STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Meter, P.J., and Gadola and Tukel, JJ.)

ANTHONY HART,

Plaintiff-Appellant,

v.

STATE OF MICHIGAN, acting through the Michigan Department of State Police,

Defendant-Appellee.

MSC No: 159539

COA No: 338171

Ct of Claims No: 16-000212-MM

PLAINTIFF-APPELLANT'S REPLY BRIEF

Oral Argument Requested

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PLAINTIFF-APPELLANT'S REPLY BRIEF

The Brief on Appeal of Defendant-Appellee State of Michigan is notable for its failure to directly address many of the arguments set forth in Plaintiff's initial brief before this Court, as well as certain points made by Court of Claims Judge Cynthia Stephens, in her April 12, 2017 Opinion and Order, denying Defendant's motion for summary disposition. As for the points Defendant's Brief does address, it misconstrues.

A. Defendant Attempts to Impose a Mechanical and Non-Contextual Standard to Determine Causal Link.

In its first argument, Defendant focuses on the "onerous standard" for establishing government liability imposed by *Canton v Harris*, 489 US 378; 109 S Ct 1197; 103 L Ed 2d 412 (1989) and *Board of Comm'rs of Bryan Cty v Brown*, 520 US 397; 117 S Ct 1382; 137 L Ed 2d 626 (1997). Indeed, Defendant devotes over five pages to quoting case law in order to establish the onerousness of this standard [Appellee Brief, pp 5-10] then, without evidence or analysis, concludes that "Hart cannot meet this onerous standard." [*Id.*, at p 10]. Furthermore, it is quite telling that, in quoting extensively from *Canton*, Defendant ignores the following explanatory language:

> Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the *factfinder*, particularly since matters of judgment may be involved, and since

> officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

Canton v Harris, 489 US at 391 (emphasis added). In fact, Defendant quotes the lines immediately before, and those immediately after, but omits those in which the *Canton* Court explains that the question as to whether there exists a direct and obvious causal link between the constitutional harm alleged and a municipality's failure to train is most certainly a question of fact for the trier of fact. *Id.* Perhaps Defendant chose to ignore Justice White's explication of the "onerous standard," because it pulls the rug out from under its argument that Plaintiff's case should be dismissed at the pleading stage, without allowing any opportunity for factual development.[1]

B. Hart Properly Pleaded that his Harm was Caused by the State's Failure to Train as well as by its Other Affirmative Policies by Defendant State.

[1] Moreover, while Defendant argues that there must be a direct and obvious link between the State's failure to train and the violation of Hart's rights, it then conclusorily declares that no such custom or policy of failing to train existed. [Appellee's Brief, p 5]. Any casual reading of Plaintiff's Complaint will disclose the existence of such allegations. [Appx I, pp 3a, 17a, ¶¶3, 80(a) and (c)]. The question as to whether there was a failure to train that constituted a custom, policy, or practice, presents a question of fact and is therefore subject to factual development. *See, e.g., Johnson v Vanderkooi*, 502 Mich 751, 774, 918 NW2d 785, 798 (2018) (finding genuine issues of material fact regarding the existence of an official municipal policy.)

Defendant argues that the Court of Appeals was correct in concluding that all of Hart's allegations "were tantamount to allegations of failure to train and supervise." [Appellee Brief, p 11 (citing Appx I, p 137a)]. In so doing, however, Defendant completely neglects to address Plaintiff's explanations as to how and why his failure to train claim—a claim based on a theory of *inaction*—is separate and distinct from his claims that Defendant State, as a matter of custom, practice or policy, engaged in affirmative conduct that violated his constitutional rights. As to the latter, Plaintiff asserted that Defendant:

1. Operated the SOR software in a manner that did not ensure Hart would be flagged and removed from the Registry after he was no longer required to be listed, and also failed to institute other sensible procedures to ensure the accuracy of the SOR (Appx I, pp 7a, 16a-17a, 19a at ¶¶24, 80, 86);

2. Promulgated a SOR it knew to be flawed to local law enforcement as an accurate reflection of individuals subject to SORA restrictions, obligations and penalties (Appx I, pp 12a-14a, 16a-17a, 19a at ¶¶60-61, 66-67, 80, 86); and

3. Deliberately and systematically, falsely published Hart's name to the public and private law enforcement registries, and law enforcement agencies, subjecting Plaintiff Hart to shame, onerous restrictions on his liberty, and an ever-looming threat of serious penalties (Appx I, pp 12a-14a, 16a-17a, 19a at ¶¶60-61, 66-67, 80, 86).

[Appellant's Brief, pp 23-25]. Rather than address the distinctions that Plaintiff articulates in his Brief on Appeal and challenge Plaintiff's argument that the above-listed claims are separate and distinct from his failure to train claim, Defendant offers

an irrelevant and nonsensical justification for the Court of Appeals' erroneous conclusion. Indeed, Defendant contends that because

> an institutional defendant such as the State of Michigan can only maintain the sex offender registry through the actions of State agents and employees … Hart's allegations could only be construed as allegations that the State failed to train or supervise its employees and agents such that the registry was improperly maintained.

[Appellee's Brief, p 11]. In other words, according to Defendant, no other theory of municipal liability is feasible on the facts of this case. This is absurd. Justice Stephens, in her Order Denying Defendant's Motion for Summary Disposition, correctly observed that

> Defendant *neither* properly trained its officers with regard to understanding the changes to SORA, *nor* did Defendant make the requisite efforts to ensure that the SOR was accurate, according to ¶80 of the complaint.

[Appx I, p 73a (emphasis added)].

Next, Defendant argues that Plaintiff failed to state a failure to train claim under *Canton* and *Bryan County* because Plaintiff stated "no facts whatsoever to support the conclusion that the State made a deliberate or conscious choice regarding the alleged failures to train and supervise." [Appellee's Brief, p 12].[2] This argument is without merit.

[2] As Defendant acknowledges, this basis for dismissal of Plaintiff's claim was not articulated by the Court of Appeals. [Appellee's Brief, p 12].

The United States Supreme Court has explained that, a government's "'policy of inaction' in light of notice that its program will cause constitutional violations 'is the functional equivalent of a decision by the city itself to violate the Constitution.'" *Connick v Thompson*, 563 US 51, 61–62; 131 SCt 1350, 1360; 179 L Ed 2d 417 (2011), quoting *Canton*, 489 US, at 395 (O'Connor, J., concurring in part and dissenting in part). In his Complaint, Plaintiff alleges, among other things, that Defendant failed to train, supervise, and/or discipline its employees despite knowledge that the failure to provide this training was likely to cause officers to violate the constitutional rights of citizens. [Appx I, pp 16a-18a, ¶¶80-82]. Thus, Plaintiff alleges sufficient facts to support the conclusion that the State's failure to adequately train its officers was the "functional equivalent" of a deliberate decision or conscious choice. *Connick v Thompson*, 563 US at 61–62 (citation omitted). *See Rushing v Wayne Cty*, 436 Mich 247, 267; 462 NW2d 23, 32 (1990) (failure to act when the need to do so is obvious may suffice to create liability).

C. A Direct and Obvious Causal Link Exists Between the States Policies and Plaintiff's Harm.

It is noteworthy that Defendant completely neglects to address the differences between the *Canton* and *Bryan County* cases, particularly the difference in the standard for establishing causation required by each. [*See* Plaintiff's discussion in Appellant's Brief, pp 15-20]. Instead, Defendant repeatedly asserts, void of any

context, that the standard applied in *Bryan County* (and *Canton*) is "onerous."[3] The point here is not whether the standard is onerous, or arduous, or daunting. Rather, the standard – and its application – is shaped and fashioned by the facts and allegations of each situation. Plaintiff's case involves allegations that the State, among other things, failed to train Michigan State Police (MSP) officers to adequately analyze and rectify the SOR. [Appx I, pp 16a-17a]. It does not include allegations, as was the case in *Bryan County*, that the State failed to adequately screen applicants for purposes of hiring police officers. The US Supreme Court opined that the latter—i.e. cases involving constitutional injuries based on an alleged failure to screen or an ill-considered hiring decision—"pose the *greatest risk* that a municipality will be held liable for an injury that it did not cause." *Bryan County*, 520 US at 415. The Court explained that, because "in the broadest sense, every injury is traceable to a hiring decision," more rigorous standards of culpability and causation are required than for cases involving a failure to train claim. [*Id.*] Defendant never addresses this distinction in its Brief.

Defendant also seemingly ignores Plaintiff's analysis, pointing out that the "moral certainty" standard established by *Canton* does not apply to Defendant's knowledge that Plaintiff would be arrested and prosecuted as a result of the State's

[3] Notably the word "onerous" is not to be found in *Canton*, *supra; Bryan County*, *supra; Connick v Thompson*, *supra;* or *City of Oklahoma v Tuttle*, 471 US 808; 105 SCt 2427; 85 L Ed 2d 791 (1985).

failure to train. [Appellee's Brief, p 14; *See* Appellant's Brief, pp 14-15, 18]. Rather, as with the fleeing felon example given by the *Canton* Court, the moral certainty in this case applies to Defendant's knowledge that its agents would be confronted with a situation in which the lack of adequate training would lead the agents to commit constitutional rights violations. *See Canton*, 489 US at 390 n10.

Based on Defendant's (and the Court of Appeals') flawed analysis as to the "moral certainty" standard, Defendant proffers an argument that only further highlights the flaw in its analysis. [Appellee's Brief, pp 14-15]. Defendant argues that there were several intervening events between the alleged policy and the ultimate injury—i.e. Hart's engagement in conduct that violated SORA; the prosecutor's decision to charge Hart with a crime; the faulty advice of Hart's then-counsel; and Hart's decision to plead guilty—and thus, the causal link between the State's policy and Plaintiff's injury is too attenuated to give rise to liability against State. [*Id.*]. Applying Defendant's argument to the fleeing felon example in *Canton,* would completely do away with the single-incident theory of liability articulated by the *Canton* Court. 489 US at 390. Indeed, the hypothetical felon in footnote 10 would first have to engage in conduct that violated the law; then the untrained officer would have to make a decision to arrest the felon and succeed in effecting the arrest; then the felon would have to make the decision to flee; then the officer would have to decide to use unconstitutional force against the fleeing felon. Surely, the US

Supreme Court did not intend every possible human decision to constitute an intervening event breaking the causal link between a government's failure to train its agents and the resultant constitutional harm suffered by a plaintiff.

D. Defendant Misconstrues Plaintiff's Argument that Placement on the Registry, in and of Itself, is Punishment and Ignores the Rest.

Defendant argues that Plaintiff waived any argument that wrongly remaining on the Registry, in and of itself, constitutes a due process violation. [Appellee's Brief, p 16]. According to Defendant, Plaintiff Hart's incorrect listing as a sex offender constitutes a different constitutional violation from those alleged in his Complaint and Hart "abandoned" the issue by failing to raise it before the Court of Claims or brief it on appeal. [*Id.* at pp 16-17]. Defendant's argument is first and foremost, false and second, a red herring.

First, Defendant is incorrect in its assertion that Plaintiff's Complaint only alleges a constitutional violation based on his arrest and prosecution. [*Id.*] In fact, Plaintiff's Complaint also asserts that by falsely publishing his name on the Registry, Defendant "deprived [Plaintiff] of his liberty;" and that this constituted a "[s]eizure and loss of liberty." [Appx I, pp 15a-16a74, 77].[4]

[4] Defendant acknowledges that while the cumulative ("aggregate") effect of being listed *may* expose those on the list to punishment, due to the hardships associated with being so listed, the mere fact of listing alone is not punishment. This is simply illogical. How can placement on a list that can automatically impose the attendant serious restrictions that are inextricably built into the SORA, not in and of itself, punishment

Perhaps more importantly, however, Defendant's argument is a distraction from the real issue here. Plaintiff's assertion that remaining on the registry is, in and of itself, a constitutional violation is not an attempt to seek new or different kinds of damages. Rather, it is a legal argument to explain why a completely mishandled registration system is sure to result in constitutional violations. In other words, it does not matter that Plaintiff did not request damages for the punishment that he suffered as a result of his erroneous listing (other than for the resulting arrest, imprisonment and defamation). Even if Plaintiff did not allege liability against the State for the imposition of the registration requirement and other restrictions on Plaintiff's liberty imposed by SORA, it remains that being listed on the Registry, without justification, was a violation of Plaintiff's constitutional due process rights. Furthermore, the fact that simply being listed on the SOR carries with it the constant and ever-looming threat of arrest and detention is further evidence of the direct and obvious causal link between the State's alleged failure to train policy and Hart's arrest and prosecution.

In *Does #1-5 v Snyder, et al.*, the US Court of Appeals for the Sixth Circuit noted:

> [S]urely something is not "minor and indirect" just because no one is actually being lugged off in cold irons bound. Indeed, *those irons are always* in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment.

834 F3d 696, 703 (6th Cir 2016) (emphasis added). With this, the *Does #1-5* Court acknowledged that even for those properly listed on the Registry, the risk of being arrested is direct and obvious. Surely, at least the same can be said for those who are wrongly included on that list. Most certainly then, the State's failure to adequately train its employees and/or its use of a defective or otherwise inadequate software program, powerfully increased the likelihood that innocent persons whose names were not removed from the list as a result, would be "lugged off in cold irons bound."

CONCLUSION

Based on the foregoing and on Plaintiff-Appellant's Brief on Appeal, Plaintiff respectfully requests that this Honorable Court reverse and/or vacate the Court of Appeals' February 7, 2019 Order, reinstate the April 12, 2017 Order of the Court of Claims, and remand this case to the Court of Claims for further proceedings.

Respectfully submitted,

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Dated: February 13, 2020

CERTIFICATE OF SERVICE

I, Laurel O. Seale certify, that on February 13, 2020, I filed a copy of **Plaintiff-Appellant's Reply Brief,** using the Michigan Courts' MiFiling system, which will serve a copy of said filing upon all attorneys of record.

/s/ Laurel O. Seale
Legal Assistant