

**Dated: December 19, 2024**  
**The following is ORDERED:**



*Jennie D. Latta*

**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re  
WILLIAM H. THOMAS, JR.,  
Debtor.

Case No. 16-27850-L  
Chapter 11

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MICHAEL E. COLLINS, TRUSTEE,  
and TI PROPERTIES, LLC,  
Plaintiffs,

v.  
SHELBY COUNTY, TENNESSEE  
and the STATE OF TENNESSEE,  
Defendants.

Adv. Proc. No. 23-00095  
Motion for Summary Judgment and  
Motion to Dismiss [ECF Nos. 29 and 40]

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**MEMORANDUM OPINION**

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BEFORE THE COURT are the Motion for Summary Judgment filed by Plaintiffs Michael E. Collins, Chapter 11 Trustee (the “Trustee”) and TI Properties, LLC (“TI”) (collectively “Plaintiffs”) and the Motion to Dismiss filed Defendants Shelby County, Tennessee and the State of Tennessee (collectively “Defendants”). [ECF Nos. 29 and 40]. The Trustee argues under a number of theories that Plaintiffs have or should have an easement allowing ingress and egress to

a tract of land described in the amended complaint upon which a billboard, the Dr. Harris Billboard, is located. The Defendants argue that the amended complaint should be dismissed because the Plaintiffs are not entitled to a prescriptive easement under either Tennessee statutory law or common law. The Defendants further argue that the lack of access from a public highway or street other than a U.S. Interstate Highway to the tract makes the Dr. Harris Billboard an unlawful use of property. Thus, the Defendants argue that the amended complaint should be dismissed for failure to state a claim upon which relief can be granted.

### **PROCEDURAL BACKGROUND**

1. On June 2, 2016, (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101 to 1532, et seq. (the “Bankruptcy Code”), in the United States Bankruptcy Court for the Northern District of Florida. The case was transferred to the United States Bankruptcy Court for the Western District of Tennessee on August 29, 2016, assigned case number 16-27850, and assigned to Chief Bankruptcy Judge David S. Kennedy (the “Debtor’s Case”).

2. On January 23, 2019, the United States Trustee moved to appoint Michael E. Collins as the Trustee pursuant to the *United States Trustee’s Application for Order Approving Appointment of Chapter 11 Trustee* (the “Appointment Application”). The Appointment Application was approved January 25, 2019.

3. On January 14, 2020, the Debtor’s Case was reassigned to Bankruptcy Judge Jennie D. Latta.

4. On February 9, 2021, Creditor Lynn Schadt Thomas gave notice that the Debtor had died.

5. On July 27, 2023, Plaintiffs filed a complaint against the Defendants, initiating this Adversary Proceeding, reflecting Adversary Proceeding Number 23-00095.

6. On August 4, 2023, Plaintiffs filed an amended complaint [ECF No. 2]. The amended complaint requested: (a) a declaration that Plaintiffs have a statutory right to an easement or right of way condemned and set aside across the Shelby County and State of Tennessee properties described in the amended complaint for the benefit of free ingress and egress to the tract upon which the Dr. Harris Billboard is located; (b) a declaration that Plaintiffs have a common law prescriptive easement right to freely use and cross the Shelby County and State of Tennessee properties described in the amended complaint by way of an access road described in the amended complaint for the benefit of free ingress and egress to the tract upon which the Dr. Harris Billboard is located; (c) that judgment be entered requiring Shelby County and State of Tennessee to deliver and turnover to the Trustee an easement by way of the Access Road for the benefit of free ingress and egress to the Tract upon which the Dr. Harris Billboard is located, which is property of the bankruptcy estate that shall be delivered to the Trustee by law; (d) that a temporary restraining order be issued restraining and prohibiting the Defendants from (i) denying access across the state property and across and along the Greenline so that Plaintiffs and Dr. Harris may utilize the access road for purposes of accessing the tract and operating and maintaining the billboard and (ii) interfering with Plaintiffs' contractual rights under a lease by ceasing Defendants' interference with Plaintiffs' rights to utilize the access road to obtain access to the tract in order to operate and maintain the billboard; (e) that a hearing be set on the motion for temporary injunction for the purpose of continuing in effect the relief prayed for in the motion for temporary restraining order; (f) that a permanent injunction be entered making the relief granted by the temporary injunction permanent, subject to such conditions as the Court otherwise deems appropriate; and (g) related

relief. On September 11, 2023, Defendant Shelby County filed an answer to the amended complaint. [ECF No. 9].

7. On January 26, 2024, the Trustee filed a motion for preliminary injunction and memorandum of law in support. [ECF No. 16].

8. On February 28, 2024, the Court entered an order granting the Trustee's motion for preliminary injunction. A Revised Consent Order on Motion for Temporary Injunction was entered on June 25, 2024, permitting access to the Tract by way of the Greenline. [ECF No. 23].

9. On August 19, 2024, the Plaintiffs filed their Motion for Summary Judgment and Memorandum in Support. [ECF Nos. 29 and 30]

10. On September 23, 2004, Defendant Shelby County filed its Motion to Dismiss Adversary Proceeding, supported by the Affidavits of Bill Gloss, Rita Anderson, and Alexander K. Seaton. [ECF Nos. 40, 44-46].

11. Although summons was served upon Defendant State of Tennessee on August 7, 2023, it has neither answered nor otherwise responded to the Amended Complaint. [ECF No. 6].

### **STIPULATED FACTS**

Both the Plaintiffs and Defendant Shelby County, Tennessee, have submitted statements of undisputed facts. The following facts are agreed to by the parties.

1. By quit claim deed dated September 30, 1993 (the "Dr. Harris Deed"), of record in the Office of the Shelby County Tennessee, Register of Deeds at DW7934, Bruce F. Gray, Jr., transferred certain real property (the "Tract") to John W. Harris, Trustee for the J.W. Harris, Jr., D.D.S. Profit Sharing Plan ("Dr. Harris"). The Tract is owned by the J.W. Harris, Jr., D.D.S. Profit Sharing Plan and Dr. Harris remains the trustee of that trust.

2. On July 20, 2004, Outdoor Management, LLC (“OML”), entered into a 40-year lease agreement (the “Lease”) with Dr. Harris, through which Dr. Harris leased to OML a part of the Tract.

3. Subsequently, OML assigned its rights as lessee in the Lease to Scenic Outdoor, LLC, which in turn assigned its rights in the Lease to TI Properties, LLC. Accordingly, TI holds a leasehold interest in the Tract.

4. TI owns and operates a billboard on the Tract (the “Dr. Harris Billboard”). It requires access to the Tract in order to operate and maintain the billboard, but the Dr. Harris Property is landlocked.

5. The Plaintiffs assert that ingress and egress to a public roadway is available by way of a dirt and gravel road (the “Access Road”) running across the property of R&D Ventures, LLC (pursuant to easement) (the “R&D Property”), which borders the Tract on the south, continuing across a parcel owned by the Wolf River Conservancy (formerly owned by the State of Tennessee) and identified as 068001 00005Z by the Shelby County, Tennessee, Assessor of Property (the “Former State Property”), and thence continuing along the same road to a railroad right of way that was owned by CSX Railroad and was subsequently transferred to Shelby County in 2009. The former CSX Railroad property now owned by Shelby County has since been converted to a greenway for the public’s use (the “Greenline”). The Defendants dispute that there is a dirt and gravel access road beyond the Greenline on the Former State Property, the R&D Ventures property, or the Thomas property.

6. The Tract is bordered by the Wolf River to the east, Interstate 40 to the north, and the turning roadway from I-240 to I-40 to the West. The only available public road access to the Tract

is south along the Access Road until it intersects the Greenline, then across the Greenline to Boswell Road.

7. The Access Road was built in approximately 1990 by Randall P. Swaney, while he was general manager of Naegele Outdoor Advertising, Inc. The Access Road begins at the Greenline, crosses the Former State Property, then proceeds north through the R&D Property until it crosses into the Tract. Swaney built the Access Road at that time, pursuant to a lease with the then owner of the R&D Property for the purpose of installing a sign on the Tract. (Although the Defendants do not dispute these facts for purposes of the motion for summary judgment, they object that the statements regarding events 34 years ago are not supported by a citation to the record or competent evidence.)

8. Ultimately a sign was not built at that time because of regulatory zoning issues. (The Defendants have the same objection as to the lack of citation to the record or competent evidence to support this statement.)

9. By Quitclaim Deed dated August 11, 2009, and filed of record in the Shelby County Register of Deeds with filing number 09097184 (the “Greenline Contract”), Shelby County acquired the Greenline property from CSX Railroad. The Greenline Deed expressly reserves an easement over the Greenline to provide access to two different billboards that are on the Greenline. The Defendants add that neither of these billboards with legitimate Greenline right-of-way access or their owner is involved this adversary proceeding.

10. The State of Tennessee is the owner of the State property, which is bordered by the Greenline to the south, the R&D Property to the north, I-240 to the west, and the Wolf River to the east. The Plaintiffs assert that the Access Road crosses directly across the State Property. The Defendants deny that there is a dirt and gravel access road across the State Property.

11. On or about 2005, William H. Thomas, Jr., who at that time owned the R&D Property, advised Dr. Harris that he would not allow access to the Tract over the R&D Property. Dr. Harris thereafter filed in the Chancery Court for the 34th Judicial District at Memphis, Tennessee, a Complaint for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction (the “2005 Complaint”) against William H. Thomas, Jr., seeking, in addition to injunctive relief, statutory access to the Tract over the R&D Property pursuant to Tennessee Code Annotated § 54-14-101, et seq., instituting case number 05-0520 (the “2005 Case”). By Consent Order dated May 27, 2011, entered in the 2005 Case (the “Consent Order”), an easement was granted allowing permanent ingress and egress over the R&D Property to Dr. Harris to access the Tract.

12. The Greenline is currently held as a public right of way that is open to the public.

13. By letter dated January 27, 2023, Shelby County advised Dr. Harris and TI to cease and desist using the Greenline to access the Tract (the “Cease and Desist Letter”).

14. By virtue of the bankruptcy estate’s 100% ownership of TI Properties, and TI Properties’ ownership of the Billboard, the bankruptcy estate has an interest in the Billboard that is property of the bankruptcy estate pursuant to 11 U.S.C. § 541.

### **JURISDICTION AND AUTHORITY**

Jurisdiction over an adversary proceeding related to a Bankruptcy Case lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The parties agree that this adversary proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(O) because it directly

affects the liquidation of assets of the estate. Amended Complaint, ¶ 8; Answer, ¶ 8. [ECF Nos. 2 and 9]. Therefore, the bankruptcy court has authority to enter a final order in this adversary proceeding subject only to appellate review. *See* 28 U.S.C. § 157(b)(1). Venue of this adversary proceeding is proper to the Western District of Tennessee because this matter is related to a bankruptcy case pending in this district. *See* 28 U.S.C. §1409(a).

### **THE MOTION TO DISMISS**

Defendant Shelby County asks that the amended complaint be dismissed pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure which incorporates Rule 12 of the Federal Rules of Civil Procedure. Rule 12(b)(6) permits the Court to dismiss a complaint that fails to state a claim upon which relief can be granted. The motion, however, must be made before pleading if a responsive pleading is allowed. Defendant Shelby County filed its answer before it filed its Motion to Dismiss. Moreover, it included with its Motion to Dismiss three affidavits in support of its motion. When matters are presented outside of the pleadings, a motion to dismiss must be treated as a motion for summary judgment. Rule 12(d). The parties have been given a reasonable opportunity to respond to all issues raised in the Motion to Dismiss. Accordingly, the Court will treat it as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

### **STANDARD FOR CONSIDERING MOTIONS FOR SUMMARY JUDGMENT**

Federal Rule of Civil Procedure 56 made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056 provides that summary judgment is appropriate if the movant can show that there is no genuine dispute as to any material fact and thus, the movant is entitled to judgment as a matter of law. Substantive law will identify which facts are material and a genuine issue of material fact exists only when, “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249,



106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but to determine whether a genuine issue for trial exists. *Id.* In reaching its decision, the court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of proof that there are no genuine issues that might affect the outcome of the action under governing law. *In re Oliver*, 414 B.R. 361, 367 (Bankr. E.D. Tenn. 2009), citing, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 126 S. Ct. 2505, 2510 (1986); *Owens Corning v. Nat'l Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). In order to survive summary judgment, the non-movant must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, “[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50, 106 S. Ct. 2505; *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475-76 (6th Cir. 2010). Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment. *Id.*; *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007).

This case presents cross motions for summary judgment. Each party is charged with proving entitlement to summary judgment and that there is no material fact in dispute. The presence of the cross motions does not mean that there is no genuine issue of material fact nor obligate the Court to render summary judgment. The Court must examine each motion separately in accordance with the above standards and determine that no issue of material fact exists. *Followell v. United States (In re Gurley)*, 335 B.R. 389, 393 (Bankr. W.D. Tenn. 2005), citing,

*Colonial Pacific Leasing v. Nancy Mayerson (In re Mayerson)*, 254 B.R. 407, 411 (Bankr. N.D. Ohio 2000). When cross motions for summary judgment are filed, the court must consider each motion in turn to determine whether it may be granted. *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003); *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

### **THE COUNTY’S MOTION TO DISMISS**

Although filed later in time, the Court will take up the County’s Motion to Dismiss first. The County argues that sovereign immunity bars a statutory easement or prescriptive easement across municipal land. Further, the County argues that the lack of legal access from a public highway or street other than a U.S. Interstate Highway renders the Dr. Harris Billboard an unlawful use of property. Therefore, it states that the complaint should be dismissed.

In support of its arguments, the County relies upon Tennessee Code Annotated § 54-14-101, et seq., and *Bratcher v. Hubler*, 508 S.W.3d 206 (Tenn. Ct. App. 2015). Prior to its repeal, section 54-14-102:

(a) Any person owning any lands, ingress or egress to and from which is cut off or obstructed entirely from a public road or highway by the intervening lands of another, or who has no adequate and convenient outlet from the lands to a public road in the state, by reason of the intervening lands of another, is given the right to have an easement or right-of-way condemned and set aside for the benefit of the lands over and across the intervening lands or property.

Tenn. Code Ann. § 54-14-102(a), repealed by 2020 Pub. Acts, c. 703, § 2, eff. June 22, 2020. In *Bratcher* the court of appeals was asked to determine whether either the State of Tennessee or a local governmental entity is subject to suit under section 54-14-102 or is immune under principles of sovereign immunity. The court held that the state and town of Smyrna, Tennessee, were immune from suit under section 54-14-102 because that section did not contain an explicit waiver of immunity. *Bratcher*, 508 S.W.3d at 320. The court did not hold, as the County suggests in its

Memorandum, “that sovereign immunity bars a statutory easement across municipal land,” as if no waiver were possible. *See* Memorandum in Support of Motion to Dismiss, p. 5. [ECF No. 48].

Subsequent to the decision in *Bratcher* two things happened. First, section 54-14-102 was repealed and replaced with the following:

(a)(1) A person owning any land, where ingress or egress to and from which is cut off or obstructed entirely from a public road or highway by the intervening land of another, or who has no outlet from the land to a public road in the state, by reason of the intervening land of another, is given the right to have a private easement or right-of-way not exceeding twenty-five feet (25') condemned and set aside for the benefit of the land over and across the intervening land for the purpose of ingress and egress and extending utility lines, including, but not limited to, electric, natural gas, water, sewage, telephone, or cable television to the enclosed land. Maintenance of the easement or right-of-way shall be the responsibility of the person granted the easement or right-of-way. Gates or fencing that restricts access to the subservient land may not be erected. In counties with a metropolitan form of government, the maximum permissible width for an easement or right-of-way is fifteen feet (15').

Tenn. Code Ann. § 54-14-102 (West) (effective April 8, 2022). Second, Tennessee Code Annotated § 1-3-121 was enacted, which provides,

Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Tenn. Code Ann. § 1-3-121 (West) (effective April 2, 2018). The Tennessee Supreme Court held that this section “waives sovereign immunity for causes of action seeking ‘declaratory or injunctive relief ... regarding the legality or constitutionality of a governmental action.’” *Recipient of Final Expunction Order in McNairy County Circuit Court Case No. 3279 v. Rausch*, 645 S.W.3d 160, 169 (Tenn. 2022). The refusal of the State and County to provide access to the Tract for the maintenance of the Dr. Harris Billboard constitutes government action. *Id.* At 168. The Plaintiffs seek declaratory and injunctive relief concerning the legality of this governmental action.

Moreover, section 106(a)(1) of the United States Bankruptcy Code provides a broad abrogation of sovereign immunity with respect to numerous sections of the Bankruptcy Code, including section 542, which the Plaintiffs rely on, and section 106(a)(3) permits the court to issue an order, process, or judgments against a governmental unit under such sections. 11 U.S.C. §§ 106(a)(1) and (3). “Governmental unit” under the Bankruptcy Code means “United States; State; Commonwealth; District; Territory; municipality.... 11 U.S.C. § 101(27). Both the State of Tennessee (a named defendant that has not responded to the amended complaint) and the County are governmental units under the Bankruptcy Code and thus subject to the abrogation of sovereign immunity contained in section 106(a)(1).

The United States Supreme Court most recently addressed the breadth of the abrogation of sovereign immunity in bankruptcy cases in *Central Virginia Community College v. Katz*, 546 U.S. 356, 126 S. Ct. 990 (2006) in which the court said that the Bankruptcy Clause of the U.S. Constitution (Article I, § 8, cl. 4) “ was intended not just as a grant of legislative authority to Congress, but also to authorize a limited subordination of state sovereign immunity in the bankruptcy arena.” *Katz*, 546 U.S. at 363. In fact, the court says, “[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.” *Id.* at 378.

Count II of the amended complaint asserts that the bankruptcy estate is entitled to condemnation of an easement over the State Property and the Greenline to access the Dr. Harris Billboard on the Tract, and that such easement is property of the bankruptcy estate. The Plaintiffs further assert that as a result of that right, the easement is an interest in real property that may be used, sold, or leased by the Trustee pursuant to 11 U.S.C. § 363, and that as such, the Defendants

are in custody and control of property that should be delivered to the Trustee pursuant to section 542 of the Bankruptcy Code.

Count I of the amended complaint asks for a declaration that the Plaintiffs are entitled to a statutory and/or common law easement across the State Property and the Greenline while Count III asks that the Defendants be permanently enjoined from denying the Plaintiffs access across the State Property and across and along the Greenline to access the Tract and maintain the Dr. Harris Billboard.

The County counters that section 106(a)(5) explicitly states that section 106 does not create any substantive claim for relief or cause of action not otherwise existing under ... nonbankruptcy law. 11 U.S.C. § 106(a)(5). The Plaintiffs respond that the cause of action they rely on *does* exist under state law, specifically section 54-14-102. The Plaintiffs assert that they are not relying on any cause of action created by the bankruptcy laws but rather invoke the bankruptcy laws to enforce the rights established by state law which became property of the bankruptcy estate when the petition in the underlying bankruptcy case was filed. *See* 11 U.S.C. § 541(a)(1) (“The commencement of a case under section 301, 302, and 303 of this title creates an estate. Such estate is comprised of [all legal and equitable interests of the debtor in property as of the commencement of the case], wherever located and by whomever held.”).

There is no question that section 106(a) of the Bankruptcy Code abrogates sovereign immunity with respect to sections 105 and 542, the sections relied upon by the Plaintiffs. The County recognizes this in its Reply: “The Trustee is correct that both 11 U.S.C. § 106 and Tenn. Code Ann. § 1-3-121 remove governments’ sovereign immunity.” Reply of Shelby County on Motion to Dismiss, p. 1. The County now argues for the first time that the abrogation or waiver of sovereign immunity is limited to *in personam jurisdiction* over governmental entities. Because the

County has conceded to the Plaintiffs' position concerning the abrogation of sovereign immunity by section 106 of the Bankruptcy Code and the waiver of sovereign immunity by section 1-3-121 of the Tennessee Code, and because Plaintiffs were not given an opportunity to respond to the new issue raised by the County for the first time in its Reply, the Motion to Dismiss should be DENIED.

### **THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Based upon the facts set forth in its Statement of Undisputed Facts, the Plaintiffs move for summary judgment as to all counts of the amended complaint. They seek a declaration that they hold both a statutory and a common law right of easement to freely use and cross the Shelby County and State of Tennessee properties by way of the Access Road to reach the Tract upon which the Dr. Harris Billboard is located. The Trustee seeks an order requiring the Defendants to deliver to him the easement over the Greenline and the State Property as required by Tennessee Code Annotated § 54-14-102(a) (West 2024). The Plaintiffs also seek a permanent injunction restraining and prohibiting the Defendants from denying them access across the State Property and across and along the Greenline for the purpose of accessing the Tract and maintaining the Dr. Harris Billboard that is on the Tract. *See* Plaintiffs' Motion for Summary Judgment; Amended Complaint, pp. 9-13. [ECF No. 29; ECF No. 2].

The County opposes the motion for summary judgment for three reasons. First, it argues that the Plaintiffs have failed to meet the evidentiary standard required by Rule 56. Second, it argues that there are four material facts in dispute. Third, it argues that the Plaintiffs' asserted right to an easement was not established at the commencement of the bankruptcy case and thus does not constitute property of the bankruptcy estate subject to turnover pursuant to section 542(a) of the Bankruptcy Code. Because the Court concludes that there are disputed issues of material fact, it will not address the third argument raised by the County.

The Court notes at the outset that the State of Tennessee has not responded to the Amended Complaint. Although service appears to have been achieved over the State, no request for entry of default or of judgment by default has been made by the Plaintiffs with respect to the State of Tennessee. The Court can only address the issues raised in the Motion for Summary Judgment regarding the County, which is the owner of the Greenline.

#### **A. The Record is Adequate**

The County argues that the Trustee's affidavit fails to meet the evidentiary standard of Rule 56 because it is not based on personal knowledge. The Court has reviewed the affidavit of the Trustee. It declares that it is made upon personal knowledge and consists almost entirely of citations to the record in this adversary proceeding and underlying bankruptcy case and to documents which are attached as exhibits to the affidavit. The primary exception to this description is paragraph 8 concerning the construction of a dirt and gravel access road by Randall P. Swaney. In order to support his statement concerning the construction of the access road (about which the Trustee apparently has no personal knowledge), the Trustee relies upon an inference to be drawn from the fact that the County issued a building permit in 2004 allowing construction of the Dr. Harris Billboard. The Trustee states that "[i]n order to receive the 2004 Permit to construct the Dr. Harris Billboard on the Tract from Shelby County, the Debtor had to show Shelby County that lawful access to the Dr. Harris Billboard existed across the CSX property (now the Greenline) and over the Access Road. This condition precedent's acceptance by Shelby County is demonstrated by the issuance of the 2004 Permit." Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment in Favor of Plaintiffs, Ex. 1, ¶ 8. [ECF No. 30]. The Building Permit, which appears as Exhibit 5 to the Plaintiffs' Memorandum of Law, is silent with respect to the access road. If there is a material dispute concerning the existence of the Access Road, it must be

submitted to the trier of fact for decision. Otherwise, the Declaration of the Trustee is based upon personal knowledge and/or public documents to which he has access and property properly supports the Motion for Summary Judgment.

### **B. There Are Disputed Material Facts**

The County asserts that there are disputes concerning four material facts necessary to the determination of the Motion for Summary Judgment.

First, the County asserts that there is a material factual dispute about whether it agreed to allow the Debtor to traverse the Greenline right-of-way to build and maintain his billboard. There is no evidence in the record that the County entered into such an agreement. The Consent Order entered in the Chancery Court concerns the condemnation of an easement across property owned by Mr. Thomas, the debtor in the underlying bankruptcy case. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment in Favor of Plaintiffs, Ex. 3. [ECF No. 30]. According to the Plaintiffs, that property, which borders the Tract on the south, is the same property identified in the Amended Complaint as the R&D Property. The County agrees that the R&D Property was formerly owned by Mr. Thomas and was the subject of litigation in the Chancery Court. *See* Response to Trustee's Statement of Undisputed Material Facts and Shelby County's Statement of Undisputed Material Facts, ¶ 21. [ECF No. 50]. The fact that an easement was condemned across the R&D Property for the benefit of the Tract does not, however, address the presence of an easement across what is now known as the Greenline.

Second, the County asserts that there is a dispute about whether the Debtor used the access in good faith or was a trespasser (and whether the Estate remains so). The Plaintiffs assert in the Amended Complaint that in meetings with Shelby County officials in 2004, Outdoor Management, LLC ("OML"), which was the lessee of the Tract, asserted that access to the Tract would be across



the R&D Property and that access for both the Tract and the R&D Property would be obtained across the CSX Parcel (not the Greenline) to Boswell Street in Memphis. The Amended Complaint further asserts that as a result of these meetings, the Memphis and Shelby County Office of Construction Code Enforcement approved the application for a permit for the erection of the Dr. Harris Billboard on the Tract. The Amended Complaint also asserts that “[t]he permit was granted with the understanding that access to the Dr. Harris Billboard was to be accomplished over the CSX Railroad property.” Amended Complaint, ¶ 20. [ECF No. 2]. The Declaration of the Trustee contains a slightly different assertion. The Trustee states:

In order to receive the 2004 Permit to construct the Dr. Harris Billboard on the Tract from Shelby County, the Debtor had to show Shelby County that lawful access to the Dr. Harris Billboard existed across the CSX property (now the Greenline) and over the Access Road. This condition precedent’s acceptance by Shelby County is demonstrated by the issuance of the 2004 Permit.

Declaration of Trustee, Ex. 1, ¶ 8. [ECF No. 30]. Neither of these assertions amounts to the positive statement that an easement was obtained across the CSX Property, now the Greenline.

The County has submitted the Affidavit of Alexander F. Seaton, a third-year law student who took photos of the current condition of the Access Road. The photographs show the end of an asphalt road and the beginning of an overgrown path. [ECF No. 46]. The photographs also show damage to a fence at or near the beginning of the overgrown path. Mr. Seaton attributes this damage to Mr. Thomas, but the Plaintiffs correctly assert that he could have no personal knowledge of the cause of the damage to the fence.

The County has also submitted the Affidavit of Rita Anderson who describes herself as the “duly appointed Building Official of Memphis and Shelby County. She avers that after reviewing the records of the County, she finds no record that the annual fee required of sign owners by the County was ever paid with respect to the Dr. Harris Billboard and further that “there is no record

of any agreement with the late Bill Thomas or any other person or entity to allow access to the billboard at 5430 I-40, known as the Dr. Harris sign, by using or crossing county Greenline property.” [ECF No. 45, ¶ 2].

The County does concede, however, that access by way of the former CSX Property was granted to two billboard owners:

One condition of the 2009 Purchase Sale Agreement and recorded Quit Claim Deed of conveyance, however, was that the owner of this CSX Railroad Right-of-Way retained unto itself, its successors and assigns, easements for the two (2) existing billboards located within this CSX Railroad Right-of-Way together with access over said CSX Railroad Right-of-Way to utilize, operate, and maintain said billboards – one west of I-240, and one east of I-240. See Collective Exhibit 2 to this Affidavit. These two (2) existing billboards still exist, as does their lawful access thereto via the Shelby Farms Greenline Right-of-Way. Neither of these two (2) existing billboards were or are currently owned by Bill Thomas, his bankruptcy estate, or company/ies under his ownership or control.

Affidavit of Bill Goss, ¶ 5. [ECF No. 44].

There is a material factual dispute about whether an easement was granted in favor of the Tract across the former CSX Property, now the Greenline.

Third, the County asserts there is a disputed material fact concerning the Trustee’s allegations that the Dr. Harris billboard is a lawful and valuable asset of the bankruptcy estate. The County argues to the contrary that the Tract on which the billboard is located is landlocked and that the annual permit required by local ordinance has not been paid. Clearly, the Trustee’s argument is that the billboard *would be* a valuable asset of the bankruptcy estate if the Court were to decide that an easement can be impressed for the benefit of the Tract. The County does not raise a disputed issue of fact but rather restates its substantive argument.

Fourth, the County raises as a disputed material fact the Trustee’s interpretation of the Cease and Desist Letter. The Trustee does rely on language in the Cease and Desist Letter to infer that if there had been an easement impressed upon the CSX Property before it was acquired by the

County, the County took the property subject to the easement. [ECF No. 2]. While the actual issue raised by the County seems to be a legal one rather than a factual one, it is true that there is a genuine dispute concerning whether access to the Tract was granted across the CSX Property before the County acquired it.

Because there are genuine disputes as to certain material facts necessary to the Plaintiffs' causes of action, summary judgment is not appropriate in this case.

### **CONCLUSION**

For the foregoing reasons, the Motion to Dismiss and the Motion for Summary Judgment are DENIED. The Motion to Dismiss is denied because the County, having conceded to the Plaintiffs' position concerning the abrogation of sovereign immunity by section 106 of the Bankruptcy Code and the waiver of sovereign immunity by section 1-3-121 of the Tennessee Code, raised a new issue in its Reply concerning the breadth of the waiver of sovereign immunity in the Tennessee Code to which the Plaintiffs have not had an opportunity to respond. The Motion for Summary Judgment is denied because there are genuine disputes concerning facts material to the Plaintiffs' causes of action.

This adversary proceeding is ready for trial. A final pretrial conference to schedule the trial shall be held Thursday, January 16, 2025, at 10:15 a.m. in Courtroom 645, 200 Jefferson Avenue, Memphis, Tennessee.

cc: Debtor  
Attorney for Debtor (if any)  
Plaintiffs  
Attorney for Plaintiffs  
Defendants  
Attorney for Defendants  
Chapter 11 Trustee  
United States Trustee