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 *CORRECTED* BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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ORDER/JUDGMENT APPEALED FROM

Plaintiff-Appellant, Anthony Hart, appeals from a February 7, 2019 decision of the Michigan Court of Appeals (Meter, P.J., and Gadola and Tukel, JJ.), reversing the Court of Claims' denial of Defendant-Appellee State of Michigan's Motion for Summary Disposition, and remanding the case for the entry of summary disposition in favor of Defendant. (Appx. I, pp. 132a-140a). Plaintiff-Appellant timely sought reconsideration (Appx. II, pp. 261a-275a), which, on March 22, 2019, the Court of Appeals denied. (Appx. II, p. 283a).

On May 3, 2019, Plaintiff-Appellant timely filed an *Application for Leave to Appeal* to this Honorable Court, which application was granted on September 25, 2019. Plaintiff-Appellant now files this Brief on Appeal within 56 days of the Court granting his application, as required by MCR 7.312(E)(1).

QUESTIONS FOR REVIEW

1. Did the Michigan Court of Appeals err in determining that there was no causal link between the MSP's failure to train its employees and the violation of Plaintiff's constitutional rights?

   Plaintiff-Appellant: YES

   Defendant-Appellee: NO

2. Did the Court of Appeals misstate the rule for establishing municipal liability based on a single constitutional rights violation, articulated by the United States Supreme Court in *Canton v. Harris*, and, consequently fail to apply the correct standard in assessing Plaintiff's allegations?

   Plaintiff-Appellant: YES

   Defendant-Appellee: NO

3. Did the Court of Appeals err by failing to recognize that simply by being forced to remain on the Michigan Sex Offender Registry after July 1, 2011, when amendments to the law mandated his removal, Plaintiff was punished in violation of his constitutional rights?

   Plaintiff-Appellant: YES

   Defendant-Appellee: NO

4. Did the Court of Appeals fail to consider allegations of customs, policies and practices that violated Plaintiff's rights other than failure to train, which allegations constitute separate basis of Defendant's liability?

   Plaintiff-Appellant: YES

   Defendant-Appellee: NO

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INTRODUCTION

The Court of Appeals' February 7, 2019 Opinion and Order contains glaring errors, including, but not limited to the misinterpretation of established United States Supreme Court precedent and, consequently the application of the wrong standard for determining municipal (and State of Michigan) liability for the deprivation of constitutional rights. Plaintiff-Appellant seeks this Honorable Court's reversal of the Court of Appeals' decision on a number of grounds set forth in the Michigan Court Rules.

Because, the decision of the Court of Appeals conflicts with United States Supreme Court precedent, it is clearly erroneous and will cause material injustice, not only to Plaintiff-Appellant Hart, but, if allowed to stand as precedent in this state, for all future plaintiffs alleging violations of their constitutional rights by the State of Michigan. Plaintiff-Appellant respectfully asks that this Honorable Court reverse the Court of Appeals' opinion below and rectify the jurisprudence of this state, insofar as the issues addressed herein are concerned.

STATEMENT OF FACTS

In 2001, Plaintiff-Appellant Anthony Hart (hereinafter "Plaintiff" or "Hart") was adjudicated in Hillsdale County Juvenile Court on a violation of MCL § 750.520(e)—fourth degree criminal sexual conduct (CSC)—for an incident that took place when he was 16 years old. (Appx. I, p. 5a at ¶14). Hart was convicted

and designated a "Tier II" sex offender which, at that time, pursuant to Michigan's Sex Offenders Registration Act (SORA) MCL § 28.721 *et seq.*, required him to report and register his address bi-annually for 25 years. (Appx. I, p. 5a at ¶15). In 2011, the Michigan Legislature amended the SORA such that, effective July 1, 2011, Tier II offenders who had previously been adjudicated as juveniles, like Hart, were no longer required or expected to register. (Appx. I, p. 5 at ¶16). *See* 2011 PA 17, 18, Eff. July 1, 2011.

Accordingly, the names of these offenders, including that of Plaintiff Hart, were to be removed from the Sex Offender Registry (hereinafter "SOR" or "registry") by the Michigan State Police ("MSP"), acting through its agents and/or officials responsible for maintaining the registry. (Appx. I, pp. 5a-6a at ¶¶18-20). However, the MSP took no action to remove Hart's name from the registry; consequently, and in violation of its statutory obligations as set forth in MCL § 28.725a(1), the MSP also failed to inform Hart that he was no longer required to register. (Appx. I, pp. 5a-6a at ¶ 18-21). Hart, therefore, continued to register as a sex offender with his local registering authorities from July 2011 through July 2013. (Appx. I, p. 6a at ¶22).

On July 5, 2013, Plaintiff Hart mistakenly registered his address as *79* Budlong, as opposed to *76* Budlong, in Hillsdale, Michigan. (Appx. I, pp. 7a-8a at

¶¶29-30).[1] As a result of this unintentional numerical error, Hart was arrested and subsequently charged with violating the SORA. (Appx. I, p. 8a at ¶31). On August 14, 2013, on the faulty advice of his then-defense counsel, Hart entered a plea of *nolo contendere* and was found guilty of one count of failing to register, in violation of Section 9 of SORA—a law that did not apply to him by virtue of the fact that the 2011 amendment to SORA exempted Hart from the registration requirement. (Appx. I, pp. 8a-9a at ¶37). He was ordered to pay a fine. *Id.*

In January 2014, Hart was once again wrongfully arrested for failing to comply with SORA reporting duties. (Appx. I, p. 9a at ¶¶41-42). On February 10, 2014, MSP agent Marci Kelley, acting pursuant to the customs, policies and/or practices of the State of Michigan, attested to the supposed validity of Hart's purported "Sex Offender Registry Certified Record," without first checking to see whether Hart may have been exempted from the SOR by the 2011 legislative amendment. Kelley then transmitted this flawed "Certified Record" to the Hillsdale City Police, thereby "establishing" the requisite probable cause needed to prosecute Hart for violating his obligations under the SORA. (Appx. I, p. 10a at ¶45). This purported "Sex Offender Registry Certified Record" falsely stated that Hart was still required to report and register on a semi-annual basis until February 20, 2054. (*Id.*,

[1] Plaintiff Hart was actually homeless at the time and staying in a treehouse in the backyard of an acquaintance who lived at 76 Budlong in Hillsdale. (Appx. I, p. 8a at ¶30).

at ¶47). Thus, not only did this "Certified Record" falsely declare that Hart was required to register, but it stated an end-date that would have required him to register for a period of 52 years, 4 months and 17 days (a registration period that does not, and did not, exist under the SORA under any circumstances).[2] (*Id.*, at ¶¶45, 47). Again, due to the faulty advice of Plaintiff's then-defense counsel and the failure of the MSP to notify him that he was no longer required to register as a sex offender, as it was required to do, Plaintiff Hart pleaded guilty to the felony of failure to report and register. (*Id.*, at ¶48). On March 17, 2014, Hart was sentenced to 16-24 months in a Michigan state correctional facility and ordered to pay $1,026.94 in fines, costs, and restitution. (*Id.*, at ¶¶48-49).

In August 2015, an agent of the Michigan Department of Corrections (MDOC) became aware that Hart was imprisoned for a non-existent crime and notified the MSP. (Appx. I, p. 11 at ¶51). On August 25, 2015, Hillsdale County Circuit Court Judge Michael Smith vacated Hart's 2014 guilty plea, conviction and sentence and the following day, Hart was released from prison. (*Id.*, at ¶¶54-55). On

[2] This registration end-date had been inexplicably altered from a 2010 version of Hart's "Sex Offender Registry Certified Record," also produced and transmitted by Kelley, which listed the registration end date as August 3, 2026. The "Verification Frequency" on Hart's "Sex Offender Registration Certified Record" was similarly altered from "Quarterly" in a 2010 version, to "Semi-annually" in the version transmitted by Kelley on February 10, 2014. This unexplained inconsistency not only constitutes another reason why the SOR was very obviously false and unreliable, but it also raises questions as to why, in what manner, and according to what policy, Hart's data was tampered with. It underscores the need (and right of Plaintiff) to conduct discovery.

November 17, 2015, Hart's 2013 guilty plea, conviction and sentence were also vacated. (*Id.*, at ¶56).

As a direct result of MSP's deliberate decisions, including its deliberate propagation of a SOR that it knew to be highly flawed, Plaintiff Hart was mistakenly, unlawfully, and punitively listed on Michigan's Sex Offender Registry for over four years after it was mandated, by law, that he be removed. This listing constituted punishment in a variety of ways, including, but not limited to: being defamatory; commanding Hart's presence at law enforcement agencies for reporting purposes; limiting the locations where Hart could live and work; twice causing Hart's arrest, prosecution, and conviction; and causing Hart to be incarcerated for 17 months[3]—all for a non-existent crime.

Plaintiff Hart commenced the instant action against Defendant State of Michigan (hereinafter, "Defendant" or "the State") in the Michigan Court of Claims on August 24, 2016,[4] alleging violations of Article 1, §§ 11 and 17 of the Michigan Constitution. (Appx. I, pp. 1a-21a). On December 5, 2016, Defendant filed a motion for summary disposition under MCR 2.116(C)(7) and (C)(8), arguing that Hart's

[3] Plaintiff's Verified Amended Complaint mistakenly stated that Plaintiff had spent 19 months in jail, calculating the time from the date of his arrest—January 23, 2014—rather than the day of his sentencing—March 17, 2014.

[4] Plaintiff Hart inadvertently commenced this action with a Complaint that was not verified. (Appx. I, p. 1a). He filed a Verified Amended Complaint on October 12, 2016. All references to the Complaint herein, refer to the Verified Amended Complaint. (Appx. I, pp. 2a-21a).

claim for damages was barred by sovereign immunity; and, that even if not so precluded, Hart's claim would nonetheless fail "because it is not based on any actual unconstitutional policy or custom of the State agency [but rather] premised upon the *failure* to follow law and policy." (Appx. I, p. 32a, Def's Motion for Summary Disposition, p.8 [emphasis in original]). On April 12, 2017, Court of Claims Judge Cynthia Stephens issued a well-reasoned opinion denying the State's motion (Appx. I, pp. 67a-74a), which Defendant appealed to the Michigan Court of Appeals. (Appx. I, pp. 75a-98a). On February 7, 2019, the Court of Appeals entered an order reversing the Court of Claims and remanding the case for the entry of summary disposition in favor of Defendant. (Appx. I, pp. 132a-140a).

The Court of Appeals agreed with Plaintiff Hart and affirmed the Court of Claims' finding that sovereign immunity is not a defense to constitutional tort claims (Appx. I, p. 136a). However, it erroneously determined that Hart "ha[d] not alleged sufficient facts to have stated a claim upon which relief can be granted." (Appx. I, pp. 139a-140a). As will be fully explained below, the latter finding is clearly erroneous and would cause material injustice to Plaintiff Hart if not reversed.

On February 28, 2019, Plaintiff filed a timely Motion for Reconsideration, which the Court of Appeals denied in a one-line Order dated March 22, 2019. (Appx. II, pp. 261a-275a, 283a). Pursuant to this Court's September 25, 2019 Order Granting Leave to Appeal, Plaintiff Hart now urges this Honorable Court to reverse

that part of the Court of Appeals' Opinion and Order that erroneously found that he had failed to state a claim under MCR 2.116(C)(8).

STANDARD OF REVIEW

Appellate review of the grant or denial of a motion for summary disposition is *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint to determine whether the plaintiff has stated a claim on which relief can be granted. *Id.* When deciding a motion under MCR 2.116(c)(8), the court must accept as true all well-pleaded factual allegations and construe them in the light most favorable to the nonmoving party. *White v Beasley*, 453 Mich 308, 313; 552 NW2d 1, 2 (1996). Summary disposition on the basis of MCR 2.116(C)(8) "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 49; 693 NW2d 149, 151 (2005), quoting *Maiden*, 461 Mich at 119; 597 NW2d 817.

ANALYSIS

The Court of Appeals' finding that Plaintiff Hart failed to allege sufficient facts to state a claim upon which relief could be granted (Appx. I, pp. 139a-140a) is based on a misapprehension of Plaintiff's claims and of the applicable law, in particular *Canton v Harris*, 489 US 378, 389; 109 S Ct 1197, 1205; 103 L Ed 2d 412

(1989) and *Board of Comm'rs of Bryan Cty v Brown*, 520 US 397, 409; 117 S Ct 1382, 1391; 137 L Ed 2d 626 (1997), as well as a failure to consider certain claims asserted by Plaintiff. Correcting these errors will necessarily result in a reversal of the Court of Appeals Order.

I. THE COURT OF APPEALS ERRED IN DETERMINING THAT THERE IS NO CAUSAL LINK BETWEEN THE MSP'S FAILURE TO TRAIN ITS EMPLOYEES AND THE VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS.

In its February 7, 2019 Opinion and Order, the Court of Appeals determined that, because being listed on the SOR does not guarantee with "moral certainty" that one will be arrested, there is no direct causal link between the MSP's failure to appropriately train its employees in SORA developments, and the constitutional violations suffered by Hart (Appx. I, p. 139a).

This assertion is based on two glaring errors in the intermediate court's analysis. First, the Court of Appeals misconstrued and misapplied the standard for establishing liability for inadequate training or supervision, under the "single violation" theory articulated by the United States Supreme Court in *Canton v Harris*, *supra* and affirmed in *Bryan County v Brown*, *supra*. Second, the Court of Appeals completely failed to recognize that simply being erroneously kept on the SOR, in and of itself, constitutes punishment in violation of an individual's constitutional rights; arrest is not required.

A. The Court of Appeals Misstated the Applicable Standard and Consequently Failed to Follow the Standard Established by the United States Supreme Court in *Canton v Harris* and Affirmed in *Bryan County*.

It is well established that inadequate training or supervision of employees may serve as a basis for municipal liability "where the failure to train amounts to deliberate indifference to the rights of persons with whom the [governmental officials] come into contact." *Canton v Harris*, 489 US at 388. The United States Supreme Court articulated two ways in which such deliberate indifference can be shown: (1) by evidence that the governmental entity failed to act in response to repeated complaints of constitutional violations by its officers, *see Connick v Thompson*, 563 US 51, 61-62; 131 S Ct 1350, 1360; 179 L Ed 2d 417 (2011); or (2) by evidence of a failure to provide adequate training in light of foreseeable consequences that could result from a lack of instruction. *Id.*, at 63-64, citing *Canton*, 489 US at 390, n 10. In the context of the latter, the United States Supreme Court opined that "a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, could trigger municipal liability." *Bryan Cty v Brown*, 520 US at 409, citing *Canton*, at 390, n 10. In other words, where the unconstitutional consequences of failing to train is so patently obvious, a governmental entity can be liable under 42 USC § 1983 without proof of a pre-existing pattern of violations.

In this case, there may well have been repeated constitutional rights violations resulting from the MSP's failure to train its employees and implement other measures to ensure that the names of persons who were no longer supposed to be listed on the SOR were properly removed. However, as Defendant moved for summary disposition on the pleadings, pursuant to MCR 2.116(C)(8), there has yet to be any discovery in this case. Consequently, Plaintiff has not been permitted the opportunity, through discovery, to establish a pattern of violations and misconduct resulting from Defendant's failure to train its employees and implement other obvious and necessary measures. Plaintiff should be permitted to pursue discovery to uncover other such violations, and thereby further establish Defendant's requisite deliberate indifference to his constitutional rights. *See Walker v City of New York,* 974 F2d 293, 300 (2d Cir 1992).

Notwithstanding the above, Plaintiff properly asserted a failure to train claim based on the "single violation" theory for establishing municipal liability. (Appx. I, pp. 16a-18a, at ¶¶78-84). However, the Court of Appeals failed to properly apply the standard articulated by the United States Supreme Court in the landmark case of *Canton v Harris, supra* and *Bryan Cty v Brown, supra* and, consequently, wrongly determined that Hart failed to allege a "*direct and obvious causal link*" between Defendant's failure to train and the deprivation of Plaintiff's constitutional rights

that demonstrates "deliberate indifference." (Appx. I, pp. 139a-140a). According to the Court of Appeals,

> the alleged failure to train MSP employees in this SORA context does not carry the same obvious or clear dangers of a constitutional violation [as the fleeing felon example given in *Canton*]. That is because the failure to train employees on how to update the SORA after pertinent legislative changes does not possess the same direct causal link to a constitutional violation, being illegally arrested.

(Appx. I, p. 139a).

The Court of Appeals went on to explain that erroneously being kept on the SOR did not bring with it the certainty of false arrest, because a person wrongly listed on the SOR would only be arrested if he or she "failed to keep the SOR updated with a correct address." (Appx. I, p. 139a). The Court opined:

> [t]his is distinguishable from the fleeing felon example in Canton because it is not "a moral certainty" or "patently obvious" that people who are on the SOR (properly or not) will fail to keep the SOR updated and be arrested as a result. But on the contrary, it is commonly and readily understood that felons do indeed flee from the police.

(*Id.*).

This analysis is flawed on a number of levels. First, persons listed on the SOR cannot avoid arrest simply by ensuring that the SOR is updated with their correct address. Such a statement greatly understates the significant obligations and tight restrictions with which a registrant is burdened, as well as the heavy consequences the registrant faces if these obligations and restrictions are not adhered to. *See* MCL 28.724a, 725, 725(a), 727, 728(a) and 729; *see also Does #1-5 v Snyder*, 834 F3d

696, 703 (6th Cir 2016), *cert den* 138 S Ct 55 (2017). For example, a registrant is subject to penalty under any of the following circumstances, among many others:

1. Failing to report to a local registering authority within a limited window of time (MCL 28.725a[3], [4], and [9]);

2. Failing to pay the annual registration fee (MCL 28.725a[6] and [9]);

3. Neglecting to report, immediately, and in-person, the buying or selling of a vehicle (MCL 28.725);

4. Being found living or working within 1,000 feet of a school (MCL 28.734); and

5. Making a *one*-digit mistake in the address reported to authorities, as occurred in this case. MCL 28.725; 2011 PA 17, 18.

Therefore, SOR registrants do not merely have to make sure they "keep the SOR updated with the correct address" in order to avoid arrest and prosecution, as was stated by the Court of Appeals. (Appx. I, p. 139a). Rather, a person erroneously listed on the SOR can be subject to false arrest if he or she inadvertently neglects to report a new job or if that new job location happens to be 950 feet from a schoolyard. MCL 28.725 and 28.734; s*ee Does #1-5 v Snyder,* 834 F3d at 697-98 (summarizing the developments in Michigan's Sex Offender Registration Act).

More significantly, however, the Court of Appeals applied the wrong standard in its analysis. The court determined that there was no direct causal link between Defendant's failure to appropriately train its agents following pertinent legislative amendments to the SOR and the constitutional violations suffered by Hart, because

it is not "'a moral certainty' or 'patently obvious' that people who are on the SOR … will fail to keep the SOR updated and be arrested as a result." (Appx. I, p. 139a). As explained below, this is not the standard that was articulated by the United States Supreme Court in *Canton v Harris* and affirmed in *Bryan County*.

1. *Canton v Harris*

The phrase "moral certainty" comes from a footnote in *Canton v Harris*, 489 US 378, 389, n 10; 109 S Ct 1197, 1205; 103 L Ed 2d 412 (1989). In *Canton*, police officers were given broad discretion to determine whether police prisoners required medical attention; but they were given no training as to how to employ that discretion. *Id.*, at 381-82. This lack of training, it was alleged, resulted in at least one mishap—that which befell Ms. Harris. *Id.* The standard by which liability should be determined for the alleged lack of training resulting in a single incident of a constitutional violation was addressed by the Court, to wit:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id., at 390. This standard was then footnoted by the Court with an example of a situation that would present such an obvious need for certain training, that the failure of a municipality to provide it could reflect deliberate indifference, even absent a pattern of violations—the "fleeing felon" example. The Supreme Court opined that,

because "city policymakers *know to a moral certainty* that their police officers will be required to arrest fleeing felons," *Canton*, 489 US at 390, n 10 (emphasis added), and, because the officers are given firearms to accomplish this task, failure to train the officers in the constitutional limitations on the use of deadly force, could be characterized as "deliberate indifference to constitutional rights." *Id.*[5] Contrary to the analysis of the Court of Appeals in this case, the *Canton* Court did not state that *it was* a "moral certainty" that people who commit felonies will try to flee and be confronted with unconstitutionally excessive or deadly police force. Rather, the Supreme Court stated that "city policymakers *know* to a 'moral certainty' that their police officers will be required to arrest fleeing felons." 489 US at 390, n 10 (emphasis added). In other words, the "moral certainty" is in the knowledge that officers or government employees would be confronted with situations in which the lack of proper training could cause them to violate the constitutional rights of

[5] The footnote reads, in pertinent part:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons and, therefore, must be trained in the constitutional limits of the use of deadly force. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v Garner*, 471 US 1, 105 S Ct 1694, 85 L Ed 2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Canton v Harris, 489 US at 390, n 10.

citizens. The "moral certainty" is not, as the Court of Appeals would have it, in the anticipated conduct of a particular plaintiff.

To be sure, the Supreme Court emphasized that the question of a city's liability for failure to train must focus on the "adequacy of the training program in relation to the tasks the particular officers must perform." *Id.*, at 390. That is, where it is obvious—i.e. where it can be said that policymakers "know to a moral certainty"—that government employees will be confronted with situations that, without proper training, are likely to result in the violation of the constitutional rights of citizens, the conscious decision not to provide the relevant training can provide the requisite proof of "deliberate indifference" for a viable municipal liability claim. *Id.*; *see also Id.*, at 393, 396 (O'Connor, J., concurring in part and dissenting in part). Applying this standard to the facts of *Canton*, the U.S. Supreme Court held that the claims of plaintiff Harris, even though based only on a single violation, were cognizable under *Monell v Dept of Social Servs of the City of New York*, 436 US 658 (1978) and could result in liability against the city of Canton if, on remand, plaintiff Harris could show the requisite knowledge of the city's policymakers as to the need to train police officers in diagnosing the symptoms of emotional illness. *Id.*, at 392 and 396.

2. *Bryan County v Brown*

The other U.S. Supreme Court case cited by the Court of Appeals in the articulation and application of its "moral certainty" test is *Board of Comm'rs of Bryan Cty v Brown*, 520 US 397, 409; 117 S Ct 1382, 1391; 137 L Ed 2d 626 (1997). (Appx. I, pp. 138a-139a). In *Bryan County*, the County Sheriff—the principal policymaker of the County—had hired as a deputy sheriff, a sketchy and untrained relative who subsequently abused plaintiff Brown following a car chase, resulting in Brown needing to undergo corrective surgery. 520 US at 400-401. Unlike the instant case, which alleges that Defendant failed to adequately provide its agents with necessary training, in *Bryan County*, the plaintiff attempted to hold the county liable for a single hiring decision. The *Bryan* Court emphasized the significant difference between these two types of cases:

> The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive. In leaving open in *Canton* the possibility that a plaintiff might succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations, we simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle *recurring situations*.

Id., at 409 (emphasis added). In contrast, the Court continued, "predicting the consequence of a single hiring decision … is far more difficult than predicting what might flow from the failure to train a single law enforcement officer to a specific skill necessary to the discharge of his [or her] duties." *Id.*, at 410.

This difference in the degree of predictability discussed by the *Bryan* Court is not only relevant to the "deliberate indifference" analysis, but also to establishing causation. *Id.*, at 409-10. Specifically, the Supreme Court opined that a high degree of predictability could "support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable." *Id.*

Recently, this Honorable Court held the same. In *Johnson v Vanderkooi*, 502 Mich 751, 775; 918 NW2d 785, 798 (2018), plaintiffs sought to hold the City of Grand Rapids Police Department liable, pursuant to 42 USC § 1983 for violating their Fourth and Fifth Amendment rights when police officers performed "photograph and print" (P&P) procedures in field interrogations, without probable cause. *Id.*, at 759. Evidence showed that the Grand Rapids Police Department had a policy or custom of authorizing the use of P&P procedures, but it did not instruct officers on the probable cause prerequisite for employing such procedures. *Id.*, at 775-76. This Court held that this evidence permitted a *reasonable inference* that the city's P&P policy or custom was the moving force behind the constitutional violations alleged by the *Johnson* plaintiffs. *Id.*

3. *Applying Canton and Bryan County to this case*

MSP agents are tasked with maintaining an accurate SOR. (Appx. I, pp. 4a-7a, ¶¶11,18,23,27). The 2011 amendments to the Michigan SORA mandated that at least three categories of offenders be removed from the SOR: (1) all offenders who

were 13 years old or younger at the time of the offense; (2) all offenders who were between the ages of 14 and 16 at the time of the offense and were classified as Tier I offenders; and (3) all offenders who were between the ages of 14 and 16 at the time of the offense and were classified as Tier II offenders. *See* 2011 PA 17.

It is indisputable that as a result of this 2011 amendment to the law, at least dozens, if not hundreds—or even thousands—of previously listed sex offenders were, by law, to be removed from the SOR. Thus, after July 1, 2011, Defendant's policymakers *knew to a moral certainty* that its agents would be required to ensure that individuals who were, by law, no longer required to register, would be appropriately removed from the registry. On these facts, it is beyond doubt that failure to train the MSP agents responsible for maintaining the SOR in the new legislation and its implementation, would lead to the propagation of a highly flawed SOR—i.e. that names would remain on the list of some who should not be there.

Moreover, the Michigan Public Sex Offender Registry (PSOR), which is maintained by Defendant, lists 40,384 registered offenders, of which 8,265, or roughly 20 percent, are listed as being in violation of their registration and reporting obligations.[6] Given the significant number of individuals who were to be removed

[6] *See* http://www.icrimewatch.net/results.php?SubmitAllSearch=1&AgencyID=55242 (accessed last on November 18, 2019). It should be noted that this number reflects the number of SOR registrants known to be in violation of their registration and reporting obligations at the given time. The percentage of registrants who violate

from the SOR after July 1, 2011, and the knowledge that at least 20 percent of all offenders violate their SORA obligations,[7] it was patently obvious to Defendant's policymakers that failure to take steps to ensure that MSP agents were trained in handling changes to the SOR, would lead to numerous wrongful arrests. In light of this obvious need to train, Defendant's failure to provide the appropriate training to its agents reflects a "deliberate or conscious choice" by Defendant—a policy of deliberate indifference to the constitutional rights of Hart and other similarly situated youthful offenders for which Defendant can be held liable, *see Canton*, at 389; and the Court of Appeals erred in determining otherwise.

As well, the Court of Appeals found that Plaintiff had failed to allege a sufficient basis for causation:

> The alleged failure to train MSP employees … does not carry the same obvious or clear dangers of a constitutional violation. That is because the failure to train employees … does not possess the same direct causal link to a constitutional violation, being illegally arrested.
> (Appx. I, p. 139a)

In so deciding, the Court of Appeals, ignored the very language from *Bryan County*, quoted in its Opinion—that a "high degree of predictability may … support an

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their obligations at some point in the duration of their registration period is likely higher. Furthermore, this number also does not include all registrants that may have been arrested for other SORA violations, such as coming within 1,000 feet of a school. MCL 28.734.

[7] *See* n 6.

inference of causation." (Appx. I, pp. 138a-139a, quoting *Byron County*, 520 US at 409). It also ignored the teaching of Justice White in *Canton v Harris*, *supra*:

> 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.

Id., at 391. Similarly, here, predicting how these matters would have played out may not be an easy task. Yet, should this Court choose to adhere to *Canton*, the matter will surely be viewed as a job for "judge and jury, doing their respective jobs." *Id.*

B. The Court of Appeals Failed to Recognize that Simply by Being Forced to Remain on the SOR After July 1, 2011, Plaintiff was Being Punished in Violation of His Constitutional Rights.

The Court of Appeals' analysis is also flawed in its determination that only an unlawful arrest resulting from the erroneous inclusion on the SOR would amount to a constitutional rights violation (Appx. I, p. 139a). It most certainly ignored the fact that simply being unlawfully listed on the SOR, in and of itself, is a form of punishment, which, if imposed without due process, is unconstitutional.

Plaintiff's Complaint reflected the unconstitutionality of being listed, in that Hart asserted that:

- He was listed on the SOR and required to register and continue to register for 25 years;

- Continuing on the list caused a deprivation of his liberty; and
- Being on the list caused law enforcement officers to advise his employers that he was a sex offender.

(Appx. I, pp. 7a, 11a-12a, 15a-16a, 18a-19a at ¶¶15, 22, 24, 27, 57, 73-77, 81-84)

Yet, according to the Court of Appeals, wrongly including a person's name on the SOR long after the law mandated its removal, will only rise to the level of a constitutional violation if the person is actually arrested on the basis of that erroneous listing. (Appx. I, p. 139a). Such a determination by the court runs afoul of the rights and liberties inherent in due process and protected by both the United States and Michigan Constitutions. US CONST AMS V, XIV; CONST 1963, ART 1 § 17.

Indeed, the United States Court of Appeals for the Sixth Circuit, in a unanimous decision, found that Michigan's SORA, with its onerous restrictions and requirements, places significant constraints on an individual's personal liberty, and, therefore, simply being listed thereon constitutes a form of punishment. *Does #1-5 v Snyder*, 834 F3d 696, 702-03, 705 (6th Cir 2016), *cert den* 138 S Ct 55 (2017). Likening the SORA to the ancient punishments of banishment and public shaming, the Sixth Circuit discussed the various ways in which simply having one's name listed on the Michigan SOR severely infringes upon an individual's liberty. *Id.*, at 702-03. These include, among other things, by mandating regular in-person reporting requirements, dictating where a registrant can and cannot live and work, and heavily restricting the places that a registrant can be physically present, all

accompanied by the ever-looming threat of imprisonment if a registrant should err. MCL 28.734; *see Does #1-5*, at 702-03.

Significantly, Defendant State of Michigan, acting through its Attorney General, *now* strongly agrees that simply being listed on the SOR is a form of punishment. In two separate *amicus briefs* filed by the Michigan Attorney General on February 8, 2019, Defendant State affirmatively acknowledges that the 2006 and 2011 amendments to Michigan's SORA—particularly the geographic exclusion zones and in-person reporting requirements, both of which Plaintiff Hart was unlawfully subjected to—impose extremely punitive burdens on registrants. BRIEF OF AMICUS CURIAE MICHIGAN ATTORNEY GENERAL DANA NESSEL, in the case of *State v Snyder*, Supreme Court No. 153696 (2019) (Appx. II, pp. 158a-167a, 199a-200a,). Therefore, as a matter of law, by keeping Plaintiff's name on the SOR and subjecting him to onerous obligations, restrictions, and stigma, for years after the law no longer required him to register, Defendant State unlawfully punished Plaintiff Hart.

Recently, in the matter of *John Does #1-6 v Snyder, et al*, Case No. 2:16-cv-13137 (ED Mich 2019), the Hon. Judge Robert A. Cleland entered an order **stipulated to by the State of Michigan's Attorney General** which stated, in relevant part:

> The Court enters a declaratory judgment, pursuant to 28 USC §§ 2201 and 2202 and consistent with *Does #1-5 v Snyder*, 834 F3d 696 (6th Cir

> 2016), *cert denied*, 138 S Ct 55 (2017), **that the current Sex Offender Registration Act (SORA), MCL § 28.721 *et seq*, is punishment** and that the ex post facto application of the 2006 and 2011 amendments is unconstitutional.

(Emphasis added). This Order further supports Plaintiff's argument that the Michigan Court of Appeals erred by failing to recognize that being erroneously kept on the SOR, in and of itself, constitutes punishment in violation of an individual's constitutional rights. (Appx. II, pp. 284a-288a).

This being the case, Plaintiff was deprived of his liberty without any process, let alone due process—all by virtue of his name remaining on the SOR long after it was required, by statute, to have been removed. Thus, contrary to the Court of Appeal's finding, Defendant's failure to train and supervise its employees, as alleged in Plaintiff's Complaint, does possess a direct causal link to a constitutional violation, that is, the punishment of being listed on the SOR without any legal basis.

II. THE COURT OF APPEALS FAILED TO CONSIDER ALLEGATIONS OF CUSTOMS, POLICIES AND/OR PRACTICES THAT VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS OTHER THAN FAILURE TO TRAIN.

Yet another defect in the Court of Appeals' analysis lies in its flawed determination that that Plaintiff's allegations "can all be summarized as the failure to train, supervise, and/or discipline defendant's employees." (Appx. I, p. 137a). While Plaintiff indeed alleged that Defendant failed to adequately train, supervise, and/or discipline its employees, he also has alleged that the MSP had customs,

policies and/or practices that failed to ensure the SOR was properly maintained, while simultaneously promulgating said registry as an accurate and authoritative database upon which law enforcement agencies were to rely for the purpose of policing sex offenders. (Appx. I, pp. 4a-7a, 12a-14a, 16a-17a, 19a at ¶¶11, 18, 23, 27, 60, 80, 86).

Plaintiff Hart has alleged that Defendant, as a matter or practice or policy, operated the SOR software in a manner that did not ensure Plaintiff would be flagged and removed from the registry following the passage of the 2011 SORA amendments, nor did it institute other sensible procedures to ensure the accuracy of the SOR. (Appx. I, pp. 7a, 16a-17a, 19a at ¶¶24, 80, 86). For example, there was no electronic cross check between dates of birth, dates of offense, and severity of offense, which would have placed an electronic safeguard in place to protect the rights of those no longer required to be listed. (*Id.*). There was no concern or process (let alone training) regarding double checking the first casual survey of the SOR, such as a second or third set of eyes brought to bear on the problem. Given the fact that mistakes are due to the failure to employ basic and sensible procedures to ensure the accuracy of the SOR, it was all but guaranteed that names would slip through the cracks, resulting in punishment without due process.

Nevertheless, Defendant promulgated this SOR that it knew to be flawed (precisely because it did not institute procedures to ensure otherwise) and presented

it to local law enforcement as an accurate reflection of individuals subject to SORA restrictions, obligations and penalties. In doing so, for several years after Plaintiff Hart was no longer required to register as a sex offender, Defendant engaged in the deliberate and systematic provision of false information used to manufacture probable cause to arrest and prosecute Hart.[8] (Appx. I, pp. 12a-14a, 16a-17a, 19a at ¶¶60-61, 66-67, 80, 86). Likewise, Defendant deliberately and systematically, falsely published Hart's name to the public and private law enforcement registries, and law enforcement agencies, subjecting him to onerous restrictions on his liberty, shame, and an ever-looming threat of serious penalties. (Appx. I, pp. 12a-14a, 16a-17a, 19a at ¶¶60-61, 66-67, 80, 86).

Failing to institute proper and necessary procedures to ensure the accuracy of the SOR, and actively propagating and publishing a flawed SOR, both constitute policies and practices, actionable under *Monell*, that are separate and distinct from, and additional to, Defendant's failure to adequately train its employees. The Court of Appeals erred in neglecting to consider these facts.

[8] Plaintiff had a constitutional right not to be deprived of his liberty based on false information, deliberately, knowingly and/or recklessly supplied by Defendant to manufacture probable cause. *Howard v Burton*, 338 Mich 178, 183-184, 61 NW2d 77 (1953); *Raudabaugh v Baley*, 133 Mich App 242, 248, 350 NW2d 242, 245 (1983).

CONCLUSION AND REQUEST FOR RELIEF

In pinning its holding on the supposed fragility of the connection between Defendant's failure to train employees as to how to maintain the accuracy of the SOR and the arrest and imprisonment of Plaintiff Hart, the Court of Appeals misapplied United States Supreme Court precedent, overlooked the fact that keeping Hart listed on the SOR itself violated Hart's constitutional rights, and disregarded Plaintiff's allegation that the violation of his rights was caused by several unconstitutional customs, practices and/or policies, in addition to failure to train.

WHEREFORE, based on the foregoing, Plaintiff Hart 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: November 21, 2019

CERTIFICATE OF SERVICE

I, Laurel O. Seale certify, that on November 21, 2019, I filed a copy of **Plaintiff-Appellant's *Corrected* Brief on Appeal,** using the Michigan Courts' TruFiling system, which will serve a copy of said filing upon all attorneys of record.

/s/ Laurel O. Seale
Legal Assistant