffs' request for a declaratory judgment is based not on an existing controversy but solely on their conjecture that TWRA officers

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may in the *future* enter their property and/or install surveillance cameras on their property. (VIII, 1138, 1151-53; *see also* I, 60-61, 101-04, 117-121.) Plaintiffs contend that they will be harmed "as long as Tenn. Code Ann. § 70-1-305 remains on the books," because TWRA officers continue to enter private property pursuant to their statutory authority under Tenn. Code Ann. § 70-1-305. (VIII, 1152-53.) But this contention is based only on the speculative occurrence of future events.

But the Declaratory Judgment Act does not "enable the courts to . . . make a declaration with regard to a claim which complainant merely fears the defendant may assert in the future." *Third Nat'l Bank v. Carver*, 218 S.W.2d 66, 69 (Tenn. Ct. App. 1948). Because Plaintiffs' notional fears and speculation are insufficient as a matter of law to establish a case or controversy under the Declaratory Judgment Act, summary judgment should have been awarded to Defendants—and denied to Plaintiffs—on this basis alone.

II. Tennessee Code Annotated §§ 70-1-305(1) and (7) Are Not Facially Unconstitutional.

Assuming a justiciable controversy exists, though, the trial court erred in holding that §§ 70-1-305(1) and (7) are facially unconstitutional. (XI, 13-21.) Plaintiffs cannot show, as they must, that there is no set of circumstances in which the statute would be valid.

"The presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute." *Waters v. Farr*, 291 S.W.3d 873, 882 (Tenn. 2009). A facial challenge to a statute is "'the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which

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the [statute] would be valid.'" *Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006).

The trial court held that Tenn. Code Ann. §§ 70-1-305(1) and (7) are facially unconstitutional based on its conclusion that these provisions "authorize unreasonable warrantless searches in violation of Article I, Section 7 of the Tennessee Constitution." (XI, 21.) But even if the court's conclusion were correct, it would not render the statute *facially* unconstitutional. Sections 70-1-305(1) and (7) authorize TWRA officers to "go upon any property . . . posted or otherwise, in the performance of [their duties]." While state-court decisions under article I, section 7, have been "somewhat more restrictive than comparable cases" under the Fourth Amendment, *State v. Lakin*, 588 S.W.2d 544, 548 (Tenn. 1979), the Supreme Court has recognized "that there are indeed areas of land which *in particular circumstances* may be beyond the protection of article I, section 7 of the state constitution." *Id.* In other words, the Supreme Court itself has effectively recognized that "circumstances exist under which [§ 70-1-305], as written, would be valid." *Waters*, 291 S.W.3d at 882. Plaintiffs' facial challenge to §§ 70-1-305(1) and (7), therefore, necessarily fails.

Defendants made this same argument below, but the trial court rejected it, relying on *City of Los Angeles v. Patel*, 576 U.S. 409 (2015), to conclude that the question was instead whether "the challenged statute *implicates* constitutionally protected property." (XI, 18) (emphasis added).) The court's reliance on *Patel*, however, was misplaced.

Patel involved a facial challenge to a municipal ordinance that authorized warrantless searches, and the Court did say, as the trial court

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here noted, that "the proper focus of the constitutional inquiry [in facial challenges] is searches that the law actually authorizes, not those for which it is irrelevant." 576 U.S. at 418. But all the Court meant here was that in determining whether a plaintiff has established that a "law is unconstitutional in all of its applications," a court considers only "actual applications" of the statute—i.e., in the context of a statute authorizing warrantless searches, "searches that the law actually authorizes." *Id.* at 418, 419. Accordingly, the Court in *Patel* did not consider situations in which exigency, a warrant, or consent justified an officer's search, because in those instances the statute at issue "[did] no work." *Id.* at 419.

Here, though, when a TWRA officer "go[es] upon any property" in the performance of his duties, he does so under authority of §§ 70-1-305(1) and (7)—even when the property is beyond the protection of the Tennessee Constitution. It cannot be said that the statute is "irrelevant" or "do[es] no work" in these situations. *Patel*, 576 U.S. at 418-19. Such applications of the statute, therefore, are properly considered in determining that Plaintiffs cannot establish that §§ 70-1-305(1) and (7) are unconstitutional in all applications.

III. TWRA Officers' Entries on Plaintiffs' Properties Were Not Unconstitutional.

Assuming a justiciable controversy exists, the trial court also erred in declaring that the TWRA officers' "searches of Plaintiffs' properties were unconstitutional and unlawful." (XI, 27.) Several reasons support this conclusion, as discussed in more detail below: (1) Sections 70-1-305(1) and (7) are not facially unconstitutional; (2) the properties at issue

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are not constitutionally protected; and (3) any "search" by the TWRA officers was not unreasonable and therefore did not violate Tenn. Const. art. I, § 7.

A. Sections 70-1-305(1) and (7) are not facially unconstitutional.

The trial court's basis for declaring the "searches of Plaintiffs' properties" unconstitutional was its holding that §§ 70-1-305(1) and (7) are facially unconstitutional. *See* XI, 21 ("Because we have already concluded that Tennessee Code Annotated subsections 70-1-305(1) and (7) are facially unconstitutional, we find no reason to examine Plaintiffs' as-applied challenges to those statutory provisions.") In essence, then, the trial court declared that "searches of Plaintiffs' properties" under §§ 70-1-305(1) and (7) were unconstitutional because it had held that *all* entries of property under § 70-1-305(1) and (7) are unconstitutional. As discussed above, though, the court erred in holding the statute facially invalid. Consequently, the court's basis for declaring the entries on Plaintiffs' properties unconstitutional falls away.

B. Plaintiffs' properties are not constitutionally protected.

Although the trial court referred repeatedly to the "searches" of Plaintiffs' properties by TWRA officers, the entries on Plaintiffs' properties were not "searches" at all, because the properties on which the officers entered are not constitutionally protected. As noted above, "there are . . . areas of land which in particular circumstances may be beyond the protection of Article I, section 7 of the state constitution." *Lakin*, 588 S.W.2d at 548. And Plaintiffs' properties fall into this category.

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1. Only four entries on Plaintiffs' properties are at issue.

Not all of Plaintiffs' properties are at issue here, though, because not all entries on Plaintiffs' properties by TWRA officers are at issue. The question is whether *the specific area where an entry occurred* falls within the protections of Tenn. Const. art. I, § 7. *See Lakin*, 588 S.W.2d at 548 ("The application of the 'open fields' doctrine or any other aspect of the law of search and seizure depends upon the facts, not upon neat phrases."). Although TWRA officers entered Plaintiffs' properties on numerous occasions between September 2016 and September 2018, Plaintiffs filed this action to challenge Tenn. Code Ann. § 70-1-305 and alleged searches conducted by TWRA officers under § 70-1-305. (I, 1.) And TWRA officers relied on their authority under § 70-1-305 to enter Plaintiffs' properties on only *four* occasions: December 21, 2016, November 7 and 14, 2017, and December 10, 2017. (VIII, 1150, 1248-49, 1255.)

TWRA's entries—and placement of surveillance cameras—on Plaintiffs' properties on other occasions occurred during and in conjunction with *federal* investigations by the U.S. Fish and Wildlife Service. (I, 117-21; IV, 515, 547-48; V, 650-51, 715-16, 721-22, 752-55, 757-58; VI, 815-17; VII, 1007-21, 1047-50; VII, Ex. H DEF000173, DEF000174; VIII, 1168-70; IX, 1299; XI, 5, 8.) And Defendant Hoofman was specifically acting under his federal delegation pursuant to the Memorandum of Agreement between the TWRA and the U.S. Fish and

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Wildlife Service. (VII, 1047-50.)[10] Since actions taken by TWRA officers as part of federal investigations were not taken pursuant to the authority afforded by § 70-1-305, such actions are not properly at issue here.[11] Indeed, the trial court found that Plaintiffs had standing in this case based solely on "Defendants' entries onto Plaintiffs' properties for the purposes of investigating purely state crimes." (XI, 22.)

[10] As part of the investigation by the U.S. Fish and Wildlife Service, Defendant Hoofman entered the property owned by Plaintiff Hollingsworth on November 30, 2017; December 12, 2017; December 15, 2017; December 21, 2017; December 24, 2017; January 5, 2018; January 10, 2018; and September 2, 2018. (VII, 1007-21, 1047-48; IX, 1299.) As part of the investigation by the U.S. Fish and Wildlife Service, Defendant Hoofman entered property owned by the Sandy River Hunting Club (which Plaintiff Rainwaters contends he leased from the club (II, 155; VIII, 1223; XI, 4)) on November 15 and 24, 2017. (VII, 1049-50.) Defendant Hoofman also entered Plaintiff Hollingsworth's property on September 1 and November 20, 2017, while enforcing laws relating to dove hunting, which can be a violation of both state law and federal law, namely, the Migratory Bird Treaty Act. (IV, 547-58; VI, 815-817; VII 1007-21, 1047.) Defendant Hoofman also entered property owned by Plaintiff Rainwaters on September 1, 2016, while enforcing laws relating to dove hunting. (I, 117-21; IV, 547-58; V, 650-51, 752-55, 757-58.)

[11] Such actions *were* properly at issue in a similar federal action brought by Mr. Hollingsworth. But the federal court ruled that the placement of a surveillance camera on Mr. Hollingsworth's property did not violate the Fourth Amendment to the United States Constitution, because the camera was placed "in what can only be described as 'open field,' an area beyond the scope of the Fourth Amendment's protections." Order, *Hollingsworth v. Tenn. Wildlife Res. Agcy., et al.*, No. 1:18-CV-1233 (W.D. Tenn. Oct. 21, 2019) (ECF 41, Page ID# 130).

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2. The properties entered on those four occasions are not protected.

The areas of land that may be beyond the protection of article I, section 7, include wild or waste lands, areas that are not used in the daily operation of the premises, or other lands that are unoccupied or not in actual possession. *See Lakin*, 588 S.W.2d at 548; *see also Chico v. State*, 394 S.W.2d 648, 651 (Tenn. 1965) ("[W]hen the land on which the evidence is found is not possessed as a part of the curtilage or used in the daily operation of the premises, then the constitutional provision against unreasonable searches and seizures does not apply."); *Welch v. State*, 289 S.W. 510, 510-11 (Tenn. 1926) ("[T]he word 'possessions' . . . refers to property, real or personal, actually possessed or occupied." Actual possession is evidenced by occupation, by substantial enclosure, cultivation, or by appropriate use.).

The properties at issue here—i.e., those entered by TWRA officers on December 21, 2016, November 7 and 14, 2017, and December 10, 2017—fall outside the protection of article I, section 7. Plaintiff Hollingsworth's 93-acre parcel along the Big Sandy River was entered on December 21, 2016; that parcel—which comprises two separate parcels of 71.1 and 21.4 acres, respectively—is unoccupied, unenclosed, and not used in the daily operation of the premises. (VIII, 1150, 1168, 1227, 1255.) The property consists of a mix of fields, woods, and waters that Mr. Hollingsworth uses for recreational activities such as hunting, fishing, camping, and farming. (I, 51; II, 171; VIII, 1168, 1226-27; XI, 6.) No one resides on the property, and although there was a gate with a single "No Trespassing" sign, there is no evidence that the property was

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fenced in any manner or that Mr. Hollingsworth had made any other efforts to occupy the property.[12] (I, 51; II, 171;VIII, 1168, 1229; XI, 6-7; *see also* I, 118-19; VII, Ex. H DEF000014-17 (photos taken on December 21, 2016).) *Cf. State v. Casteel*, No. E1999-00076-CCA-R3-CD, 2001 WL 329538, at *18 (Tenn. Crim. App. Apr. 5, 2001), *perm. app. denied*. (Tenn. Sept. 17, 2001) (concluding that the defendant's property was not "wild and unoccupied" and therefore constitutionally protected, where he had "posted 'No Trespassing' signs around his property" and was "trying to occupy the land and keep strangers from entering the property").

Plaintiff Rainwaters' 123-acre parcel on Harmon Creek Road was entered on November 7, November 14, and December 10, 2017. (I, 117.) Mr. Rainwaters leases this parcel from his brother and uses it for hunting. (VIII, 1223; XI, 4.) This property is also unoccupied and unenclosed; there is a gate at its entrance with a single "No Trespassing" sign (VIII, 1223; XI, 4), but there is no evidence that the property is fenced in any manner or that anyone resides on the property. Photographs taken by Defendant Hoofman while on the property show that he was in an open field and not within any area that was used in the daily operation of the premises. (I, 117; VII, Ex. H DEF000155-168.) *Cf. Welch*, 289 S.W. at 10 (concluding that constitutional protection applied to a one-acre lot that was entirely enclosed with a wire fence and in daily use by the owner); *cf. also Lakin*, 588 S.W.2d at 547-49 (concluding that

[12] There is no evidence that TWRA officers ever opened the gate to gain entry to Mr. Hollingsworth's property. Defendant Hoofman testified that the gate was open when he accessed the property. (V, 644-45.)

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constitutional protection applied to area of property where marijuana was found; though it was outside the curtilage of a home, the area was near a barn and garden that were in apparent regular use by the occupant).

C. Any "search" of Plaintiffs' properties was reasonable and therefore not unconstitutional.

Even if Plaintiffs properties fall under the protection of Tenn. Const. art. I, § 7, TWRA's entries on those properties were still not unconstitutional. The Tennessee Constitution, in article I, section 7, protects against "*unreasonable* searches and seizures." *See Lakin*, 588 S.W.2d at 548 (emphasis added). "In the end," therefore, "under both state and federal constitutions, the issue in each case is whether or not a particular search or seizure was reasonable under all the facts and circumstances." *Id.* Here, any "search" of Plaintiffs' properties by a TWRA officer was reasonable; Plaintiffs had a statutory duty to submit to inspection when participating in hunting and fishing activities in the State. (V, 774, 780-82, 863-65.)

The State is the sole owner and title holder of wildlife within its boundaries, *see* Tenn. Code Ann. § 70-4-101(a); *Acklen v. Thompson*, 126 S.W. 730 (Tenn. 1909), and the General Assembly has authority to enact laws for the protection and preservation of wildlife within the State. Tenn. Const. art. XI, § 13. The TWRA was created for the management, protection, propagation, and conservation of wildlife within the State, *see* Tenn. Code Ann. § 70-1-301, and Tenn. Code Ann. §§ 70-1-305(1) and (7) give TWRA officers authority "to go upon any property, outside of buildings, posted or otherwise," to enforce all laws relating the wildlife.

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Meanwhile, individuals are generally required to obtain a license to hunt, chase, trap, kill, or take any form of wildlife in the open season. *See* Tenn. Code Ann. § 70-2-101.[13] "It is the duty of every person participating in the privileges in taking or possessing such wildlife . . . to permit the executive director or officers of the [TWRA] to ascertain whether the requirements of [Title 70, pertaining to wildlife laws] are being faithfully complied with, including the possession of a proper license." Tenn. Code Ann. § 70-6-101(b)(1).

Both Plaintiffs here have "participat[ed] in the privileges of taking or possessing . . . wildlife" in the State. *Id.* Mr. Rainwaters uses his properties for hunting, including the 123-acre parcel at issue here. (I, 49, VIII, 1220-21, 1223-24; XI, 4.) Mr. Hollingsworth uses his property for hunting and fishing, among other activities. (XI, 6.) Indeed, each Plaintiff has sought and obtained a hunting license in the past. (VIII, 1224-25, 1227.) So the properties in question are the properties of individuals who have voluntarily subjected themselves to regulation and inspection by the TWRA. And TWRA officers enter private property under their statutory authority to do so only when and if they believe hunting activities are currently taking place or have taken place on the property in the past. (IV, 576-78; VII, 1043; VIII, 1115-17, 1173-74.). Any "search" of Plaintiffs properties under these circumstances and for these purposes was therefore reasonable. *See Cason v. State Dept. of Wildlife and Fisheries*, 16 So.3d 598, 603 (La. Ct. App. 2009) (concluding, where

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[13] Narrow exceptions to the licensure requirement, not applicable here, are contained in Tenn. Code Ann. §§ 70-2-103 and 70-2-204.

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property owner fished and hunted on his property, "it is entirely reasonable . . . that the [State Department of Wildlife and Fisheries'] agents should have authority to enter onto his land to ensure that the laws of this state were being complied with").

IV. The Award of Nominal Damages Is Barred by Sovereign Immunity.

For all the reasons discussed above, the trial court erred in denying Defendants summary judgment and in awarding summary judgment to Plaintiffs. But even if this Court were to disagree, it should at least reverse the trial court's award of nominal damages against Defendant Ed Carter (XI, 27-28), as such an award is barred by sovereign immunity.

The Tennessee Constitution grants immunity to the State 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." Tenn. Const. art. I, § 17. Tennessee courts have long interpreted article I, section 17 as the "doctrine of sovereign immunity, under which no suit may be maintained against the State absent express authorization from the Legislature." *Williams v. Nicely*, 230 S.W.3d 385, 388 (Tenn. Ct. App. 2007)(citing *Coffman v. City of Pulaski*, 422 S.W.2d 429, 431 (Tenn. 1967)).

The Legislature codified the doctrine of sovereign immunity by directing that:

> [n]o court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the state acting by authority of the state with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion,

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> pleas or demurrer of the law officer of the state, or counsel employed for the state.

Tenn. Code Ann. § 20-13-102(a). Since sovereign immunity is both constitutionally and statutorily based, "[i]t is not within the power of the courts to amend it." *Farmer v. Tennessee Dept. of Safety*, 228 S.W.3d 96, 100 (Tenn. Ct. App. 2007) (citing *Jones v. The L&N R.R.*, 617 S.W.2d 164, 170 (Tenn. Ct. App. 1981)). Thus, the State can only be subject to suit in those instances where a statute clearly and specifically waives sovereign immunity. *See Webster v. Board of Regents*, 902 S.W.2d 412, 415 (Tenn. Ct. App. 1995).

In *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008), the Supreme Court held that sovereign immunity does not bar an action *for declaratory or injunctive relief* against state officials, in their individual capacity, to prevent the enforcement of an unconstitutional statute. 263 S.W.3d at 853-54. This does not mean, though, that the Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101, *et seq.*, contains an explicit waiver of sovereign immunity. *Id.* at 853. Thus, an action for damages—even nominal damages—remains barred by sovereign immunity.

Defendant Carter moved to dismiss any claims for money damages. (XII, 1, 11.) But the trial court, citing *Carey v. Piphus*, 435 U.S. 247, 266 (1978), found that "an award of $1 in nominal damages is a 'proper' remedy for past constitutional violations. (XII, 36). The trial court further stated:

> the Declaratory Judgment Act allows the Court to declare that Defendant Carter violated Plaintiffs' rights and to grant '[f]urther relief . . . [if] necessary or proper.' Tenn. Code Ann.

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> § 29-14-110(a). That 'further relief . . . may include the award of damages.' *Paduch v. Johnson City*, 896 S.W.2d 767, 771 (Tenn. 1995).

(XII, 36.)

The two cases relied upon by the trial court in denying the motion to dismiss Plaintiffs' claim for nominal damages do not address whether nominal damages can be awarded against the State or its employees under the Declaratory Judgment Act. *Paduch v. Johnson City,* 896 S.W.2d 767 (Tenn. 1995), involved an action against a city under the Declaratory Judgment Act in which the Supreme Court reversed the judgment awarding damages against the city because the city retained immunity for money damages under the Governmental Tort Liability Act. 896 S.W.2d at 771-73. And *Carey v. Piphus*, 435 U.S. 247 (1978), involved the imposition of nominal damages in a federal civil-rights action under 42 U.S.C. § 1983.

By contrast, *Colonial Pipeline* expressly held that a court may issue "declaratory and injunctive relief against [state officials] in their individual capacity, so long as the court's judgment is tailored to prevent the implementation of unconstitutional legislation and *does not 'reach the state, its treasury, funds, or property*.'" 263 S.W.3d at 583 (internal citations omitted)(emphasis added). Since Defendant Carter was sued as the then-executive director of the TWRA, the award of nominal damages against him reaches "the state, its treasury, funds, or property"; accordingly, the award of damages is barred by sovereign immunity.

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CONCLUSION

For the reasons stated, the judgment of the circuit court should be reversed and the case remanded with instructions to award summary judgment to the Defendants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing document complies with the word limit of Tenn. Sup. Ct. R. 46, Section 3.02. Based upon the word count of the word processing system used to prepare this brief, the word count is 6,378.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2022, a true and exact copy of the foregoing was served via the court's electronic filing system and forwarded by U.S. Mail to:

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