STATE OF MICHIGAN

IN THE SUPREME COURT

HARVEY JOHNSON, Personal Representative of the Estate of Harvey Steward, Deceased, Plaintiff-Appellee, v BURTON CITY POLICE OFFICER JEREMY DRIGGETT, in his individual and official capacity, Defendant-Appellant. _____/	Supreme Court Case No. 146837 Court of Appeals Case No. 306560 Genesee Circuit Court Case No. 09-91432-NO

BRIEF AMICUS CURIAE ON BEHALF OF THE MICHIGAN MUNICIPAL LEAGUE

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STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance.

This brief amicus curiae is authorized by the Legal Defense Fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Stephen K. Postema, city attorney, Ann Arbor; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, City of Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League.

STATEMENT OF THE ISSUES

Amicus Curiae, the Michigan Municipal League, accepts the Statement of Question Presented as set forth in the Application for Leave to Appeal filed on behalf of Burton City Police Officer Jeremy Driggett.

STATEMENT OF FACTS

Amicus Curiae, the Michigan Municipal League, relies on the Statement of Facts as set forth in the Application for Leave to Appeal filed on behalf of Burton City Police Officer Jeremy Driggett.

ARGUMENT

NOTWITHSTANDING THIS COURT'S HOLDING IN *ODOM V WAYNE COUNTY*, 482 MICH 459 (2008), WHICH HELD THAT MCL 691.1407 DOES PROVIDE AN IMMUNITY DEFENSE TO LOWER LEVEL GOVERNMENTAL EMPLOYEES WHO ARE ALLEGED TO HAVE COMMITTED INTENTIONAL TORTS, THE STANDARD FOR THAT IMMUNITY AS ARTICULATED AND APPLIED BY THE COURT OF APPEALS EFFECTIVELY DENIES ANY IMMUNITY DEFENSE TO POLICE OFFICERS WHO HAVE ALLEGEDLY USED EXCESSIVE FORCE DURING THE COURSE OF A LAWFUL ARREST.

Unlike most other governmental employees, police officers necessarily expose themselves to potential liability for the commission of intentional torts by simply going to work each day and doing their jobs. This case questions the circumstances which would allow the imposition of that liability on them, and avoid the immunity otherwise available to them under MCL 691.1407, when police officers are alleged to have performed their dangerous jobs honestly, albeit imperfectly. It assumes the existence of facts which could give rise to liability, and asks whether immunity will, nevertheless, avoid that potential liability.

It is the job of police officers to investigate crime and make arrests. If they err in their determination of probable cause, they expose themselves to intentional tort claims of false arrest and malicious prosecution. It is also their job to decide how much force is reasonably necessary to effectuate those arrests. When they misperceive the dangerous circumstances they confront, *and even when they don't*, they expose themselves to intentional tort claims of assault and battery. These claims are inevitable. Since it is also inevitable that an officer will make a mistake of fact or a mistake of law which would otherwise expose him to both suit and liability, Michigan recognizes that public policy is

best served by affording some level of immunity to these public employees so as to ensure that they continue to honorably perform their dangerous jobs rather than avoid the potential liability by avoiding the danger itself.

In *Ross v Consumers Power (On Rehearing)*, 420 Mich 567, 625 (1984), this Court considered the then existing state of the law which defined individual immunity, concluding that "the scope of immunity from tort liability granted to officers, employees, and agents of a governmental agency is not presently clear." It then attempted to provide the missing clarity by articulating standards which would effectuate the underlying rationale for that immunity. Rejecting an approach which defined individual immunity with respect to whether the individuals were engaged in a "governmental function," the Court commented that "[i]ndividual immunity exists to ensure that a decision maker is free to devise the best overall solution to a particular problem, undeterred by the fear that those few people who are injured by the decision will bring suit." *Id.,* 631. The *Ross* Court adopted an approach that accorded absolute immunity to "judges, legislators, and the highest executive officials of all levels of government," while only qualified immunity was given to lower level officials, employees and agents. In explanation of the justification for this two-tiered approach, *Ross* quoted with approval from Littlejohn & Demars, *Governmental Immunity After Parker and Perry: The King Can Do Some Wrong,* 1982 Detroit College L Rev 1, pp 27-28, including the comment that "official immunity should not shield malicious or intentionally unlawful behavior when the actor is not engaged in broad, essential governmental decision-making." *Id.,* 632. Further

explaining its three-part test for lower level immunity, the *Ross* Court stated that "[t]he ultimate goal is to afford the officer, employee, or agent enough freedom to decide the best method of carrying out his or her duties, while ensuring that the goal is realized in a conscientious manner." *Id.,* 635.

The matter now before this Court questions how this goal is to be achieved in a case alleging the intentional tort of assault and battery against a police officer who was called to the scene of a problem, encountered a dangerous situation, and, in the course of doing his job, decided that it was necessary to discharge his weapon – to use deadly force. It is representative of the category of such cases and affords a needed opportunity to apply the analysis of *Odom v Wayne County*, 482 Mich 459 (2008) to those cases. Consideration of these immunity questions will require a consideration of the public's need for conscientious police protection, while also respecting the suspect's right to be protected from malicious, intentionally wrongful behavior. Honest mistakes, be they mistakes of law or mistakes of fact, should be shielded from liability by governmental immunity, regardless of the fact that these mistakes led to intentional conduct that harmed the plaintiff and could have been foreseen to cause that harm.

A. Whether a plaintiff can establish a prima facie case of assault and battery against a police officer by providing facts supportive of a finding that the force used was not objectively reasonable, is a question distinct from whether the police officer is, nevertheless, entitled to immunity for that liability.

On April 25, 2009, Burton Police Officer Jeremy Driggett was dispatched to respond to numerous calls from motorists regarding an unknown man walking in the road

in the middle of traffic. He was, thereafter, required to respond to the type of rapidly evolving conditions that confront police officers on a daily basis, as to which decisions must quickly be made regarding the detention of persons who are perceived to present a danger to themselves, to others, and/or to the officers themselves. Once a decision to detain is made, decisions as to how much force is appropriate to effect that detention will evolve as the situation the officer confronts evolves. What may start as an event appearing to require only a verbal inquiry or command to stop may escalate, de-escalate, and then escalate again, depending on the varying responses of the suspect to the officer's presence, words, and actions. When the suspect is acting erratically, whether by reason of intoxication or mental disease, his responses are particularly unpredictable and dangerous to everyone And, as evidenced by both state and federal case precedent, the decisions made by the officer will, thereafter, often be second-guessed in civil suits alleging, *inter alia*, false arrest and assault and battery (excessive force).

This is one such case. As defined in *Tinkler v Richter*, 295 Mich 396, 401 (1940), and more recently quoted in *Espinoza v Thomas*, 189 Mich App 110, 119 (1991) and *VanVorous v Burmeister*, 262 Mich App 467, 482-483 (2004):

> "An assault may be defined as any intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another, under such circumstances as create a well founded fear of imminent peril, coupled with the apparent present ability to effectuate the attempt if not prevented.
>
> "A battery, or assault and battery, is the willful touching of the person of another by the aggressor or by some substance put in motion by him; or, as it is sometimes expressed, a battery is the consummation of the assault."

"The question of intent and/or willfulness is an element of assault and battery." *Young v Morrall*, 359 Mich 180, 187 (1960). Accordingly, in every case in which liability is imposed, there is necessarily an intentional and willful touching or use of force. This requisite element of intent must inform the consideration of the immunity which will, nevertheless, be available, when the claim is made against a police officer.

A plaintiff who asserts that the force utilized by a police officer was excessive is seeking recovery for the intentional tort of assault and battery, and case law recognizes that "reasonable" force may be used by an officer. "The force reasonably necessary to make an arrest is 'the measure of necessary force [] that [] an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary.'" *VanVorous v Burmeister*, 262 Mich App 467, 480-481 (2004). If, during the course of a lawful arrest, an officer uses more force than later deemed to have been objectively necessary, he may be subject *to liability* for assault and battery. Liability is not, however, the question presented in this case. Rather, it is assumed that the force actually used was not reasonably necessary to make the arrest and that the elements of liability have been satisfied. The question presented concerns the officer's *immunity* from that liability. Issues of liability and immunity present distinct questions and are not to be conflated. *Odom v Wayne County, supra,* 482 Mich, 481-482; *Latits v Phillips*, 298 Mich App 109, 114-115 (2012). Thus it is always important to recognize the elements of the cause of action for which immunity is sought, but not to be constrained by those

elements. Immunity presupposes liability, and the question is *what more* must be established, beyond the elements of liability, in order to avoid the defense of immunity.

B. In *Odom v Wayne County*, the Michigan Supreme Court resolved a conflict in the lower court opinions regarding the availability of, and standard for, immunity for claims of intentional torts brought against lower level governmental employees, adopting the three-part test articulated in *Ross v Consumers Power (On Rehearing)*, and affirmatively recognizing the existence of such immunity.

Following this Court's opinions in *Ross* and *Odom, supra,* Michigan case law reflected different approaches to the question of the governmental immunity of lower level employees for intentional torts. One was to simply apply the statutory requisite set forth for avoiding that liability in MCL 691.1407(2) by establishing facts that would support a finding of "gross negligence" that is "the proximate cause" of the injury, as in *Bell v Fox*, 206 Mich App 522, 525-526 (1994). Another approach was utilized in *VanVorous, supra*, 262 Mich App, 483, which suggested that officers were not generally afforded immunity for their intentional torts but, nevertheless, excused them from liability as long as their conduct was objectively reasonable: "[G]overnmental actors may find it necessary – and are permitted – to act in ways that would, under different circumstances, subject them to liability for an intentional tort. To find for plaintiff on these claims, our courts would have to determine that the officers' actions were not justified because they were not objectively reasonable under the circumstances." This approach, also seen in *Sudul v City of Hamtramck*, 221 Mich App 455, 458 (1997), effectively held that there was no immunity for intentional torts. A third approach was discussed in *Frohriep v*

Flanagan, 278 Mich App 665, 677 (2008), *rev'd in part and remanded*, 483 Mich 920 (2009), which referenced MCL 691.1407(3) and applied the common law qualified immunity that existed before July 7, 1986, as articulated in *Ross, supra*. That immunity was extended as long as the officer was acting in good faith while performing discretionary acts within the scope of his authority.

In *Odom,* this Court resolved the issue which had emerged after *Ross* and made clear that, notwithstanding the commission of an intentional tort, lower level governmental employees *are* entitled to assert governmental immunity. As explained in *Odom,* the test of that immunity is derived from the opinion in *Ross,* wherein the Court had set forth the criteria for immunity for lower level governmental employees without regard to whether the potential liability was for negligent or intentional torts. This immunity was a common law immunity and its articulated test was held in *Odom* to have survived the statutory immunity that was thereafter created by the Legislature in MCL 691.1407, at least as to intentional torts. While MCL 691.1407(2) departed from the *Ross* tests regarding the immunity available to lower level employees for negligent conduct, by its express terms MCL 691.1407(3) maintained "the law of intentional torts as it existed before July 7, 1986." *Odom* thus reasoned that the *Ross* standard continued to govern the immunity available to lower level governmental employees for intentional torts:

> Under *Ross*, to be immune from liability for intentional torts, the governmental employee must first establish that the acts were taken "during the course of . . . employment and" that the employee was "acting within the scope of [his] authority." This requirement ensures that a governmental employee will not be afforded immunity when committing ultra vires acts, as these are outside the scope of the employee's authority. However, it also

> protects a governmental employee who reasonably believes that he was authorized to take certain actions, but later learns that he was mistaken.
>
> The governmental employee must also establish that he was acting in "good faith." *Ross* did not elaborate on this element, relying instead on Prosser on Torts and the cases cited therein. * * *
>
> * * *
>
> The final *Ross* element to be considered when determining whether an individual is entitled to governmental immunity is whether the challenged "act" was ministerial or discretionary in nature. * * * Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions.
>
> (482 Mich, 473-476) (footnotes omitted)

Since the lower courts had not applied this standard to the intentional tort claims pending in *Odom*, the matter was remanded to the circuit court so it could do so, with the following guidance:

> * * * A police officer would be entitled to immunity under *Ross* if he acted in good faith and honestly believed that he had probable cause to arrest, even if he later learned that he was mistaken. * * *
>
> The Court of Appeals held that there remained a question of fact whether defendant's conduct was justified and "objectively reasonable." This objective analysis is also not the proper *Ross* inquiry. The good-faith element of the *Ross* test is subjective in nature. It protects a defendant's good-faith conduct with the cloak of immunity while exposing a defendant who acts with malicious intent.
>
> (482 Mich, 481-482)

C. The ruling of the Court of Appeals, which equates a lack of good faith with evidence of a defendant's indifference to whether harm will result, in a case alleging the excessive use of force by a police officer, mis-applies *Odom* and serves to deprive officers of their immunity defense in this class of intentional tort cases.

In the case at bar, the Court of Appeals purported to apply the *Odom* test to the allegations of liability directed against Officer Driggett. Holding that it was beyond dispute that Officer Driggett had been acting within the scope of his employment and had been engaged in a discretionary act at the time of the shooting, the Court focused on the requirement of "good faith". Noting the *Odom* Court's observations concerning the potential meanings of good faith, including, *inter alia*,

- "malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of an intentional abuse of power,"
- actions which are undertaken "maliciously or with a wanton or reckless disregard of the rights of another,"
- acts of "wanton or malicious conduct" or which demonstrate "a reckless indifference to the common dictates of humanity,"

the Court of Appeals rejected any contention that immunity could only be overcome by a showing of a specific intent to harm, holding "a lack of good faith [malice] may be shown by wanton or reckless conduct or by evidence of a defendant's indifference to whether harm will result." (Slip Opinion, p 10) Concluding that a reasonable jury could find that the officer had "acted wantonly, recklessly, or was indifferent to whether plaintiff's

decedent would be seriously harmed or killed," it affirmed the trial court's denial of summary disposition to the defendant police officer. (Slip Opinion, p 11)

But, since liability for assault and battery by a police officer during the course of an arrest will always be predicated on an intent or willingness to use that force, and since the risk of harm (serious harm in the case of the use of deadly force) will ultimately have been disregarded by the officer, the Court of Appeals' application of the standard for immunity in the case at bar would lead inevitably to an avoidance of immunity whenever liability could be imposed, thus conflating the liability and immunity inquiries. This is contrary to *Odom*'s holding that intentional torts *are* subject to the defense of immunity.

Moreover, the test articulated by the Court of Appeals is amorphous and transforms the variety of guiding words articulated in both *Ross* and *Odom* into the standard itself, as if the immunity inquiry were a multiple choice test which allowed any case to go to a jury as long as the evidence could support application of at least one of the possible guides. Actions, for example, which may be found to constitute "malicious, corrupt, and otherwise outrageous conduct on the part of those guilty of an intentional abuse of power," are categorically different from those which demonstrate an indifference to whether harm will result. Yet, pursuant to the analysis of the Court of Appeals, either will suffice to avoid immunity, thus rendering relevant only the lower standard of indifference. This is contrary to both *Ross* and *Odom*, each of which envisioned further development of the standard as a result of lower court review of particular facts in specific contexts. [Were it otherwise, there would have been no need for the remand in *Odom*.]

In other words, *Odom* provided only the starting point for the analysis which would follow as cases presented themselves. This is how the law develops in an orderly manner. Upon consideration of a record, it might be determined that one guide articulated in *Odom* is better suited to some intentional torts, while another guide is the touchstone for others. For example, an indifference to whether harm will result (which may not evince an intentional abuse of power) may be suitable for a defamation claim, and perhaps some malicious prosecution or false arrest claims, but never suitable for a claim of excessive force during an arrest where there is necessarily an understanding that some harm is inevitably going to result from the use of force.

On its face, the standard adopted by the Court of Appeals in this case is inconsistent with the dictate of *Odom*, wherein this Court remanded the matter for a determination by the circuit court of whether the officer had acted in good faith, with an honest belief that he had probable cause to arrest, or whether he had acted with malicious intent. In the context of a claim of an assault and battery during the course of an arrest, this would translate into an inquiry of whether the officer had an honest belief that the amount of force used was reasonable or whether, conversely, he had acted with malicious intent. Actions taken with malicious intent are categorically different from actions taken "wantonly, recklessly, or with indifference" to whether serious harm would result. Malicious intent seems more closely analogous to an intentional abuse of power, or gratuitous violence, or conduct taken with the primary intent to inflict punishment, than it

is to indifference to whether harm will result, which standard is, itself, distinguishable from indifference which is equivalent to an intent to harm.

The significant differences between these standards, and the import of the language chosen to describe the standard, is demonstrated by the reality that the law recognizes varying standards of conduct in different contexts. For example, pursuant to MCL 691.1407(2), lower level employees are immune from liability for negligent torts if, *inter alia*, their conduct does not constitute "gross negligence." Gross negligence is statutorily defined in this context by MCL 691.1407(7)(a) as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." As so defined, gross negligence is not simply a lack of concern, but a "substantial" lack of concern and it is through developing case precedent that this standard takes form.

Other cases discuss the meaning of the term "wilful and wanton misconduct", as in *Gibbard v Cursan*, 225 Mich 311 (1923) in the context of an allegation of contributory negligence and an attempt to distinguish between a defendant's wilful and wanton misconduct, and a plaintiff's negligence. The same term was considered again in *Burnett v City of Adrian*, 414 Mich 448 (1982), in the context of its use in the Recreational Use Act. The *Burnett* Court concluded that wilful and wanton misconduct "is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." (414 Mich, 455-456) This could be an "indifference" or "lack of concern" even greater than the statutory test for gross negligence which requires only a "substantial" lack of concern. [The

quantum of indifference articulated by the Court of Appeals in the case at bar is, arguably, even less than "substantial".]

In *Jennings v Southwood*, 446 Mich 125 (1994), the Court again turned to the meaning of the phrase "wilful and wanton misconduct," and, specifically, the distinction of that phrase from the term "willful misconduct" as used in the Emergency Medical Services Act, which limited the defendant's potential liability to "gross negligence" or "willful misconduct."

> On the one hand, wilful involves design and purpose. "Wilful means intentional." [citations omitted]
>
> > **Willful**. Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional purposeful; not accidental or involuntary. [Black's Law Dictionary (6th ed), p 1599].
>
> Wilful and wanton misconduct, on the other hand describes conduct that is *either* willful – i.e., intentional, *or* its effective equivalent. "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm *or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does." Burnett* at 445. (emphasis added [in *Jennings*]).
>
> A panel of the Court of Appeals recognized this distinction [and] [w]e approve of their reasoning:
>
> > Plaintiff here, however, relies on authority construing the phrase "wilful and wanton misconduct." We think the two differ significantly. "Wanton" conduct is "reckless," conduct that "amounts to" wilful injury, [citation omitted], but without intent. As the Supreme Court said in discussing *Gibbard, supra*, conduct that shows "such indifference to whether harm will result as to be the equivalent of a willingness that it does" fits the "wanton" prong of the "wilful and wanton" standard. *Burnett, [supra]*. A standard that permits liability for "wilful and wanton" conduct is less restrictive than one that confines liability to "wilful conduct alone. *The former*

> *allows liability when the defendant is so careless as to, in effect, intend harm, but the latter requires that intent actually be present.* [Emphasis added (in *Jennings*)].

(446 Mich, 139-141)

This discussion reflects the importance of the precise language chosen to define the standard for immunity, a precision which is missing in the appellate opinion in the case at bar. In *Ross*, the Court used the phrase "good faith," which, in the context of immunity for intentional torts was equated in *Odom* with an honest belief [in the reasonableness of the conduct] and/or the absence of malicious intent. Differentiating the existence of intent from the existence of malice (or absence of good faith) is especially important in the context of claims of excessive force, where there is always an intent to act with the concomitant understanding that harm may, or will, result, but without the specific intent that it does, and without the intent to harm itself being the guiding force of the decision to act.[1]

Immunity is intended to provide an additional layer of protection to an officer, protecting him from the liability which could be imposed on him in the absence of that immunity. There must be a formulation which accomplishes this task. As the Odom court held, lower level governmental employees do have a qualified immunity from

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[1] See, for example, the concurring statement of Justice Young, declining the request to answer certified questions, in *In re Certified Question: Lighthouse Neurological Rehabilitation Center v Allstate Ins Co*, 490 Mich 922 (2011), where the distinction was drawn between the subjective intent to do the act and the subjective intent to cause the injury when interpreting MCL 500.3105(4). Although this distinction was thought to be required by the statutory language itself, the distinction discussed remains relevant to the present inquiry as well.

liability for intentional torts. The Court of Appeals' application of *Odom* in the case at bar, however, fails to distinguish the elements which will support the imposition of liability, from the immunity elements to be considered that would avoid that liability.

D. The need for Supreme Court review, and a more precise articulation of the meaning of "good faith" in the context of excessive force claims, is evident from a review of lower court case precedent and a consideration of the factual circumstances which give rise to such claims.

A review of other appellate decisions released since this Court's opinion in *Odom*, including the Court of Appeals opinion after the remand in *Odom*, itself, demonstrates the existence of conflicting analyses. In *Odom v Wayne County (After Remand)*, CA #293021 (12/14/2010), 2010 WL 5093374 [attached hereto as Exhibit A], the Court of Appeals considered the circuit court's ruling on remand which found a question of fact as to whether the officer had acted in good faith when she detained and ticketed the plaintiff. The Court of Appeals reversed, finding that summary disposition should have been granted because only impermissible speculation could support a finding that the officer had "acted without honesty and with a lack of good faith": "To conclude, as plaintiff urges us to, that defendant acted with intent to harm plaintiff, merely because plaintiff provided an explanation consistent with legal activity, would be an entirely speculative conclusion." It also rejected the contention that the officer's rude and obnoxious attitude was direct evidence of bad faith:

> * * * However, defendant's comment and composure could just as easily be interpreted as frustration at having to make a difficult decision. Or, it could also indicate defendant's exasperation due to her disbelief of plaintiff's story. In short, defendant's comment could have signified any number of

> emotions given the circumstances. See, cf, *Oliver [v Smith],* ___ Mich App at ___. Accordingly, the comment alone does not create a justiciable question of fact whether defendant acted with good faith when she detained and ticketed plaintiff. *Id.* When all of the facts are taken into consideration, including the reasonable inferences arising therefrom, in the light most favorable to plaintiff, it cannot be inferred that defendant's actions were motivated by an intent to harm plaintiff or that they embodied an indifference that harm would result. * * *

The Supreme Court denied leave to appeal. [489 Mich 941 (2011)] *Oliver v Smith*, 290 Mich App 678 (2010), cited in the above quotation, involved an allegation of assault and battery against an officer because the officer had allegedly intentionally handcuffed the plaintiff's wrists too tight during an arrest. Applying the *Odom* factors to the immunity available to the officer for the intentional tort alleged against him, the Court found no evidence to support a finding that he had not acted in good faith, even in the face of evidence of his laughter:

> * * * Plaintiff relies solely on defendant's laughter when plaintiff informed him that the handcuffs were too tight to suggest that defendant's decision in that regard may not have been made in good faith. But defendant's laughter after plaintiff's complaint could just as fairly indicate his disbelief of plaintiff, thinking that if he loosened the handcuffs, plaintiff might again endeavor to resist, thereby creating another dangerous situation that defendant was not willing to risk. The laughter could also indicate that defendant was flabbergasted with plaintiff after plaintiff's obstreperous behavior, and had nothing to do with his previous act of cuffing plaintiff. When looking at the situation as a whole, the officers were faced with an unruly individual who was verbally belligerent, actively disturbing a police inquiry, and creating a dangerous situation for the officers involved. Plaintiff was intent on physically resisting arrest and as a result, plaintiff's injuries were just as likely caused by his own repeated efforts to physically thwart the officer's attempts to restrain him and regain control of the situation. Under these facts, considering the vast array of emotions defendant's laughter could signify, even when viewing the evidence in the light most favorable to plaintiff, plaintiff's reliance on the laughter alone,

> without more, did not create a justiciable question of fact with regard to whether defendant acted in good faith when he placed the cuffs on plaintiff.
>
> (290 Mich, 689)

The lower court ruling in the case at bar is inconsistent with both of these opinions and demonstrates that consideration of the question by this Court is warranted so as to permit a consistent approach and to inform proceedings in the trial courts.[2] It is also inconsistent with *Latits v Phillips*, 298 Mich App 109 (2012), which derived some guidance from federal precedent. In *Latits, supra,* the incident began with a routine traffic stop, escalated to a chase after the officer observed a bag of marijuana in the car, and ended in a parking lot where shots were fired at Latits' car as he continued to attempt to evade capture. Latits died of the gunshot wounds. It was alleged that the officer was liable under Michigan law because he had exercised poor judgment in using deadly force. Citing *Odom*, the Court of Appeals explained that a showing that a mistake was made would not defeat immunity:

> Thus, while plaintiff would ultimately have to prove that defendant was not justified in using deadly force in order to prevail at trial on her assault and battery claim, this showing is inadequate to defeat the defense of governmental immunity. As long as defendant can show that he had a good-faith belief that he was acting properly in using deadly force, he is entitled to the protections of governmental immunity regardless of whether

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[2] Although decided before this Court's ruling in *Odom*, the appellate decision in *Ealey v City of Detroit*, 144 Mich App 324 (1985) should also be considered. It applied the *Ross* factors to a claim that the defendant officer had used excessive force when he shot and killed plaintiff's decedent, finding no evidence that the officer had not acted in good faith. It also expressed concern that, to impose liability, or to deny immunity, because the officer could have waited instead of acting would give a message to officers that they should not risk their own lives to protect the public but should just wait for additional help to arrive.

> he was correct in that belief. And there is no evidence in this case to show that defendant did not have such a belief.
>
> (298 Mich App, 115)

The Court noted that the stated rationale of the officer had been to ensure his own safety and that of others, and found that the plaintiff had identified no evidence supportive of a finding of malice. It again noted that whether or not, "when viewing the facts objectively with the benefit of hindsight," the use of deadly force was justified was not the issue. *Id.,* 116. Rather, "the standard is a subjective one from the perspective of defendant with respect to whether he was acting in good faith" and "[w]hether the standards for acting in self-defense or defense of others was met is not controlling." *Id*. "What is relevant was whether defendant, in good faith, believed that he needed to fire his weapon to protect himself and others." *Id.* Of note, the Court found the United States Supreme Court opinion in *Brousseau v Haugen*, 543 US 194; 125 SCt 596; 160 LEd2d 583 (2004) to be instructive, even though *Brousseau* concerned the qualified immunity available against a claim brought under 42 USC §1983:

> Of course, unlike *Brousseau*, the case at bar does not involve a claim under §1983 or issues of qualified immunity. But *Brousseau* does provide guidance on two points. First, it draws into question plaintiff's claim that the force was excessive. If Brousseau's actions were on the "hazy border" between acceptable and excessive force, defendant's actions in the case at bar would seem to more clearly fall into the area of acceptable force. Second, and more to the point, if Brousseau's actions, and the circumstances surrounding her decision to shoot Haugen, did not clearly establish excessive force, then the circumstances surrounding defendant's decision to shoot Latits do not establish malice on behalf of defendant.
>
> (298 Mich App, 117-118)

Latits supports a standard that would afford immunity as long as the officer was acting honestly in his belief that the force was necessary, even when it is determined that he was wrong in his perception of the facts or his understanding of the law.

Consideration of federal precedent is informative because it presents a helpful analytical model which distinguishes liability from immunity. The existence of qualified immunity under §1983 presents an objective inquiry, while the immunity afforded under state law presents a subjective one. Thus, even though an officer's conduct may be objectively unreasonable, it may still have been subjectively undertaken in good faith. So too, the elements of assault and battery may have been satisfied because the use of force was unreasonable, but it may still have been undertaken in good faith.

Federal precedent is also helpful because it provides context and cases involving the use of deadly force are instructive as to the factual circumstances in which excessive force cases may arise.

- In *Bletz v Gribble*, 641 F3d 743 (6th Cir 2011), the officer had gone to a home late at night to execute a bench warrant, but when he followed the cooperative suspect into his home to get his shoes, he was confronted with the suspect's father who had both poor vision and hearing, and was pointing a gun at him. The officer took cover, the father did not comply with an order to drop his weapon, and the officer fired four shots, fatally wounding the father.
- In *Stephens v City of Akron*, 419 Fed Appx 586 (6th Cir 2011), officers were dispatched following a 911 call to a home where shots had been fired at a 4th of

July party, where they were approached by men with guns. Only one of the men quickly complied with the order to get on the ground, while the other was perceived as reaching for his gun. The officer fired, and the second man died.

- In *Steele v City of Cleveland*, 375 Fed Appx 536 (6th Cir 2010), after the officers had effected a traffic stop and the driver had exited the vehicle, and in violation of repeated orders, the driver reached into the vehicle for a gun. He was fatally wounded while struggling with the officers for control of the weapon.
- In *Jefferson v Lewis*, 594 F3d 454 (6th Cir 2010), the officer responded to a situation involving reported gunshots, heard gunshots when he arrived, and fired his weapon when he thought he saw a shot coming towards him from the doorway to a house, injuring an unarmed woman.
- In *Scozzari v Miedzianowski*, 454 Fed Appx 455 (6th Cir 2012), the officers responded to a report of a man with a gun, observed a man who was coming out of the woods who failed to obey commands to stop, and ultimately shot and fatally wounded the man when he came out of the cabin he had entered, wielding a knife.
- In *Chappell v City of Cleveland*, 585 F3d 901 (6th Cir 2009), the officer was conducting a protective sweep of a home prior to the execution of a search warrant, when he came upon a 15-year-old boy hiding in a closet. When he was ordered out of the closet, the boy emerged with a knife and the officer fired after the boy ignored orders to drop the knife.

Some of these §1983 cases could not be resolved on summary judgment because there were questions of fact which precluded a legal ruling regarding the objective reasonableness of the officers' actions. However, in none of these cases was there a suggestion that the officers were, subjectively, looking for trouble or using deadly force with malicious intent. In all of the cases, the officers were responding to and confronting dangerous situations, as their jobs required. They were doing their jobs, possibly imperfectly. Had a claim for assault and battery been asserted against them under Michigan law, the courts would have also been called upon to resolve the question of the officers' subjective good faith – an issue irrelevant to the §1983 claim. Indeed, this issue of state governmental immunity was presented in *Bletz, supra*. Although the *Bletz* Court held that questions of fact existed as to the objective reasonableness of the force used, it applied *Odom* when it granted summary judgment on the state assault and battery claim premised on the officer's governmental immunity:

> * * * Here, Gribble testified that he fired at Fred only because he was in fear for his life and the life of Denny. Although Zachary testified that Fred was lowering his weapon when Gribble fired, it is undisputed that Fred pointed a gun in the direction of the officers and may have initially ignored Gribble's order to drop his weapon. Accordingly, the record evidence does not support a finding that Gribble possessed malicious intent when he shot and killed Fred. * * *
>
> (641 F3d, 757-758)

Thus, although the degree of force used by an officer may, in retrospect, be found to have been excessive (to have been objectively unreasonable), and absent the existence of actual evidence that the use of fatal force had been undertaken with malicious intent,

an officer is entitled to immunity from liability. Contrary to the ruling of the Court of Appeals, malicious intent is not evidenced by an officer's mere indifference to whether harm will result, since harm will always result from the use of force. Rather, there must be a subjective intent to do something unlawful, evidence of a gratuitous use of violence.

If left undisturbed, the holding of the Court of Appeals will permit the avoidance of immunity whenever the elements of an assault and battery are, or may be, established. This is contrary to this Court's ruling in *Odom*, and contrary to the public policy enunciated in *Ross* which led it to the test of immunity which is now to be applied in cases involving the alleged excessive use of force. Officers who are honestly performing their job duties are entitled to this immunity, even when they err.

RELIEF REQUESTED

Amicus curiae, the Michigan Municipal League, respectfully requests that this Court grant the pending Application for Leave to Appeal filed by Jeremy Driggett.

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Dated: May 10, 2013.
1095286.1

EXHIBIT A

Odom v Wayne County (After Remand),
CA #293021 (12/14/2010), 2010 WL 5093374

STATE OF MICHIGAN

IN THE SUPREME COURT

HARVEY JOHNSON, Personal Representative of the Estate of Harvey Steward, Deceased, Plaintiff-Appellee, v BURTON CITY POLICE OFFICER JEREMY DRIGGETT, in his individual and official capacity, Defendant-Appellant. _____/	Supreme Court Case No. 146837 Court of Appeals Case No. 306560 Genesee Circuit Court Case No. 09-91432-NO

PROOF OF SERVICE

Proof of Service: I certify that a copy of **BRIEF AMICI CURIAE ON BEHALF OF THE MICHIGAN MUNICIPAL LEAGUE** and this **PROOF OF SERVICE** were served on the following attorneys of record as indicated below:

Date of Service: May 10, 2013

Signature: /s/ Enis J. Blizman
Enis J. Blizman

VIA FIRST CLASS MAIL	**VIA FIRST CLASS MAIL**
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