

STATE OF MICHIGAN
IN THE SUPREME COURT

AMANDA JEAN ODOM,

Plaintiff-Appellee,

-vs-

WAYNE COUNTY and
CITY OF DETROIT,

Defendants,

and

CHRISTINE KELLY,

Defendant-Appellant.

Supreme Court No. 133433

Court of Appeals No. 270501

Wayne County Circuit Court
No. 05-503671-NI

BRIEF OF AMICUS CURIAE
MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL
AND MICHIGAN MUNICIPAL LEAGUE

PROOF OF SERVICE

PLUNKETT COONEY
MARY MASSARON ROSS (P43885)
Attorneys For Amicus Curiae
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

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**STATEMENT CONCERNING THE JUDGMENT APPEALED
FROM AND THE RELIEF SOUGHT**

The Wayne County Circuit Court erroneously denied Christine Kelly's motion for summary disposition in an order entered on May 11, 2006. The Court of Appeals erroneously affirmed that order in an opinion issued on February 1, 2007. Kelly sought, and was eventually granted, leave to appeal. (Order, April 25, 2008). The Michigan Municipal League and the Michigan Municipal League Liability and Property Pool support Wayne County Sheriff Deputy Christine Kelly's argument that she is entitled to summary disposition because the complained-of conduct occurred while she was acting as a law enforcement officer within the scope of her authority and, under the law of intentional torts as it existed before July 7, 1986, her conduct was not actionable.

QUESTIONS PRESENTED FOR REVIEW

This Court granted leave to appeal on Kelly's motion for reconsideration and directed the parties to brief the following questions:

- (1) what is the proper interpretation of MCL 691.1407(3);
- (2) can intentional tort claims be brought under MCL 691.1407(2);
- (3) for an intentional tort claim, what must a plaintiff plead to avoid governmental immunity?

Amici contend that resolution of these questions will result in remand for entry of an order of summary disposition in Kelly's favor.

STATEMENT OF FACTS

For purposes of this brief, Amicus Curiae the Michigan Municipal League Liability and Property Pool and the Michigan Municipal League accept the factual recitation set forth in defendant-appellant Deputy Sheriff Christine Kelly's brief on appeal.

ARGUMENT

MICHIGAN'S GOVERNMENTAL TORT LIABILITY ACT DOES NOT ALLOW INTENTIONAL TORT CLAIMS AGAINST GOVERNMENT ACTORS WHEN THEIR CONDUCT IS JUSTIFIED, A DETERMINATION MADE BY APPLYING THE HISTORICAL TEST ADOPTED BY THE LEGISLATURE IN MCL 691.1407(3).

A. STANDARD OF REVIEW.

This Court reviews questions of law, such as the proper interpretation of a statute, de novo. *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008); *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007); *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

B. THE LEGISLATURE CREATED A COMPLEX SCHEME OF IMMUNITY FOR GOVERNMENTAL AGENCIES AND INDIVIDUALS THAT MUST BE INTERPRETED BASED ON THE PLAIN MEANING OF THE LANGUAGE AND THE STATUTE, READ AS A WHOLE AGAINST THE FABRIC OF THE LAW.

Resolution of the issues presented in this appeal requires interpretation of the various provisions of MCL 691.1401 *et seq.*, which must be broadly construed to afford protection to public entities. See *Nawrocki v Macomb Co Road Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (“the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed”). The proper interpretation of a statutory provision is a question of law, which this Court reviews de novo. *Neal v Wilkes*, 470 Mich 661, 664; 685 NW2d 648 (2004). When construing the provisions of a statute, the primary task of this Court is to discern and to give effect to the intent of the Legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). This starts by examining the language of the statute itself. *Id.* Where the plain language of the statute is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed and no further judicial construction is

required or permitted. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). Rather, the statute must be enforced as written. *Id.*

The Court seeks an interpretation that will harmonize the provisions of the Governmental Tort Liability Act while giving effect to the Act's plain language. See *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001) ("We construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature."); *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998) (if statutes can be construed in a manner that avoids conflict, then that construction should control the analysis). The Court also seeks an interpretation that gives meaning to the words used without substituting its own policy choices for those made by the Legislature. *Lansing v Michigan Public Service Comm*, 470 Mich 154, 167; 680 NW2d 840 (2004). See also, *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (every word is used for a purpose and effect must be given to every clause and sentence).

A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). But a legal term of art must be construed in accordance with its peculiar and appropriate legal meaning. *Brackett v Focus Hope, Inc*, ___ Mich ___; 753 NW2d 207 (2008). See also, *Allison v AEW Capital Management, LLP*, 481 Mich 419, 427; 751 NW2d 8 (2008). Legal terms of art are generally accorded their established meaning in the law. *In re Complaint of Rovas Against SBC Michigan*, ___ NW2d ___, 2008 WL 2876507 (Mich, 2008). In addition,

statutes are construed so as not to abolish by implication “well-settled common-law principles.”

Id. citing *Marquis v Hartford Accident & Indemnity*, 444 Mich 638; 513 NW2d 799 (1994).

Counsel for Kelly has offered the Court a thoughtful and far-reaching approach to interpreting MCL 691.1407(2) and (3). Kelly essentially reads the statute to abrogate any and all intentional tort claims against government actors. The approach offered by Kelly is consistent with this Court’s methodology of statutory interpretation, provides a clear roadmap for bench and bar regarding the scope of immunity, and offers cogent answers to this Court’s questions. If this Court does not accept Kelly’s approach, Amici offer another for consideration.

C. INTENTIONAL TORT CLAIMS MAY NOT BE BROUGHT UNDER MCL 691.1407(2).

MCL 691.1407(2) creates a narrow exception to governmental immunity for individuals acting on behalf of governmental agencies when specified criteria have been satisfied. The statute reads:

(2) Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer’s, employee’s, member’s, or volunteer’s conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

MCL 691.1407(2). This provision immunizes government actors from tort liability for personal injury or property damage the government actor causes while in the course of employment or

service or, if caused by a volunteer, while acting on behalf of a governmental agency if three criteria are met. MCL 691.1407(2). The criteria are:

- that the government actor is acting or reasonably believes that he or she is acting within the scope of his or her authority;
- that the government agency is engaged in the exercise or discharge of a governmental function; and
- that the government actor's conduct does not amount to gross negligence as defined in the statute, that is the proximate cause of the injury or damage.

Subsection 2 of § 7 provides an immunity rule for individuals with a narrow exception to that immunity for instances when a government actor is not acting or does not reasonably believe he or she is acting within the scope of his or her authority, when the governmental agency is not engaged in a governmental function as broadly defined in the statute, or when the government actor's conduct amounts to gross negligence which is the proximate cause of injury. See *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

These criteria may be traced to concepts long employed by common law courts to differentiate conduct, on the one hand, engaged in by the government or by government actors to accomplish government functions, and, on the other, ultra vires conduct or conduct engaged in by those working for the government but acting on a lark of their own, unauthorized and unrelated to their government responsibilities. See generally, Eugene McQuillin, *The Law of Municipal Corporations*, Vol 18, § 53, (2003). Because a municipal corporation acts in a dual capacity, both as a corporate entity and as a sub-sovereign entity exercising delegated power from the state, common law courts tried to differentiate between sovereign conduct, which could not be the basis of liability, and corporate conduct, often called proprietary, which could. *Id.* at 134-158, 385-392. See also E Borchard, *Government liability in tort*, 34 Yale L J 129 (1924) (discussing dual character of municipal corporations and early history of treating them as private corporations liable in tort); Frug, *The city as a legal concept*, 93 Harv L R 1057, 1099-109

(1980). The various doctrines used to analyze these complex issues resulted in confusion regarding municipal liability in many states, including Michigan. Scholars and courts noted the difficulties of defining and applying these often-conflicting doctrines in particular cases. See e.g., McQuillin, *supra* at 153-154 (“the passage of time has made many of the actual distinctions seem exceedingly arbitrary or even bizarre”); Michigan Municipal Law, 1987 Supplement, p 16-5 (ed. David L. Dalenberg & Teresa Schafer Sullivan, 1987) (“confusion after the *Ross* decision remains, and ... many authorities fear one set of problems encountered pre-*Ross* have merely been replaced by an equally vexatious set”). A number of the common law immunity distinctions proved to be unworkable in practice.

At the same time, liability for those acting for the government was resolved employing a different set of distinctions, also predicated on common law concepts relating to government authority, public duty, and vicarious responsibility. See e.g., *Nicholson v Detroit*, 129 Mich 246; 88 NW 695 (1902). These concepts worked together to protect government actors in some circumstances but amounted to patchwork protection that was unpredictable and offered little advance guidance regarding when suit could be brought and when it could not. Michigan decisional authority on these points is a confusing body of law in that the courts have not always been precise in their discussion, but rather have blended concepts of the law of intentional torts, the law of immunity, and the related common law concepts and tests.

After approximately a decade of debate about the nature and proper test for common law immunity and the passage of several statutes attempting to codify some form of immunity for public entities and those who act for them, the Legislature enacted the present statute, MCL 691.1401 *et seq.* The statute was carefully designed to provide broad protection to public entities of all types, to abolish many of the old distinctions, and to replace them with a new statutory test

that would be easier to apply and more predictable in outcome. Thus, the Legislature replaced the old government-function test with a new broadly worded statutory test. See MCL 691.1401(f). It abolished the use of the distinction between ministerial and discretionary as a basis for imposing liability onto individuals. MCL 691.1407(2). And it made other changes, all intended to facilitate a broad protection for governmental entities and those acting on their behalf, while providing clear tests for the limited exceptions to immunity.

The issue presented to the Court today involves the proper test for one of those exceptions: that provided in MCL 691.1407 for individual government actors sued for tort liability. MCL 691.1407(2) makes clear that individuals acting for the government (when they are within the scope of their employment or reasonably believe that they are AND when the government is engaged in a government function) are immune unless their grossly negligent conduct amounts to the proximate cause of injury. See *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

MCL 691.1407(2) qualifies and limits this broad protection in the opening phrase, which reads as follows:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question,

MCL 691.1407(2). The qualifier instructs that the potential liability of a government actor must be determined “without regard to the discretionary or ministerial nature of the conduct in question”. MCL 691.1407(2). Through this phrase, the Legislature rejected a longstanding common law test which required the court to examine whether an individual’s conduct was discretionary, in which case it could not be the basis for liability in tort, or ministerial, in which case the government actor could be liable in tort.

By including the introductory phrase “[e]xcept as otherwise provided in this section” in MCL 691.1407(2), the Legislature modified the test for individual immunity by marking off and exempting from Subsection 2 whatever had been “otherwise provided in this section”. To interpret this phrase, the Court must examine MCL 691.1407 to locate anything “otherwise provided” to what is set forth in Subsection 2. This leads naturally to Subsection 3, which otherwise provides that “Subsection 2 does not alter the law of intentional torts as it existed before July 7, 1986.” MCL 691.1407(3). Reading the two provisions together, it is apparent that the Legislature sought to preserve and to protect “the law of intentional torts” from alteration as a result of the statute. By making clear that Subsection 2 does not change the law of intentional torts, the Legislature excluded the law of intentional torts from the reach of MCL 691.1407(2). See analysis in *Sudul v City of Hamtramck*, 221 Mich App 485; 562 NW2d 478 (1997).¹

The Legislature’s intent to exclude intentional torts from the reach of MCL 691.1407(2) can also be seen in its inclusion of criteria in that provision that can never be satisfied when claims are based on intentional torts. First, Michigan courts have long held that a government actor, such as a police officer, who has engaged in unlawful intentionally tortuous conduct is not deemed to be an agent of the municipality acting within the scope of his or her authority or reasonably believing he is doing so. See *Tzatzken v Detroit*, 226 Mich 603, 605; 198 NW 214 (1924). This rule stems from the basic principles of agency, which do not allow an employer to be held liable for the torts of its personnel when they are committed outside the scope of their employment. See e.g., *Mazanec v Gogebic Timber & Lumber Co*, 313 Mich 117; 20 NW2d 382 (1945). Second, a governmental entity’s intentional tort has traditionally been deemed an ultra

¹ Kelly asserts this means that intentional tort claims outside the government context are preserved and that no intentional tort claims remain against those acting for the government. If this Court does not go so far, amici offers a reading that interprets the language to preserve the common law notion that justified conduct is not tortious.

vires act, and thus if a governmental entity is engaged in an intentional tort, it could not be seen as acting in the exercise or discharge of a governmental function. At the same time, if an individual engages in unauthorized intentionally tortious conduct, which was not at the behest of or in furtherance of his employer's objectives, he can be sued individually, but his conduct cannot be imputed to his employer.² *Sweet v Small*, 65 Mich 90; 31 NW 767 (1887). Third, an intentional tort claim is inherently inconsistent with a gross negligence claim since an intentional tort requires deliberate commission of a tortious and unlawful act, while gross negligence must involve a negligently performed act or one that has been neglected or omitted. *Hill v Saginaw*, 155 Mich App 161; 399 NW2d 388 (1986). Thus, intentional torts are not governed by Subsection 2 because the express language excludes them and because no intentional tort committed by a government actor can satisfy the criteria necessary to fall within this exception to immunity.

D. MCL 691.1407(3) ESTABLISHES A HISTORICAL TEST FOR INTENTIONAL TORTS THAT ALLOWS SUCH CLAIMS ONLY WHEN THE PLAINTIFF DEMONSTRATES THAT CONDUCT OCCURRED WHICH SATISFIES THE ELEMENTS OF AN INTENTIONAL TORT AND DEMONSTRATES THAT THE TORTIOUS CONDUCT WAS NOT JUSTIFIED.

MCL 691.1407(3) provides:

(3) Subsection (2) does not alter the law of intentional torts as it existed before July 7, 1986.

This language limits the scope of Subsection (2) by adding a historical test to it. In Subsection (2), the Legislature created immunity for government actors and a narrow exception for injuries

² This common law outcome was essentially adopted by the Legislature in MCL 691.1401 *et seq.* At common law, the government was also immune unless the action was ultra vires. The same result holds true under the statute. If the government is acting in the exercise or discharge of a governmental function, it is not liable under the statute. MCL 691.1407(1). Only if the government is not acting in the exercise or discharge of a governmental function, which under the statutory definition, essentially equates to ultra vires, may the government be held liable.

caused by a government actor's grossly negligent conduct that is the proximate cause of injury. But it qualified that language to make clear that Subsection (2) "does not alter the law of intentional torts as it existed before July 1, 1986." Thus, the Legislature sought to maintain "the law of intentional torts" at the time it enacted the statute. To give the language effect, the Court must conduct a historical analysis, examining the law of intentional torts as of July 7, 1986 to determine whether an individual may be held liable.

The law of intentional torts as it existed before July 7, 1986 supports the notion that a government actor's tortious conduct is not actionable when the conduct is justified. Any historical analysis of state and local government liability law must begin with *Russell v Men of Devon*, 100 Eng Rep 359, 2 Term Reports 667 (KB 1788). The court announced that a citizen injured through the tortious conduct of a county employee could not sue because "the king can do no wrong." *Id.* Based on this, early common law rule litigants could not successfully sue the sovereign. The U.S. Supreme Court in *Alden v Maine*, 527 US 706; 119 S Ct 2240; 144 L Ed 2d 636 (1999), accepted the notion that states are sovereign and that immunity inheres in the nature of sovereignty. Likewise, these notions found expression in Blackstone's Commentaries about sovereignty and immunity from suit:

[N]o suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.

1 W Blackstone, Commentaries on the Laws of England, 234-235 (1765). This doctrine was universal in the States when the United States Constitution was drafted. *Chisolm v Georgia*, 2 Dall 419, 434-435; 1 L Ed 440 (1793) (Iredell, J, dissenting and surveying English practice). And these principles limiting suits against the sovereign were extended as a matter of common law to protect local governments and those acting for them in the nineteenth century. See generally, Ann Judith Gillis, *Legislative reforms of governmental tort liability*, 21 Rutgers L J

375, 378-382 (1990). These notions were embodied in the common law understanding of torts. *Id.* See also *Larkin v County of Saginaw*, 11 Mich 88 (1862) (“no action would lie against a municipal corporation or body for an injury resulting from a lawful exercise of its legislative authority”).

The word “tort” has a technical meaning which developed gradually in the law according to Prosser and Keeton. W Page Keeton, Prosser and Keeton *On the Law of Torts* 2 (5th ed 1984). From the French word for “twisted,” tort means a “civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages.” *Id.* In other words, the law holds a civil defendant responsible for what the law regards as unjustified. Prosser & Keeton, p 4.

A justified action is warranted; it is not wrongful. Kent Greenawalt, *The Perplexing borders of justification and excuse*, 84 Colum L R 1897, 1903 (1994). The word “justified” is used in ordinary language, Hall, *Comment on Justification and Excuse*, 24 Am J Comp L 638, 639 (1976) (“‘Justification’ and ‘excuse’ ... have long been parts of everyday speech.”). Justification is also a concept used in criminal law as well as tort law. For example, the Model Penal Code provides that “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable in specified circumstances.” Model Penal Code § 3.02. Likewise, the Restatement of Torts recognizes the doctrine of justification as a basis of permitting an individual to protect himself or another. Restatement (Second) of Torts § 76 (2008). The doctrine has also long been built in to the law of torts, as in the common law defamation tort, which does not permit liability for defamatory but truthful words because the airing of the truth is justified. R H Helmholz, *Selected Cases on Defamation to 1600*, cvii (1985) quoted in John C P Goldberg, *Ten half-truths about tort law*, 42 Val U L R 1221 (2008).

Justifications are (1) typically specified in terms of the actor's ends, but do not specify the particular means to accomplish the ends, (2) include a standard of reasonable belief, and (3) can be seen when certain individuals with the requisite legal power or authority decide their conduct is justified to do something generally prohibited such that the decision brings about a change in what is legally permitted to be done. Malcolm Thorburn, *Justifications, powers, and authority*, 117 Yale L J 1070, 1080-1085 (2008). This concept is well illustrated by recognizing that "a police officer is justified in carrying out an otherwise prohibited assault as part of an arrest, or when he is justified in doing what would otherwise constitute a trespass as part of a lawful search." *Id.* This approach has long been part of the law of intentional torts in Michigan.

The law of intentional torts as it developed in Michigan before July 7, 1986 reflects acceptance of these notions. Michigan courts have long-recognized that government actors, acting on behalf of the sovereign, must often engage in conduct that would be tortious if done by a private actor, but that is justified when done on behalf of a government by an individual acting in good faith and with a reasonable belief that his or her conduct is justified. This understanding of tortious conduct was discussed by the Michigan Court of Appeals well before July 1, 1986 in *Brewer v Perrin*, 132 Mich App 520, 528-529; 349 NW2d 198 (1984):

Governmental actions which would normally constitute intentional torts are protected by governmental immunity³ if those actions are justified. Conversely, if the actions are not justified, they are not protected by governmental immunity. Specifically, a police officer may use reasonable force when making an arrest. Therefore, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary. By itself, the use of handcuffs is not unreasonable force.

³ The Court's discussion employs the use of governmental immunity but the analysis is essentially grounded in the law of intentional torts with its concept of justification, which means that the individual's conduct is not deemed tortious.

Id. at 528-529; 349 NW2d 198 (1984) (citations and internal punctuation omitted). The use of force was not actionable in *Brewer* because the force was justified as necessary for the arresting officer. Under the law of intentional torts, the conduct at issue was not tortious. According to *Brewer*, when the government finds it necessary to do things that would normally be called intentional torts, the individual's conduct is not tortious. *Brewer, supra* citing *Barrett v United States*, 64 F2d 148, 149 (CA 6, 1933).

The *Brewer* court further observed that, "A tort is a civil wrong and conduct which is wrong within one setting can be permissible within another. For example, a police officer may not intentionally strike a citizen peacefully walking down the street, but his duty may require the police officer to intentionally strike another citizen to prevent him from murdering a third peaceful citizen." *Lockaby v Wayne County*, 406 Mich 65, 82; 276 NW2d 1 (1979) (Williams, J., concurring). Justified conduct is not actionable. *Smith v Michigan*, 122 Mich App 340, 344-346; 333 NW2d (1983). Accordingly, a police officer may use force he reasonably believes is necessary when acting in good faith to make an arrest. *Firestone v Rice*, 71 Mich 377; 38 NW 885 (1888); 35 CJS, False Imprisonment, § 25, pp 657-660. The measure of necessary force is that which an ordinarily prudent and intelligent person with the knowledge of and in the situation of an arresting officer would have deemed necessary. 132 Mich App at 528.

Citing *Brewer v Perrin, supra*, the court in *Butler v Detroit*, 149 Mich App 708; 386 NW2d 645 (1986) also acknowledged that a police officer's duty may require him/her to intentionally strike another individual in order to prevent that person from harming another citizen. The *Butler* court taught that an intentional tort claim cannot be premised on actions that are justified. Only if the actions are not justified are they intentional torts. *Id.* at 715. Individuals acting in the course of their governmental employment may perform intentional acts

which are intended to cause harm and for which there is no liability. *Burns v Malak*, 897 F Supp 985 (ED Mich, 1995). In a given situation, a police officer may use substantial, but necessary, force to subdue a suspect resulting in injury to the suspect. In that event, there would be no liability on the part of the police officer, not because of the defense of immunity, but because there was no wrongful conduct, i.e., no tort. *Id.*

As far back as *Blackman v Cooper*, 89 Mich App 639; 280 NW2d 620 (1979), Michigan courts have spoken about the “freedom from tort liability possessed by law enforcement officers when acting within the scope of their official duties”. The *Blackman* court said that the rule is sometimes cast as being conditioned upon actions taken in good faith with probable cause. 89 Mich App at 642-643. Thus, where a police officer acts in good faith with probable cause within the scope of his authority, intentional tort claims for false arrest or false imprisonment will not lie even though an arrest may be subsequently found to be baseless.

In *Lockaby v Wayne County*, 406 Mich 65; 276 NW2d 1 (1979), Justice Williams acknowledged this justification concept:

A tort is a civil wrong and conduct which is wrong within one setting can be permissible within another. For example, a police officer may not intentionally strike a citizen peacefully walking down the street, but his duty may require the police officer to intentionally strike another citizen to prevent him from murdering a third peaceful citizen. Further, *McCann* clearly sets limits that the conduct must be without and not within the scope of the exercise and discharge of a governmental function.

406 Mich 82-83. Three justices in *Lockaby* were of the view that the government is not immune from an intentional tort. On the other hand, three other justices opined that an intentional tort allegation takes the parties outside governmental immunity only if the intentional conduct is ultra vires. *Lockaby, supra*, at 78, 82-83. The court in *Smith v Michigan*, 122 Mich App 340; 333 NW2d 50 (1983) suggested that these two views could be reconciled:

If a police officer lawfully arrests an individual, he may use reasonable force if that individual resists. [Citation omitted]. Both sides would agree that the police officer is immune by governmental immunity from any suit alleging an intentional tort. However, both sides would also agree that the police officer is not immune if he uses force if the arrestee did not resist or if the officer used unreasonable force.

* * *

Thus, a police officer's "assault" on a person attempting murder is justified by the overriding necessity of protecting the potential victim. The officer's duties include this protection and sometimes require extraordinary measures. An attendant at a state mental hospital may be justified in "assaulting" a patient where the patient threatens the safety of himself or others but would not be justified in assaulting the same patient where the patient is merely recalcitrant in dressing. Justice Levin's concern that the State may not be privileged in abusive behavior does not apply where the circumstances require such extraordinary actions and so justify taking the measures. Likewise, Justice Williams' concern that the State not be punished for acting where it must is also met.

Thus, whenever a plaintiff in a complaint alleges an intentional tort, a defendant may answer arguing that the allegation should be dismissed ... because the action was justified under the particular facts of the case. If the plaintiff does not contest these facts, the allegation would subsequently be dismissed. However, if the plaintiff does contest the facts underlying the justification, the case would proceed to trial.⁴

122 Mich App 340, 346-347.

Applying the historical test to the law of intentional torts, Michigan decisional authority, like that of other jurisdictions, reveals that justified actions do not constitute tortious conduct at all. Indeed, the concept of a justified tort is an oxymoron. *Murray v Yuchasz*, Unpublished opinion per curiam of the Court of Appeals, issued 10/31/06 (Docket No. 268909). As that court explained, if conduct is justified, it is not wrong. And, in such a case, a defendant prevails, not because his wrongful conduct is shielded by immunity, but because there is no wrongful conduct to begin with. More particularly, the *Murray* court said about the defendant police officer's use of force that the use of force may be justified. The law permits a police officer to use the amount

⁴ The Court blurs immunity and justification in its discussion but the case illustrates that the law of intentional torts did not encompass justified conduct.

of force reasonably necessary to make an arrest. Consequently, the use of force by an officer is not an assault and battery if the force used was objectively reasonable under the circumstances. What this means is that no tort occurred, not that a tort occurred but is shielded by immunity. There simply is no wrongful conduct. If the conduct is justified, it is not tortious and therefore does not amount to an intentional tort.

E. TO PLEAD AN INTENTIONAL TORT CLAIM IN AVOIDANCE OF GOVERNMENTAL IMMUNITY, A PLAINTIFF MUST PLEAD THE ELEMENTS OF A PRIMA FACIE INTENTIONAL TORT AND THE ACTOR'S LACK OF JUSTIFICATION FOR THE COMPLAINED-OF CONDUCT.

At the outset, a plaintiff seeking to pursue intentional tort claims against a governmental actor must plead the elements of the particular tort. In other words, in order to establish the tort of false imprisonment, plaintiff must prove that he or she was intentionally unlawfully restrained against his or her will. The elements of false imprisonment are an act committed with the intention of confining another; the act directly or indirectly resulting in such confinement; and the person being confined being conscious of his or her confinement. *Stowes v Wolodzko*, 386 Mich 119; 191 NW2d 355 (1971). A plaintiff seeking to press a claim for malicious prosecution bears the burden of proving (1) that the defendant initiated a criminal prosecution against the plaintiff; (2) that the criminal proceedings terminated in the plaintiff's favor; (3) that the person who instituted or maintained the prosecution lacked probable cause for his action; and (4) that the action was undertaken with malice or a purpose for instituting criminal claim other than bringing the offender to justice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365; 572 NW2d 603 (1998), citing *Weiden v Weiden*, 246 Mich 347, 352; 224 NW2d 345 (1929).

Pleading an intentional tort means pleading more than that the complained-of conduct was intentional. The Court of Appeals in *Elliott v Dep't of Social Services*, 124 Mich App 124;

333 NW2d 603 (1983), instructed that negligence is not transformed into an intentional tort by merely alleging that the defendant's activity was intentional, willful, and in conscious disregard of the consequences. The *Elliott* court made the point that an intentional tort involves activities which have traditionally been regarded as intentional torts. In addition, where the complained-of act is one of omission, rather than commission, the claim is not properly characterized as an intentional tort. *Id.*

In *Mosqueda v Macomb County Youth Home*, 132 Mich App 462; 349 NW2d 185 (1984), the court likewise instructed that not all intentional activity constitutes an intentional tort. Common sense dictates that negligence is not transformed into an intentional tort by merely alleging that the defendant's activity was intentional, willful, and in conscious disregard of the consequences. The *Mosqueda* court held that the plaintiff had not actually assigned a label to the intentional tort which the defendant was supposed to have committed. It also observed that the cases where this Court has recognized the existence of intentional torts in avoidance of governmental immunity concern conduct which has traditionally been regarded as an intentional tort. To the *Mosqueda* court's way of thinking, for purposes of determining whether conduct amounts to an intentional tort, acts of commission, rather than of omission, are the only ones properly characterized as an intentional tort. The *Mosqueda* court recognized the *Elliott*'s court's limits on the nature and scope of intentional torts:

The Supreme Court's decisions concerning the avoidance of governmental immunity where intentional torts are involved relate to torts such as assault, *Lockaby, supra*, and intentional interference with economic relations, defamation, and slander, *McCann*, [*v Michigan*, 398 Mich 65; 247 NW2d 521 (1976)]. This Court has also ruled that immunity is not available where claims such as conversion, *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344; 311 NW2d 776 (1981), trespass, *Madajaski v Bay County Public Works*, 99 Mich App 158; 297 NW2d 642 (1980), and other similar claims are involved. All of these decisions have involved claims covering activities which have traditionally been regarded as intentional torts. In our opinion, for purposes of determining governmental

immunity, where the complained-of act is one of omission, rather than commission, the claim cannot be characterized as an intentional tort.

132 Mich App 462, 468. Likewise, the courts in *Jacobs v Dep't of Mental Health*, 88 Mich App 503; 276 NW2d 627 (1979) and in *Randall v Delta Charter Twp*, 121 Mich App 26; 328 NW2d 562 (1982) were persuaded that, by characterizing an activity as “willful”, “intentional”, and in “conscious disregard of the consequences” a litigant is not automatically assumed to be possessed of an intentional tort claim.

Many of these same points were raised by the court in *Shunk v State*, 132 Mich App 632; 347 NW2d 767 (1984). That court reaffirmed that negligence does not become an intentional tort merely because the government actor acted willfully or intentionally in doing or failing to do a particular act. So, too, the *Shunk* court emphasized that the intentional tort exception to governmental immunity has historically been limited to the commission of traditional intentional torts. It also mentioned that acts of omission, rather than commission, are generally not regarded as intentional torts:

Generally, intentional tort exception of the governmental immunity doctrine has been limited to traditional intentional torts [citations omitted] and acts omission, rather than commission, are not generally characterized as intentional torts.

Thus, plaintiff must plead the elements of a traditional intentional tort.

Assuming that a plaintiff sufficiently pleads the elements of a prima facie intentional tort recognized in Michigan, the next step is to consider the justification for the governmental actor's complained-of conduct. An actor's conduct will be deemed justified if the actor is acting in the exercise or discharge of a governmental function and if a person, in possession of the same information as the defendant possessed, would reasonably have believed that the conduct was lawful. Stated otherwise, the question becomes whether, in light of the observations made by the defendant officer, a reasonable officer could believe that the force which the defendant used was

reasonable or justified. This calls for a comparison of the defendant's alleged actions to those which a reasonable officer could have believed lawful at the time. In *Delude v Raasakka*, 391 Mich 296; 215 NW2d 685 (1974), the court opined that, as a threshold question, the determination to be made is whether the pursuit was legally justified. If so, police officers have a right to arrest without a warrant. Governmental actors may find it necessary and are permitted to act in ways that would under different circumstances subject them liability for an intentional tort. To find for a plaintiff on such a claim, the court would have to determine that the officer's actions were not justified because the officer could not have reasonably believed they were lawful under the circumstances. Contrarily, a police officer is shielded from liability if his/her actions are justified because he reasonably believed his conduct was lawful under the circumstances as they appeared at the time:

Governmental actions which would normally constitute intentional torts are protected by governmental immunity if those actions are justified. Conversely, if the actions are not justified, they are not protected by governmental immunity. Specifically, a police officer may use reasonable force when making an arrest. Therefore, the measure of necessary force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation the arresting officer would have deemed necessary....

Brewer, supra, 132 Mich App at 528-529.⁵ Based upon these principles, a plaintiff's claims for intentional torts survive only if she can plead that the defendant officer reasonably believed his conduct was justified in light of the knowledge of the officer at the time and in the circumstances. To subject a defendant to intentional tort liability, a court must first determine that the officer's actions were not justified because the officer could not have reasonably believed the conduct was lawful, i.e. justified, under the circumstances as they appeared to the

⁵ This test is akin to the qualified immunity test recognized in *Saucier v Katz*, 533 US 194, 202; 121 S Ct 2151, 150 L Ed 2d 272 (2001) ("sufficient grounds for the officer to have concluded he had legitimate justification under the law for acting as he did").

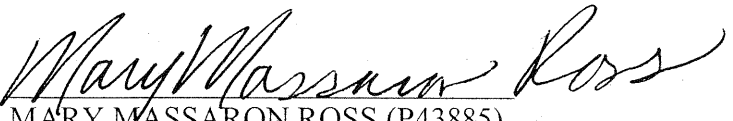
officer at the time. Police officers engaged in the exercise or discharge of a governmental function based on justifiable actions are not engaged in tortious or wrongful conduct.

RELIEF

WHEREFORE, Amicus Curiae The Michigan Municipal League Legal Defense Fund and the Michigan Municipal League Liability and Property Pool respectfully request this Court to reverse the lower courts, adopt a rule as proposed in this brief, and rule that Kelly was entitled to summary disposition or grant such other relief as is warranted.

Respectfully submitted,

PLUNKETT COONEY

BY: 
MARY MASSARON ROSS (P43885)
Attorney for Amicus Curiae
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

DATED: September 10, 2008

STATE OF MICHIGAN
IN THE SUPREME COURT

AMANDA JEAN ODOM,

Plaintiff-Appellee,

-vs-

WAYNE COUNTY and
CITY OF DETROIT,

Defendants,

and

CHRISTINE KELLY,

Defendant-Appellant.

Supreme Court No. 133433

Court of Appeals No. 270501

Wayne County Circuit Court
No. 05-503671-NI

PROOF OF SERVICE

RAINAY CARUANA states that on September 10, 2008, the Brief Of Amicus Curiae Michigan Municipal League Liability And Property Pool And Michigan Municipal League, was served on, JASON SAKIS, Attorney for Plaintiff-Appellee, 4967 Crooks Road, Suite 100, Troy MI 48098; and CARSON J. TUCKER, Attorney for Defendant-Appellant, 31700 Middlebelt Road, Suite 150, Farmington Hills, MI 48334, by depositing same in the United States Mail with postage fully prepaid.


RAINAY CARUANA