IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
BOONSTRA P.J., and O'BRIEN and LETICA, JJ.

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

MSC No. 160958
COA No. 330536
Trial Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

MSC No. 160959
COA No. 330537
Trial Court No. 14-002166-NO

APPELLANTS' APPENDIX

Miriam J. Aukerman (P63165)
American Civil Liberties Union Fund of Michigan
1514 Wealthy St., Suite 242
Grand Rapids, MI 49506
(616) 301-0930

Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824

Edward R. Becker (P51398)
Margaret Curtiss Hannon (P78726)
David A. Moran (P45353)
Cooperating Attorneys, American Civil Liberties Union Fund of Michigan
625 S. State St.
Ann Arbor, MI 48109
(734) 763-4714

Nathan Freed Wessler
Ezekiel R. Edwards
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500

TABLE OF CONTENTS

17th Circuit Court Name Search

Register of Actions

Confirmation of whether charges in criminal cases are misdemeanors or felonies is not available from the Kent County Circuit Court Clerk's Office.

Information is available at http://legislature.mi.gov/documents/mcl/pdf/mcl-chap750.pdf.

Case # 14-02166-NO

File Date: 03/12/2014

HARRISON, KEYON et al vs. VANDERKOOI, CURT et al

HARRISON, KEYON - PLAINTIFF

Other Parties: VANDERKOOI, CURT - DEFENDANT

Other Parties: HARRISON NEXT FRIEND OF KEYON HARRISON, ANCHANET - PLAINTIFF

Other Parties: CITY OF GRAND RAPIDS, - DEFENDANT

1	03/01/2021	ORDER FROM THE SUPREME COURT, DATED 2/26/21 (SC # 160959) (APPLICATION FOR LEAVE TO APPEAL THE 11/21/19 JUDGMENT OF THE COURT OF APPEALS IS CONSIDERED AND GRANTED)
2	02/20/2020	NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL IN MI SUPREME COURT DANIEL S. KOROBKIN (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
3	01/08/2020	ORDER FROM THE COURT OF APPEALS, DATED 1/3/20 (MOTION FOR RECONSIDERATION DENIED)
4	11/21/2019	ORDER FROM THE COURT OF APPEALS - ON REMAND (AFFIRMED)
5	11/21/2019	ORDER FROM THE COURT OF APPEALS - ON REMAND (CONCURRING)
6	12/03/2018	ORDER FROM THE COURT OF APPEALS (CASES TO BE CONSOLIDATED TO ADVANCE THE EFFICIENT ADMINISTRATION OF JUSTICE)
7	09/13/2018	ORDER FROM THE COURT OF APPEALS (MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REMAND GRANTED)
8	07/10/2017	NOTICE OF FILING OF APPLICATION FOR LEAVE TO APPEAL DANIEL S KOROBKIN (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
9	05/23/2017	ORDER FROM THE COURT OF APPEALS (AFFIRMING TRIAL COURT DECISION)
10	08/17/2016	CONTENT OF TRANSMISSION TO THE COURT OF APPEALS FILED (COA #330537)
11	08/17/2016	NOTICE OF TRANSMISSION TO THE COURT OF APPEALS SENT TO BERNARD SCHAEFER AND KRISTEN REWA FILE (COA #330537)
12	03/07/2016	TRANSCRIPT OF MOTIONS FOR SUMMARY DISPOSITION, MOTION FOR PARTIAL SUMMARY DISPOSITION, AND MOTION TO STRIKE (49 PGS) (HELD ON 10/30/15 BEFORE JUDGE GEORGE JAY QUIST) (STACY DILWORTH COURT REPORTER)
13	03/07/2016	NOTICE OF FILING OF TRANSCRIPT & POS
14	12/14/2015	REPORT/RECORDER'S CERTIFICATE OF TRANSCRIPT ON APPEAL

15	12/04/2015	CLAIM OF APPEAL AND POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
16	12/04/2015	CLAIM OF APPEAL FEE Receipt: 819341 Date: 12/04/2015
17	11/23/2015	CANCELLED The following event: SETTLEMENT CONFERENCE scheduled for 12/18/2015 at 1:30 pm has been resulted as follows: Result: CANCELLED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B
18	11/19/2015	CANCELLED The following event: CASE EVALUATION HEARING scheduled for 12/03/2015 at 9:00 am has been resulted as follows: Result: CANCELLED Judge: ZPANEL, DEC 3, 2015 Location:
19	11/18/2015	OPINION AND ORDER RE: DEFS' MOTION TO STRIKE PL'S EXPERT WILLIAM TERRILL AND POS FILED (GRANTED)
20	11/18/2015	OPINION AND ORDER RE: PL'S MOTION FOR PARTIAL SUMMARY DISPOSITION AND DEFS' MOTIONS FOR SUMMARY DISPOSITION AND POS FILED (PL'S MOTION DENIED, DEFS' MOTION GRANTED, CASE DISMISSED W/PREJUDICE)
21	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188 The following event: MOTION TO STRIKE scheduled for 10/30/2015 at 9:00 am has been resulted as follows: Result: HELD - WRITTEN OPINION TO BE ISSUED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
22	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188 The following event: MOTION FOR SUMMARY DISPOSITION scheduled for 10/30/2015 at 9:00 am has been resulted as follows: Result: HELD - WRITTEN OPINION TO BE ISSUED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
23	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188 The following event: MOTION FOR SUMMARY DISPOSITION scheduled for 10/30/2015 at 9:00 am has been resulted as follows: Result: HELD - WRITTEN OPINION TO BE ISSUED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
24	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188 The following event: MOTION FOR PARTIAL SUMMARY DISPOSITION scheduled for 10/30/2015 at 9:00 am has been resulted as follows: Result: HELD - WRITTEN OPINION TO BE ISSUED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
25	10/27/2015	DEF CITY AND VANDERKOOI'S REPLY IN SUPPORT OF THEIR MOTIONS FOR SUMMARY DISPOSITION & POS FILED KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI (DEFENDANT)
26	10/27/2015	RESPONSE TO DEFS' MOTION TO STRIKE PL'S EXPERT, DR. WILLIAM TERRILL PHD, POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
27	10/23/2015	RESPONSE TO DEF CURT VANDERKOOI'S MOTION FOR SUMMARY DISPOSITION BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON, ANCHANET HARRISON NEXT FRIEND OF KEYON HARRISON (PLAINTIFF)
28	10/23/2015	RESPONSE TO DEF CITY OF GRAND RAPIDS' MOTION FOR SUMMARY DISPOSITION, POS (CIVIL BOX 510) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON, ANCHANET HARRISON NEXT FRIEND OF KEYON HARRISON (PLAINTIFF)
29	10/23/2015	RESPONSE TO PL'S MOTION FOR PARTIAL SUMMARY DISPOSITION, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
30	10/23/2015	POS (PL'S RESPONSE TO DEF CURT VANDERKOOI'S MOTION FOR SUMMARY DISPOSITION)

31	10/21/2015	SCHEDULED Event: MOTION TO STRIKE Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD - WRITTEN OPINION TO BE ISSUED
32	10/20/2015	MOTION TO STRIKE PLS' EXPERT WILLIAM TERRILL, NOTICE, BRIEF & POS (10/30/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
33	10/20/2015	MOTION FEE PAID Receipt: 809563 Date: 10/20/2015
34	10/16/2015	NOTICE TO APPEAR (CASE EVALUATION) AND POS (12/3/15 @ 9:00)
35	10/09/2015	ORDER REGARDING CASE EVALUATION AND POS FILED (ADJOURNED, TO BE SET DECEMBER 2015)
36	10/09/2015	CASE EVALUATION HEARING ADJOURNED The following event: CASE EVALUATION HEARING scheduled for 11/10/2015 at 9:00 am has been resulted as follows: Result: CASE EVALUATION HEARING ADJOURNED Judge: ZPANEL, NOV 10, 2015 Location:
37	10/01/2015	SETTLEMENT CONFERENCE (NOTICE & PROOF) Event: SETTLEMENT CONFERENCE - JUDGE SET Date: 12/18/2015 Time: 1:30 pm Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: CANCELLED
38	09/23/2015	NOTICE TO APPEAR (CASE EVALUATION) AND POS (11/10/15 9:00)
39	09/14/2015	SCHEDULED Event: MOTION FOR SUMMARY DISPOSITION Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD - WRITTEN OPINION TO BE ISSUED
40	09/14/2015	SCHEDULED Event: MOTION FOR SUMMARY DISPOSITION Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD - WRITTEN OPINION TO BE ISSUED
41	09/11/2015	SUMMARY DISPOSITION EXHIBIT LIST KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
42	09/11/2015	MOTION FOR SUMMARY DISPOSITION, NOTICE, BRIEF & POS (10/30/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI (DEFENDANT)
43	09/11/2015	MOTION FOR SUMMARY DISPOSITION, NOTICE, BRIEF & POS (10/30/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CITY OF GRAND RAPIDS (DEFENDANT)
44	09/11/2015	MOTION FOR PARTIAL SUMMARY DISPOSITION, NOTICE, BRIEF & POS (10/30/15 @ 9:00) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
45	09/11/2015	MOTION FEE PAID Receipt: 801261 Date: 09/11/2015
46	09/11/2015	SCHEDULED Event: MOTION FOR PARTIAL SUMMARY DISPOSITION Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD - WRITTEN OPINION TO BE ISSUED
47	09/11/2015	MOTION FEE PAID Receipt: 801227 Date: 09/11/2015
48	09/04/2015	TRANSCRIPT OF MOTION (9 PGS) (HELD 07/10/15 BEFORE JUDGE GEORGE JAY QUIST) (STACY DILWORTH COURT REPORTER)
49	09/03/2015	POS (DEF CITY OF GRAND RAPIDS' SUPPLEMENTAL RESPONSE TO PL KEYON HARRISON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
50	09/02/2015	POS (RESPONSE TO PLS' FIFTH SET OF REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)

51	08/31/2015	POS (RESPONSE TO PLS' FOURTH SET OF INTERROGATORIES, REQUESTS TO ADMIT AND REQUEST FOR PRODUCTION OF DOCUMENTS TO CITY OF GRAND RAPIDS)
52	08/21/2015	POS (DEF'S ANSWERS TO PLS' INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS REGARDING DEFS' EXPERT)
53	08/21/2015	ANSWERS TO PL DENISHIO JOHNSON'S FIRST REQUEST FOR ADMISSIONS, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
54	08/21/2015	ANSWERS TO REQUESTS FOR ADMISSIONS TO DEFS CURT VANDERKOOI AND CITY OF GRAND RAPIDS, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
55	08/21/2015	ANSWERS TO PLS' REQUESTS TO ADMIT TO DEF CITY OF GRAND RAPIDS, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
56	08/21/2015	AMENDED WITNESS LIST AND POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
57	07/31/2015	MEDIATION STATUS REPORT (NOT HELD) OTHER: MOTION TO COMPEL MEDIATION DENIED
58	07/30/2015	POS (NOTICE OF DEPOSITION OF DR. WILLIAM TERRILL)
59	07/24/2015	AMENDED EXPERT WITNESS LIST AND POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
60	07/16/2015	ORDER CONCERNING 7/10/15 HEARING FILED (DEF'S MOTION TO SANCTION PLS FOR EXPERT DISCOVERY VIOLATIONS GRANTED IN PART PLS' MOTION TO COMPEL PARTICIATION OF DEF CITY OF GRAND RAPIDS IN MEDIATION DENIED)
61	07/10/2015	HELD- ORDER TO FOLLOW STACY DILWORTH CER 8188 The following event: MOTION TO COMPEL scheduled for 07/10/2015 at 9:00 am has been resulted as follows: Result: HELD Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
62	07/10/2015	HELD- ORDER TO FOLLOW STACY DILWORTH CER 8188 The following event: MISCELLANEOUS MOTION scheduled for 07/10/2015 at 9:00 am has been resulted as follows: Result: HELD Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
63	07/08/2015	RESPONSE IN OPPOSITION TO PLS' MOTION TO COMPEL MEDIATION, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
64	07/07/2015	ADDITIONAL EXHIBITS AND POS, EXHIBIT K, EXHIBIT L
65	07/06/2015	SCHEDULED Event: MOTION TO COMPEL Date: 07/10/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD
66	07/02/2015	LAY WITNESS LIST AND POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
67	07/02/2015	WITNESS LIST AND POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
68	07/02/2015	MOTION TO COMPEL PARTICIPATION OF DEF CITY OF GRAND RAPIDS IN MEDIATION, NOTICE AND POS (07/10/15 @ 9:00) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
69	07/02/2015	MOTION FEE PAID Receipt: 786337 Date: 07/02/2015
70	06/30/2015	MEDIATION STATUS REPORT (NOT HELD) OTHER: DISCOVERY CLOSES 7/31/15

71	06/26/2015	E-MAIL TO MEDIATOR REQUESTING STATUS REPORT FORM
72	06/24/2015	MOTION TO SANCTION PLS FOR EXPERT DISCOVERY VIOLATIONS PURSUANT TO MCR 2.302(E)(1)(A)(II) AND 2.313(D), NOTICE, BRIEF & POS (07/10/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
73	06/24/2015	SCHEDULED Event: MISCELLANEOUS MOTION Date: 07/10/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD
74	06/24/2015	MOTION FEE PAID Receipt: 784379 Date: 06/24/2015
75	06/22/2015	POS (DEF CITY OF GRAND RAPIDS' RESPONSE TO PLS' THIRD SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS)
76	06/12/2015	NOTICE OF REASSIGNMENT AND POS
77	05/30/2015	CASE ASSIGNED TO HON. GEORGE JAY QUIST AS SUCCESSOR TO HON. JAMES R. REDFORD 6/1/2015
78	05/08/2015	POS (DEF CITY OF GRAND RAPIDS' RESPONSE TO PLS' THIRD SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS)
79	05/01/2015	EXPERT WITNESS DISCLOSURE AND POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
80	04/10/2015	POS (DEFS' SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO PL KEYON HARRISON)
81	04/01/2015	POS (PL DENISHIO JOHNSON'S ANSWERS TO DEFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS)
82	03/31/2015	EXPERT WITNESS LIST AND POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
83	03/30/2015	MEDIATION STATUS REPORT (HELD/NOT SETTLED) PARTIES DID NOT SETTLE
84	03/20/2015	POS (DEFS RESPONSE TO PLS' SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS)
85	02/26/2015	POS (DEFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO KEYON HARRISON AND DENISHIO JOHNSON)
86	02/23/2015	STIPULATION AND ORDER TO EXTEND DEADLINES IN SCHEDULING ORDER
87	02/23/2015	NOTICE OF TAKING DEPOSITION OF KEYON HARRISON (03/26/15 @ 2:00) & POS KRISTEN REWA (Attorney) on behalf of CITY OF GRAND RAPIDS (DEFENDANT)
88	02/20/2015	POS (DEF CITY OF GRAND RAPIDS' FIRST SUPPLEMENTAL RESPONSE TO PL DENISHO JOHNSON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
89	02/17/2015	POS (JUDGMENT ENTERED BY HONORABLE MARK A. TRUSOCK)
90	02/17/2015	POS (DEF CITY OF GRAND RAPIDS' FIRST SUPPLEMENTAL RESPONSE TO PLNF KEYON HARRISON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)

91	01/23/2015	POS (DEF ELLIOTT BARGAS' RESPONSE TO PL DENISHIO JOHNSON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF ELLIOTT BARGAS, AND DEF CITY OF GRAND RAPIDS' RESPONSE TO PL DENISHIO JOHNSON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
92	01/20/2015	POS (DEF CURT VANDERKOOI'S RESPONSE TO PL KEYON HARRISON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CURT VANDERKOOI AND DEF CITY OF GRAND RAPIDS' RESPONSE TO PL KEYON HARRISON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
93	01/05/2015	NOTICE OF MEDIATION AND POS (1/29/15 @ 2:00)
94	01/05/2015	NOTICE OF MEDIATION AND POS (1/28/15 @ 1:00)
95	12/31/2014	POS (SUMMONS, SECOND AMENDED COMPLAINT, AND STIPULATION AND ORDER TO CONSOLIDATE CASES FOR DISCOVERY PURPOSES)
96	12/10/2014	APPOINTMENT AS MEDIATOR LETTER (DISPUTE RESOLUTION CENTER)
97	12/02/2014	ORDER FOR REFERRAL FOR MEDIATION (MEDIATOR DISPUTE RESOLUTION CENTER)
98	11/20/2014	SCHEDULING ORDER
99	10/10/2014	ANSWER TO SECOND AMENDED COMPLAINT WITH AFFIRMATIVE DEFENSES & POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT); MARGARET P. BLOEMERS (Attorney) on behalf of CURT VANDERKOOI, CITY OF GRAND RAPIDS (DEFENDANT)
100	09/22/2014	STIPULATION AND ORDER TO CONSOLIDATE CASES FOR DISCOVERY PURPOSES ONLY
101	09/19/2014	SECOND AMENDED COMPLAINT (6 PAGES) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
102	09/19/2014	SUMMONS ISSUED CITY OF GRAND RAPIDS (DEFENDANT);
103	09/11/2014	AMENDED ORDER (PL'S MOTION FOR LEAVE TO FILE 2ND AMENDED COMPLAINT GRANTED ; AMENDED COMPLAINT AND/OR MOTION TO JOIN 14-07226-NO FOR DISCOVERY PURPOSES ONLY ON OR BEFORE 9/19/14, ETC)
104	09/10/2014	POS (TWO ORDERS DATED 9/9/14)
105	09/09/2014	ORDER FILED (NON-PARTY CITY OF GRAND RAPIDS' MOTION DENIED)
106	09/09/2014	ORDER FILED (PL TO FILE AMENDED COMPLAINT AND/OR MOTION TO JOIN DENISHIO JOHNSON FOR DISCOVERY PURPOSES ONLY ON OR BEFORE 9/9/14, DEF TO FILE OBJECTION ON OR BEFORE 9/30/14 AND ANSWER ON OR BEFORE 10/10/14)
107	09/05/2014	HELD The following event: MISCELLANEOUS MOTION scheduled for 09/05/2014 at 10:30 am has been resulted as follows: Result: HELD. MOTION TO DISQUALIFY PLF ATTY DENIED. COURT TO ISSUE ORDER. Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A HELD ON THE RECORD COURT REPORTER: PAT VAN TIL Certificate #: CER 5656
108	09/05/2014	HELD The following event: ORAL ARGUMENTS scheduled for 09/05/2014 at 10:30 am has been resulted as follows: Result: HELD. COURT TO ISSUE ORDER. Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A HELD ON THE RECORD COURT REPORTER: PAT VAN TIL Certificate #: CER 5656
109	08/29/2014	RESPONSE TO MOTION BY NON PARTY CITY OF GRAND RAPIDS FOR DISQUALIFICATION OF PL COUNSEL, AFFIDAVIT OF BERNARD SCHAEFER & POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)

110	08/27/2014	RENOTICE OF HEARING AND POS (09/05/14 @ 10:30) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
111	08/18/2014	EXHIBIT LIST MOTION BY NON-PARTY CITY OF GRAND RAPIDS FOR DISQULIFICATION OF PLS' COUNSEL AND POS
112	08/18/2014	SCHEDULED Event: MISCELLANEOUS MOTION Date: 09/05/2014 Time: 10:30 am Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A Result: HELD
113	08/15/2014	MOTION BY NON-PARTY CITY OF GRAND RAPIDS FOR DISQUALIFICATION OF PL'S COUNSEL, NOTICE, BRIEF & POS (09/05/14 @ 10:30) (CIVIL BOX 510) CATHERINE M MISH (ATTORNEY)
114	08/15/2014	MOTION FEE PAID Receipt: 718064 Date: 08/15/2014
115	08/01/2014	SCHEDULED Event: ORAL ARGUMENTS Date: 09/05/2014 Time: 10:30 am Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A Result: HELD
116	08/01/2014	HELD IN ABEYANCE The following event: MOTION FOR LEAVE TO FILE AMENDED COMPLAINT scheduled for 08/01/2014 at 9:00 am has been resulted as follows: Result: HELD IN ABEYANCE Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A HELD ON THE RECORD COURT REPORTER: HEACOCK, TERI Certificate #: CSR-2309
117	07/29/2014	POS (LIMITED APPEARANCE TO CONTEST JOINDER AS PARTY DEF, NON PARTY CITY OF GRAND RAPIDS OPPOSITION TO PL MOTION TO COMPEL DISCOVERY AND OPPOSITION TO PL MOTION TO JOIN CITY AS PARTY)
118	07/29/2014	NON PARTY CITY OF GRAND RAPIDS OPPOSITION TO PL MOTION TO COMPEL DISCOVERY AND OPPOSITION TO PL MOTION TO JOIN CITY AS PARTY CATHERINE M MISH (ATTORNEY), KRISTEN REWA (ATTORNEY) ON BEHALF OF CITY OF GRAND RAPIDS
119	07/29/2014	LIMITED APPEARANCE TO CONTEST JOINDER AS PARTY DEF CATHERINE M MISH (ATTORNEY) ON BEHALD OF CITY OF GRAND RAPIDS
120	07/25/2014	BRIEF IN SUPPORT OF MOTION TO AMEND COMPLAINT AND MOTION TO COMPEL DISCOVERY AND POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
121	07/25/2014	MOTION TO COMPEL DISCOVERY, NOTICE AND POS (08/01/14 @ 9:00) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
122	07/25/2014	MOTION FEE PAID Receipt: 713372 Date: 07/25/2014
123	07/07/2014	SCHEDULED Event: MOTION FOR LEAVE TO FILE AMENDED COMPLAINT; AND 2) MOTION TO COMPEL Date: 08/01/2014 Time: 9:00 am Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A Result: HELD IN ABEYANCE
124	07/03/2014	RENOTICE OF HEARING ON PL'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND POS (08/01/14 @ 9:00) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
125	07/02/2014	HELD The following event: SCHEDULING CONFERENCE scheduled for 07/01/2014 at 4:30 pm has been resulted as follows: Result: HELD BY ATTYS. PROPOSED PRETRIAL SCHEDULE SUBMITTED. PER JRR, WILL DECIDE PENDING MOTION TO AMEND COMPLAINT BEFORE PREPARING SCHEDULING ORDER. Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A
126	07/01/2014	MOTION FOR LEAVE TO FILE SECOND AMENEDED COMPLAINT, NOTICE AND POS (07/18/14 @ 9:00) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
127	07/01/2014	MOTION FEE PAID Receipt: 708239 Date: 07/01/2014
128	06/26/2014	POS (STIPULATION AND ORDER)

129	06/17/2014	STIPULATION AND ORDER (KEYON HARRISON IS NOW AN ADULT AND FIRST AMENDED COMPLAINT AMENDED TO REFLECT STATUS)
130	06/05/2014	SCHEDULING CONFERENCE (NOTICE & PROOF) Event: SCHEDULING CONFERENCE Date: 07/01/2014 Time: 4:30 pm Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A Result: HELD
131	05/08/2014	ANSWER TO FIRST AMENDED COMPLAINT WITH AFFIRMATIVE DEFENSES RELIANCE UPON JURY DEMAND & POS MARGARET P. BLOEMERS (Attorney) on behalf of CURT VANDERKOOI (DEFENDANT)
132	04/18/2014	FIRST AMENDED COMPLAINT & POS (4 PAGES) BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
133	04/18/2014	JURY DEMAND & POS BERNARD C. SCHAEFER (Attorney) on behalf of KEYON HARRISON (PLAINTIFF)
134	04/18/2014	JURY DEMAND Receipt: 692164 Date: 04/18/2014
135	04/09/2014	APPEARANCE ANSWER TO COMPLAINT WITH AFFIRMATIVE DEFENSES & POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI (DEFENDANT)
136	03/12/2014	COMPLAINT(4)
137	03/12/2014	FILING FEES FOR NEW CASE Receipt: 683386 Date: 03/12/2014
138	03/12/2014	SUMMONS ISSUED CURT VANDERKOOI (DEFENDANT);

17th Circuit Court Name Search

Register of Actions

Confirmation of whether charges in criminal cases are misdemeanors or felonies is not available from the Kent County Circuit Court Clerk's Office.

Information is available at http://legislature.mi.gov/documents/mcl/pdf/mcl-chap750.pdf.

Case # 14-07226-NO

File Date: 08/07/2014

JOHNSON, DENISHIO et al vs. VANDERKOOI, CURT et al

JOHNSON, DENISHIO - PLAINTIFF

Other Parties: VANDERKOOI, CURT - DEFENDANT

Other Parties: BARGAS, ELLIOT - DEFENDANT

Other Parties: CITY OF GRAND RAPIDS, - DEFENDANT

1	03/01/2021	ORDER FROM THE SUPREME COURT, DATED 2/26/21 (SC # 160958) (APPLICATION FOR LEAVE TO APPEAL THE 11/21/19 JUDGMENT OF THE COURT OF APPEALS IS CONSIDERED AND GRANTED)
2	02/20/2020	NOTICE OF FILING APPLICATION FOR LEAVE TO APPEAL IN MI SUPREME COURT DANIEL S. KOROBKIN (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
3	01/08/2020	ORDER FROM THE COURT OF APPEALS, DATED 1/3/20 (MOTION FOR RECONSIDERATION DENIED)
4	11/21/2019	ORDER FROM THE COURT OF APPEALS - ON REMAND (AFFIRMED)
5	11/21/2019	ORDER FROM THE COURT OF APPEALS - ON REMAND (CONCURRING)
6	12/03/2018	ORDER FROM THE COURT OF APPEALS (CASES TO BE CONSOLIDATED TO ADVANCE THE EFFICIENT ADMINISTRATION OF JUSTICE)
7	09/13/2018	ORDER FROM THE COURT OF APPEALS (MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REMAND GRANTED)
8	08/23/2018	SYLLABUS AND OPINION FROM SUPREME COURT
9	08/23/2018	ORDER FROM THE SUPREME COURT (IN LIEU OF GRANTING LEAVE TO APPEAL, PART III OF THE COURT OF APPEALS' JUDGMENT IS REVERSED AND MATTER IS REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS)
10	07/10/2017	NOTICE OF FILING OF APPLICATION FOR LEAVE TO APPEAL DANIEL S KOROBKIN (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
11	05/23/2017	ORDER FROM THE COURT OF APPEALS (AFFIRMING TRIAL COURT DECISION)
12	08/17/2016	CONTENT OF TRANSMISSION TO THE COURT OF APPEALS (COA #330536)
13	08/17/2016	NOTICE OF TRANSMISSION TO THE COURT OF APPEALS SENT TO BERNARD SCHAEFER AND KRISTEN REWA FILED (COA #330536)
14	03/07/2016	TRANSCRIPT OF MOTIONS FOR SUMMARY DISPOSITION, MOTION FOR PARTIAL SUMMARY DISPOSITION, AND MOTION TO STRIKE (49 PGS) (HELD ON 10/30/15 BEFORE JUDGE GEORGE JAY QUIST) (STACY DILWORTH COURT REPORTER)

15	03/07/2016	NOTICE OF FILING OF TRANSCRIPT & POS
16	12/14/2015	REPORT/RECORDER'S CERTIFICATE OF TRANSCRIPT ON APPEAL
17	12/04/2015	CLAIM OF APPEAL AND POS BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
18	12/04/2015	CLAIM OF APPEAL FEE Receipt: 819340 Date: 12/04/2015
19	11/19/2015	CANCELLED The following event: CASE EVALUATION HEARING scheduled for 12/03/2015 at 9:00 am has been resulted as follows: Result: CANCELLED Judge: ZPANEL, DEC 3, 2015 Location:
20	11/18/2015	OPINION AND ORDER RE: DEFS' MOTION TO STRIKE PL'S EXPERT WILLIAM TERRILL AND POS FILED (GRANTED)
21	11/18/2015	OPINION AND ORDER RE: DEFS' MOTIONS FOR SUMMARY DISPOSITION AND POS FILED (PL'S CASE DISMISSED W/PREJUDICE)
22	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188 The following event: MOTION TO STRIKE scheduled for 10/30/2015 at 9:00 am has been resulted as follows: Result: HELD - WRITTEN OPINION TO BE ISSUED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
23	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188
24	11/03/2015	HELD - WRITTEN OPINION TO BE ISSUED STACY DILWORTH CER 8188 The following event: MOTION FOR SUMMARY DISPOSITION scheduled for 10/30/2015 at 9:00 am has been resulted as follows: Result: HELD - WRITTEN OPINION TO BE ISSUED Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
25	10/27/2015	RESPONSE TO DEFS' MOTION TO STRIKE PL'S EXPERT, DR. WILLIAM TERILL PHD, POS BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
26	10/27/2015	REPLY TO PL'S RESPONSES, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
27	10/23/2015	RESPONSE TO DEF BARGAS AND VANDERKOOI'S MOTION FOR SUMMARY DISPOSITION, POS BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
28	10/23/2015	RESPONSE TO DEF CITY OF GRAND RAPIDS' MOTION FOR SUMMARY DISPOSITION, POS BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
29	10/21/2015	SCHEDULED Event: MOTION TO STRIKE Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD - WRITTEN OPINION TO BE ISSUED
30	10/20/2015	MOTION TO STRIKE DR WILLIAM TERRILL, NOTICE, BRIEF & POS (10/30/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
31	10/20/2015	MOTION FEE PAID Receipt: 809564 Date: 10/20/2015
32	10/16/2015	NOTICE TO APPEAR (CASE EVALUATION) AND POS (12/3/15 @ 9:00)
33	10/09/2015	ORDER REGARDING CASE EVALUATION AND POS FILED (ADJOURNED, TO BE SET IN DECEMBER 2015)
34	10/09/2015	CASE EVALUATION HEARING ADJOURNED The following event: CASE EVALUATION HEARING scheduled for 11/10/2015 at 9:00 am has been resulted as follows: Result: CASE EVALUATION HEARING ADJOURNED Judge: ZPANEL, NOV 10, 2015 Location:

35	09/23/2015	NOTICE TO APPEAR (CASE EVALUATION) AND POS (11/10/15 @ 9:00)
36	09/14/2015	SCHEDULED Event: MOTION FOR SUMMARY DISPOSITION Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD
37	09/14/2015	SCHEDULED Event: MOTION FOR SUMMARY DISPOSITION Date: 10/30/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD - WRITTEN OPINION TO BE ISSUED
38	09/11/2015	SUMMARY DISPOSITION EXHIBIT LIST KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
39	09/11/2015	MOTION FOR SUMMARY DISPOSITION, NOTICE, BRIEF & POS (10/30/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS (DEFENDANT)
40	09/11/2015	MOTION FOR SUMMARY DISPOSITION, NOTICE, BRIEF & POS (10/30/15 @ 9:00) KRISTEN REWA (Attorney) on behalf of CITY OF GRAND RAPIDS (DEFENDANT)
41	09/11/2015	MOTION FEE PAID Receipt: 801262 Date: 09/11/2015
42	09/04/2015	TRANSCRIPT OF MOTION (9 PGS) (HELD 07/10/15 BEFORE JUDGE GEORGE JAY QUIST) (STACY DILWORTH COURT REPORTER)
43	09/03/2015	POS (DEF CITY OF GRAND RAPIDS' SUPPLEMENTAL RESPONSE TO PL KEYON HARRISON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
44	09/02/2015	POS (RESPONSE TO PLS' FIFTH SET OF REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
45	08/31/2015	POS FILED (RESPONSE TO PLA'S 4TH SET OF INTERROGATORIES, REQUESTS TO ADMIT AND REQUEST FOR PRODUCTION OF DOCUMENTS TO CITY OF GR)
46	08/24/2015	AMENDED WITNESS LIST AND POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
47	08/21/2015	ANSWERS TO PL DENISHIO JOHNSON'S FIRST REQUEST FOR ADMISSIONS, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
48	08/21/2015	ANSWERS TO REQUESTS FOR ADMISSIONS TO DEFS CURT VANDERKOOI AND CITY OF GRAND RAPIDS, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
49	08/21/2015	ANSWERS TO PLS' REQUESTS TO ADMIT TO DEF CITY OF GRAND RAPIDS, POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
50	07/31/2015	MEDIATION STATUS REPORT (NOT HELD) OTHER: MOTION TO COMPEL MEDIATION DENIED
51	07/24/2015	AMENDED EXPERT WITNESS LIST AND POS (SEE 14-02166-NO FOR DOCUMENT) BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
52	07/16/2015	ORDER CONCERNING 7/10/15 HEARING FILED (DEF'S MOTION TO SANCTION PLS FOR EXPERT DISCOVERY VIOLATIONS GRANTED IN PART PLS' MOTION TO COMPEL PARTICIATION OF DEF CITY OF GRAND RAPIDS IN MEDIATION DENIED)
53	07/10/2015	HELD- ORDER TO FOLLOW STACY DILWORTH CER 8188 The following event: MOTION TO COMPEL scheduled for 07/10/2015 at 9:00 am has been resulted as follows: Result: HELD Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:

54	07/10/2015	HELD- ORDER TO FOLLOW STACY DILWORTH CER 8188 The following event: MISCELLANEOUS MOTION scheduled for 07/10/2015 at 9:00 am has been resulted as follows: Result: HELD Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B HELD ON THE RECORD COURT REPORTER: JAVS 9B Certificate #:
55	07/07/2015	ADDITIONAL EXHIBITS AND POS, EXHIBIT K, EXHIBIT L
56	07/06/2015	SCHEDULED Event: MOTION TO COMPEL Date: 07/10/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD
57	07/06/2015	RESCHEDULED EVENT The following event: MISCELLANEOUS MOTION scheduled for 07/17/2015 at 9:00 am has been resulted as follows: Result: RESCHEDULED EVENT Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B
58	07/06/2015	SCHEDULED Event: MISCELLANEOUS MOTION Date: 07/10/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: HELD
59	07/02/2015	LAY WITNESS LIST AND POS (SEE 14-02166-NO FOR DOCUMENT) BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
60	07/02/2015	WITNESS LIST AND POS KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
61	07/02/2015	MOTION TO COMPEL PARTICIPATION OF DEF CITY OF GRAND RAPIDS IN MEIDATION, NOTICE AND POS (07/10/15 @ 9:00) (SEE 14-02166-NO FOR DOCUMENT) BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
62	06/26/2015	MEDIATION STATUS REPORT (NOT HELD) OTHER: PARTIES TO SET UP MEDIATION AFTER DISCOVERY CLOSES
63	06/25/2015	E-MAIL TO MEDIATOR REQUESTING STATUS REPORT FORM
64	06/24/2015	MOTION TO SANCTION PLS FOR EXPERT DISCOVERY VIOLATIONS PURSUANT TO MCR 2.302(E)(1)(A)(II) AND 2.313(D), NOTICE, BRIEF & POS (07/10/15 @ 9:00) (SEE 14-02166-NO FOR DOCUMENT) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
65	06/24/2015	SCHEDULED Event: MISCELLANEOUS MOTION Date: 07/17/2015 Time: 9:00 am Judge: QUIST, HONORABLE GEORGE JAY Location: 17TH CIRCUIT COURT- COURTROOM #9B Result: RESCHEDULED EVENT
66	06/22/2015	POS (DEF CITY OF GRAND RAPIDS' RESPONSE TO PLS' THIRD SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOUMENTS) (SEE 14-02166-NO FOR DOCUMENT)
67	06/12/2015	NOTICE OF REASSIGNMENT AND POS
68	05/30/2015	CASE ASSIGNED TO HON. GEORGE JAY QUIST AS SUCCESSOR TO HON. JAMES R. REDFORD 6/1/2015
69	05/26/2015	POS (NOTICE OF DEPOSITION)
70	05/08/2015	POS (DEF CITY OF GRAND RAPIDS' RESPONSE TO PLS' THIRD SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS)
71	05/01/2015	EXPERT WITNESS DISCLOSURE AND POS (SEE 14-02166-NO FOR DOCUMENT) KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
72	04/10/2015	POS (DEFS' SECOND SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO PL KEYON HARRISON) (SEE 14-02166-NO FOR DOC)
73	04/01/2015	POS (PL DENISHIO JOHNSON'S ANSWERS TO DEFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS) (SEE 14-02166-NO FOR DOC)

74	03/31/2015	EXPERT WITNESS LIST AND POS (SEE 14-02166-NO FOR DOC) BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
75	02/26/2015	POS (DEFS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO KEYON HARRISON AND DENISHIO JOHNSON)
76	02/23/2015	STIPULATION AND ORDER TO EXTEND DEADLINES IN SCHEDULING ORDER
77	02/23/2015	NOTICE OF TAKING DEPOSITION OF KEYON HARRISON (03/26/15 @ 2:00) & POS KRISTEN REWA (Attorney) on behalf of CITY OF GRAND RAPIDS (DEFENDANT)
78	01/23/2015	POS (DEF ELLIOTT BARGAS' RESPONSE TO PL DENISHIO JOHNSON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF ELLIOTT BARGAS AND DEF CITY OF GRAND RAPIDS' RESPONSE TO PL DENISHIO JOHNSON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEF CITY OF GRAND RAPIDS)
79	01/05/2015	NOTICE OF MEDIATION AND POS (2/2/15 @ 9:00)
80	12/10/2014	APPOINTMENT AS MEDIATOR LETTER (DISPUTE RESOLUTION CENTER)
81	12/02/2014	ORDER FOR REFERRAL FOR MEDIATION (MEDIATOR DISPUTE RESOLUTION CENTER)
82	11/24/2014	NOT HELD The following event: SCHEDULING CONFERENCE scheduled for 11/25/2014 at 4:00 pm has been resulted as follows: Result: NOT HELD. SCHEDULING ORDER ENTERED. Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A
83	11/20/2014	SCHEDULING ORDER
84	10/22/2014	SCHEDULING CONFERENCE (NOTICE & PROOF) Event: SCHEDULING CONFERENCE Date: 11/25/2014 Time: 4:00 pm Judge: REDFORD, HONORABLE JAMES Location: 17TH CIRCUIT COURT- COURTROOM #11A Result: NOT HELD
85	09/22/2014	STIPULATION AND ORDER TO CONSOLIDATE CASES FOR DISCOVERY PURPOSES ONLY
86	09/22/2014	RELIANCE ON JURY DEMAND & POS PATRICK JAMES LANNEN (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
87	09/19/2014	POS (APPEARANCES OF COUNSEL)
88	09/19/2014	APPEARANCE KRISTEN REWA (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
89	09/19/2014	APPEARANCE PATRICK JAMES LANNEN (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
90	09/17/2014	JURY DEMAND & POS BERNARD C. SCHAEFER (Attorney) on behalf of DENISHIO JOHNSON (PLAINTIFF)
91	09/17/2014	JURY DEMAND Receipt: 724829 Date: 09/17/2014
92	09/03/2014	APPEARANCE OF COUNSEL, ANSWER TO COMPLAINT WTITH AFFIRMATIVE DEFENSES & POS MARGARET P. BLOEMERS (Attorney) on behalf of CURT VANDERKOOI, ELLIOT BARGAS, CITY OF GRAND RAPIDS (DEFENDANT)
93	08/07/2014	SUMMONS ISSUED CURT VANDERKOOI (DEFENDANT); ELLIOT BARGAS (DEFENDANT); CITY OF GRAND RAPIDS (DEFENDANT);
94	08/07/2014	COMPLAINT(6)
95	08/07/2014	FILING FEES FOR NEW CASE Receipt: 716314 Date: 08/07/2014

Case Search

Case Docket Number Search Results - 330537

Appellate Docket Sheet

COA Case Number: 330537

MSC Case Number: 160959

KEYON HARRISON V CURTIS VANDERKOOI

1	HARRISON KEYON MINOR	ZZ		
2	HARRISON ANCHANET NEXT FRIEND Oral Argument: Y Timely: Y	PL-AT	RET	(40114) **SCHAEFER BERNARD**
			CO	(72842) **KOROBKIN DANIEL S**
3	VANDERKOOI CURTIS Oral Argument: Y Timely: Y	DF-AE	CTY	(73043) **REWA KRISTEN LEE**
4	GRAND RAPIDS CITY OF	DF-AE	SAM	
5	AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN	AC	RET	(51398) **BECKER EDWARD R**

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

Consolidations:

330536 DENISHIO JOHNSON V CURTIS VANDERKOOI (Case Concluded; File Open)

12/04/2015 1 Claim of Appeal - Civil
- Proof of Service Date: 12/04/2015
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Fee Code: EPAY
- Attorney: 40114 - SCHAEFER BERNARD

11/18/2015 2 Order Appealed From
- From: KENT CIRCUIT COURT
- Case Number: 14-002166-NO
- Trial Court Judge: 43884 QUIST GEORGE J
- Nature of Case:
  - Summary Disposition Granted

12/04/2015 3 Transcript Requested By Atty Or Party
- Date: 12/03/2015
- Timely: Y
- Reporter: 8188 - DILWORTH STACY
- Filed By Attorney: 40114 - SCHAEFER BERNARD
- Hearings:
  - 10/30/2015

12/16/2015 8 Steno Certificate - Tr Request Received
- Date: 12/14/2015
- Timely: Y
- Reporter: 8188 - DILWORTH STACY
- Hearings:
  - 10/30/2015

12/18/2015 9 Appearance - Appellee
- Date: 12/18/2015
- For Party: 3 VANDERKOOI CURTIS DF-AE
- Attorney: 73043 - REWA KRISTEN LEE

01/08/2016 10 Docketing Statement MCR 7.204H
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Proof of Service Date: 01/08/2016
Filed By Attorney: 40114 - SCHAEFER BERNARD
Comments: 330536 pending related appeal

01/11/2016 11 Proof of Service - Generic
Date: 01/11/2016
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Attorney: 40114 - SCHAEFER BERNARD
Comments: for AT's docketing statement

03/08/2016 12 Notice Of Filing Transcript
Date: 03/07/2016
Reporter: 8188 - DILWORTH STACY
Hearings:
10/30/2015

05/02/2016 13 Brief: Appellant
Proof of Service Date: 05/02/2016
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 40114 - SCHAEFER BERNARD
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT

05/03/2016 14 Appearance - Appellee
Date: 05/03/2016
For Party: 3 VANDERKOOI CURTIS DF-AE
Attorney: 77117 - GRUSZKA ELLIOT

06/02/2016 15 Motion: Extend Time - Appellee
Proof of Service Date: 06/02/2016
Filed By Attorney: 77117 - GRUSZKA ELLIOT
For Party: 3 VANDERKOOI CURTIS DF-AE
Fee Code: EPAY
Requested Extension: 08/01/2016
Answer Due: 06/09/2016

06/14/2016 17 Submitted on Administrative Motion Docket
Event: 15 Extend Time - Appellee
District: G
Item #: 6

06/15/2016 18 Order: Extend Time - Appellee Brief - Grant
View document in PDF format
Event: 15 Extend Time - Appellee
Panel: JPH
Attorney: 77117 - GRUSZKA ELLIOT
Extension Date: 08/01/2016

08/01/2016 20 Brief: Appellee
Proof of Service Date: 08/01/2016
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 73043 - REWA KRISTEN LEE
For Party: 3 VANDERKOOI CURTIS DF-AE

08/02/2016 19 Noticed
Record: REQST
Mail Date: 08/03/2016

08/15/2016 21 Brief: Reply
Proof of Service Date: 08/15/2016
Filed By Attorney: 40114 - SCHAEFER BERNARD
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT

08/19/2016 22 Record Filed

Comments: 5 FILES (TRNS INCL); 2 LCT PLEADINGS

08/22/2016 24 Motion: Amicus Curiae Brief
Proof of Service Date: 08/22/2016
Filed By Attorney: 63165 - AUKERMAN MIRIAM
Answer Due: 09/05/2016
Comments: Brief filed with motion

08/22/2016 28 Brief: Amicus Curiae
Proof of Service Date: 08/22/2016
Filed By Attorney: 51398 - BECKER EDWARD R
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC

08/23/2016 25 Fee - Motion - Defect Cured
Date: 08/23/2016
Attorney: 63165 - AUKERMAN MIRIAM
Fee Code: EPAY

09/06/2016 26 Submitted on Administrative Motion Docket
Event: 24 Amicus Curiae Brief
District: G
Item #: 2

09/07/2016 27 Order: Amicus Brief - Grant
View document in PDF format
Event: 24 Amicus Curiae Brief
Panel: JPH
Attorney: 63165 - AUKERMAN MIRIAM
Comments: The brief that was received on 8/22/16 is accepted for filing

04/17/2017 40 Motion: Oral Argument on Case Call
Proof of Service Date: 04/17/2017
Filed By Attorney: 51398 - BECKER EDWARD R
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC
Fee Code: EPAY
Answer Due: 04/24/2017

04/17/2017 41 Fee - Motion - Defect Cured
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC
Attorney: 51398 - BECKER EDWARD R
Fee Code: EPAY

04/18/2017 42 Submitted on Motion Docket Affecting Call
Event: 40 Oral Argument on Case Call
District: G
Item #: 2

04/21/2017 43 Answer - Motion
Proof of Service Date: 04/21/2017
Event No: 40 Oral Argument on Case Call
For Party: 3 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 73043 - REWA KRISTEN LEE

04/25/2017 44 Order: Oral Argument - Grant
View document in PDF format
Event: 40 Oral Argument on Case Call
Panel: KTW,MTB,CAO
Attorney: 51398 - BECKER EDWARD R
Comments: counsel for Amicus party ACLU of Michigan entitled to 10 mins of the 30 mins o/a awarded to AT

04/25/2017 45 Case Call Update For Panel
Comments: counsel for Amicus party ACLU of Michigan entitled to 10 mins of the 30 mins o/a awarded to AT

05/02/2017 33 Submitted on Case Call
District: G
Item #: 10
Panel: KTW,MTB,CAO

05/02/2017 46 Oral Argument Audio

05/23/2017 51 Opinion - Per Curiam - Unpublished
View document in PDF format
Pages: 13
Panel: KTW,MTB,CAO
Result: L/Ct Judgment/Order Affirmed
Comments: Judge Wilder is not participating.

07/05/2017 52 SCt: Application for Leave to SCt
Supreme Court No: 156058
Answer Due: 08/02/2017
Fee: E-Pay
For Party: 1
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Same application 156057 - 156058, ALL EVENTS IN 156057

07/10/2017 53 Other
Date: 07/05/2017
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Notice of filing application for leave to appeal in the Supreme Court.

07/20/2017 54 Supreme Court - File & Record Sent To
File Location: Z
Comments: sc#156058 5 lcf(tr incl);2 lc pld

01/12/2018 57 SCt Order: MOAA -Oral Argument on Lv Appl
View document in PDF format
Comments: Sequential brf'g. Invited AC = interested persons or groups may move to file.

07/30/2018 58 Opinion on Application - Remand to CoA
View document in PDF format
Comments: Reverse part III of CoA opinions and remand to CoA

08/02/2018 65 Telephone Contact
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Atty Will Serve As Co-Counsel In This Matter On Remand from the MSC

08/21/2018 60 Record Filed
File Location:
Comments: 5 lcf(tr incl);2 lc pld--SC Remand

08/21/2018 61 Supreme Court - File Ret`d by - Re-Open for Reconsideration
File Location: L

08/22/2018 62 Re-Submitted Per Supreme Court Remand
District: L
Item #: 0

08/22/2018 63 Telephone Contact
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Attorney: 40114 - SCHAEFER BERNARD
Comments: B Schaeffer Still Atty Record But D Korobkin Will Be Proceeding In The COA On Remand

08/22/2018 64 Correspondence Sent
Comments: Advised Attys Case Now Reopened And Resubmitted On Remand

08/31/2018 68 Motion: Supplemental Brief
Proof of Service Date: 08/31/2018
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 1 HARRISON KEYON MINOR ZZ
Fee Code: EPAY
Requested Extension: 10/01/2018
Answer Due: 09/07/2018
Comments: On Remand

09/07/2018 70 Answer - Motion
Proof of Service Date: 09/07/2018
Event No: 68 Supplemental Brief

For Party: 3 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 77117 - GRUSZKA ELLIOT

09/11/2018 69 Submitted on Motion Docket Affecting Call
Event: 68 Supplemental Brief
District: L
Item #: 2

09/11/2018 71 Order: Supplemental Brief - Grant
View document in PDF format
Event: 68 Supplemental Brief
Panel: MTB,CAO,AL
Attorney: 72842 - KOROBKIN DANIEL S
Comments: ATs may file supl brf by 10-1-18. AEs may file resp brf wi 35 dys. ATs may file reply brf wi 21 dys

09/11/2018 72 Verbal Order to Parties-Phone

10/01/2018 73 Brief: Supplemental Brief - AT
Proof of Service Date: 10/01/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Comments: On Remand; Accepted Per COA Order Issued 9/11/2018

11/05/2018 74 Brief: Supplemental Brief - AE
Proof of Service Date: 11/05/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 77117 - GRUSZKA ELLIOT
For Party: 3 VANDERKOOI CURTIS DF-AE
Comments: On Remand; Accepted Per COA Order 9/11/2018

11/26/2018 75 Brief: Reply
Proof of Service Date: 11/26/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Comments: Reply Brief On Remand; Accepted Per COA Order Issued 9/11/2018

11/30/2018 77 Order: Consolidate - Administrative
View document in PDF format
Panel: MTB,CAO,AL
Comments: Consl: 330536, 330537

05/20/2019 81 Brief: Supplemental Auth`y
Proof of Service Date: 05/20/2019
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT

11/21/2019 84 Opinion - On Remand SCt - Authored
View document in PDF format
Pages: 15
Panel: MTB,CAO,AL
Author: MTB
Result: L/Ct Judgment/Order Affirmed

11/21/2019 85 Opinion - Concurrence
View document in PDF format
Pages: 2
Author: AL

12/12/2019 86 Motion: Reconsideration of Opinion
Proof of Service Date: 12/12/2019
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Fee Code: FP

Answer Due: 12/26/2019

12/26/2019 87 Answer - Reconsideration
Proof of Service Date: 12/26/2019
Event No: 86 Reconsideration of Opinion
For Party: 3 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 73043 - REWA KRISTEN LEE

12/31/2019 88 Submitted on Reconsideration Docket
Event: 86 Reconsideration of Opinion
District: C

01/03/2020 89 Order: Reconsideration - Deny - Appeal Remains Closed
View document in PDF format
Event: 86 Reconsideration of Opinion
Panel: MTB,CAO,AL
Attorney: 72842 - KOROBKIN DANIEL S

02/14/2020 90 SCt: Application for Leave to SCt
Supreme Court No: 160959
Answer Due: 03/13/2020
Fee: E-Pay
For Party: 1
Attorney: 63165 - AUKERMAN MIRIAM
Comments: Same application 160958 - 160959, all events in 160958

02/18/2020 91 Other
Date: 02/18/2020
For Party: 2 HARRISON ANCHANET NEXT FRIEND PL-AT
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Notice of filing for leave to appeal in the Supreme Court

03/09/2020 92 Supreme Court - Record Sent To
File Location:
Comments: sc#160959 5 lcf(trs incl);2 lc pld

10/19/2020 94 Michigan Appeals Reports Publication
330 Mich App 506

02/26/2021 96 SCt Order: Application - Grant
View document in PDF format
Comments: 20-min OA per side. Invited AC=CDAM, PAAM.

Case Listing Complete

Case Search

Case Docket Number Search Results - 330536

Appellate Docket Sheet

COA Case Number: 330536

MSC Case Number: 160958

DENISHIO JOHNSON V CURTIS VANDERKOOI

1	JOHNSON DENISHIO Oral Argument: Y Timely: Y	PL-AT	RET	(40114) **SCHAEFER BERNARD**
			CO	(72842) **KOROBKIN DANIEL S**
2	VANDERKOOI CURTIS Oral Argument: Y Timely: Y	DF-AE	CTY	(73043) **REWA KRISTEN LEE**
3	BARGAS ELLIOTT	DF-AE	SAM	
4	GRAND RAPIDS CITY OF	DF-AE	SAM	
5	AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN	AC	RET	(51398) **BECKER EDWARD R**

COA Status: Case Concluded; File Open **MSC Status:** Pending on Application

Consolidations:

330537 KEYON HARRISON V CURTIS VANDERKOOI (Case Concluded; File Open)

12/04/2015 1 Claim of Appeal - Civil
- Proof of Service Date: 12/04/2015
- Jurisdictional Checklist: Y
- Register of Actions: Y
- Fee Code: EPAY
- Attorney: 40114 - SCHAEFER BERNARD

11/18/2015 2 Order Appealed From
- From: KENT CIRCUIT COURT
- Case Number: 14-007226-NO
- Trial Court Judge: 43884 QUIST GEORGE J
- Nature of Case:
  - Summary Disposition Granted

12/04/2015 3 Transcript Requested By Atty Or Party
- Date: 12/03/2015
- Timely: Y
- Reporter: 8188 - DILWORTH STACY
- Filed By Attorney: 40114 - SCHAEFER BERNARD
- Hearings:
  - 10/30/2015

12/16/2015 8 Steno Certificate - Tr Request Received
- Date: 12/14/2015
- Timely: Y
- Reporter: 8188 - DILWORTH STACY
- Hearings:
  - 10/30/2015

12/18/2015 9 Appearance - Appellee
- Date: 12/18/2015
- For Party: 2 VANDERKOOI CURTIS DF-AE

Attorney: 73043 - REWA KRISTEN LEE

01/08/2016 10 Docketing Statement MCR 7.204H
For Party: 1 JOHNSON DENISHIO PL-AT
Proof of Service Date: 01/08/2016
Filed By Attorney: 40114 - SCHAEFER BERNARD

03/24/2016 11 Transcript Overdue - Notice to Reporter
Mail Date: 03/24/2016
Reporter: 8188 - DILWORTH STACY
Comments: 10/30/15

03/30/2016 12 Invol Dismissal Warning - No Transcript
Attorney: 40117 - SHORTER PAMELA C
Due Date: 04/20/2016

04/01/2016 13 Notice Of Filing Transcript
Date: 03/07/2016
Reporter: 8188 - DILWORTH STACY
Hearings:
10/30/2015
Comments: NFT originally rec'd by COA on 3/8/16

05/02/2016 14 Brief: Appellant
Proof of Service Date: 05/02/2016
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 40114 - SCHAEFER BERNARD
For Party: 1 JOHNSON DENISHIO PL-AT

05/03/2016 15 Appearance - Appellee
Date: 05/03/2016
For Party: 2 VANDERKOOI CURTIS DF-AE
Attorney: 77117 - GRUSZKA ELLIOT

06/02/2016 16 Motion: Extend Time - Appellee
Proof of Service Date: 06/02/2016
Filed By Attorney: 77117 - GRUSZKA ELLIOT
For Party: 2 VANDERKOOI CURTIS DF-AE
Fee Code: EPAY
Requested Extension: 08/01/2016
Answer Due: 06/09/2016

06/14/2016 18 Submitted on Administrative Motion Docket
Event: 16 Extend Time - Appellee
District: G
Item #: 5

06/15/2016 19 Order: Extend Time - Appellee Brief - Grant
View document in PDF format
Event: 16 Extend Time - Appellee
Panel: JPH
Attorney: 77117 - GRUSZKA ELLIOT
Extension Date: 08/01/2016

08/01/2016 20 Brief: Appellee
Proof of Service Date: 08/01/2016
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 73043 - REWA KRISTEN LEE
For Party: 2 VANDERKOOI CURTIS DF-AE

08/01/2016 21 Noticed
Record: REQST
Mail Date: 08/03/2016

08/19/2016 22 Record Filed
Comments: 2 FILES (TRNS INCL)

08/22/2016 24 Motion: Amicus Curiae Brief
Proof of Service Date: 08/22/2016
Filed By Attorney: 63165 - AUKERMAN MIRIAM
Answer Due: 09/05/2016
Comments: Brief filed with motion

08/22/2016 28 Brief: Amicus Curiae
Proof of Service Date: 08/22/2016
Filed By Attorney: 51398 - BECKER EDWARD R
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC

08/23/2016 25 Fee - Motion - Defect Cured
Date: 08/23/2016
Attorney: 63165 - AUKERMAN MIRIAM
Fee Code: EPAY

09/06/2016 26 Submitted on Administrative Motion Docket
Event: 24 Amicus Curiae Brief
District: G
Item #: 1

09/07/2016 27 Order: Amicus Brief - Grant
View document in PDF format
Event: 24 Amicus Curiae Brief
Panel: JPH
Attorney: 63165 - AUKERMAN MIRIAM
Comments: The brief that was received on 8/22/16 is accepted for filing.

04/17/2017 40 Motion: Oral Argument on Case Call
Proof of Service Date: 04/17/2017
Filed By Attorney: 51398 - BECKER EDWARD R
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC
Fee Code: EPAY
Answer Due: 04/24/2017

04/17/2017 41 Fee - Motion - Defect Cured
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC
Attorney: 51398 - BECKER EDWARD R
Fee Code: EPAY

04/18/2017 42 Submitted on Motion Docket Affecting Call
Event: 40 Oral Argument on Case Call
District: G
Item #: 1

04/21/2017 43 Answer - Motion
Proof of Service Date: 04/21/2017
Event No: 40 Oral Argument on Case Call
For Party: 2 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 73043 - REWA KRISTEN LEE

04/25/2017 44 Order: Oral Argument - Grant
View document in PDF format
Event: 40 Oral Argument on Case Call
Panel: KTW,MTB,CAO
Attorney: 51398 - BECKER EDWARD R
Comments: counsel for Amicus party ACLU of Michigan entitled to 10 mins of the 30 mins o/a awarded to AT

04/25/2017 45 Case Call Update For Panel
Comments: counsel for Amicus party ACLU of Michigan entitled to 10 mins of the 30 mins o/a awarded to AT

05/02/2017 33 Submitted on Case Call
District: G
Item #: 9
Panel: KTW,MTB,CAO

05/02/2017 46 Oral Argument Audio

05/23/2017 51 Opinion - Authored - Published

View document in PDF format
Pages: 22
Panel: KTW,MTB,CAO
Author: MTB
Result: L/Ct Judgment/Order Affirmed
Comments: Judge Wilder is not participating.

07/05/2017 52 SCt: Application for Leave to SCt
Supreme Court No: 156057
Answer Due: 08/02/2017
Fee: E-Pay
For Party: 1
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Same application 156057 - 156058, ALL EVENTS IN 156057

07/05/2017 53 SCt Case Caption
Proof Of Service Date: 07/05/2017

07/10/2017 54 Other
Date: 07/05/2017
For Party: 5 AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN AC
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Notice of filing application for leave to appeal in the Supreme Court.

07/20/2017 55 Supreme Court - File & Record Sent To
File Location: Z
Comments: sc#156057 2 lcf(tr incl)

07/20/2017 56 SCt: COA and TCt Received
7 files

08/02/2017 57 SCt: Answer - SCt Application/Complaint
Filing Date: 08/02/2017
For Party: 2 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 77117 - GRUSZKA ELLIOT

08/23/2017 58 SCt: Reply - SCt Application/Complaint
Filing Date: 08/23/2017
For Party: 1 JOHNSON DENISHIO PL-AT
Filed By Attorney: 72842 - KOROBKIN DANIEL S

10/30/2017 59 Michigan Appeals Reports Publication
319 Mich App 589

01/12/2018 60 SCt Order: MOAA -Oral Argument on Lv Appl
View document in PDF format
Comments: Sequential brf'g. Invited AC = interested persons or groups may move to file.

02/16/2018 61 SCt: MOAA - AT supp'l brf
Filing Date: 02/16/2018
For Party: 1 JOHNSON DENISHIO PL-AT
Filed By Attorney: 72842 - KOROBKIN DANIEL S
Comments: + Joint Appendix

02/27/2018 62 Oral Arguments Scheduled
Proof Of Service Date: 02/27/2018
Comments: MOAA - April 2018 Session

03/06/2018 63 SCt Correspondence Received
Proof Of Service Date: 03/06/2018
Filed By Attorney: 72842 - KOROBKIN DANIEL S
Comments: Letter re scheduling of argument and counsel who will argue

03/08/2018 64 SCt Correspondence Received
Proof Of Service Date: 03/08/2018
Filed By Attorney: 77117 - GRUSZKA ELLIOT
Comments: Letter re scheduling of argument and spelling correction

03/09/2018 65 SCt: MOAA - AE supp'l brf

Filing Date: 03/09/2018
For Party: 2 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 77117 - GRUSZKA ELLIOT

03/23/2018 66 SCt: MOAA - AT supp'l brf
Filing Date: 03/23/2018
For Party: 1 JOHNSON DENISHIO PL-AT
Filed By Attorney: 72842 - KOROBKIN DANIEL S
Comments: Reply

04/12/2018 67 Oral Arguments Held
Proof Of Service Date: 04/11/2018
Comments: MOAA - 04-12-2018

07/30/2018 68 Opinion on Application - Remand to CoA
View document in PDF format
Comments: Reverse part III of CoA opinions and remand to CoA

08/21/2018 69 Remittitur
Proof Of Service Date: 08/21/2018
Comments: CoA and Kent County records to CoA

08/21/2018 70 Record Filed
File Location:
Comments: 2 lcf(tr incl)--SC Remand

08/21/2018 71 Supreme Court - File Ret`d by - Re-Open for Reconsideration
File Location: L

08/22/2018 72 Re-Submitted Per Supreme Court Remand
District: L
Item #: 0

08/22/2018 73 Telephone Contact
For Party: 1 JOHNSON DENISHIO PL-AT
Attorney: 40114 - SCHAEFER BERNARD
Comments: B Schaeffer Still Atty Record But D Korobkin Will Be Proceeding In The COA On Remand

08/22/2018 74 Correspondence Sent
Comments: Advised Attys Case Now Reopened And Resubmitted On Remand

08/22/2018 75 Telephone Contact
For Party: 1 JOHNSON DENISHIO PL-AT
Attorney: 72842 - KOROBKIN DANIEL S
Comments: Atty Will Serve As Co-Counsel In This Matter On Remand from the MSC

08/31/2018 78 Motion: Supplemental Brief
Proof of Service Date: 08/31/2018
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 1 JOHNSON DENISHIO PL-AT
Fee Code: EPAY
Requested Extension: 10/01/2018
Answer Due: 09/07/2018
Comments: On Remand

09/07/2018 80 Answer - Motion
Proof of Service Date: 09/07/2018
Event No: 78 Supplemental Brief
For Party: 2 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 77117 - GRUSZKA ELLIOT

09/11/2018 79 Submitted on Motion Docket Affecting Call
Event: 78 Supplemental Brief
District: L
Item #: 1

09/11/2018 81 Order: Supplemental Brief - Grant
View document in PDF format
Event: 78 Supplemental Brief

Panel: MTB,CAO,AL
Attorney: 72842 - KOROBKIN DANIEL S
Comments: ATs may file supl brf by 10-1-18. AEs may file resp brf wi 35 dys. ATs may file reply brf wi 21 dys

09/11/2018 82 Verbal Order to Parties-Phone

10/01/2018 83 Brief: Supplemental Brief - AT
Proof of Service Date: 10/01/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 1 JOHNSON DENISHIO PL-AT
Comments: On Remand; Accepted Per COA Order Issued 9/11/2018

11/05/2018 84 Brief: Supplemental Brief - AE
Proof of Service Date: 11/05/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 77117 - GRUSZKA ELLIOT
For Party: 2 VANDERKOOI CURTIS DF-AE
Comments: On Remand; Accepted Per COA Order Issued 9/11/2018

11/26/2018 85 Brief: Reply
Proof of Service Date: 11/26/2018
Oral Argument Requested:
Timely Filed: Y
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 1 JOHNSON DENISHIO PL-AT
Comments: Reply Brief On Remand; Accepted Per COA Order Issued 9/11/2018

11/30/2018 88 Order: Consolidate - Administrative
View document in PDF format
Panel: MTB,CAO,AL
Comments: Consl: 330536, 330537

05/20/2019 92 Brief: Supplemental Auth`y
Proof of Service Date: 05/20/2019
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 1 JOHNSON DENISHIO PL-AT

11/21/2019 95 Opinion - On Remand SCt - Authored
View document in PDF format
Pages: 15
Panel: MTB,CAO,AL
Author: MTB
Result: L/Ct Judgment/Order Affirmed

11/21/2019 96 Opinion - Concurrence
View document in PDF format
Pages: 2
Author: AL

12/12/2019 97 Motion: Reconsideration of Opinion
Proof of Service Date: 12/12/2019
Filed By Attorney: 72842 - KOROBKIN DANIEL S
For Party: 1 JOHNSON DENISHIO PL-AT
Fee Code: EPAY
Answer Due: 12/26/2019

12/26/2019 98 Answer - Reconsideration
Proof of Service Date: 12/26/2019
Event No: 97 Reconsideration of Opinion
For Party: 2 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 73043 - REWA KRISTEN LEE

12/31/2019 99 Submitted on Reconsideration Docket

Event: 97 Reconsideration of Opinion
District: C

01/03/2020 100 Order: Reconsideration - Deny - Appeal Remains Closed
View document in PDF format
Event: 97 Reconsideration of Opinion
Panel: MTB,CAO,AL
Attorney: 72842 - KOROBKIN DANIEL S

02/14/2020 101 SCt: Application for Leave to SCt
Supreme Court No: 160958
Answer Due: 03/13/2020
Fee: E-Pay
For Party: 1
Attorney: 63165 - AUKERMAN MIRIAM
Comments: Same application 160958 - 160959, all events in 160958

02/14/2020 102 SCt Case Caption
Proof Of Service Date: 02/14/2020

02/18/2020 103 SCt: Miscellaneous Filing
Filing Date: 02/18/2020
For Party: 1 JOHNSON DENISHIO PL-AT
Filed By Attorney: 72842 - KOROBKIN DANIEL S
Comments: Notice of filing

02/18/2020 104 Other
Date: 02/18/2020
For Party: 1 JOHNSON DENISHIO PL-AT
Attorney: 40114 - SCHAEFER BERNARD
Comments: Notice of filing for leave to appeal in the Supreme Court

03/09/2020 105 Supreme Court - Record Sent To
File Location:
Comments: sc#160958 2 lcf(trs incl)

03/10/2020 106 SCt: Trial Court Record Received
7 files

03/13/2020 107 SCt: Answer - SCt Application/Complaint
Filing Date: 03/13/2020
For Party: 2 VANDERKOOI CURTIS DF-AE
Filed By Attorney: 73043 - REWA KRISTEN LEE

06/17/2020 108 SCt: Reply - SCt Application/Complaint
Filing Date: 06/17/2020
For Party: 1 JOHNSON DENISHIO PL-AT
Filed By Attorney: 72842 - KOROBKIN DANIEL S

09/10/2020 109 SCt: Appearance of Attorney
Filing Date: 09/10/2020
For Party: 4 GRAND RAPIDS CITY OF DF-AE
Filed By Attorney: 41430 - FOSSEL ELIZABETH JOY
Comments: Appearance of atty Fossel in place of atty Rewa.

10/19/2020 110 Michigan Appeals Reports Publication
330 Mich App 506

02/26/2021 111 SCt Order: Application - Grant
View document in PDF format
Comments: 20-min OA per side. Invited AC=CDAM, PAAM.

Case Listing Complete

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

DENISHIO JOHNSON,	Hon. James R. Redford
Plaintiff,	CASE No: 14-07226-NO
v.	
CURT VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS, a Michigan Municipal Corporation,	**COMPLAINT with ATTORNEY APPEARANCE**
Defendants.	

Bernard Schaefer (P40114)
Attorney for Plaintiff
161 Ottawa NW, Suite 502-D
Grand Rapids, MI 49503
(616) 272-4361

NOW COMES the Plaintiff, Denishio Johnson, by and through his attorney Bernard Schaefer, now APPEARING herein, and for his Complaint in this case, states as follows:

COMMON ALLEGATIONS

1. This action arises under the US Constitution, 42 USC §1981, 42 USC §1983, and 42 USC §1988.

2. Plaintiff Denishio Johnson is an adult who resides in Kent County, Michigan.

3. Defendants Curt VanderKooi and Elliott Bargas are adults who reside in Michigan and are being sued in their individual capacity.

4. Defendant City of Grand Rapids is a Michigan Municipal Corporation, located in Kent County, Michigan.

5. The events which give rise to Plaintiff's cause of action took place in Kent County, Michigan.

6. Plaintiff's damages exceed $25,000 and the Kent County Circuit Court has jurisdiction over this matter pursuant to MCL 600.601 - 605.

7. When the events alleged in this Complaint occurred, Defendants VanderKooi and Bargas were acting within the scope of their employment with the City of Grand Rapids and under color of law.

8. At all times relevant herein, Defendants VanderKooi and Bargas have violated clearly established constitutional standards under the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment of which a reasonable person would have known.

COUNT I – CLAIM AS TO DEFENDANT VANKDERKOOI AND DEFENDANT BARGAS

9. On August 25, 2011, Plaintiff Johnson was sitting on the grass approximately 150 south of Burton Street near the intersection of Breton Avenue in the City of Grand Rapids.

10. Plaintiff Johnson is an African-American.

11. Officer Greg Edgcombe contacted Plaintiff Johnson following a call from personnel at the Michigan Athletic Club ("MAC").

12. Despite being told that Plaintiff Johnson had not tried to open or enter any of the vehicles in the MAC parking lot (unlike the initial information), Sgt. Elliott Bargas took a full set of fingerprints and two photos of Plaintiff Johnson, without probable cause, a search warrant or other legal authority to do so.

13. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to photograph Plaintiff Johnson and have the photograph stored in the files and records of the City

of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.

14. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to take Plaintiff Johnson's fingerprints and have the fingerprints stored in the files and records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.

15. Defendants VanderKooi and Bargas took the above actions against Plaintiff Johnson, because he is an African-American.

16. At no time on August 15, 2011, did Plaintiff Johnson commit any offense in violation of the laws of the City of Grand Rapids, State of Michigan, or the United States.

17. There was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints.

18. The actions taken by Defendant Bargas and VanderKooi, were unreasonable and excessive.

19. Plaintiff Johnson's constitutionally protected rights that Defendant Bargas and VanderKooi violated include the following:

a. His right to fair and equal treatment guaranteed and protected by the Equal Protection Clause of the Fourteenth Amendment.

b. His rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure.

c. His rights under the Fifth Amendment which bars the taking of private property for public use without just compensation.

d. His right to privacy under the U.S. Constitution;

e. His rights protected by 42 U.S.C. § 1981 and 42 U.S.C. § 1983.

20. As a direct and proximate result of Defendant's conduct, Plaintiff Johnson suffered a loss of freedom, emotional injury, including but not limited to fright, shock, embarrassment, and humiliation, and other constitutionally protected rights described above.

COUNT II – MUNICIPAL LIABILITY CLAIM

21. An analysis of incident reports from 3/18/08 through 3/18/13, where the name Captain VanderKooi appears in the report and the phrase "p&p" or any similar reference to the taking of a photograph or thumb print of a citizen was indicated, show that there were 11 people, including Johnson, who were innocent of any wrongdoing that had their photograph and prints taken, plus 1 person who only had his photograph taken.

22. The above reports, indicate that 75% of those individuals were African-American, while only 20% of the Grand Rapids Population is African-American. All of the individuals were males.

23. In one case, Keyon Harrison was standing at the intersection of Lake Drive SE and E. Fulton Street in the City of Grand Rapids, with another minor, known as Pablo on May 31, 2012. Harrison is an African-American and the other minor, Pablo, is not an African-American. Defendant VanderKooi observed Harrison and Pablo standing on the corner and watched them part company. Defendant VanderKooi then circled the block and returned to the intersection to find Harrison, who had then walked to the Park at the same intersection, and stopped him from walking away.

24. Defendant VanderKooi called for officers of the City of Grand Rapids to come to the scene, and directed an officer to search Harrison without probable cause or lawful consent. Defendant VanderKooi directed an officer to photograph Harrison, take his thumbprint and have the photograph and thumbprint stored in the files and records of the City of Grand Rapids Police Department, without probable cause or legal authority to do so.

25. Defendant VanderKooi took the above actions against Harrison, because he is an African-American. At no time did Harrison commit any offense in violation of the laws of the City of Grand Rapids, State of Michigan, or the United States. There was no legal cause to justify the stop, detention and/or search of Harrison or the seizure of his photographic image and thumbprint. The actions taken by Defendant VanderKooi, individually and through his orders directing others, were unreasonable and excessive. Defendant VanderKooi violated Harrison's same constitutionally protected rights, as Plaintiff Johnson.

26. Plaintiff states, upon information and belief, that the Grand Rapids Police Department stores photographs like the one obtained of Plaintiff in a "Photo Index." The thumbprint taken from Harrison is contained on a card with the Grand Rapids Police logo, which indicates "Forward to Forensic Services" and Plaintiff is informed and believes that his fingerprints were also forwarded to Forensic Services.

27. Plaintiff is informed and believes his photograph and thumbprint were taken, stored and used pursuant to written policies of the Defendant City of Grand Rapids and the custom and practice of its police personnel.

28. Plaintiff Johnson is informed and believes that he was targeted for scrutiny by the Defendant individuals, because of his race and that such actions reflect the custom and practice of some of the Defendant City of Grand Rapids Police Department's personnel.

29. Plaintiff's damages were directly and proximately caused by the actions and/or inactions of the Defendant City of Grand Rapids which encouraged, tolerated and ratified the following policies, customs, and/or practices:

a. Taking photographs and fingerprints of innocent individuals;

b. Retaining and storing photographs and fingerprints of innocent individuals;

c. Using photographs and fingerprints of innocent individuals.

30. The policy, custom, and/or practices of the Defendant City of Grand Rapids described in this Complaint were applied in a discriminatory matter, due to the race of the Plaintiff and others who are similarly situated to him.

WHEREFORE, Plaintiff Denishio Johnson requests that this Honorable Court enter a Judgment against the Defendants as follows:

a. Grant a money judgment in an amount consistent with the damages sustained;

b. Order the destruction of the Plaintiff's photographs and fingerprints;

c. Declaratory and injunctive relief, including but not limited to an order that the Defendant City of Grand Rapids cease its violation of the constitutional rights of its citizens as described herein;

d. Award payment of reasonable attorney fees and costs; and

e. Such other and further relief as may appear just and appropriate.

RESPECTFULLY SUBMITTED,

Dated: August 7, 2014

Bernard Schaefer (P40114)
Attorney for Plaintiff
161 Ottawa NW, Ste. 502-D
Grand Rapids, Michigan 49503
(616) 272-4361

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

v CASE NO: 14-02166-NO
HON. JAMES R. REDFORD

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS, a Michigan
Municipal Corporation,

Defendants.

DEPOSITION OF OFFICER DENNIS NEWTON
taken before Shawn M. Breimayer, Certified Shorthand Reporter, at the office of GRAND RAPIDS CITY ATTORNEY, 300 Monroe NW, Ste 620, Grand Rapids, MI, Wednesday, March 11, 2015, commencing at 1:05 PM, pursuant to notice.

APPEARANCES:

FOR THE PLAINTIFF: Bernard Schaefer (P40114)
161 Ottawa Ave Ste 502-D
Grand Rapids, MI 49503
(616) 272-4361

FOR THE DEFENDANT: Kristen Rewa (P73043)
Assistant City Attorney
300 Monroe NW Ste 620
Grand Rapids, MI 49503
(616) 456-4026

Reported by: Shawn M. Breimayer, CSR-6888

TABLE OF CONTENTS

DE SITION OF OFFICER DENNIS NEWT
3-11-2015

(Deposition commenced at 1:05 PM)

OFFICER DENNIS NEWTON

BY MR. SCHAEFER:

Q. Good afternoon, Officer, please state your name for the record?

A. Dennis Kent Newton.

Q. Have you ever given a deposition before?

A. Yes.

Q. So, you're familiar with the basic ground rules?

A. Yes.

MR. SCHAEFER: Okay. Just to refresh your memory, please when I ask you questions if I'm not clear on my question, will you let me know, please?

THE WITNESS: Yep.

MR. SCHAEFER: And try to answer from memory, personal knowledge without guessing or speculating.

THE WITNESS: Yes.

MR. SCHAEFER: Okay. And that does it for me.

BY MR. SCHAEFER:

Q. Officer, what is your current position with the City of Grand Rapids?

A. Police officer, patrolman.

Q. And is there a particular area where you work now?

A. West service area.

Q. Okay. Now, we briefly looked at a incident report off

the record here, and I'll give you an extra copy here for our records so we can mark that as an exhibit soon enough. The report relates to an occasion back in May 31, 2012, do you recall being called to that particular incident?

A. Yes.

Q. And you've brought here today in your notebook and you've copied the cover, the inside cover and page that relates to some notes you made on that date?

A. Yes.

(Deposition Exhibits 1 & 2 marked at 1:10 PM)

BY MR. SCHAEFER:

Q. Officer, on that particular day, do you recall what your assignment was?

A. Same assignment, patrol officer working the north service area.

Q. And was there a particular individual whose command you were under that day?

A. My immediate commander for the north service area is sergeant or Captain Pete McWaters, but Captain Vanderkooi is commander of the east service area.

Q. Okay. So, on that date you were working under Captain Pete McWaters?

A. Yes.

Q. Okay. And if you could, please, kind of going from the

beginning, what do you remember as far as the call there that is reflected in incident number 12-050306?

A. I was on routine patrol, and Captain Vanderkooi requested assistance contacting two subjects near Lake Drive and Fulton Street.

Q. And you got that call over the radio?

A. Came out over the air, yes.

Q. And what, if anything, do you do next?

A. I think I volunteered to assist. That borders my B area, service area, so I responded to the general area.

Q. And did you respond somehow verbally to somebody?

A. Just acknowledged that I would be heading that way to dispatch.

Q. Okay.

A. Acknowledged dispatch.

Q. So, you headed that way?

A. Yep.

Q. And what happened next?

A. Information was related two subjects had separated, and I'd given the direction of the one head left in one direction. And then, so I went to that area to initiate for the subject that had gone to the east.

Q. Was that dispatch that relayed that information to you that the two subjects had separated and?

A. I don't recall who specifically it would have most, it

would have been Vanderkooi putting it out over the air to tell the dispatcher.

Q. Okay. But you heard it from a dispatcher?

A. I don't recall if it was.

Q. Okay.

A. Most likely it was from Vanderkooi.

Q. So, just so I understand and so the record is clear, your original call to see whether you could assist came from dispatch?

A. From Vanderkooi. Vanderkooi is asking for assistance.

Q. Okay.

A. But he's not talking to me, he's talking to dispatch.

Q. I got it.

A. Okay.

Q. So, in your cruiser there on your routine patrol, that day you hear things over the radio?

A. Yes.

Q. And it could be people in dispatch saying things?

A. Yes.

Q. And it could be other police personnel saying things?

A. Yeah.

Q. Okay. It helps to explain that, because for lay people, including myself, we don't know necessarily. So, Captain Vanderkooi asked for the assistance in contacting two subjects?

DEPOSITION OF OFFICER DENNIS NEWTON
3-11-2015

7

A. Yes.
Q. Is what you heard from him. And you heard additional information from Captain Vanderkooi that they had separated and one was heading in an easterly direction?
A. Yes.
Q. Do you recall what street he said that person was heading?
A. I don't recall what street specifically.
Q. So, you went to the area?
A. Yes.
Q. Okay. And did you get more information about a particular subject then that you were to make contact with?
A. Yes.
Q. And what happened next in that regard?
A. I located subject fitting that description and made contact with him.
Q. Okay. So, after Captain Vanderkooi had reported that the two subjects separated, did he provide a description of the two subjects?
A. I don't recall if he did or didn't. It's been awhile.
Q. Okay. But --
A. Obviously, I located the kid that was there, so the information I was provided was accurate.
Q. Okay. You just don't remember what the information

8

was?
A. Right.
Q. Okay. So, somehow or another you engaged one of the subjects?
A. Yes.
Q. And where did you find the particular individual?
A. I believe it was on Packard between Lake Drive and Eastern. Lake Drive and Fulton not Eastern, Fulton Street.
Q. Okay, thank you.
A. Yeah, I was like.
Q. I was scrolling through the map in my head.
A. Yeah, yeah, Fulton and Lake Drive.
Q. All right. So, you encountered the subject on Packard between Lake Drive and Fulton, and what happened next?
A. Just pulled up to him, asked him to stop, made contact with him. The contact was outside the cruiser on the sidewalk.
Q. And when you pulled up, was he on foot or on bike?
A. I don't exactly recall.
Q. Okay. And I maybe should have backed up a question or two. Did you notice when you pulled up whether he was with a bicycle?
A. I don't recall.
Q. Okay. All we know is you pulled up and you asked him

9

to stop?
A. I found the right kid, I don't know.
Q. Okay. And so, then what happened after you asked him to stop?
A. Just asked him what he was doing, asked him for his ID, just verified the story.
Q. Okay. And do you recall when you asked him what he was doing what he responded?
A. He was just horsing around with his friend at the park.
Q. Oh, okay.
A. I don't know if it was a park. He was horsing around with his friend.
Q. Is that kind of a quote?
A. They were at a park initially or that was where they, I think they were first seen.
Q. Okay.
A. In that area of a park, that's why I had the park in my head. But he said he was horsing around with his friend.
Q. Okay. And is that kind of a quote then?
A. No, it's not a quote. I wouldn't know. I couldn't remember his word for word.
Q. Okay. So, the gist of what you recall him saying was he was horsing around with his friend?
A. He was with his friend, and yeah. Yes.

10

Q. Well, you're cutting out the horsing around part, and I'm not trying to give you a hard time, I'm just trying to pinpoint?
A. No, that was how it was described.
Q. By the subject?
A. Yes.
Q. Okay.
A. My interpretation of what he said was horsing around.
Q. Okay. But clearly, the subject indicated he had been with a friend of his?
A. Yes.
Q. Okay. And so, you asked him for ID, did he have any ID?
A. Yeah, school ID.
Q. Okay. And did you determine who he was then?
A. Yeah, I wrote down his, copied his name into my notebooks.
Q. Okay. So, the second exhibit there with, what did you determine the person's name was?
A. Pablo R. Aguilar.
Q. Okay. And what else do you have in your notebook that relates to him?
A. Then I obtained his date of birth, his home address and a phone number. They were also copied down that he was a student at University Prep.

11

Q. Okay. And those are the lines reflected in your handwritten notes there in Exhibit 2?
A. Yes.
Q. And you had indicated earlier that you verified his story, what was the story that you verified?
A. They were chasing birds in the park or chasing birds or a bird.
Q. Okay. Anything else?
A. Nope.
Q. Okay.
A. Not that I can recall.
Q. And then, after you asked him what he was doing and asked for his ID and verified his story, what did you do next?
A. File checked him, made sure he wasn't a run away or wanted.
Q. And what does that mean to file check?
A. Run him in our system to make sure he's not a run away or had any warrants for his arrest.
Q. Okay. So, you have an onboard computer in your vehicle?
A. Yes.
Q. And you put his name into that?
A. Yes.
Q. And nothing came up?

12

A. Nothing.
Q. Okay. And what did you do after that?
A. He had his identification, I believed who he was, I let him go.
Q. Okay. Did you assist Officer Naagtzaam in any way in the preparation of his incident report?
A. I provided the name, date of birth, address and phone number for Pablo.
Q. Okay. Do you recall in terms of gender and race what Pablo was?
A. Light skinned Hispanic or black male. He was light skinned black guy or Hispanic male.
Q. Is that what you told Officer Naagtzaam?
A. I don't remember specifically what I told him his race was.
Q. Okay. But your recollection is that from your perspective he was either light skinned African American or Hispanic?
A. Yes.
Q. Did you ask him what his race was what?
A. No.
Q. Were you the only one who had contact with Pablo Aguilar?
A. Direct contact, yes.
Q. Okay. Did somebody have indirect contact?

13

A. Someone may have backed me up and stood as my cover officer, but I don't recall who or if there actually was.
Q. Okay. But at least when you stopped Pablo Aguilar on Packard, as you recall, you were the only one there?
A. I was the, initially I was the only one.
Q. Okay. And someone may or may not have arrived to back you up?
A. Correct.
Q. Does the department, to your knowledge, have any standards for how you identify the race of an individual for an incident report?
A. Standard, no.
Q. Okay.
A. Our selections, you mean, what we can choose it, or explain how.
Q. Well, is there a list of categories that you could put in the race box on an incident report?
A. Yes.
Q. Okay. And is there a definition of each category provided to the department personnel to use?
A. I don't know what you mean. Like I know what a, I know what W means, it means white.
Q. Okay.
A. And B means black and H means Hispanic and A means

14

Asian.
Q. Okay.
A. I don't know if it's spelled out in the procedure or not.
Q. Okay. So, you don't know if it's in the manual procedures what the definition is of each one?
A. No.
Q. Okay.
A. No, sorry.
Q. Did you search Mr. Aguilar?
A. Yes.
Q. Now, you didn't mention that so far as we were going through the steps in the encounter. At what point did you search him?
A. I don't recall the specific if I got his ID first or if I searched him first. I don't recall the order of actions.
Q. Okay. And what was the basis for searching him?
A. The information that was initially relayed that there's some sort of suspicious activity or hand to hand contact between him and the other subject.
Q. And why would that indicate to you that a search was appropriate?
A. It's only a couple blocks off from one of our drug areas. Hand to hands are commonly associated with

street level narcotic sales.
Q. And what is the drug area that you're referring to?
A. Could be anywhere up off of Eastern, Sherman area, Eastern, you can go further south down Wealthy, Fuller area, Fulton, Diamond area, Styuvesant Apartments on Cherry Street.
Q. So, you said the drug areas included the Eastern and Sherman area?
A. Mm-hm.
Q. Wealthy and Fuller?
A. Wealthy, Eastern.
Q. And you said Diamond?
A. Diamond and Fulton.
Q. The Styuvesant's?
A. Styuvesant's, Cherry and Madison.
Q. So, do you remember who had provided you with information that the two subjects might have had a hand to hand encounter?
A. I don't recall what, if that was specifically from Captain or not.
Q. Was your search just a pat down or was it a thorough search?
A. It was a thorough search.
Q. And did you ask for permission to search?
A. Yes, consent was granted.

Q. Did you find anything during the search?
A. Nothing illegal was located.
Q. Okay. Did Aguilar have anything that he was holding or carrying or anything like that?
A. I don't recall.
Q. Okay. So, you don't recall if he had a backpack?
A. No.
Q. Did you or anyone else take a picture of Mr. Aguilar?
A. No.
Q. Did you or anyone else take a thumbprint of him?
A. No.
Q. You had mentioned in the course of your description of the events that Captain Vanderkooi had requested the assistance that he relayed that the two people had separated and may have given a description, was that the end of the information that you received from Captain Vanderkooi or were there additional things he said over the airwaves to you or information he gave to you to guide your actions?
A. Just a, Pablo's story corresponded with the other subject's story, that there was no need to detain him any longer.
Q. Okay. So, once you talked to Mr. Aguilar about what had been going on with him and his friend you --
A. Relayed.

Q. -- reported that to Captain Vanderkooi?
A. Yeah.
Q. And he reported back to you that --
A. I don't know if it was him or Luke or whoever, but he said it was fine.
Q. Okay.
A. But yeah, communication went between me and Captain Vanderkooi or whoever was over at the other location about the stories being the same.
Q. Okay. So, either Captain Vanderkooi or Officer Naagtzaam relayed back to you that the stories were the same and you didn't need to detain Mr. Aguilar?
A. Correct.
Q. Did anyone ask you to search Mr. Aguilar or were you following some sort of department protocol or policy?
MS. REWA: Objection. Compound statement.
By MR. SCHAEFER:
Q. You can go ahead and answer.
A. Ask me what you want, ask it again.
Q. Okay. Did someone specifically ask you to search Mr. Aguilar or were you following a department policy or protocol when you determined that you would do that?
A. First half. Nobody told me to search Pablo.
Q. Okay.
A. That's my own actions.

Q. Okay.
A. Initiated by me.
Q. So, you did it pursuant to some particular departmental policy or procedure?
MS. REWA: Objection. Misstates testimony.
THE WITNESS: I searched him based on my suspicions and the information I had received. There was no, they don't, there's no written policy as far as when I shall or not shall search somebody, specifically, in this case pertaining to this case.
BY MR. SCHAEFER:
Q. Okay.
A. So, my policies explain how and when I will search somebody. They don't tell me if I have to or not have to in this case.
Q. And I'm not trying to ask any trick questions, so I'll phrase it a little differently. The manual of procedure tells you how to undertake a search, is that correct?
A. Correct.
Q. And the decision you made to undertake the search wasn't because policy required it, but it was because of what you had understood the circumstances were and you thought it was appropriate in that case?
A. Correct.

Q. Okay, understood.

MR. SCHAEFER: I don't have any more questions.

MS. REWA: I don't have any questions.

(Deposition ended at 1:37 PM)

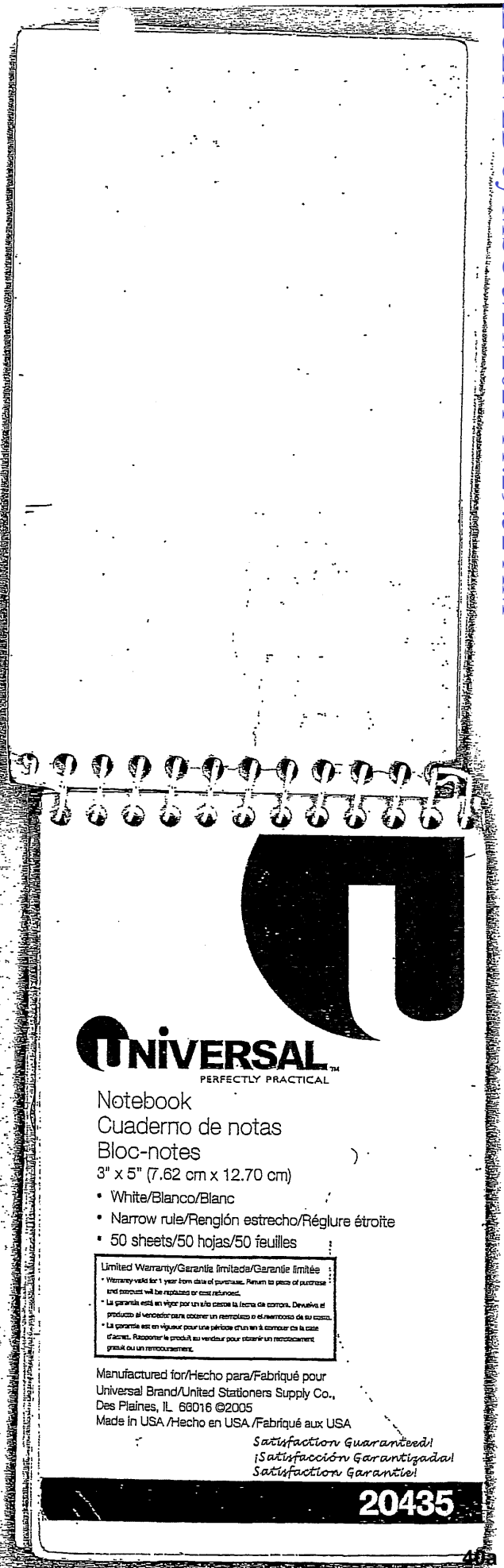
STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

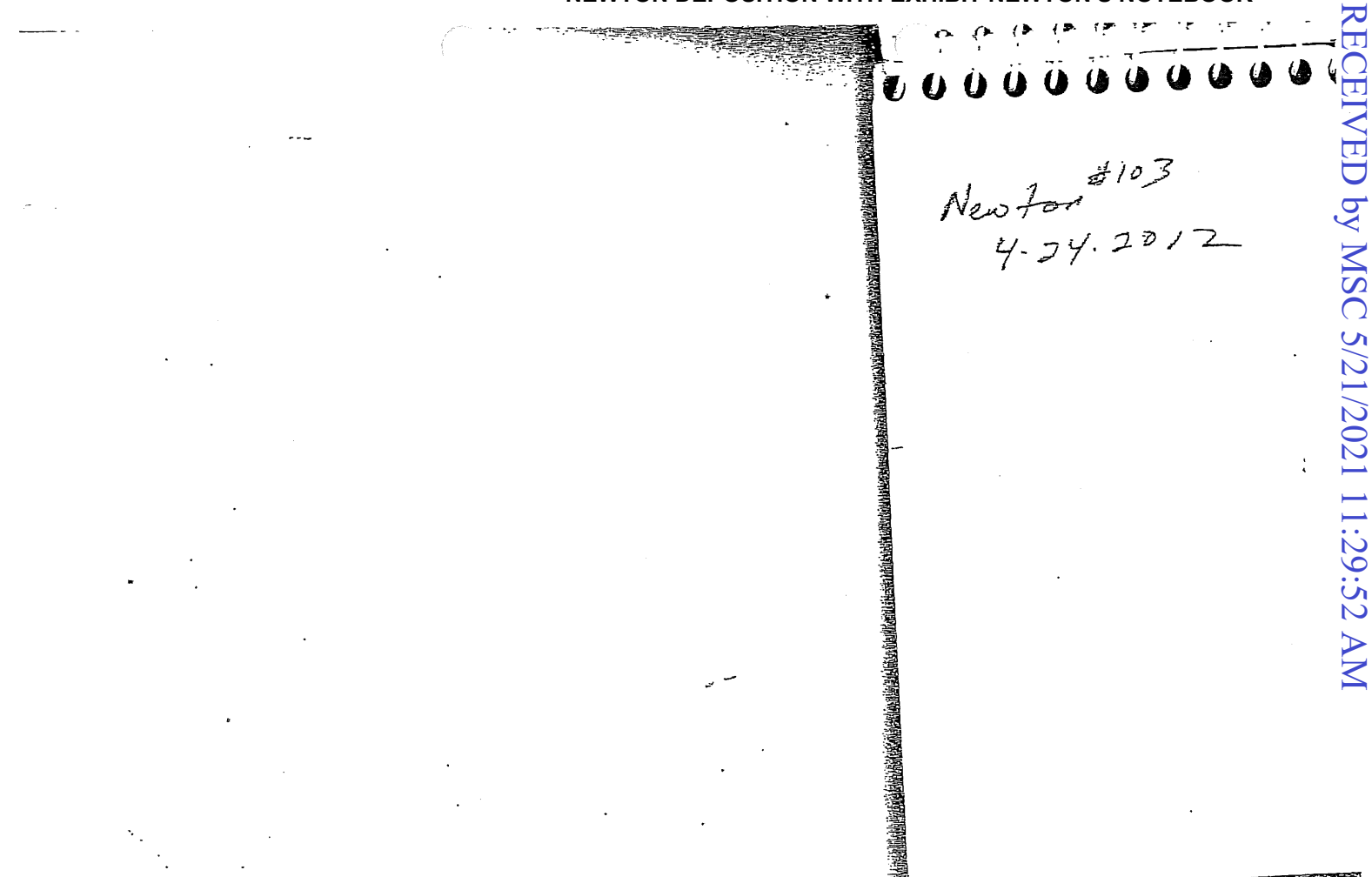
I, Shawn Breimayer, (CSR-6888) do hereby certify that the foregoing deposition consisting of 20 pages, is a complete, true and correct transcript of the deposition proceedings and testimony of Officer Dennis Newton held in this case on Wednesday, March 11, 2015; and do also certify that the foregoing transcript is a true and correct transcript of my stenographic notes of said deposition so reported and transcribed by me.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Dated: March 20, 2015

_____
Shawn M. Breimayer, CSR
Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-2020





Pablo R. Aguilar
8-31-97
104 Caulfield
245-9512
~~Bus~~ Univ. Prep.
CAH 4127 Gold
State Farm Mutual 075 1941-D22
Oct. 24-2012 22
706 0667

(D) Grn
589-1390

(P) 589-1367
Mistir Temesgen
12-15-82
1828 Merson #B

Rental Almaq
534-5194

Angelo
Rental Kitchen
887 1113

~~Peter~~

July 21

Costco - Derek
233 4448
Speech for Public Safety

Katie - 284-9506
July 14

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

vs

Hon. James R. Redford

Case No. 14-02166-NO

CURT VANDERKOOI, and CITY OF GRAND RAPIDS, a Michigan Municipal Corporation,

Defendants.
_____ /

Deposition of KEYON HARRISON, taken on the 26th day of March, 2015, at the offices of Bernard Schaefer, 161 Ottawa Avenue, NW, Suite 212, Grand Rapids, Michigan, commencing at 2:09 p.m.

APPEARANCES:

For the Plaintiff: BERNARD SCHAEFER (P40114)
161 Ottawa Ave, NW, Ste. 212
Grand Rapids, MI 49503
616.272.4361

For the Defendant: KRISTEN REWA (P73043)
PATRICK LANNEN (P35171)
Assistant City Attorney
300 Monroe Ave, NW, Ste. 620
Grand Rapids, MI 49503
616.456.3181

Also Present: Capt. Curt VanderKooi

Reported By: Edith G. Bultman, CER5800

INDEX OF WITNESSES

INDEX OF EXHIBITS

Grand Rapids, Michigan

Thursday, March 26, 2015

DEPOSITION

KENYON HARRISON,

Having been first duly sworn by the reporter, was examined and testified on his oath as follows:

EXAMINATION

BY MS. REWA:

Q. Mr. Harrison, my name is Kristen Rewa, I'm an assistant city attorney representing the defendant in this case.

Could you please state and spell your full name for the record?

A. **Keyon Harrison, K-E-Y-O-N H-A-R-R-I-S-O-N.**

Q. Have you had your deposition taken before?

A. **No.**

Q. I'm just going to give you a rundown. I'm sure your attorney's probably already talked to you about this but I will just probably go over the same things he did. But the deposition is under oath. The court reporter sitting next to you is taking down everything that we are saying, so it's important that we verbalize our answers and questions. The court reporter can't

take a nod. Likewise it's difficult to transcribe and understand like uh-huh an uh-uh, so we need to make sure it's yes or no, that sort of thing.

I can almost guarantee you I'm going to ask a poor question at some point, so it's really important to listen to the question I ask and if it doesn't make sense or you need me to rephrase it, you need some sort of clarification, please let me know and I will rephrase it for you. Again, if you answer my question I'm going to assume that you understood what I asked. So please, it's very important to seek any clarification if that's necessary.

Feel free to ask for a break at any time. If you need to take a break for the bathroom or get something to drink, that's fine. The only provisal is that if there is a question on the table, if I ask a question I'm going to need an answer and then we can go to a break.

Have you had any -- have you prepared for this deposition in any way?

A. **Yes.**

Q. How did you prepare?

A. **Did my own research on civil rights.**

Q. What do you mean by your own research?

A. **I started tapping into some law books that I have**

including constitution and looked at some previous cases regarding relatedness to my own and used some of the information I obtained from those cases to my case.

Q. Did you review any document -- other than the law books you talked about did you review any documents for this case?

MR. SCHAEFER: Objection. You mean for the deposition today?

MS. REWA: Yeah.

BY MS. REWA:

Q. Did you review any documents to help you prepare for the deposition?

A. **No, just the deposition itself.**

Q. What cases did you review?

A. **Previous cases from 2003. What is it called? Mayor versus City of Grand Rapids and I can't pronounce his name, With something. Again, another cop by the name of Ranford (phonetic).**

Q. With that second case was that a Grand Rapids police officer?

A. **Yes.**

Q. What were the facts of that case as you read them?

A. **This case pertained to more civil rights case and also discriminatory matters. This one, however, was**

towards a paraplegic.

Q. Was that -- do you know was that a federal case or a state case?

A. **I think it was a state case. I'm not sure on the stature of it.**

Q. Sure. The first case that you said, Mayor versus City of Grand Rapids, what were the facts of that case as you read them?

A. **This was also a civil rights case.**

Q. Do you remember what that case was about?

A. **Also pertaining to discriminatory matters. Nothing more.**

Q. Did you review anything else in preparation for your deposition?

A. **No.**

Q. As I understand it at the time of the incident that formed the basis of this lawsuit you were in high school?

A. **Yes.**

Q. What high school was that?

A. **University Preparatory Academy.**

Q. Where is that?

A. **It's now located on Division and Logan.**

MR. SCHAEFER: Where was it located then?

BY MS. REWA:

Q. Yeah. Where was it located then?

A. **We shared a space with Central High School on Fountain and College.**

Q. The incident we're going to talk about today occurred May 31st, 2012; is that correct?

A. **That is correct.**

Q. What grade were you in?

A. **Eleventh.**

Q. As I understand it you had a school project that day that you gave a presentation on; is that correct?

A. **No.**

Q. No? Did you have a project that you had to turn in that day?

A. **My project was presented the week prior to the incident.**

Q. What was your project about the week prior?

A. **Well, basically job skills, different college presentations regarding what college. Like for example Michigan State University and University of Michigan, just present the overview of each college and then how I can plant myself to go to one of those colleges.**

Q. As I understand it on May 31st, 2012, you assisted another student with a project that day?

A. **Yes.**

Q. Can you explain to me how you assisted? First of all let me ask this. Which student did you assist?

A. **His name is Pablo. He was a sophomore.**

Q. His last name?

A. **I'm not sure.**

Q. Were you in the same class together?

A. **No.**

Q. How did you assist Pablo?

A. **Helping him carry some materials back to his internship.**

Q. To his internship?

A. **Internship site.**

Q. What kind of materials did you help him carry?

A. **Toy fire truck.**

Q. Anything else?

A. **That was all I carried.**

Q. Can you describe the toy fire truck for me?

A. **It was red, had a gray stripe going around it. Looked like he built it from scratch.**

Q. How big was it?

A. **I would say about at least a foot in length and half foot wide.**

Q. Why were you helping Pablo carry those materials?

A. **He was carrying a battery in his backpack and power source for the fire truck and it was very heavy.**

Q. How did you know Pablo?
A. We went to the same school for about two years.
Q. Would you consider him -- was he a friend of yours at that time?
A. He was a friend of mine at the time.
Q. Are you still in contact with Pablo?
A. No.
Q. Now, as I understand it you have since graduated from University Prep; is that correct?
A. Yes.
Q. When did you graduate?
A. 2014.
Q. Did you graduate with any distinction or honors?
A. I was on the top ten list, honor roll.
Q. What was your GPA when you graduated?
A. Cumulative or current?
Q. The high school cumulative final GPA.
A. 2.8.
Q. Are you attending college now?
A. Yes.
Q. Where do you go to college?
A. Cornerstone University.
Q. That's here in Grand Rapids?
A. Yes.
Q. Do you live on campus?

A. Yes.
Q. In a dorm?
A. Yes.
Q. When did you start attending Cornerstone?
A. Fall of 2014.
Q. What's your major?
A. Psychology.
Q. Does Cornerstone operate on trimesters?
A. No.
Q. Semesters then?
A. Yes.
Q. How many semesters have you attended at Cornerstone to date?
A. Can you rephrase the question?
Q. How long have you gone to Cornerstone?
A. Are you asking me how many semesters I have completed or just attended, including now?
Q. How many have you completed?
A. One.
Q. Are you still going to Cornerstone?
A. Yes.
Q. So I'm guessing, I presume that you have one semester that you are finishing up now?
A. Yes.
Q. Do you have your grades back from the one

semester you completed?
A. Yes.
Q. What was your GPA for that?
A. I'm not obliged to tell you that. Sorry. It's a confidentiality agreement that's not with Cornerstone.
MR. SCHAEFER: I can get that for you.
BY MS. REWA:
Q. Did you take a full course load when you attended?
A. Yes.
Q. Are you taking a full course load now?
A. Yes.
Q. What do you hope to do when you complete your psychology degree?
A. Go on to master's.
Q. Master's in what?
A. Counseling.
Q. What do you hope to make out of your career? What do you want your career to be?
A. Private practice, psychologist, marriage and family therapist.
Q. I would like to turn back to the May 31st, 2012 incident. You were helping Pablo carry a fire truck?
A. Yes.
Q. Had school ended at that time? Was this after

school that you were helping him carry?
A. Yes.
Q. About what time of day was that?
A. Say around 3:22 p.m.
Q. Were you walking?
A. Yes.
Q. Where were you walking to?
A. Down Fulton Street.
Q. Towards which direction?
A. East.
Q. Where were you walking to?
A. Originally I was walking home.
Q. Were you going to -- how far were you going to carry the fire truck for Pablo?
A. Just across the street.
Q. Across which street?
A. Union.
Q. Walking down Fulton Street east is that a normal route that you would have taken home from school?
A. Yes.
Q. Can you describe the full route that you normally took home from school?
A. Well, from the school go down College, then turn on Fulton, cross Union Street, then cross over Fulton to Lake Drive, go down Lake Drive until I reach Eastern,

turn right on Eastern, go down Eastern until I reached Fairmount, then went down Fairmount, turned on Hollister, went home.

Q. About how far a walk is that from school to home?

A. About a quarter of a mile.

Q. Did you typically walk home from school?

A. Yes.

Q. Did you typically walk to school?

A. Yes.

Q. Did you take the same route?

A. Yes.

Q. So on this day, May 31st, 2012, you left school with Pablo; is that correct?

A. No. I left school, went down Fulton Street, I found Pablo riding his bike.

Q. Then what happened?

A. I talked to him, asked him what was bothering him because he had a backpack and a battery, he was carrying a fire truck on his side, so I asked if I could assist.

Q. You used the word bother. Did he appear bothered to you?

A. He was off balance.

Q. So did Pablo take you up on your offer of assistance?

A. Yes.

Q. So then what happened?

A. Then we walked down Fulton towards Union, crossed the street at Union, I told him I had to cross the street, go down Lake Drive, we said goodbye.

Q. Did he walk down Fulton with you?

A. He rode down Fulton.

Q. I hope I don't get the street mixed up. Correct me if I do. You crossed Lake Drive?

A. I crossed over Fulton to Lake Drive.

Q. Okay. And that's where you parted ways with Pablo?

A. Yes.

Q. Once you parted ways which direction did Pablo go?

A. Pablo continued down Fulton east.

Q. Then which way did you go?

A. I continued down Lake Drive.

Q. Then what happened?

A. Then I saw a bird with a broken wing in a little park area that divides Lake Drive and Fulton and kind of casually followed it.

Q. Was the bird on the ground?

A. It was on the ground.

Q. Distance wise how far did you follow it?

A. About five feet in circles.

Q. Can you describe that a little more for me? Describe that following process for me.

A. So the bird was on the ground, I knelt down, looked at it, then I got up, walked around in circles for about five feet, decided to leave the bird alone, then continued my way down Lake Drive.

Q. So you walked in circles around the bird?

A. Yes.

Q. The bird wasn't hopping around in circle?

A. It wasn't.

Q. Okay. Then once you decided that you were done following the bird then what happened?

A. I continued down Lake Drive.

Q. So you are continuing down Lake Drive, what happened next?

A. After walking distance of 20 feet from the bird I encountered Capt. VanderKooi, who rode in a tan Crown Royal, got out of his car.

Q. I'm sorry, what was the last word you said?

A. He got out of his car, asked if he could speak to me.

Q. So the tan Crown Royal, did that have any police lights on top of it?

A. No.

Q. Did it have any police emblems written on the

side of it?

A. No, not that I recall.

Q. Okay. So then Capt. VanderKooi asked if he could speak to you?

A. Yes.

Q. Then what happened?

A. Then he asked me -- to the best of my knowledge he noticed that me and my friend were walking down the street, he noticed that I was carrying a fire truck, thought that I was trying to sell him something.

Q. Is this information that Capt. VanderKooi told you?

A. Yes.

Q. When he asked you if he could speak to you did you say anything?

A. I said, sure.

Q. Then was it after that point that he told you about what he saw about you and your friend?

A. Rephrase that, please.

Q. I'm trying to get the chronology right in my head here. He gets out of his car and asks to speak to you, you said, sure.

A. Yes.

Q. And then did he tell you that he saw you and your friend walking down the street?

A. **Yes.**
Q. Then he said -- correct me if I am wrong -- he said that he thought that you were trying to sell him something?
A. **Yes.**
Q. Trying to sell your friend something?
A. **Yes.**
Q. Did you respond to that statement in any way?
A. **I said -- yes.**
Q. What did you say?
A. **I said, no, I was just helping him carry his internship project back to his internship. I have to make my way home, so I gave it back to him, let him go on his way.**
Q. What happened after you said that?
A. **Capt. VanderKooi told me to hold on, so I waited, then he called for backup.**
Q. How did he call for backup?
A. **Radio out in the car.**
Q. A radio out of the car?
A. **Yes.**
MR. SCHAEFER: I'm sorry, a radio on his person?
THE WITNESS: Sorry. In the car. The radio came from the car. He came out with the radio and said

he needed backup on Lake Drive something.
BY MS. REWA:
Q. Was this radio a portable radio?
A. **No. It was connected to the car.**
Q. It had a wire --
A. **Yes.**
Q. What was Capt. VanderKooi wearing?
A. **To the best of my knowledge sunglasses, a tan sweater zip up, zips up about midway. I couldn't tell if they were gray or black slacks and black shoes.**
Q. Did that look to be a police uniform to you?
A. **No.**
Q. What were you wearing that day?
A. **A black hoodie. Under the black hoodie my high school uniform, kakis and black loafers.**
Q. What kind of shirt were you wearing?
A. **My uniform.**
Q. Can you describe that?
A. **Dark blue with University Prep logo on it.**
Q. Is it a polo?
A. **Yes.**
Q. So Capt. VanderKooi radioed for backup, then what happened?
A. **Then we waited, one cop came, he was tall, he wore glasses, gray hair.**

Q. How long did you wait?
A. **About two minutes.**
Q. During that time you were waiting did you and Capt. VanderKooi have any conversation?
A. **Not that I recall.**
Q. So the first cop shows up, was he wearing a uniform?
A. **Yes.**
Q. What happened when he shows up?
A. **He waits with me and Capt. VanderKooi and Capt. VanderKooi used his radio again and sends a cop to contact Pablo. And during that time he told me that he was sending a cop to Pablo just to make sure our stories were the same.**
Q. You overheard him send out directions on the radio?
A. **I did not.**
Q. How did you know that he sent a cop to contact Pablo?
A. **He said his name.**
Q. Who did?
A. **Capt. VanderKooi.**
Q. Correct me if I'm wrong, sounds like Capt. VanderKooi told you that he had gotten on the radio to tell a police officer to find Pablo?

A. **Yes.**
Q. So after that second time Capt. VanderKooi gets on the radio then what happens?
A. **Then we wait again.**
Q. For about how long?
A. **Approximately four minutes.**
Q. What did you do during this approximately four-minute wait?
A. **Looked at the ground.**
Q. Did you talk to anybody?
A. **Well, me and Capt. VanderKooi made some conversation regarding where I was from, what school I went to. That was pretty much it.**
Q. And you responded to him?
A. **Yes.**
Q. What did you tell him as far as where you were from?
A. **City I was from.**
Q. You said the city?
A. **Yes.**
Q. Which city?
A. **Grand Rapids.**
Q. As far as him asking what school you went to did you tell him what school you went to?
A. **Yes.**

Q. What did you tell him?
A. University Prep Academy.
Q. You said that you were staring at the ground during this four-minute wait, where were you located?
A. The park area dividing Fulton and Lake Drive. We're on Lake Drive on the sidewalk by the park area.
Q. Were you on that sidewalk area when Capt. VanderKooi first came up to you?
A. Yes.
Q. Did you stay in this sidewalk area the entire time of this incident?
A. With Capt. VanderKooi and his backup.
Q. Were you standing this entire time?
A. Yes.
Q. Can you describe for me the tone of the conversation you were having with Capt. VanderKooi at this point?
A. Intense.
Q. What do you mean intense?
A. On my part it was very intense. Felt like I did something that I was not supposed to.
Q. How was the tone of your voice during this conversation?
A. On my part? Nervous.
Q. What was Capt. VanderKooi's tone like during the

conversation?
A. Calm.
Q. Calm?
A. Calm, collective.
Q. Did a second police officer arrive at this location?
A. You mean a third?
Q. Correct. So we have Capt. VanderKooi, the second officer with the gray hair, was there a third officer then?
A. Yes.
Q. Can you describe the third officer for me?
A. Had sandy, white complexion, dark hair, say about dark brown, looked younger, about 24, 25, five foot ten.
Q. What happened when this third officer arrived?
A. He came by Capt. VanderKooi, asked could he search me. I said, yes. So the other officer searched me.
Q. Capt. VanderKooi was the one that asked you?
A. Yes.
Q. Describe the search that that officer did.
A. Procedure?
Q. Like, yeah. How did he do that? What was the search? Well, that's two questions. Let's start to make it clear, everything is on the record. Let me

break this up, ask one at a time.
So how did that officer search you?
A. Frisked me.
Q. What do you mean by frisked?
A. Searched my pants, my coat, patted me up and down.
Q. Did he start the search with your pants?
A. No. He started at the top.
Q. Where up top?
A. Arms.
Q. Describe for me how he searched your arms.
A. Started at the wrists, then patted around my arms until he reached my shoulders.
Q. Was that over your clothes?
A. Yes.
Q. And did he do that procedure for both arms?
A. Yes.
Q. And at this point you are still wearing your sweatshirt?
A. Yes.
Q. Did you take your sweatshirt off during the search?
A. After the stories were summed up.
Q. Okay. But while the officer was patting your arms you were wearing the sweatshirt?

A. Yes.
Q. Did you have pockets on that sweatshirt?
A. Yes.
Q. Did the officer check your pockets?
A. Yes.
Q. Did you have anything in your pockets?
A. No.
Q. To clarify did you have anything in your sweatshirt pockets?
A. No.
Q. So when the --
MR. SCHAEFER: I'm confused. He has the hoodie on outside, are you calling that the sweatshirt?
MS. REWA: Yes.
MR. SCHAEFER: Then underneath he's got --
THE WITNESS: Uniform polo.
MR. SCHAEFER: You are calling that the sweater?
MS. REWA: I didn't say sweater; did I?
MR. SCHAEFER: I thought you did.
MS. REWA: Okay. If I did say sweater I didn't mean to.
BY MS. REWA:
Q. Just for clarity's sake for everyone, Mr. Harrison, I have been saying sweatshirt, would you

prefer me to call the outer garment that you had on your upper body -- what do you want me to call it?

A. You can call it whatever you feel is necessary.

Q. So if I say sweatshirt you understand what we're talking about?

A. I understand.

MR. SCHAEFER: I just wanted to make sure, did the polo shirt have pockets on it?

MS. REWA: I haven't asked that yet.

BY MS. REWA:

Q. Did the polo shirt have pockets?

A. No.

Q. So then after the police officer checked your arms what did he search next?

A. Proceeded down to the pants.

Q. Describe for me how he searched your pants.

A. Pockets.

Q. The pockets? Did you have anything in your pants pockets?

A. Pencil.

Q. Anything else?

A. Wallet.

Q. Did the officer remove those items from your pockets?

A. Yes.

Q. Which pocket was the pencil in?

A. Left.

Q. Is that the left --

A. Front pocket.

Q. In the front?

A. Yes.

Q. Which pocket was your wallet in?

A. Back right pocket.

Q. After the officer removed the pencil and wallet from your pants did he continue to search?

A. Yes.

Q. What did he do?

A. He asked me again could he search my bag, my backpack.

Q. Did the officer pat your legs like he patted your arms?

A. Yes.

Q. Both legs?

A. Yes.

Q. Did he do this on the outside of your kakis?

A. Yes.

Q. Did he do that? Did he pat down your legs before he asked to search your backpack?

A. No.

Q. We've already covered the top part of your body

but I want to be clear on the chronology how he searched the lower part of your body. Order of operation if you will.

A. Started at the top, then went to the bottom.

Q. So started with the pockets?

A. Yes.

Q. Then did the legs?

A. Yes.

Q. Then what happened?

A. Asked me to take off my shoes.

Q. Did you take them off?

A. Yes.

Q. Then what happened?

A. Capt. VanderKooi asked me if he could search my bag.

Q. What did you say?

A. I said, yes.

Q. What kind of bag did you have?

A. Small Nike bag.

Q. Is it a messenger bag?

A. Sports bag.

Q. So describe for me the search of your bag.

A. Gave it to the officer with the gray hair and glasses.

Q. Did you give your bag to Capt. VanderKooi?

A. Yes.

Q. Prior to this how were you carrying that bag?

A. On my back.

Q. The bag that I am picturing in my mind, I want you to correct me if I am wrong, one of the nylon ones with thin straps; is that correct?

A. Yes.

Q. So you removed the backpack, the bag from your back?

A. Yes.

Q. Then did you give it to Capt. VanderKooi?

A. Yes.

Q. Sounds like he gave it to the gray-haired officer?

A. Yes.

Q. Then what happened?

A. Then after he searched it I put my shoes back on, they gave my bag back, he asked me did I have ID.

Q. Unpack that a little bit. Did you see the officer search the bag?

A. Yes.

Q. How did he search it?

A. He dug through it, riddled his hands around as if he was moving things.

Q. Did he take anything out?

A. **Nope.**
Q. When he was finished searching the bag what did he do with the bag?
A. **He gave it back to me.**
Q. What did you do with the bag?
A. **I set it down next to me on the sidewalk.**
Q. Then at that point did you put your shoes back on?
A. **This was before that.**
Q. Okay. So officer searches the bag, then gives it back to you?
A. **Yes.**
Q. After that point you set it on the ground?
A. **Yes.**
Q. And then after you set that on the ground you put your shoes back on?
A. **No. After the search of my person, after he patted down my legs, then asked me to take my shoes off, then Capt. VanderKool asked me if he could search my bag.**
Q. Okay. You have already described how the bag was searched, the last thing you said is who asked -- someone asked you if you had identification on you?
A. **Capt. VanderKool did.**
Q. Did you respond to him?

A. **Yes.**
Q. What did you tell him?
A. **I told him I didn't.**
Q. Did Capt. VanderKool go through your wallet?
A. **Just opened up the cash pocket.**
Q. Did any of the other officers go through your wallet?
A. **No.**
Q. After you told Capt. VanderKool that you didn't have any identification what happened next?
A. **Told me to identify who I am he would have to take my picture.**
Q. How did you respond?
A. **I asked him, did I do something illegal.**
Q. You asked Capt. VanderKool if you did something illegal?
A. **Yes.**
Q. Did he respond to you?
A. **Yes.**
Q. What did he say?
A. **He told me this was just to make sure that I was who I say I am.**
Q. Did you say anything after he said that?
A. **Yes.**
Q. What did you say?

A. **I said, okay.**
Q. What was your tone of voice during this interaction?
A. **Nervous.**
Q. By nervous what do you mean?
A. **Shaky.**
Q. Your voice was shaky?
A. **Yes.**
Q. How was Capt. VanderKool's tone of voice?
A. **Calm, collective.**
Q. Okay. So what happened after next?
A. **The cop with the gray hair and glasses took my picture and then the other cop decided to make conversation with me.**
Q. By other cop do you mean the younger guy?
A. **The junior one.**
Q. The cop with the gray hair and glasses that took your photo did he have conversation with you?
A. **No. He didn't speak.**
Q. Did you know how many photos he took?
A. **One.**
Q. What kind of device did he use to take your photo?
A. **Camera.**
Q. Digital camera?

A. **Yes.**
Q. So the other younger cop that decided to engage in connection did he -- did this engage of conversations occur after your photo was taken?
A. **Yes.**
Q. What does he converse with you about?
A. **About what I wanted my career to be in life, what school I went to.**
Q. Did you respond?
A. **Yes.**
Q. What did you tell him about career?
A. **Told him I wanted to be a veterinarian.**
Q. Did you tell him that you went to University Prep?
A. **Yes.**
Q. Did he respond to your answers in any way?
A. **Yes.**
Q. What did you say? Let me break that out because it's compound. What did he say about your telling him that you wanted to be a veterinarian?
A. **He commended me on the idea, told me how it would be a great career.**
Q. Did he respond to your telling him that you went to University Prep?
A. **Yes.**

Q. What did he say?
A. **Said it sounds like a nice school.**
Q. Was there any more -- was there any additional topics discussed in this conversation?
A. **I don't know.**
Q. What was your tone of voice when you were engaged in this conversation with the younger officer?
A. **Calm.**
Q. What was the younger officer's tone of voice like in that conversation?
A. **Calm and enthusiastic.**
Q. What happened after that conversation?
A. **I turned to Capt. VanderKooi, then I looked over again, I glanced, I see the officer with the gray hair and glasses put on latex gloves or some form of latex and bring out a black cartridge with ink in it and a small piece of paper with a small box on it.**
Q. At that point did you hear -- you said you turned towards Capt. VanderKooi, why did you turn towards him?
A. **I was going to ask him was there anything else that he wanted to know.**
Q. Were you able to ask him that?
A. **Yes.**
Q. Did you ask him that at that time?
A. **Yes.**

Q. Did he answer you?
A. **Yes.**
Q. What did he say?
A. **He said, we need to take your fingerprints.**
Q. Did you respond to that?
A. **Yes.**
Q. What did you say?
A. **I asked him why.**
Q. Did he answer you?
A. **Yes.**
Q. What did he say?
A. **He said, this is just to clarify again to make sure you are who you say you are.**
Q. Did you say anything after he made that statement?
A. **Yes.**
Q. What did you say?
A. **I said, okay.**
Q. So was it -- you have already testified that you saw the gray-haired officer with the glasses putting on the gloves, whatnot, was he doing that while you were talking to Capt. VanderKooi?
A. **Yes.**
Q. Did you hear Capt. VanderKooi tell the officer with the gray hair and glasses to put on latex gloves?

A. **I don't know.**
Q. Did you hear him tell the gray-haired officer with the glasses anything about taking your fingerprints?
A. **I don't know.**
Q. You don't know if you heard anything like that?
A. **I honestly don't remember.**
Q. Stepping back up a little bit, I apologize for getting out of order, but going back to taking the photograph did you hear Capt. VanderKooi tell the officer with the gray hair and glasses to take your photograph?
A. **Yes.**
Q. Did you hear the officer with the gray hair and glasses respond in any way?
A. **No. He didn't speak during the entire incident.**
Q. Okay. So then jumping back forward, we're back in the chronology of things to fingerprints, you say that officer with gray hair and glasses brings out a black cartridge?
A. **Yes.**
Q. And a small paper box or small piece of paper with a box on it?
A. **Yes.**
Q. What happened next?

A. **Then he placed my thumb on the ink cartridge, reeled it around for a little while, then put my thumb on the piece of paper with a small box.**
Q. Which thumb?
A. **Right.**
Q. Then what happened?
A. **And then he closed the ink cartridge, put the thumbprint in the small evidence bag and then took off his latex gloves. And then Capt. VanderKooi said, you are good to go.**
Q. Sounds like -- please correct me if I am wrong -- sounds like that officer with gray hair and gloves placed your hands on the card?
A. **Yes.**
Q. Can you describe for me --
A. **The sensation?**
Q. Yes. Thank you. Describe to me the sensation how he placed your hands on the card.
A. **He was easygoing. He was careful.**
Q. He didn't speak to you while he did this?
A. **Not that I recall.**
Q. Did you actually look at the -- I have been calling it a card, is that a fair word to use?
A. **That's fine.**
Q. Did you look at the card when he put your

thumbprint on the card?
A. **Yes.**
Q. Was there writing on the card?
A. **Yes.**
Q. Do you recall what it said?
A. **Said, print.**
Q. Do you think you would recognize it if I showed you a copy?
A. **Depends.**
(Discussion off the record.)
BY MR. REWA:
Q. Other than the size of this piece of paper does that look like the card that was used on this May 31st, 2012 incident?
A. **Yes.**
MR. SCHAEFER: For the record can you indicate which exhibit from which dep this is?
MS. REWA: Yes. For the record the exhibit is marked as Exhibit 3, 12-16-14 is the date below Exhibit 3.
MR. SCHAEFER: We're thinking that's from the deposition of Sgt. Steve LaBrecque.
BY MS. REWA:
Q. After the officer with the gray hair and glasses finished taking your print did he hand you anything?

A. **No.**
Q. Did you still have the -- what color was the stuff from the cartridge?
A. **The ink was black.**
Q. Did you still have the black ink on your thumb?
A. **Yes, for about ten seconds. That's when Sgt. LaBrecque handed me a hand wipe, I wiped it off.**
Q. Then you said he placed the card in an evidence bag?
A. **Yes.**
Q. Was it at that point that Capt. VanderKooi said, you were good to go?
A. **It was after that point.**
Q. How long after that point?
A. **Sixteen seconds.**
Q. Then what happened?
A. **Then I said, thank you for your time, shook their hands, headed down the street towards home.**
Q. Other than the statements you have already identified today do you recall Capt. VanderKooi saying anything else to you during the course of this incident?
A. **Yes.**
Q. What did he say?
A. **Well, first start off I asked -- well, okay. Sorry. Before he told me I was good to go I asked him**

what was I being originally stopped for, is there a certain reason why I was stopped. He told me again that he thought I was trying to sell my friend Pablo something and looked suspicion. So I said, okay. Then he told me there were a lot of burglaries in the City of Grand Rapids. So I said, okay, well, I never robbed anyone let alone did anything illegal but I appreciate the concern. Then that's when he said I was good to go.
Q. And you used the words what was the reason why you were stopped?
A. **Yes. I said it at the beginning of the incident, then at the end of the incident.**
Q. When you said it at the beginning of the incident Capt. VanderKooi explained why he contacted you?
A. **Yes.**
Q. And when he used that phrase again at the end of the incident did Capt. VanderKooi again explain why he contacted you?
A. **Yes.**
Q. Did Capt. VanderKooi use the word stop at any time during the incident?
A. **Pardon me?**
Q. Did Capt. VanderKooi use the word stop at any point in the incident?
A. **No.**

Q. Did the officer -- well, you already said the officer with the gray hear and glasses didn't say anything.
A. **Not that I recall.**
Q. So then the younger officer, the 20-something officer that arrived third, did he use the word stop with you at any time during the incident?
A. **Not that I recall.**
Q. So what happened after he said -- Capt. VanderKooi said you were good to go?
A. **I shook all of their hands, I said, thank you for your time, I continued on home.**
Q. What was your tone of voice when you thanked the officers for their time?
A. **Nervous.**
Q. You continued home, did you take the -- when you continued home did you take your usual route for going home?
A. **Yes.**
MS. REWA: How about we take a break right now. Do you want a break or do you want to continue:
THE WITNESS: I would rather continue.
BY MS. REWA:
Q. What happened when you got home?
A. **I was freaked out, called for my mom, told her**

what happened.
Q. Were you the only one at your house when you got home?
A. **No.**
Q. Who else was there?
A. **My mother and my younger sisters.**
Q. What's your mom's name?
A. **Anchanet, A-N-C-H-A-N-E-T.**
Q. Her last name?
A. **Harrison.**
Q. How many younger sisters were at your home?
A. **Two.**
Q. What are their names?
A. **Kaylee and Kalyce, K-A-L-Y-C-E?**
Q. How do you spell Kaylee?
A. **K-A-Y-L-E-E.**
Q. How old is Kaylee? How old is Kaylee now?
A. **Now she is 14.**
Q. How old is Kalyce now?
A. **Ten.**
Q. So earlier you said you called your mom, did you call her on the telephone?
A. **No. I called her when I got in the door.**
MR. SCHAEFER: He called for his mom he said.

MS. REWA: I got it.
BY MS. REWA:
Q. Now, you used the term freaked out, can you describe that for me? How were you freaked out?
A. **Scared, nervous, upset, sad.**
Q. Did your mom respond to your call out for her?
A. **Yes.**
Q. What did you tell your mom?
A. **Told my mom about the incident.**
Q. What did you tell her about the incident?
A. **Told her I was stopped by the police, they thought that I was doing something suspicious and they took my picture and fingerprint.**
Q. Did your mom respond?
A. **Yes.**
Q. What did she say?
A. **She said that I could have told the cops that I didn't want to be searched since I was a minor.**
Q. Did she say anything else to you?
A. **No.**
Q. Did you tell your sisters that day about the incident?
A. **No.**
Q. Have you talked with your sisters about the incident?

A. **Yes.**
Q. Are these the two sisters you said were at home, are those your only two sisters?
A. **No.**
Q. Okay. Let's identify all of your siblings. So we have Kaylee, Kalyce, you have other sisters?
A. **Yes.**
Q. Can you give me their names?
A. **Ruqyyah.**
Q. Can you spell that for me?
A. **R-U-Q-Y-Y-A-H.**
Q. How old is Ruqyyah now?
A. **Nineteen.**
Q. Do you have any other sisters?
A. **Dalvonie, D-A-L-V-O-N-I-E.**
Q. How old is Dalvonie?
A. **Fourteen.**
Q. Do you have any brothers?
A. **Davone, Jr. D-A-V-O-N-E.**
Q. How old is Davone, Jr., now?
A. **Fourteen.**
Q. Did all of your siblings live with you at the time of this incident?
A. **No.**
Q. Which ones lived with you?

A. **Kaylee and Kalyce.**
Q. And was it Kaylee and Kalyce? Did you talk to Kaylee and Kalyce about this incident?
A. **Not for a while.**
Q. What is a while?
A. **Two weeks.**
Q. Did you talk to Ruqyyah about this incident?
A. **No.**
Q. How about Dalvonie?
A. **Dalvonie is autistic. No.**
Q. How about Davone, Jr.?
A. **No.**
Q. Did you talk to Pablo later that day?
A. **Talked to him the day after.**
Q. Was that at school?
A. **Yes.**
Q. What did you talk about?
A. **He asked me what happened with the whole cop situation. I told him that they thought that we were doing something illegal, so they searched me, took my picture, print, that was it.**
Q. Was it Pablo that approached you to talk about this incident?
A. **Yes.**
Q. Did he tell you if he was contacted by the

police?
A. Not that I remember.
Q. The next day, this puts us to June 1st, do you remember what day of the week it was?
A. I do not.
Q. Okay. The next day was a school day though?
A. Yes.
Q. So on June 1st did you walk to school?
A. No.
Q. How did you get to school?
A. My mom drove me.
Q. Why did she drive you?
A. Too scared to walk to school.
Q. Did she pick you up from school that day as well?
A. Yes.
Q. As I understood after the May 31st, 2012 incident there were only two more days in that school year; does that sound accurate?
A. It was at least another week and a half to two weeks.
Q. Was it just the day after on June 1st that your mom drove you to school?
A. No.
Q. How long did she drive you to school?
A. Last two weeks.

Q. And picked you up from school as well?
A. Yes.
Q. What about your last year of high school, what was your normal method for getting to school?
A. Walking.
Q. Your last year of high school when you were a senior was University Prep still located in that shared space?
A. No.
Q. Where was it located in your senior year?
A. Division and Logan.
Q. Why was it then your normal method to walk to school that last year?
A. Well, for the first semester I walked. The only reason I walked was because my sisters went to Martin Luther King Leadership Academy, I would drop my sisters off at their school, then continue down Logan to my school.
Q. What about the second semester?
A. Second semester I started getting rides from a friend.
Q. During your junior year of high school were you involved in any extracurricular activities?
A. Soccer and that.
Q. School soccer team?

A. Ottawa Hills.
Q. Were you on the -- was that the varsity team?
A. Yes.
Q. Did you play soccer your senior year?
A. Nope.
Q. Your junior year of high school were you involved in any other extracurricular activities other than soccer?
A. Can you rephrase the question?
Q. Your junior year of high school --
A. Okay. In terms of like something organized or just anything?
Q. Organized. Anything through --
A. Through the school system?
Q. Through the school system.
A. No.
Q. Were you involved in any other sort of organized activities not part of the school system?
A. Yes.
Q. What was that?
A. Martial arts, weight lifting.
Q. That was an organized program?
A. Kind of.
Q. Where did you go to do that?
A. Community gym called -- like I can't remember.

It's located on Logan and Eastern, more Eastern than Logan.
Q. Were you still involved in this mixed martial arts weight lifting program around May 31st, 2012?
A. No.
Q. When did you discontinue doing the mixed martial arts weight lifting program?
A. Start of senior year.
Q. How long had you been involved in that program?
A. Only a year and a half.
Q. With the mixed martial arts is that a belt system where you achieve belts based on your time you have been involved doing it?
A. No. It was more on skill set.
Q. Okay. In your senior year did you engage in any extracurricular activities?
A. Okay. Not necessarily. I went to Kent Career Tech Center which is basically like it was part of your school curriculum but I decided to take part in pharmacy tech. I wouldn't call that extracurricular because it was part of school but also a side interest.
Q. Sure. Did you go to the Kent Career Tech Center during school hours?
A. Yes.
Q. Did you work while you were a senior?

A. **First semester.**
Q. Where did you work?
A. **Small shop owned by Goodwill called Blue.**
Q. Blue?
A. **Yes.**
Q. What is that shop?
A. **A boutique.**
Q. What did you do there?
A. **Retail assistant.**
Q. Your second semester did you work anywhere?
A. **No.**
Q. At the Kent Career Tech Center was there any sort of certification that you received for pharmacy tech?
A. **Yes.**
Q. What kind of certification was that?
A. **Certificate for completing the program and understanding the perception made by pharmacy technicians.**
Q. As part of that school did you actually work in a pharmacy?
A. **No.**
Q. Did you sit for the certified pharmacy technician test? The national one?
A. **No.**
Q. When did you start going to Cornerstone?

A. **Fall of 2014, September 2nd.**
MR. SCHAEFER: You asked that already.
BY MS. REWA:
Q. Are you involved in any extracurricular activities at Cornerstone?
A. **Yes.**
Q. What are you involved in?
A. **Mixed martial arts.**
Q. Anything else?
A. **No.**
Q. How long -- the mixed martial arts program is that through the university?
A. **Yes.**
Q. How long have you been involved in that program?
A. **Only for three months.**
Q. Did you do any extracurricular activities your first semester of school?
A. **No.**
Q. Okay. The photo that the officer with the gray hair and glasses took of you did you ever see the photo?
A. **Yes.**
Q. When did you see it?
A. **My lawyer got a copy of it.**
Q. So you were not shown a copy on camera on the scene?

A. **Not that I recall.**
Q. Were you handcuffed at all on the scene?
A. **No.**
Q. Did you sit in any police cruiser during the May 31st, 2012 --
A. **No.**
Q. During the May 31st, 2012 incident did the officers drive you anywhere?
A. **No.**
Q. Did they take you anywhere away from where the contact initiated?
A. **No.**
Q. This is another one of those exhibits that has been previously marked, I'm going to hand you a copy. It has a handwritten Exhibit No. 2 on there from LaBrecque's deposition. Why don't we make it a little more official and actually mark that Defense Exhibit A.
(Deposition Exhibit Letter A was marked.)
BY MS. REWA:
Q. Mr. Harrison, I'm handing you what has been marked as Defendant's Exhibit A, can you tell me what that is?
A. **Myself.**
Q. It's a photograph of yourself?
A. **Yes.**

Q. Is it your understanding that the photograph marked as Exhibit A is the photograph that the officer with the gray hair and glasses took of you on May 31st, 2012?
A. **Yes.**
Q. Now, I understand you saw this photograph later after your lawyer obtained it for you; is that accurate?
A. **Yes.**
Q. Other than whatever your lawyer gave to you I don't know, I don't want to know about that. Have you seen this photo in any other situation?
A. **No.**
Q. You haven't seen it on a billboard?
A. **No.**
Q. You haven't seen it posted on a website?
A. **No.**
Q. You haven't seen it in the newspaper?
A. **No.**
Q. You haven't seen it posted on a bulletin board somewhere in the city?
A. **No.**
Q. I did have some questions for you on the Interrogatories and you just gave -- your attorney gave me a signed copy of these signed Interrogatories just now. I'm going to give you the unsigned copy because

that's the one that I have an extra copy for. Let's mark this Deposition Exhibit B.

(Deposition Exhibit Letter B was marked.)

BY MS. REWA:

Q. Okay. Specifically I wanted to ask some questions about the response to Number 9, which is on page 5 if you want to flip to that one. When you have had a chance to look that over let me know.

A. **What question?**

Q. Number 9 on the damages. You're claiming a million dollars in damages in this case; is that right?

A. **Yes.**

Q. I would like to kind of talk about how you broke these figures down. Number 9 you have listed as loss of freedom $400,000; is that correct?

A. **Yes.**

Q. How did you come up with that figure?

A. **The fact that there is always an error made in search and seizure, always. Now, due to the loss of freedom claim this was made by my personal observation of the fact that there are more cases similar to mine in the past two decades that have not been looked at carefully. So the only reason I made it that amount is because I had the thought that what if I was falsely accused over something or what if my name ended up**

coming up in the books and I ended up getting falsely imprisoned or put into custody over a situation that I had nothing to do with.

Another reason why I chose that, if a human life is priceless you really can't put a price on someone's life. So technically this would be like the easiest decision of my claim, if that answers your question.

Q. What do you mean, the easiest decision of your claim?

A. **Okay. I quote again human life is priceless. You can't put a price on anyone's life no matter who it is, what they've done. Now, what made this the easiest decision to come up with this number is the fact that my life could have been taken away and if I hadn't thought carefully about it I probably would have made it even higher. But let's say loss of freedom would have been the whole budget for GRPD.**

Q. Have you had any contact with a Grand Rapids Police Officer since the May 31st, 2012 incident?

A. **No.**

Q. Have you had any contact with any other law enforcement agency since the May 31st, 2012 incident?

A. **No.**

Q. Did you have any contact with a Grand Rapids

Police Officer prior to the May 31st, 2012 incident?

A. **No.**

Q. Did you have any contact with any other law enforcement agency prior to the May 31st, 2012 incident?

A. **Pardon me?**

Q. Prior to May 31st, 2012, had you had any contact with any law enforcement agency other than the Grand Rapids Police Department?

A. **Not that I recall.**

Q. So the May 31st, 2012 incident --

A. **So before that?**

Q. Right. Before that.

A. **Not that I remember.**

Q. So sounds like the May 31st, 2012 incident was your first contact with any police officer?

A. **Yes.**

Q. And it's been the only contact to date that you had with any police officer?

A. **Yes.**

Q. You testified you didn't want your name on the books; did I say that right?

A. **I didn't want my name in the system. I didn't want any part of me in the system.**

Q. Why?

A. **Because once you are in the system anything can**

happen. There is always an error regarding if it's a false accusation or prosecution of such due to the fact that I am African Americans that African Americans obviously commit more crimes than any other ethnicity in America.

Q. What do you base that statement on?

A. **I'm saying that I didn't want to be a part of the population that commits crimes and I'm a part of the population that has never committed a crime.**

Q. I think I would like to move on to the second point now. Under emotional injury you listed $250,000; is that correct?

A. **Yes.**

Q. Then you broke that down into four separate categories; is that right?

A. **Yes.**

Q. Can you tell me about the fright that you are asking for?

A. **The fright came about that night later May 31st, 2012, couldn't sleep. Couldn't sleep for a week actually, which also kind of affected my studies during that year.**

Q. Did you go to see a doctor regarding your inability to sleep?

A. **No.**

Q. Did you take any medication to help you with your inability to sleep?
A. No.
Q. Did your inability to sleep last longer than that week?
A. No.
Q. How about shock? Can you talk to me about the shock that you are seeking damages for?
A. Shock part came about when every cop I either saw from a distance or passed by my school I always had the sensation that I was in more trouble, that maybe because I was then put in the system due to having my picture taken and fingerprint I had a feeling every cop would come for me.
Q. How long have you had that feeling?
A. Kind of hard to say because I still feel it.
Q. Did you have it before May 31st, 2012?
A. No.
Q. Talk to me about the embarrassment. Why are you seeking damages for embarrassment?
A. I was in a public area where there was a lot of heavy traffic and to notice that people riding by in cars and looking at me gave me the idea that I actually did do something wrong. Unconsciously I felt like I was that person during the time. Even though logically I

didn't do anything the feeling itself just wouldn't go away.
Q. How long did you have that feeling?
A. Pretty much a week.
Q. You also listed humiliation under emotional injury, can you talk to me why you are seeking damages for humiliation?
A. When I arrived at school my peers had a lot to say about the incident. I don't know how they heard about the incident but apparently I asked Pablo about it, he said he didn't say anything. Apparently I heard that some people were riding the city bus past me, so I got called out that by the drugs or I robbed someone's house or maybe even shot somebody.
Q. The kids at school said that to you?
A. Yes.
Q. How long was that all -- you learned that information the next day?
A. Yes.
Q. Did those beliefs of the students to your knowledge persist after that next day?
A. For the remaining two weeks, yes, and some kids that I have seen over summer, yes.
Q. What about your senior year of high school?
A. Senior year of high school the beginning it was

brought up once but since then nothing else occurred.
Q. And then the last area that you are seeking damages for is impairment of constitutional rights. You've listed $350,000?
A. That is correct.
Q. Now, looks like you have listed three separate things. So you are seeking compensation for your constitutional right to lawful search and seizure?
A. Uh-huh.
Q. Then the second one is you are seeking damages for equal protection of the law?
A. Yes.
Q. And finally to just compensation?
A. Yes.
Q. How did you arrive at this $350,000 figure for the constitutional rights?
A. It's a law search and seizure, I kind of realized it was unlawful. P and P's are actually more recommended for people who are driving; not for people that are walking. And another reason why I also came to that conclusion is that there were -- do you mind if I consult my lawyer?
Q. Yes, I do.
A. How many cases were --
MR. SCHAEFER: Well, you're answering the

question, so if you don't have information available that you might offer then you just don't offer that. So today you are just speaking from your memory or your heart and explaining that particular number.
THE WITNESS: In other words just the thought of having a P and P and then knowing that its become a custom practice which is actually unlawful.
BY MS. REWA:
Q. How -- what information are you basing the statement that P and P has become a custom practice?
A. From my own research regarding city practices among law and law enforcement.
Q. What sort of research is that?
A. Cooley's Law Library, Federal Supplement, Federal Reporter, Michigan Code of Conduct.
Q. And you also testified previously it was your understanding that P and P is recommend for driving more than walking; am I repeating your statement correctly?
A. Kind of.
Q. What was your statement?
A. P and P is actually for -- it's supposed to be for people who are driving with an unauthorized license or no license. Only people who are driving should be P and P'd; not people who are walking.
Q. How did you learn this information?

A. **Michigan Code of Conduct.**
Q. And then the final thing was just compensation. Why do you feel like you are entitled to just compensation as separate from equal protection and separate from search and seizure?
A. **Well, like I said before, human life is priceless, can't put a price on it. But what happens when apparently your rights are not recognized and manipulated? Sure, I didn't know my rights at the time but when someone of the law is clear on what civil rights are noticed or even if they may not have a clue to what rights are noticed at that time why waste a good half hour regarding just taking time out from someone's day knowing that that could actually be taken away for something else or used for something else for a better cause?**
Q. We didn't actually talk about equal protection of the laws -- or excuse me -- equal protection of the law, which is under the impairment of constitutional protective rights. Why do you feel that your equal protection of the laws was impaired?
A. **The fact that I was racially discriminated.**
Q. Why do you say that?
A. **I was the one that was subjected to the P and P; my friend Pablo wasn't.**

Q. Any other reason why you think this was racially motivated?
A. **Well, from my knowledge of understanding I think Capt. VanderKooi was heading east; not west on Lake Drive, apparently made a U turn onto Fulton; therefore, passing Pablo before he stopped me and then going down Fulton going down to Packard, saying he lost sight of Pablo, and then turning back onto Lake Drive, came across me.**
Q. Did you see Capt. VanderKooi take this path with his vehicle like you just stated?
A. **I did not. I did see him, however, ride on the street and then park right next to me.**
Q. So you did not observe how he drove his vehicle prior to him parking next to you?
A. **No.**
Q. Any other reasons why you believe this May 31, 2012 incident was racially motivated?
A. **No.**
Q. Did you have a driver's license on May 31st, 2012?
A. **No.**
Q. Did you have a state ID on May 31st, 2012?
A. **No.**
Q. Have you ever called any police agency to assist

you?
A. **No.**
Q. Have you ever given a statement to any police agency as a victim?
A. **No.**
Q. Has any police officer ever contacted or spoken to you as when you were a possible victim?
A. **No.**
Q. Do you have photographs of yourself on social media?
A. **Yes.**
Q. Which social media outlet?
A. **Facebook.**
Q. Do you have any other accounts on any other social media outlets?
A. **No.**
Q. You don't have a Twitter account?
A. **No.**
Q. You don't use Instagram?
A. **No.**
Q. Do you Snapchat?
A. **Yes.**
Q. Do you use Pinterest?
A. **No.**
Q. How about Google Plus?

A. **Like putting a photo of myself on Google?**
Q. The actual social media account called Google Plus.
A. **Or do you mean a G-mail account?**
Q. No, I mean Google Plus.
A. **Just making sure. No.**
Q. Do you upload video on Youtube?
A. **No.**
Q. Do you upload any videos onto any internet website?
A. **Facebook.**
Q. How long have you had a Facebook account?
A. **Since 2010 or 2009.**
Q. So you had a Facebook account on May 31st, 2012?
A. **Yes.**
Q. Do you continue to use Facebook?
A. **Yes.**
Q. Did you post anything onto Facebook regarding the May 31st, 2012 incident?
A. **No.**
Q. To your knowledge -- have you ever Googled yourself?
A. **Yes.**
Q. When was the last time that you have done that?
A. **About a year ago.**

Q. What showed up?
A. **My profile picture in the images section along with other people.**
Q. Profile picture from where?
A. **My current profile picture from 2013.**
Q. Is that from Facebook?
A. **Yes.**
(Deposition Exhibit Letter C was marked.)
BY MS. REWA:
Q. Hand you what has been marked as Exhibit C.
MR. SCHAEFER: Take a minute to look at it.
BY MS. REWA:
Q. Yeah. Does Exhibit C appear to be a printout of a computer screen?
MR. SCHAEFER: Objection. Calls for speculation.
BY MS. REWA:
Q. What does Exhibit C look like?
A. **A search.**
Q. Search of what?
A. **Myself.**
Q. There are several Keyon Harrison items on Exhibit C.
A. **I'm at the top.**
Q. That's you?

A. **Yes.**
Q. That's your photograph?
A. **Yes.**
Q. That identifies you as studying at Cornerstone University?
A. **Yes.**
Q. That identifies you as being from Grand Rapids, Michigan?
A. **Yes.**
Q. Is that all information that you placed onto Facebook?
A. **Yes.**
Q. You also said that you posted pictures to Facebook; is that right?
A. **Yes.**
MS. REWA: Can you mark this as D?
(Deposition Exhibit Letter D was marked.)
BY MS. REWA:
Q. Mr. Harrison, I'm handing you what has been marked as Exhibit D.
MR. SCHAEFER: Take your time to look through it.
BY MS. REWA:
Q. Can you tell me what Exhibit D shows?
A. **My Facebook profile.**

Q. Am I your Facebook friend, Mr. Harrison?
A. **I don't know.**
Q. You would be able to tell by looking on your Facebook account; right?
A. **Yes.**
Q. I'm going to hand you a red pen and I have marked in red pen on each page of Exhibit D, which is four pages, numbers, just so we're clear when we go through. On page 1 of Exhibit D can you please take that red pen and circle for me all of the photos you have of you on page 1? And can you put your initials by that circle? So let's flip to page 2. Can you circle for me with that red pen all of the photographs that are of you? Can you put your initials by all of those? That's just to show that you are the one that did this.
A. **Might I ask what this is for?**
Q. It's a question I'm asking you in the deposition.
A. **Okay.**
Q. If we can flip to page 3, same procedure. If you can circle all of the pictures of you that appear on page 3 and initial by the circle. Okay. One more page, same procedure if you can flip --
MR. SCHAEFER: Can he put one circle around all of them?
MS. REWA: Yeah, that's fair.

BY MS. REWA:
Q. Thank you very much. Have you ever been fingerprinted prior to the May 31st, 2012 incident?
A. **No.**
Q. For any reason?
A. **No.**
Q. Since the May 31st incident had you ever had any of your fingerprints taken for any reason?
A. **No.**
MS. REWA: I would like to take a little break before I finish if that's all right.
(A short recess was taken.)
BY MS. REWA:
Q. I just have one more little line of questioning, I think we will be done. Mr. Harrison, are you asking for any out-of-pocket costs? Let me ask a better question.
Did you seek any medical treatment for what happened on May 31st, 2012?
A. **Okay. Now, when you say that do you mean like any time from May 2012 to now?**
Q. Long and short of it is you listed some emotional damages, the humiliation, things like that. What I need to know is are you asking that the defendants pay any medical bills?

A. **No.**
Q. Are you alleging that you want the city or any of the defendants to pay for any lost wages?
A. **Rephrase that.**
Q. Like did you miss any work, lose any pay because of what happened on May 31st, 2012?
A. **Now, define work.**
Q. Were you working on May 31st, 2012?
A. **No.**
Q. Were you employed on May 31st, 2012?
A. **No.**
Q. Okay. Are you asking any of the defendants to provide you any compensation for any property that was damaged?
A. **Yes.**
Q. What is that?
A. **Fingerprint, the picture. I don't know if my wellbeing counts.**
Q. I'm talking about tangible stuff.
A. **Well, the picture and the print.**
Q. The picture you are talking about the picture that the officer with the gray hair and glasses took of you?
A. **Yes.**
Q. Do you know was that picture destroyed to your

knowledge?
A. **I don't recall.**
Q. Then the fingerprint, we're talking about the thumbprint that was taken on May 31st, 2012. Are you asking for damages because that was destroyed?
A. **Please rephrase that.**
MR. SCHAEFER: You might be confusing him. What she is trying to find out is is there anything that you had to spend money for as a result of the incident that you want the city to reimburse you for?
THE WITNESS: No.
MS. REWA: I'm done.
(The witness was excused.)
(The deposition was concluded at 4:10 p.m.)

STATE OF MICHIGAN)
) SS
COUNTY OF KENT)

I certify that this transcript, consisting of 71 pages, is a complete, true, and correct record of the testimony of KEYON HARRISON, held in this case on March 26, 2015.

I also certify that prior to taking this deposition KEYON HARRISON was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in the action.

4-6-15 Edith G. Bultman

Date Signature

Edith G. Bultman, CER 5800
Breimayer Tremblay & Associates
2922 Fuller Ave.
Suite 103A
Grand Rapids, Michigan 49505
(616) 456-6787

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

vs

Hon. James R. Redford

Case No. 14-02166-NO

CURT VANDERKOOI, and CITY OF GRAND RAPIDS, a Michigan Municipal Corporation,

Defendants.
_____ /

Deposition of **SGT. STEPHEN LABRECQUE,** taken on the 16th day of December, 2014, at the Grand Rapids City Hall, 300 Monroe, NW, Suite 611, Grand Rapids, Michigan, commencing at 9:05 a.m.

APPEARANCES:

For the Plaintiff: BERNARD SCHAEFER (P40114)
161 Ottawa, NW, Ste. 212
Grand Rapids, MI 49503
616.272.4361

For the Defendant: Assistant City Attorneys
BY: KRISTEN REWA (P73043)
MARGARET P. BLOEMERS (P40853)
300 Monroe, NW, Ste. 620
Grand Rapids, MI 49503
616.456.4026

Reported By: Edith G. Bultman, CER5800

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

vs

Hon. James R. Redford

Case No. 14-02166-NO

CURT VANDERKOOI, and CITY OF GRAND RAPIDS, a Michigan Municipal Corporation,

Defendants.
_____ /

Deposition of SGT. STEPHEN LABRECQUE, taken on the 16th day of December, 2014, at the Grand Rapids City Hall, 300 Monroe, NW, Suite 611, Grand Rapids, Michigan, commencing at 9:05 a.m.

APPEARANCES:

For the Plaintiff: BERNARD SCHAEFER (P40114)
161 Ottawa, NW, Ste. 212
Grand Rapids, MI 49503
616.272.4361

For the Defendant: Assistant City Attorneys
BY: KRISTEN REWA (P73043)
MARGARET P. BLOEMERS (P40853)
300 Monroe, NW, Ste. 620
Grand Rapids, MI 49503
616.456.4026

Reported By: Edith G. Bultman, CER5800

INDEX OF WITNESSES

INDEX OF EXHIBITS

Grand Rapids, Michigan

Tuesday, December 16, 2014

DEPOSITION

SGT. STEPHEN LABRECQUE,

Having been first duly sworn by the reporter, was examined and testified on his oath as follows:

EXAMINATION

BY MR. SCHAEFER:

Q. Please state your name for the record.

A. Sergeant Stephen Labrecque, S-T-E-P-H-E-N, L-A capital B-R-E-C-Q-U-E.

Q. Good morning, sergeant.

A. Good morning.

Q. Thank you for coming here today to talk about this particular incident. I will give you a copy of the incident report in a minute but I do need to have you for the record, can you tell us your educational background?

A. I graduated from high school and then I obtained two associate's degrees from Mott Community College in Flint.

Q. What were the associate degrees in?

A. Associate's Degree in Criminal Justice and

Associate's Degree in Arts.

Q. Any other post high school education?

A. I also am an accident reconstructionist, so there is a large amount of education along with that that I earned at Michigan State University.

Q. And how are you currently employed?

A. Currently a Sergeant with the Grand Rapids Police Department.

Q. How long have you been a Sergeant for the Grand Rapids Police Department?

A. Almost 18 years.

Q. What position did you have before you were a sergeant?

A. Patrolman.

Q. How long were you on patrol?

A. Well, I was a police officer for seven years before I was promoted.

Q. And what was your employment before you were a police officer?

A. I wrote parking tickets for the City of Flint Police Department and I was a security guard at a business in Flint.

Q. Okay. So you mentioned your training in accident reconstruction, has there been any other training other than through the department there, regular training

sessions that you have had that you would consider having provided you with a special skill or expertise?

A. I guess I'm not sure -- as far as --

Q. Accident reconstruction training you took that at MSU?

A. Right.

Q. Did you attend any other special training for any other purpose at an institution outside of the Grand Rapids Police Department?

A. I attended the leadership institute that was here at Calvin College but that was hosted by the police department.

Q. Okay. I would like to show you a document here being an incident report and ask you to take a moment to review the document. Take as much time as you need.

A. Okay.

Q. Do you have much independent recollection of the incident described in the police report you just looked at?

A. I recall going and completing a P and P of looks like Keyon Harrison, but other than that that's what I did.

Q. Okay. Do you recall what you were assigned to be doing that particular day?

A. I would have been working my assigned shift as a

patrol sergeant.

Q. And would that have been in a vehicle or in a physical stationary location?

A. It would have been uniformed patrol. I'm assigned my police cruiser which is a marked vehicle.

Q. And do you recall which service area or sector you were working in that day?

A. I would have been assigned the west service area.

Q. So this particular incident do you know what service area this took place in?

A. I believe it's the south service area.

Q. And how did it happen then that you ended up at this particular location indicated in this incident?

A. How I specifically -- I don't recall if I was specifically sent or I volunteered to go take a P and P. I heard a request -- at some point a request was made for P and P, picture and print, but I don't recall whether or not I was sent or I happened to volunteer for it.

Q. Okay. Do you recall who made the request?

A. I don't recall.

Q. And the request for the P and P would that have been made of the dispatch system?

A. I believe it would have.

Q. So you don't recall who made that call on

dispatch?

A. No, sir.

Q. And do you recall any of the details of the dispatch request for the P and P?

A. It would have been a request for a P and P. Wouldn't have been anything else other than that.

Q. Okay. I suppose there was some direction made as to where the location was where you were to go to?

A. Yes.

Q. The incident report shows a location of Lake Drive and Fulton Street. Do you recall where the people were located when you arrived?

A. I believe I met Capt. VanderKooi on Lake Drive just east of Fulton Street.

Q. Do you recall what Capt. VanderKooi said upon your arrival?

A. I do not.

Q. Did Capt. VanderKooi give you any directions on your arrival?

A. I don't know who I spoke with about pointing out the subject of the P and P. I don't recall that.

Q. So someone who you don't recall pointed out Keyon Harrison, asked you to take his picture and print?

A. Yes.

Q. For the record that's shorthand referred to as P

and P in the department?

A. It is.

Q. And so then when you were requested to take Mr. Harrison's picture and print what did you do next?

A. I obtained the picture and print from Mr. Harrison.

Q. And in terms of obtaining the picture did you say anything to him or have him do anything?

A. Just have him stand still, basically grab a picture and a thumb print from you and be on your way.

Q. Okay. Is that exactly what you said to him?

A. I couldn't tell you exactly what I said but that's generally where it goes.

Q. So in your duties as a sergeant on patrol you have a digital camera in the vehicle?

A. I do.

Q. You use that to take the photograph?

A. Yes.

Q. And then print, that has a thumb print that you took?

A. Yes.

Q. And what supplies did you use to take the print?

A. We have a department issued thumb print card for just this type of P and P that lists some information as an open space for the thumb print. I have an ink pad

that I will press on the thumb and roll it onto the cardboard or onto the form. What I would do then is provide them a towelette to take ink off their thumb, then I fill out the rest of the card.

MR. SCHAEFER: Okay. Let's go off the record a second.

(Deposition Exhibit Nos. 1-3 were marked.)

BY MR. SCHAEFER:

Q. Sergeant, we went off the record for a minute and remarked the incident report we were talking about as Exhibit 1; is that correct?

A. Yes.

Q. I would like to show you Exhibit 2, ask you if you recognize that item.

A. That's a photograph of an individual. I don't have an independent recollection of the person here.

Q. Okay. And then I would like to show you Exhibit 3, ask you if you recognize that.

A. It's a photocopy of the digital print card that I would keep with it for the P and P.

Q. So with regard to Exhibit 2 you don't recognize the individual shown in the picture?

A. I do not.

Q. And let's talk a little bit about you mentioned that you obtained the picture and print from Mr.

Harrison, do you recall anything Mr. Harrison might have said during that process?

A. No.

Q. And about how long did it take to take the picture and print?

A. Very short period of time.

Q. Do you recall about how many minutes?

A. Wouldn't have taken more than two minutes.

Q. And then do you recall if Mr. Harrison said or did anything after you took the picture?

A. No.

Q. You mentioned earlier that you had arrived at the location and you met with Capt. VanderKooi on Lake Drive there, did you talk to any of the other police personnel that was present?

A. I don't recall.

Q. So when you completed the picture and print, just going slowly chronologically, what did you do next?

A. After completing the picture and print I would have downloaded the picture onto my log, put a note onto the log, finished putting notes on the digital card and I would have gone about my business.

Q. So we can help people understand what you mean when you say download pictures onto your log, what exactly is the log?

A. In our reporting system I have a log that keeps track of my activities throughout the day.

Q. Okay. And what is the name of the reporting system?

A. We currently use Filemaker as our electronic records management system.

Q. And at that time were you also using Filemaker?

A. That is -- yes.

Q. You said currently, so I wanted to be clear.

A. Yeah. At the time it was also Filemaker.

Q. So you -- on that day you were maintaining a log of activity on Filemaker and the picture that you downloaded how was that stored or categorized within the log activity?

A. From this particular call or service the P and P would have been entered onto my log. While that particular incident is open I can add digital pictures to that report number. Took the card out of my camera, put it into the computer, downloaded the picture to the computer, then I closed the log.

Q. So the computer is located in your cruiser?

A. It is.

Q. Is it connected with a central computer through some wireless capability?

A. It has a wireless capability back to the building

or to wherever the big network is, yes.

Q. Would the picture have been forwarded to the central computer at that moment using the wireless capability or at the end of the day utilize some kind of a piece of hardware to download everything from your cruiser computer too?

A. At the end of my shift once I make it back to the motor pool in order to close out the log for the day it would ask to submit to the network. Once I submit everything to the network then it takes the work for the day and submits it to those photographs.

Q. Okay. And was there more than one photograph?

A. Of?

Q. Of Mr. Harrison.

A. Not that I recall.

Q. Okay. The Exhibit 1 is an incident report that Off. Nagtzaam prepared. That Exhibit 1 is a printed copy of an incident report that would have been stored electronically on Filemaker; correct?

A. Correct.

Q. And is it your testimony that the network for Filemaker allowed you to attach the photograph to the electronic copy of the incident report, so that it would have been stored in that fashion?

A. Yes.

Q. Then a person who, so to speak, looked up the incident report on Filemaker but also viewed the photograph?

A. Yes.

Q. Was that the extent of your involvement then with the photograph?

A. Yes.

Q. Okay. With regard to the Exhibit 2 of the print card --

A. Exhibit 3.

Q. Excuse me. Exhibit 3. After you completed the picture and print and downloaded the picture onto your log what was it that you did then with the print card, Exhibit 3?

A. The print card would have been held until I ended my tour of duty for the day, then I would have submitted it to the workbox in the motor pool.

Q. And the -- what's the workbox?

A. It's a box mounted on the wall to collect paperwork.

Q. And is that workbox used by the department to collect papers for various parts of the department or is it just for forensic services?

A. It's any paperwork, handwritten paperwork that would be generated. It goes into the workbox, sorted,

distributed to the appropriate places.

Q. So Exhibit 3 indicates on the top there, forward to forensic services?

A. Yes.

Q. Is it your understanding then that somebody would go through the process of taking the papers from the workbox that day, send this Exhibit 3 to forensic services?

A. Yes.

Q. Now, at the time of this particular incident you said that you were a uniformed patrol sergeant assigned to the west service area; is that correct?

A. It is.

Q. Were you assigned at all that particular day or week to the support services division?

MS. REWA: Objection. Compound.

BY MR. SCHAEFER:

Q. During that particular week were you assigned at all to the support services division?

A. No.

Q. Were you assigned at all that week to the forensic services division?

A. No.

Q. Do you have any knowledge with regard to the photograph of Mr. Harrison, would it have been

distributed to any other electronic or physical files within the department after you had downloaded it onto your log to be attached to the incident report?

A. I have no knowledge how it was used after I downloaded it.

Q. Okay. At the scene there did you see any other civilians besides Mr. Harrison?

A. Not that I recall.

Q. Do you have any knowledge as to why you were asked to P and P Mr. Harrison?

A. It was a subject stop by Sgt. VanderKooi. Short of that, no.

Q. So you took the picture and print of Mr. Harrison because Capt. VanderKooi wanted you to do that?

A. I was asked to complete a P and P, which I did.

Q. Okay. And beyond that you don't have any further knowledge as to why Mr. Harrison was stopped?

A. I do not.

Q. Or why Capt. VanderKooi wanted the P and P on him?

A. No.

MR. SCHAEFER: Mark this as Exhibit 4, please.

(Deposition Exhibit No. 4 was marked.)

BY MR. SCHAEFER:

Q. Sergeant, I would like to ask you to look at Exhibit 4, ask you if you recognize that particular document.

A. It is the two pages from our manual procedures for MOP 8-13.1 digital evidence photographs.

Q. Do you know if that particular policy would apply to the digital camera that you had with you that day to take the photograph of Mr. Harrison?

A. In what regard?

Q. The Specific Responsibilities, section D, would that have applied to your use of the camera that day?

A. Did you say D?

Q. Yes.

A. Regarding the support services division being responsible?

Q. Yes.

A. And specifically under bullet 2, Operator Responsibilities?

Q. Yes.

A. I complied with that directive.

Q. Okay. So subpart D 2 would have applied to your use of the camera that day?

A. Yes.

Q. Okay. The fact that you had the camera was that

regularly in your cruiser or did you obtain it each day when you went out as a sergeant on patrol?

A. It is assigned to me personally.

Q. Where do you store it at the end of the workday?

A. It's in my camera bag and ultimately when I store my equipment at the end of the day goes into the backroom, which is a place that is locked off the motor pool.

Q. Okay. And did you have any responsibility around the time of the Harrison incident to report to the support services division your use of the camera and -- strike that.

Did you periodically have to report to the support services division on your use of that camera?

A. No.

Q. About how long had you had the camera?

A. At the time of this, which was in May 2012, that particular camera, a few years.

Q. Is it fair to say that you didn't have any involvement in any field interrogation of Mr. Harrison?

A. Other than completing the P and P I did not speak to him about whatever it was that he was being spoken to.

Q. So that would be yes?

A. Yes.

(Deposition Exhibit No. 5 was marked.)

BY MR. SCHAEFER:

Q. Sergeant, I would like to show you Exhibit 5, ask you if you recognize that document.

A. It is a portion of the Patrol Sergeant Field Training Tasks Manual, I guess they call it, specifically relating to traffic accident procedures being revised in January of 2013.

Q. Now, the first page of the text under traffic accident procedures under item 3 describes pictures and prints; is that correct?

A. It does.

Q. Have you had any involvement with the department in using the camera for traffic accident procedures?

A. I have.

Q. And in doing so would you have followed particular tasks that are shown there for taking a picture and print?

A. Yes.

Q. Are you aware of any training manuals relating to taking of pictures and prints in situations that didn't involve a traffic accident?

A. No.

Q. Do you know how it came about that you were asked to, as a matter of practice, take the picture and print

of Mr. Harrison that day?

MS. REWA: Objection to the word practice. You can answer.

THE WITNESS: There was a request to take a picture and print of Mr. Harrison.

BY MR. SCHAEFER:

Q. On that occasion there was no traffic accident; correct?

A. No.

Q. So you took the picture and print because you were asked by Capt. VanderKooi?

A. Yes.

MR. SCHAEFER: Thank you. No further questions.

MS. REWA: I want to take a five-minute break if that's all right.

(A short recess was taken.)

EXAMINATION

BY MS. REWA:

Q. Sergeant, you had testified previously that you went to the leadership institute; is that accurate?

A. Yes.

Q. Can you tell me what the leadership institute is?

A. That was a four-week course one week a month for four months hosted by our department to help develop

leadership skills. It was held out at Calvin College. There was a number of notable persons in the leadership field that came and lectured a class.

Q. What year would you have attended that?

A. I believe that would have been in the last part of 2011, first part of 2012.

Q. I just want to review some of your testimony to make sure I understand what your testimony is today. I believe you said previously that you cannot recall if you were sent or volunteered to go to this incident; is that a fair statement?

A. Yes.

Q. What do you recall brought you out there?

A. To?

Q. To Lake Drive and Fulton, the request for this incident.

A. The request for P and P.

Q. How did you receive that request?

A. It would have been over the air, over our police radio. There would have been a request for a P and P. What I don't recall is whether I was directed by dispatch or I volunteered.

Q. When you say directed by dispatch who would have actually stated we are requesting a P and P at Lake Drive and Fulton?

A. Somebody at Lake Drive and Fulton. I don't know if it was the officer or the captain. I don't know who it was.

Q. Did you talk to Capt. VanderKooi while you were on the scene at Lake Drive and Fulton?

A. May have been some idle conversation but what was said I don't recall.

Q. Do you recall if Capt. VanderKooi directed you to do the P and P?

MR. SCHAEFER: Objection. Asked and answered.

THE WITNESS: Did he order me to? He asked for a P and P, I did a P and P. He didn't direct me per se as saying, sergeant, I'm ordering you to do this. It was he asked for the P and P, which I did.

Q. And doing a P and P is part of a duty that you, as a sergeant, does?

A. Yes.

MS. REWA: I don't have any more questions.

EXAMINATION

BY MR. SCHAEFER:

Q. When a captain asks you to do something that's within your job description is it expected that you do it?

A. Yes.

Q. So day-to-day police activity it's customary to do the things that a captain asks if they are part of your job duty; is that correct?

A. Yes.

Q. So captains don't run around ordering people to do things, do they, generally?

A. Not generally.

Q. They have the authority to do that but they are much politer when they want someone to do that; is that fair to say?

A. Yes.

Q. So they just ask you instead of ordering you?

A. Generally.

MR. SCHAEFFER: Thank you.

MS. REWA: I don't have any further questions.

(The witness was excused.)

(The deposition was concluded at 9:51 a.m.)

STATE OF MICHIGAN)

) SS

COUNTY OF KENT)

I certify that this transcript, consisting of 23 pages, is a complete, true, and correct record of the testimony of SGT. STEPHEN LABRECQUE, held in this case on December 16, 2014.

I also certify that prior to taking this deposition SGT. STEPHEN LABRECQUE was duly sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in the action.

12-29-14 Edith G. Bultman

Date Signature

Edith G. Bultman, CER 5800

Breimayer Tremblay & Associates

2922 Fuller Ave.

Suite 103A

Grand Rapids, Michigan 49505

(616) 456-6787

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

v HON. JAMES R. REDFORD
CASE NO: 14-02166-NO

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS, a Michigan
Municipal Corporation,

Defendants.

DEPOSITION OF OFFICER LUCAS NAGTZAAM
taken before Shawn M. Breimayer, Certified Shorthand Reporter, at the office of City Attorney, Grand Rapids City Hall, 300 Monroe Ave NW, Room 611, Grand Rapids, MI, Thursday, November 13, 2014, commencing at 10:10 AM, pursuant to notice.

APPEARANCES:

FOR THE PLAINTIFF: Bernard Schaefer (P40114)
161 Ottawa Ave, Ste 502-D
Grand Rapids, MI 49503
(616) 272-4361

FOR THE DEFENDANT: Margaret P. Bloemers (P40852)
Kristen Rewa (P73043)
300 Monroe Ave NW Room 611
Grand Rapids, MI 49503
(616) 456-4026

Reported by: Shawn M. Breimayer, CSR-6888

TABLE OF CONTENTS

DEPOSITION OF OFFICER LUCAS NAGTZAAM
11-13-2014

(Deposition commenced at 10:10 AM)
(Deposition Exhibit 1 marked at 10:00 AM)
MR. SCHAEFER: Good morning.
THE WITNESS: Good morning.
OFFICER LUCAS NAGTZAAM
after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:
DIRECT EXAMINATION
BY MR. SCHAEFER:
Q. Please state your name for the record?
A. Lucas Nagtzaam.
MR. SCHAEFER: My name is Bernard Schaefer. Have you ever given a deposition before?
THE WITNESS: No.
MR. SCHAEFER: Okay, there's just a couple of grounds rules. A deposition is simply a conversation between two people, where the court reporter takes it down. If I ask you a question and it isn't clear to you what I am asking, will you let me know, please?
THE WITNESS: Yes.
MR. SCHAEFER: Okay. And when I ask you questions please make sure to answer yes, no, or with a narrative, rather than mm-hm or mm-mm, which the court reporter has trouble figuring out what you mean.

THE WITNESS: Yes, just like court.
BY MR. SCHAEFER:
Q. Now, you've testified in court before, haven't you?
A. Yes.
Q. Okay. And you're employed by the Grand Rapids Police Department?
A. Yes.
Q. And what is your position there?
A. Detective.
Q. How long have you been a detective?
A. One week.
Q. Well, congratulations. Is there a particular area of focus for you as a detective?
A. General case.
Q. General case, okay.
MR. SCHAEFER: If you need a break at any point let me know, okay?
THE WITNESS: Thank you.
BY MR. SCHAEFER:
Q. Before you became a detective, what was your position with the department?
A. I was a community police officer.
Q. Okay. And how long were you in that position?
A. About four years.
Q. And then, what were, what position were you in before being a community police officer?
A. Before that I was a operator on the special response team.
Q. Okay.
A. For about three years.
Q. And what is an operator on the special response team?
A. Just an officer trained tactically.
Q. Okay. And so, you were on the special response team for three years?
A. Yes.
Q. And what was your assignment before that?
A. Patrol.
Q. Okay. And how long were you a patrol officer?
A. About two-and-a-half to three years.
Q. Did you hold any position with the Police Department before becoming a patrol officer?
A. No, I worked for a different Police Department before that.
Q. Okay. And which department was that?
A. Wyoming, City of Wyoming Police Department.
Q. And how long were you employed there?
A. About two-and-a-half years.
Q. And what did you do at the Wyoming Police Department?
A. I was patrol officer there.
Q. Okay. I'm going to show you an exhibit, and basically,

give you a chance to look it over. That's Exhibit 1, and once you've had a chance to look at it if you can identify what it is, please tell me what it is.
A. This is a police report that I wrote on May 31, 2012.
Q. And so, at that time, you were a community police officer?
A. Yes, I was.
Q. Looking at the second page of the report, you indicate as the reporting officer that you responded, what was that you were responding to?
A. Captain Vanderkooi had called over the radio that he was making contact with a person.
Q. Okay. And were you in a car or on foot at that point?
A. I was in a marked cruiser in Grand Rapids Police uniform.
Q. Okay. So, when you responded and first arrived, what did you observe going on?
A. I observed Captain Vanderkooi talking to somebody.
Q. Okay.
A. On the sidewalk there at Lake and, where Lake and Union and Fulton come together.
Q. Okay. I imagine you've written hundreds, if not thousands, of reports over the years, do you have a very good recall of this particular occasion?
A. Pretty vague recall.

Q. Okay. So, when you arrived, were there any other police personnel present?
A. No.
Q. Okay. And do you recall where you worked your cruiser?
A. Not exactly. I think that I ended up facing westbound on Lake Drive, on the north side of Lake Drive. I think that's where my cruiser ended up.
Q. Okay. And where was Captain Vanderkooi and the individual in terms of that area? You said they were on the sidewalk, can you be a little more specific?
A. The sidewalk on the north side of Lake Drive east of where those three streets intersect.
Q. Okay. The three streets being Lake Drive Union and Fulton?
A. Right.
Q. Okay. And then, on the other side of the sidewalk, were there buildings or was it an open area?
A. Some kind of a little park area.
Q. Okay. Now, on that particular date, what was your assignment before you got the call to respond?
A. Generally, as a community officer I was assigned as a liaison between the Police Department and businesses, schools, the neighborhood association that I was assigned to, and in addition to that, the other community officers that I work with we would do,

generally do proactive enforcement, following up on complaints received by our community associations and, and businesses and schools, follow up with those complaints.
Q. Which neighborhood association were you assigned a liaison with?
A. At that time, it was the SCA, the southeast community association.
Q. Okay. And was there a service area, that is, where SCA is located?
A. Yes.
Q. And which service area is that?
A. South service area.
Q. Okay. And in terms of your day-to-day assignment on that particular day, was there a physical location where you were assigned to be or were you driving around in the cruiser responding as needed?
A. I don't remember exactly what I was doing right before I responded there.
Q. Okay. And generally, as a community police officer assigned to the SCA area, would you work out of a building, would you generally be working from your cruiser?
A. Oh, I would be generally working from my cruiser.
Q. Okay. So, as best you can recall then, when you

arrived on scene there was just Captain Vanderkooi and another individual or were there other Grand Rapids Police Department personnel?
A. I'm pretty sure when I got there it was just Captain Vanderkooi.
Q. Okay. And what did you do once you arrived?
A. I approached where he was standing with the person on the sidewalk.
Q. Okay. And what happened next?
A. I couldn't tell you an exact sequence of events from my recollection, but at some point, I asked the person he was talking to if he had any weapons or anything illegal on him. He said that he didn't and he consented to a search of his person, and I conducted a consent search.
Q. Why did you ask him if he had any weapons or illegal?
A. That's my normal, normally what I do if I'm involved in a contact or a stop of someone on the street who may have been involved in some type of suspicious activity.
Q. As you approached, what was your perception of what was going on there? Was it a contact, a stop, a field interrogation, what was your perception?
MS. REWA: Objection. Calls for a legal opinion. Go ahead.
THE WITNESS: I couldn't tell you exactly. I

don't really remember.
BY MR. SCHAEFER:
Q. Okay. You're familiar with the terms contact, stop and field interrogation from your training with the Grand Rapids Department, are you not?
A. Yes.
Q. Okay. So, what was the reason that you asked the individual if he had any weapons or illegal?
A. Because I wanted to know if he had anything illegal or any weapons.
Q. Okay. Was there something that indicated to you that he might?
A. Not that I remember.
Q. Okay. Did you see any indications that there was any criminal activity going on?
A. Other than Captain Vanderkooi making contact with him, nothing specific.
Q. Okay. Did Captain Vanderkooi indicate to you there was some kind of criminal activity going on?
A. I don't remember exactly. I could guess that I had some type of information before I asked him that question, but I would be guessing at this point, because I just don't remember.
Q. Okay. Do you know why you were called to respond to assist Captain Vanderkooi?

DEPOSITION OF OFFICER LUCAS NAGTZAAM
11-13-2014

A. I know that he was, he had a plain car, which means he had a police car that had no markings on it that you would normally see on a regular fully marked cruiser, and he also didn't have a traditional police uniform on. Also, it's pretty much standard practice that when somebody calls on the radio that they are going to be talking to somebody at such and such location that another officer would stop by just to make sure everything was okay.
Q. What was Captain Vanderkooi wearing?
A. I don't remember exactly. I know he didn't have a uniform on, though.
Q. Okay. Do you recall seeing any identifying insignia for the Grand Rapids Police Department?
A. I don't remember.
Q. What happened next after you searched the individual?
A. I don't remember exactly, but sometime in there Sergeant Labreque stopped by.
Q. Okay. And what happened next when Sergeant Labreque stopped by?
A. And again, I don't remember the exact sequence of events, but at some point, Sergeant Labreque obtained a picture and fingerprint from the person that Captain Vanderkooi had been talking to and there was also some radio transmission with Officer Newton, who had stopped

a separate individual.
Q. Could you visually observe Officer Newton and that other individual?
A. No, I don't believe I ever saw either one of them.
Q. Okay. But you received a radio transmission to that effect?
A. From what I recall, yes.
Q. Okay. What do you recall then happened next?
A. I believe that we all left and went our separate ways.
Q. Okay.
A. At that point. I don't think it was very long that we were there.
Q. When you were on scene, did you talk to Captain Vanderkooi?
A. I must have, but I couldn't tell you exact conversations. I don't recall an exact conversation, but I wouldn't have showed up and left without talking to him.
Q. So, you don't remember anything that he said?
A. Nothing specific.
Q. Did you talk to the other individual?
A. Sergeant Labreque?
Q. Oh, I'm sorry, did you talk to the civilian that Captain Vanderkooi stopped when you first approached?
A. Are you talking about after the point that he had a

picture and print taken or anytime?
Q. I guess I would be interested in if you talked to him at any time and kind of go in order in terms of your contacts with the individual?
A. I don't think that I really had any kind of conversation or words back and forth with this person. Generally, when you stop to back up or check on another officer, like I did with Captain Vanderkooi, generally, as that second officer you don't really get involved too much with any kind of discussion or anything like that. Your job is more to watch over and, I guess, watch the other person's back, you would say.
Q. Now, you described earlier that you did ask the individual if he had any weapons or anything illegally, and do you recall his words in responding to that?
A. I don't remember any specific words.
Q. Okay. But you indicated earlier that he said that he didn't have such items weapons or illegal items?
A. Right.
Q. Then you asked if you could search him?
A. I don't know the exact words that I used, but at some point, there was, I asked him and there was a consent.
Q. And how did he verbalize or articulate his consent?
A. Again, I don't remember exact words.
Q. Okay. Did you just frisk him or did you do a full

search?
A. Search.
Q. Okay. So then, beyond that question and answer with the individual, you don't recall any other discussions with him?
A. No.
Q. Okay. Now, we're turning to your report.
A. Yes.
Q. How did it happen that you ended up writing the report?
A. I'm not sure. My, I could guess, I probably told Captain Vanderkooi I'll take care of the report. It seems like what I would do in that circumstance.
Q. And in writing the report there, we're looking at the second sentence, you indicate, on my arrival the subject Keyon Harrison advised, and then the sentence indicates what Harrison advised. Do you recall where you got the information about what Harrison advised that you put in the report there?
A. No, I don't recall, other than I'm guessing he said that when I was there. It was something that I heard him say, but I can't sit here and specifically say I recall that moment.
Q. But in looking at the report, you're thinking he said that to you rather than somebody else and then you wrote it down or is it possible?

A. No.
Q. You're writing down what somebody else heard him advise them?
A. I think I was writing down something that I heard. I think that he was talking to Captain Vanderkooi and I was just there.
Q. Okay. So, in observing Captain Vanderkooi and Mr. Harrison, you're thinking you heard Mr. Harrison advise that he had just been chasing a bird around in the yard area here on the southeast corner of the intersection with one of his friends after school?
A. I'm sorry, what was the, what was your question?
MR. SCHAEFER: Let's read it back. Sorry, it was so long.
(Court reporter read last question back)
THE WITNESS: Yes.
BY MR. SCHAEFER:
Q. Now, going into the second paragraph there of your report, do you recall Captain Vanderkooi advising you that there had been another subject with him?
A. I'm thinking it's something that he said on the radio, so if there's another officer in the area he could check for that person.
Q. Okay. And then, you indicate Officer Newton located that subject. Now, do you recall how it was that you

learned that the other individual was identified as Pablo Aguilar?
A. At some point, I must have had contact with Officer Newton. I don't think I talked to him face to face. I don't know if I had a phone conversation with him or something, but at some point, Officer Newton gave me that person's name so that I could write it down in the report.
Q. Okay. And you indicated earlier that you had heard on the radio Officer Newton making contact with the other subject?
A. Yes.
Q. And can you tell me the next sentence there, and it will be a long question, so we'll have to be prepared for that. What you put in the report was as it turned out it appeared that their story was valid, however, their activities had appeared suspicious initially. Do you recall what information you learned that led you to write that sentence in the report?
A. The first part of that sentence, as it turned out it appeared that their story was valid, I think that comes from that each of them told the same story to Captain Vanderkooi and Officer Newton separately.
Q. Okay. And do you recall what the story was that they told?

A. Not exactly. I think it had something to do with one of them handing something to the other one, but I don't recall specifics.
Q. So, you don't know what it was one handed to the other one?
A. No.
Q. Or why they did that?
A. No.
Q. And then you were saying with regard to the rest of the sentence?
A. And then, the rest of the sentence, however, their activities had appeared suspicious initially must have come from Captain Vanderkooi, what he had initially seen occurred.
Q. And do you recall what it was that appeared suspicious?
A. Not exactly, no.
Q. You don't recall anything specifically in terms of facts that might have gone into that statement?
A. No.
Q. When you initially arrived on scene, what did you observe with regard to Mr. Harrison, how would you describe his demeanor when you initially arrived on scene?
A. Again, I don't remember specifics, but I remember thinking that he seemed calm and he seemed like a nice

young man.
Q. And in your contact with him related to the question and the search, how did he appear to you in terms of his demeanor and behavior?
A. He seemed the same throughout, just calm and seemed forthcoming and nothing really stood out, I guess.
Q. Okay. And when Sergeant Labreque was taking the picture and the print, what did you observe in terms of Mr. Harrison's demeanor?
A. Nothing really stands out to me. I don't, I don't really recall exactly how that went, but nothing stands out as unusual.
Q. Did you observe the picture and the print taken?
A. I know I was there during that time, but I, I don't remember exactly how that went.
Q. Okay. Then as the matter wrapped up, do you recall how Mr. Harrison was behaving, what his demeanor was?
A. Not exactly, other than I think he just throughout the entire time of contact he seemed calm, he didn't seem upset or anything.
Q. Did you write the report then at the conclusion of the contact?
A. I don't know exactly when I wrote it. It must have been shortly when I wrote it. That's what I normally do.

DI SITION OF OFFICER LUCAS NAGTZ M
11-13-2014

19

Q. Okay. I was just trying to understand, Mr. Harrison walks away, everyone else drives off, do you sit on your cruiser at that point?
A. Just based on the traffic at that intersection, I would imagine I drove somewhere to be out of traffic, but it's, yeah, I mean, normally on, normally I write a report right after the contact is over, you know, when I'm done with whatever I'm doing.
Q. Okay.
A. Unless I get called somewhere else immediately or something like that.
Q. Okay. Going back to page one of the report. For offense descriptions it indicates field contact report. Can you explain for the record what that means?
A. It's just a contact with a citizen, where something like this, where the consent search was done or something like that and just to document that it happened and who it was with, something like that. It's no, it's not like a criminal report or anything like that.
Q. Did the fact that a search was done then require that a written report be completed?
A. Yes.
Q. What is the system or program that the report was prepared and placed into?

20

A. File maker.
Q. Are field contacts sometimes closed out and report electronically without a formal report and file maker?
A. No.
Q. Okay. Field contacts are always reported in this fashion?
A. What do you mean by field contact?
Q. Well, you've titled this a field contact report, so I guess my question is, from your recollection in your training and practice as a community police officer, would a field contact always lead to preparation of a report like this that's put in file maker?
A. At any time that a Grand Rapids police officer puts their hands on somebody and does a search, something like that and, you know, no criminal report is done, it would be a field contact report.
Q. Okay.
A. Or it would be, yeah.
Q. I'm just trying to lay some ground work for a record?
A. Oh, okay.
Q. So, these maybe mystifying questions, but other people will read this who have no familiarity with the police procedure or department.
A. Okay.
Q. In your work as a community police officer, would there

21

be occasions where you would make a field contact that's strictly verbal and then it wouldn't require that you do a report in file maker?
A. Yes, that's, and that's why I asked you what you meant by field contact, because yeah, obviously, there are times when the police officers just talk to people and you don't need to do a, we wouldn't do a report on that.
Q. Okay. And in this case to summarize then, because you "put your hands on the individual", then you do the report?
A. Yes.
Q. Thank you for the explanation. Now, you've indicated in the lower part of page one subject status, suspect, and next to that Harrison Keyon Ahkile, can you explain why you put the word suspect there?
A. Just the way our training is in a field contact report we're just trained to list the subject status as suspect on the person who we searched or if they're, I'm trying to think of any other reason why it would be listed as suspect. Yeah, that's about it.
Q. Okay.
A. And I'm not sure, I don't know if it has to do with recordkeeping or what. I don't know the answer to that, other than that's the way we're trained to write

22

a field contact report.
Q. And then, after Mr. Harrison's name you've got capital B slash capital M, what does that stand for?
A. B stands for black, M stands for male.
Q. And then, that's also stated again in the box labeled race, you have a B and the box label sex you have an M; is that correct?
A. Did I miss something? What was that question?
Q. Following the name and the --
A. Oh, okay.
Q. The indication B slash M?
A. I'm sorry, I was already looking over here when you asked me the first question.
Q. Okay.
A. After his name it says BM. That stands for black male. Then the box that says race, B stands for black. The box the says sex, M stands for male.
Q. Okay. How did you determine Mr. Harrison's date of birth and his address?
A. I don't know, but I would imagine that he told us.
Q. Okay. And then, below Mr. Harrison you've got another suspect listed Aguilar Pablo R, and you've indicated after that name also B slash M. Now, from what you said earlier, you never actually saw Officer Newton or Mr. Aguilar; is that right?

DEPOSITION OF OFFICER LUCAS NAGTZAAM
11-13-2014

A. Right.
Q. How was it that you determined to put black male after his name?
A. I don't remember exactly, but I would imagine Officer Newton conveyed that information to me.
Q. Okay. So, you didn't visually observe Mr. Aguilar?
A. Not that I recall.
Q. Okay. And do you know how you obtained his date of birth and address?
A. No. I think that Officer Newton gave me that information, but I don't remember exactly how I received that information.

MR. SCHAEFER: Okay, that's all the questions I have.

THE WITNESS: Oh, okay.

MR. SCHAEFER: Do you guys have any?

MS. REWA: Yeah I have a few.

CROSS-EXAMINATION

BY MS. REWA:

Q. Officer Nagtzaam, when you were a community police officer, who was your commanding captain?
A. Captain Payne, P-a-y-n-e.
Q. So, what service area were you assigned?
A. South service area.
Q. When you first arrived on the scene, you provided

testimony already on Mr. Harrison's demeanor, do you recall what Captain Vanderkoi's demeanor was?
A. Not exactly, but the contact seemed low key and non-confrontational, I would say.
Q. Do you recall Sergeant Labreque's demeanor at all during this contact?
A. No, not really.

MS. REWA: Yeah, I think I'm all done, too.

MR. SCHAEFER: Great. Thank you very much for coming.

THE WITNESS: Sure.

(Deposition ended at 10:50 AM)

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Shawn Breimayer, (CSR-6888) do hereby certify that the foregoing deposition consisting of 25 pages, is a complete, true and correct transcript of the deposition proceedings and testimony of Lucas Nagtzaam held in this case on Thursday, November 13, 2014; and do also certify that the foregoing transcript is a true and correct transcript of my stenographic notes of said deposition so reported and transcribed by me.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Dated: November 24, 2014

_____
Shawn M. Breimayer, CSR
Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-2013

GRAND RAPIDS POLICE DEPARTMENT
INCIDENT REPORT FORM

Inc Number: 11-077503

Report Date/Time	Date/Time - Between	and/or On	Original Reporting Officer
08/15/2011 / 13 42 hrs	/	08/15/2011 / 13 41 hrs	Edgcombe, Greg #283

Offense Descriptions	Offense Code	Attempt	PT	WT	BM	TA	PN
1. Suspicious Person/Vehicle	9510	Local	C				
2.							
3.							
4.							

Location of Incident 2500 BURTON ST SE — Beat Area **E4**
Intersection Grand Rapids MI

☐ Alcohol Related
☐ Drug Use Suspected
☐ Computer Involved

INVESTIGATION DETAILS

Invest. Type	Status	Date Assign	
AUTO	08-Completed	8/18/2011	8/18/2011

Investigator Assigned	Disposition	Solve
Walker, Edward #155		50

Invest. Supv. Review By

RELATED INCIDENT NUMBERS / TITLES

Rel. Inc Num. Off Code Offense Title

Assisting Officers

Bargas, Elliott #503
Laudenslager, Eugene #032
VanderKooi, Curtis #550

Parties Involved

Subject Status	Last Name, First, Middle	Age	Race	Sex	DOB	Eyes	Hair
Suspect	JOHNSON, DENISHIO EARL-CALVIN B/M	15 to	B	M	[redacted]1995	BRO	BLK

	Ht	Wt	
2200 Burning Tree Dr Se Grand Rapids MI	600 to	175 to	Ask-in Date / Time /

Positive ID Type — State ID Number — Phone Type: Home (616) [redacted] / Cell (616) [redacted]

Additional & Clothing Description: RED T-SHIRT, BLUE JEANS

Subject Status	Last Name, First, Middle	Age	Race	Sex	DOB	Eyes	Hair
Complainant	MICHIGAN ATHLETIC CLUB,	to					

	Ht	Wt	
2500 Burton St Se Grand Rapids MI	to	to	Ask-in Date / Time /

Positive ID Type — State ID Number — Phone Type — Phone Number

Additional & Clothing Description:

Subject Status	Last Name, First, Middle	Age	Race	Sex	DOB	Eyes	Hair
Complainant	WEIBLEN, BARB W/F	to 48	W	F			

	Ht	Wt	
2500 Burton St Se Grand Rapids MI	to	to	Ask-in Date / Time /

Positive ID Type — State ID Number — Phone Type: Cell — Phone Number: (616) 956-0944

Additional & Clothing Description: MANAGER OF THE MAC

Report Date/Time	Date/Time - Between	and/or On		Inc Number
08/15/2011 / 13 42 hrs	/	08/15/2011 / 13 41 hrs		11-077503

Subject Status	Last Name, First, Middle	Age	Race	Sex	DOB	Eyes	Hair
Witness	Heibel, George Randel W/M 5/12/1958	53 to	W	M	[redacted]/1958		

	Ht	Wt	
2624 Inverness Rd Se Grand Rapids MI	to	to	Ask-in Date / Time /

Positive ID Type	State	ID Number	Phone Type	Phone Number	Additonal & Clothing Description
			Home	(616) [redacted]	

Vehicles Involved

Property Involved

Narrative *Reporting Officer:*

Rpt Date / Time: 8/15/2011 / 13:42 Edgcombe, Greg #283

On 8-15-2011 at 1341 hours the listed suspect was walking through the Michigan Athletic Club parking lot 2500 Burton St. SE, and the nursery just east of the club looking into several cars as he passed by them in the lot as if looking to steal something if it presented it self to him.

We responded to the MAC and I spoke with a female employee at the driveway who told me that the guy who was looking into cars was now westbound on Burton St. near Breton Ave SE. I drove west on Burton and located suspect, Denishio Johnson, sitting under a shade tree just west of the Macatawa Bank that is in turn just west of the Michigan Athletic Club. He was sitting approximately 150 feet south of Burton St. SE.

I contacted the suspect who didn't have any ID on him. He told me his name and date of birth along with his address. He told me that he had just walked from his house on Burning Tree just south of here, to meet his friend who was taking a bus here.

I told him that I was here because the Michigan Athletic Club called us saying that he was walking through their parking lot looking into several cars in the parking lot and that as they watched him he walked to the parking lot of the child daycare business just east of the MAC and were looking into cars in that lot as well before coming to this location.

He responded by telling me that he had simply walked through the MAC lot on his way here but didn't say anything about looking into cars.

I file checked Denishio and discovered that he didn't have any wants or previous arrests.

Witness George Heibel was a witness who watched Denishio looking into cars. He took a look at Denishio from a distance away while accompanied by Officer Laudenslauger. Officer Laudenslauger told me that Denishio was the same person that the witness saw looking into cars in the MAC parking lot.

We discovered that Denishio had looked into cars but unlike the initial information he had not tried to open or enter any of the vehicles that he looked into.

The Michigan Athletic Club signed a no trespass letter in the past couple months according to Officer Niemeyer however it is not on file with the Grand Rapids Police Department. Officer Niemeyer will look into that letter.

There have been numerous burglaries from vehicles in the MAC parking lot over the past several months. Some of those burglaries had descriptions of the young black male suspect who left the area over the south parking lot grassy knoll which is directly in the path of where Denishio lives on Burning Tree Drive.

Sgt. Bargas took a full set of finger prints from Denishio Johnson and a couple of photos of his face and tattoos. We advised the mother of Denishio that his prints would be compared to the prints from the prior B&E's in the MAC lot. She reassured us that she would have him take a different path of travel from now on to avoid this problem.

Report Date/Time	Date/Time - Between	and/or On		Inc Number
08/18/2011 / 09 17 hrs	/	08/15/2011 / 13 41 hrs		11-077503

Narrative *Reporting Officer:*

Rpt Date / Time: 8/18/2011 / 9:17 Follow-Up Report Walker, Edward #155

8/18/11. I checked the listed address for larceny/burglary reports with prints from 1/1/2011 to 8/18/2011. The following reports were checked however only one report (11-35125) had prints. 11-17886, 28572, 28579, 28790, 35125, 40621, 46860.

I submitted a prints request for 11-35125.

This case will be re-coded to a suspicious person as opposed to a trespass.

Case closed 08. P.W #155

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

Case No. 14-02166-NO

v.

HON. JAMES R. REDFORD

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS,
a Michigan Municipal Corporation,

Defendants.

DENISHIO JOHNSON,

Plaintiff,

Case No. 14-07226-NO

v.

HON. JAMES R. REDFORD

CURT VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS, a Michigan municipal corporation

Defendants.

_____/

BERNARD SCHAEFER (P40114)
Attorney for Plaintiff
161 Ottawa Ave. NW, Ste. 502-D
Grand Rapids, MI 49503
(616) 272-4361

MARGARET P. BLOEMERS (P40853)
PATRICK J. LANNEN (P35171)
KRISTEN REWA (P73043)
Assistant City Attorneys
Attorneys for Defendants
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

_____/

DEFENDANT CITY OF GRAND RAPIDS' RESPONSE TO PLAINTIFF DENISHIO JOHNSON'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT CITY OF GRAND RAPIDS

INTERROGATORIES

1. State the full name, badge number, and position in the Grand Rapids Police Department of all police officers who were present during the incident described in the Complaint.

ANSWER:

- **Officer Greg Edgcombe, #283**
- **Officer Eugene Laudenslager, #032**
- **Sgt. Elliott Bargas, #503**
- **Cpt. Curtis VanderKooi, #550**

Reference: GRPD Incident Report 11-077503, and persons named above.

2. For each individual named in response to Interrogatory No. 1, detail whether that person had physical contact of any nature with Plaintiff. In responding to this interrogatory, specifically identify each person or document that was the source of this information and what each particular source stated.

ANSWER:

- **Officer Greg Edgcombe: yes, see response to Interrogatory #4, below.**
- **Officer Eugene Laudenslager: the interrogatory will be supplemented when the information becomes available.**
- **Sgt. Elliott Bargas: yes, see his responses to Interrogatories directed to him, dated 1/18/15.**
- **Cpt. Curtis VanderKooi: no.**

Reference: Officer Edgcombe, Sgt. Bargas, Cpt. VanderKooi.

3. For each individual named in response to Interrogatory No. 1, state where Plaintiff was observed, what Plaintiff was doing, what Plaintiff was wearing, and whether Plaintiff had any visible injuries or bruises. In responding to this interrogatory, specifically identify each person or document that was the source of this information and what each particular source stated.

ANSWER:

- **Officer Greg Edgcombe: see response to Interrogatory #4, below.**
- **Officer Eugene Laudenslager: the interrogatory will be supplemented when the information becomes available.**
- **Sgt. Elliott Bargas: see his responses to Interrogatories directed to him, dated 1/18/15.**
- **Cpt. Curtis VanderKooi: VanderKooi does not remember seeing plaintiff on the date of the incident.**

Reference: Officer Edgcombe, Sgt. Bargas, Cpt. VanderKooi.

4. For each individual named in response to Interrogatory No. 1, provide that individual's account of the incident described in the Complaint.

ANSWER:

- **Officer Greg Edgcombe: see Edgcombe's narrative contained in 11-077503. Additionally:**

Officers Edgcombe and Laudenslager responded to a dispatched call of suspicious person walking through the MAC parking lot checking cars in the lot. The suspect was described a black male, about 20 years old, wearing a red top over bluejeans. Edgecombe, as an officer in the East Service Area, where the MAC is located, was aware of several, seven to ten, break-ins and thefts from vehicles located in the MAC parking lot. Some of the suspects in those prior incidents were described as young, black males who, after breaking and entering into the vehicles, would exit by walking over the berm behind the MAC. Edgecombe spoke with the female MAC employee who called in the incident. She said the person she saw walked westbound on Burton Street.

Officer Edgecombe located Johnson on a grassy hill in or around the Macatawa bank parking lot, west of the MAC. Johnson explained that he was waiting for a friend and had walked through the MAC parking lot, from his home on Burning Tree, which is a street located behind the MAC on the other side of the berm. His route of travel was consistent with the route traveled by suspects of the prior vehicle break-ins. Johnson denied trying to open any vehicles.

Officer Laudenslager spoke to the male witness and had him look at Officer Edgecombe and Johnson. The witness identified Johnson as the person he saw walking through the MAC parking lot. Through additional questioning, the witness stated he saw Johnson looking into cars, but he did not see Johnson trying to use the vehicle handles or otherwise try to get into any vehicles.

Johnson's mother was contacted and she came to the scene. The officers explained the incident and their actions to her. Edgecombe does not believe Johnson was placed in handcuffs, he cannot remember if he sat in a police cruiser. Edgecombe does not recall any officer searching Johnson. Edgecombe recalls standing outside his cruiser with Johnson. Edgecombe did not see any injuries on plaintiff or hear complaints of injuries.

Sgt. Bargas arrived on scene and took Johnson's photos and fingerprints. Captain VanderKooi arrived on scene at some point, but Officer Edgcombe does not recall what the Captain did, if anything. Edgecombe believes that prints were taken to compare to other vehicle break-ins in this parking lot.

Johnson was cordial and compliant.

- **Cpt. Curtis VanderKooi:**

Captain VanderKooi heard the radio traffic about this incident. Officers were on-scene at the MAC at about the time Captain VanderKooi drives from GRPD headquarters to the East Service Area. He does not recall if his normal routine or this specific call caused him to drive to this location. VanderKooi drove to the MAC and arrived on scene towards the end of the officers' investigation. He does not recall if he ever saw Johnson on-scene that day. He did not have any physical contact with Johnson. During the time of this incident, the MAC parking lot was a hot-spot for crime in the middle of the day; there was a multitude of day-time larcenies in vehicles parked at the MAC.

- **Officer Eugene Laudenslager: the interrogatory will be supplemented when the information becomes available.**

- **Sgt. Elliott Bargas: see his responses to Interrogatories directed to him, dated 1/18/15.**

Reference: Officer Edgcombe, Sgt. Bargas, Cpt. VanderKooi.

5. For each individual named in response to Interrogatory No.1, state that individual's detailed explanation of why he/she went to the area of the incident described in the Complaint at the time of the incident, and what, if any, information he/she possessed or was told about to support the stop, search and photograph and thumbprinting of Plaintiff. Each individual, in responding to this interrogatory, is directed to state whether this is information derived from personal observation or from any other source, which source is to be explicitly identified.

ANSWER:

- **Officer Greg Edgcombe: see response to Interrogatory #4, above.**
- **Officer Eugene Laudenslager: the interrogatory will be supplemented when the information becomes available.**
- **Sgt. Elliott Bargas: see his responses to Interrogatories directed to him, dated 1/18/15.**
- **Cpt. Curtis VanderKooi: see response to Interrogatory #4, above.**

Reference: Officer Edgcombe, Sgt. Bargas, Cpt. VanderKooi.

6. Provide the names of all civilian employees, witnesses, and any and all other individuals who were present at any time during the incident described in the Complaint.

ANSWER: All employees of the City of Grand Rapids are civilians when acting in the scope of their duties as city employees. In addition to the

not relevant to any claim or defense of any party, and therefore, unduly burdensome.

Without waiving the objection, neither Defendant VanderKooi or Bargas have been named as defendants for actions arising out of their duties as police officers.

Reference, Captain VanderKooi, Sgt. Bargas, and City Attorney's Office records.

13. State whether the Grand Rapids Police Department has conducted any investigation into the incident described in the Complaint, and, if so, describe the results of said investigation and identify any and all documents produced during the course of and as a result of that investigation.

ANSWER: **Defendant City objects to the word "investigation" as vague; it is unclear what type of investigation Plaintiff seeks information on.**

Without waiving the objection, the GRPD IAU did not conduct an investigation into this incident. The GRPD did investigate this incident as part of a criminal investigation into several vehicle larcenies in the MAC parking lot. The incident reports referenced in Detective Walker's narrative in 11-077503 are enclosed. Plaintiff's fingerprints taken in this incident (11-077503) were to be compared against suspect prints recovered in incident 11-35125, however, plaintiff's prints taken in this case (11-077503) were insufficient to allow for print review. See Documents disclosed for Request for Production #8, below.

Source: Lt. Reilly; Incident Report 11-077503; case file for 11-35125; Gretchen Ross, Latent Print Examiner.

14. Identify the person who maintains the Grand Rapids Police Department's record system where Plaintiff Denishio Johnson's photographs are stored and describe the system.

ANSWER: **Lt. Schnurstein. Mr. Harrison's photograph is stored in the Grand Rapids Police Department's electronic records management system, called Empower Records Management System, which runs on the FileMaker database platform.**

15. Identify the person who maintains the record system containing Plaintiff Denishio Johnson's thumbprint and describe the system.

ANSWER: **Denishio Johnson had a full set of prints taken on a print card, which is stored in the case file jacket for incident report 11-35125. This file is located in the GRPD Latent Print Unit Room.**

Source: Julie Snyder, Gretchen Ross (Latent Print Examiners), Cecile Herald (Forensic Services Manager).

REQUEST TO PRODUCE

Produce the following documents:

1. Any and all documents you used as a source of information in your responses to Plaintiff's Interrogatories to you and any and all documents referenced in said responses.

RESPONSE: Documents are indicated in the relevant interrogatory and enclosed, unless otherwise noted in the interrogatory.

2. Any and all documents which form any basis for or support the Defendant City of Grand Rapid's defenses.

RESPONSE: All documents that are being, or have been, produced in discovery by any party, including the incident report and CAD history. Defendant City is also including printed screenshots referenced in its response to Keyon Harrison's Request for Production #2, dated 1/16/15, as well as publically available photos found when doing a Google search of "Denishio Johnson Grand Rapids."

This request will be supplemented with any documents that may yet be revealed in the course of as they are revealed.

3. Any and all documents that concern or are at all relevant to the incident described in the Complaint.

RESPONSE: Defendant City objects to Request 3 because it is so vague and overbroad that it provides no guidance as to which documents plaintiff wants.

4. Any and all documents that comprise or are part of the personnel file of the persons identified in your response to Interrogatory, including disciplinary records of said persons.

8. Any and all documents related to any investigation into the incident described in the Complaint.

RESPONSE: Documents identified as being part of the vehicle larceny investigation are being disclosed. See Response to Interrogatory # 13, above.

9. Produce copies of all incident reports where Plaintiff Keyon Harrison is named.

RESPONSE: These incident reports are enclosed.

Respectfully submitted,

CITY OF GRAND RAPIDS,

Defendant

Dated: January 20, 2015

By: _____

KRISTEN REWA (P73043)
Assistant City Attorney
Attorney for Defendants

Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

v CASE NO: 14-02166-NO
HON. JAMES R. REDFORD

CURT VANDERKOOI and
CITY OF GRAND RAPIDS, a Michigan
Municipal Corporation,

Defendants.

DENISHIO JOHNSON,

Plaintiff,

CASE NO: 14-02166-NO

CURT VANDERKOOI and
CITY OF GRAND RAPIDS, a Michigan
Municipal Corporation,

Defendants.

DEPOSITION OF CAPTAIN CURT VANDERKOOI
taken before Shawn M. Breimayer, Certified Shorthand Reporter, at the office of City Attorney, 300 Monroe NW Ste 620, Grand Rapids, MI, Monday, June 15, 2015, commencing at 9:10 AM, pursuant to notice.

APPEARANCES:

FOR THE PLAINTIFF: Bernard Schaefer (P40114)
161 Ottawa Ave Ste 502-D
Grand Rapids, MI 49503
(616) 272-4361

FOR THE DEFENDANT: Kristen Rewa (P73043)
Patrick J. Lannen (P35171)
Assistant City Attorney
300 Monroe NW Ste 620
Grand Rapids, MI 49503
(616) 456-4026

Reported by: Shawn M. Breimayer, CSR-6888

DEPO[illegible]ION OF CAPTAIN CURT VANDERKO[illegible]
6-15-2015

TABLE OF CONTENTS

DEPO ION OF CAPTAIN CURT VANDERKO(
6-15-2015

(Deposition commenced at 9:10 AM)

CURT VANDERKOOI

after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SCHAEFER:

Q. Please state your name for the record?
A. Curt Vanderkooi.
Q. And what did you review to prepare for this deposition?
A. Reports provided by the City Attorneys.
Q. And what reports were those?
A. I don't remember all of them related to the incidents involved here. I can't list them by numbers.
Q. Okay. So, they were police incident reports?
A. Yes.
Q. Anything else that was written material that you reviewed?
A. Yeah, it was also east edges reports that were provided to me by the City Attorney.
Q. Any other written materials?
A. Written materials, there might be other incident reports, yes.
Q. Did you read any depositions?
A. I read my own. I don't know what you call that

document, but draft, what do you call that?

MS. REWA: You have to answer the best you know.

THE WITNESS: Yeah, I don't know what the terminology is, but it's a document that you were given as well.

BY MR. SCHAEFER:

Q. Okay. Have you ever given a deposition before?
A. Yes.
Q. Okay. So, you're familiar with the ground rules that if I ask you a question and it's not clear, will you let me know that, please?
A. I will.
Q. And you've got to be careful not to speak too quickly so we each get our statements out before the other one?
A. Sure.
Q. Okay. So, you reviewed a document that was something that had been provided to us previously?
A. Yes.
Q. So, you didn't read any depositions then?
A. No.
Q. And did you interview anyone or talk to anyone other than your attorneys to prepare for the deposition?
A. No.
Q. As you're aware of, at least the first part of the deposition is regarding the incident involving Keyon

Harrison. What was your assignment on that particular day?
A. I was -- I'm the captain of the southeast service area, and that's the location where it occurred.
Q. Okay. I had obtained a plan here from the City website, does that show the service areas in the City?
A. Yes.
Q. Okay.

(Deposition Exhibit 1 marked at 9:13 AM)

BY MR. SCHAEFER:

Q. Now, the service area that you were assigned to that particular day was which one?
A. The southeast service area.
Q. Okay. I'm looking at the map and I see south and east as separate service areas?
A. Correct.
Q. Okay. Were you assigned to both service areas?
A. No.
Q. What is the southeast service area that you're referring to?
A. Well, you're looking at a map where they actually abbreviated. East is southeast. Officially my area is called southeast.
Q. Okay.
A. But they abbreviated it on the map and they call it

east.
Q. Okay. Could you write southeast on the map, please, and do an arrow to the service area that's your service area. So, write it on the white part southeast. So, the -- you've identified the service area that you were assigned to that day. Now, in fact, the location of the incident with Keyon Harrison was not in that service area, correct?
A. Yes.
Q. So, what -- where were you going when you saw Mr. Harrison?
A. Going back to headquarters downtown.
Q. Any particular reason you were going back to headquarters downtown?
A. That's where my office is.
Q. Okay. And where were you coming from?
A. I don't remember.
Q. Okay.

(Deposition Exhibit 2 marked at 9:16 AM)

BY MR. SCHAEFER:

Q. I've got a aerial photograph, which shows the intersections of Fulton, Union, Lake Drive and the Packard Street triangle, and we've marked as Exhibit 2 a diagram that reflects those same streets, is that correct?

DEPO ION OF CAPTAIN CURT VANDERKO(
6-15-2015

7

A. Yes.
Q. And if you could, please, could you locate your vehicle on the diagram with a little rectangle where you were located when you first saw Mr. Harrison?
A. You want it on here?
Q. Yes, please?
A. What do you want me to do draw?
Q. Just draw a rectangle where your vehicle was located when you first saw Mr. Harrison. And then, put a one inside there, okay, thank you. So, on that date when you saw Mr. Harrison, you've read the incident report regarding the particular encounter that day, correct?
A. Yes.
Q. Okay. And please describe what you observed when you first saw Mr. Harrison?
A. I saw him walk up to another individual, who was on a bicycle, and they -- Mr. Harrison had in his hands a rather large, what I would say model type engine to a train. I thought it looked a little more like something very expensive and something that wasn't a toy. It was more of an ornament type thing that could be of value.
Q. And when you saw Mr. Harrison walk up to the other individual on the bike, where were they located?
A. They were on the sidewalk on Fulton, north side close

8

to Union.
Q. Do you recall if they were on the northwest or the northeast side?
A. They would be on the northeast corner or near the northeast corner of Union and Fulton.
Q. Okay. Could you put a K H please on the diagram where you first saw Mr. Harrison? After you made the observations you've just described, what happened next?
A. It was a red light and it turned green.
Q. Okay.
A. So, rather than -- I decided to observe what was going on, because it looked like some kind of transaction between the two. So, I made a right turn onto Fulton, and as I'm going -- now, I'm going eastbound on Fulton. I see the object that Mr. Harrison had he then, as I'm passing and going, now they're behind me, I see that it goes to the Hispanic male on the bicycle.
Q. So then, the -- what made you think that it looked like, some kind of transaction?
A. Well, it's a transfer of property from one person to another. That's a transaction.
Q. And so, you see the object go to the Hispanic male on the bicycle, and this is on your left then as you're proceeding east on Fulton?
A. I'm passing and simultaneously I'm watching where I'm

9

driving, so it was kind of a combination watching where you're driving and watching.
Q. So, then the individual on the bicycle, what did he do after he received the object?
A. He started riding his bike, but simultaneously I'm past them. So, I'm by Packard now, and so I make a right hand turn on Packard.
Q. And which direction did the young man on the bicycle ride?
A. I think he went eastbound.
Q. And was he eastbound on the Fulton sidewalk or in the street?
A. I'm not sure, was, like I said, I lost sight of him pretty fast after I passed and Packard is very close, so there's only like seconds as you go eastbound on Fulton and then Packard.
Q. So, then you turned right onto Packard?
A. Yes.
Q. Okay. And what did you do next?
A. I took a, it would be another right onto Lake Drive.
Q. Okay. And then you proceeded west on Lake Drive?
A. Westbound again, yes.
Q. Okay. And then, did you park your vehicle on Lake Drive?
A. I first made an observation before I parked the car,

10

but yes, I did park the car.
Q. Okay. Did you make the observation while driving or did you slow and stop?
A. I made, I saw the observation and then I stopped.
Q. Okay.
A. I wanted to find a safe and legal place to stop, so, which I did.
Q. Okay. And what was the observation that you made?
A. I saw Mr. Harrison in the park now and he was in the, at the time it was, that had some small trees and bushes and high weeds. I saw him in that clump of small trees.
Q. Okay.
A. I think they cut some of that down.
Q. Okay.
A. If you go by the park they cleaned it out.
Q. Okay. Would it be then, please locate on the Exhibit 2 where you saw Mr. Harrison when you made that observation that he was in the park?
A. The park has like manicured lawn, so to speak, for part of the triangle, it's a triangle park.
Q. Okay. Go ahead and write lawn there if you want where the lawn is.
A. It's not dimensional here, but.
Q. Well, I have got the aerial photo to help us if that

DEPOSITION OF CAPTAIN CURT VANDERKOOI
6-15-2015

helps at all?
A. Yeah. That's a, might be, yeah, if that's the park. There's the, kind of the manicured lawn type and then here they had a lot of small trees, bushes, and that's where I saw -- you want to mark his initials in there again?
Q. Yes, please?
A. I saw him right in about the center.
Q. So, Mr. Harrison was in the part of the park where there was small trees, grass, a higher grass, that kind of thing?
A. Yeah, and I think there's some bushes there.
Q. Okay.
A. Not many.
Q. Could you put the word lawn, please, where the manicured lawn is? Thank you. So you made that observation, you saw Mr. Harrison in the park there, did you see anyone else there with him?
A. No.
Q. And about how long did it take you to proceed from the point where you last saw the young man on the bicycle to where you turned onto Packard, onto Lake Drive and encountered Mr. Harrison again?
A. Probably twenty, thirty seconds.
Q. Now, at the point that you saw Mr. Harrison then in the

park, did you see the boy on the bicycle anymore?
A. No.
Q. Okay. So, then can you locate your vehicle where you parked then after you made that observation of Mr. Harrison in the park?
A. I parked at about directly in front of where the, where he was, but I was on Lake Drive westbound, going westbound.
Q. Right.
A. Yeah.
Q. Okay. So, when you parked your vehicle it would have been just below where you've got Mr. Harrison's initials in the park?
A. Yeah, about that.
Q. Okay. Right where I put the X here?
A. Yes.
Q. Okay. Now, so you parked in a safe, legal spot?
A. It was safe. I'm not sure if it was in a no parking zone.
Q. Okay, at least it was a safe spot. Now, at any time in between your driving at the point the light turned green when you did the circle around the block and then parked there, did you broadcast anything over the radio?
A. Not yet.

Q. Okay. So, after you parked your vehicle, what did you do next?
A. Well, I, based on seeing Mr. Harrison acting suspicious in the park, I decided that I was going to step out and ask him what was going on.
Q. Okay. And exactly what was it that Mr. Harrison was doing that you thought was acting suspicious?
A. Well, he's, he was either crouched or on his knees and his back is to me. He's looking the other direction. And he was moving a little bit his arms, and so, I wasn't -- to me, based on the prior transaction and now seeing him in the, more of a secluded position there in a park I thought it warranted further investigation, so I made a contact.
Q. And how did you make the contact?
A. I walked up and told him who I was and asked him what he was doing.
Q. Okay. And what did he answer?
A. He said he, he was coming home from school, that he gave that object to his friend and presently he was in the park, because he was trying to catch some birds.
Q. Okay. So, you asked Mr. Harrison what he was doing and he told you all of that in his answer?
A. I'm paraphrasing the answer, yes.
Q. Okay. What was the first thing he said after you asked

him what he was doing?
A. I think he said he was trying to catch birds.
Q. Okay. And did you ask him a question in response to him saying he was catching a bird?
A. Well, then I asked him well, what were you doing across the street.
Q. Okay. And how did he answer that question?
A. Well, he said he had been coming, that he was, had been walking home from school. He was carrying this object and it was related to a project at school, and that he had gave it to his friend and his friend was going to take care of it.
Q. Did he say specifically take care of it or did he explain in more detail what his friend was doing?
A. That he didn't get into details about what he was doing with it. Oh, I think he said something about return it.
Q. Okay. And did he state what the object was that they had used for the school project?
A. I think he said it was an engine of a train.
Q. Okay. And did he say where his friends was going to return it?
A. No.
Q. Now, what Mr. Harrison told you that we've just discussed, that was all legal behavior and there was no

DEPOSITION OF CAPTAIN CURT VANDERKOOI
6-15-2015

crime committed, correct?
A. I had a suspicion that he may have been involved in -- we have a lot of larcenies and home invasions, especially after school in that area, so I was suspicious that what the story was not, you know, fully truthful.
Q. Okay. But what he told you he was doing, that was not a crime, correct?
A. If it was true it would not be a crime.
Q. Okay.
A. But I didn't believe it.
Q. Okay. And, in fact, what he told you was true, correct?
A. I don't know if we fully confirmed that yet.
Q. Well, I mean, ultimately, what he told you was true, correct?
A. About what?
Q. About he was walking home from school and he had given the other student the object that he was going to return had been used in the school project?
A. Well, some of that was confirmed and some of that behavior that you're paraphrasing yourself here has not been confirmed.
Q. You mean as of today it hasn't been confirmed?
A. Yes, as of today there's certain parts like where that

was taken to, I don't know where it was taken to. We never recovered it.
Q. Okay.
A. And whether it was used in a project or not I didn't go to the school to look for a professor to confirm that either, so.
Q. But if what he said was true that wasn't a crime, correct?
A. If everything he said was true that was not a crime.
Q. Okay. And so, why exactly didn't you believe him?
A. Well, because his behavior in the park when I first saw him it just, to me, looked like he could, he was acting rather unusual and I was suspecting might be a lookout and that the property was, a lot of times when you get stolen property they'll secrete it at different locations near where they have taken it, and they take things, object by object they take it and deliver it somewhere else. So, that was what was going through my mind when I saw this transaction, and more so I was confirming what was going on looking suspicious the way he was in the park in the woods, wooded area and he was actually kneeling or crouching.
Q. Did you see a bird near him?
A. No.
Q. So, what did you do next?

A. Well, we kind of jumped ahead of the story, because you asked me what he said. But before, as I'm walking up to him, before I talked to him I put over the air broadcasting on the radio that I wanted an officer to come to the scene and I wanted another officer to find the Hispanic male on his bicycle.
Q. Okay. So, in between getting out of the car and making contact with Mr. Harrison you put over the air what you just said?
A. Yes.
Q. Okay. So, then you make the contact with Mr. Harrison and you have the discussion that we've covered already, and you reached the point where you indicated you didn't believe him, is there anything else you did prior to that point that I didn't give you a chance to explain?
A. I asked consent to search him.
Q. Okay. And, at that point, there was no indication that he had a weapon, correct?
A. No.
Q. And there was no indication that he had any contraband, correct?
A. Well, we hadn't consented, well, we didn't do a search so I didn't know if there would be contraband or not.
Q. Right, but there was no evidence that he had any

contraband?
A. Well, he was carrying a knapsack, so I asked consent to look inside where there could have been contraband.
Q. Okay. But there was no evidence prior to your asking to search him that he had any contraband, correct?
A. I saw a transaction occurring where he was delivering property to another person that was on a bicycle. I went around the corner and saw him acting suspiciously in the woods, so I suspected there might be contraband in his knapsack or on his person.
Q. But there wasn't any evidence that he had contraband, correct?
A. I just told you that that's what I believe is a reasonable expectation there might be contraband. That's why I asked consent to search.
Q. Okay. That contact you had with him in the park there, did you observe that he was wearing a school uniform?
A. No.
Q. Did you ever observe during your contacts with him that he was wearing a school uniform?
A. No.
Q. Now, he told you he was coming home from school, right?
A. Correct.
Q. And is it customary for high school students to have backpacks that they carry school materials in?

DEPO ION OF CAPTAIN CURT VANDERKO(
6-15-2015

19

A. Yes.
Q. Okay. And yet, you thought that the backpack could contain contraband?
A. Yes.
Q. And what exactly was your source for thinking the backpack had contraband in it?
MS. REWA: Objection. Asked and answered.
THE WITNESS: Same answer I gave before. I saw suspicious behavior, the transaction of the object, they split, then I saw him in the woods. He was kneeling down. He was looking the other direction, and I -- it was like in a more secluded position, and therefore, I thought that there could be contraband in his knapsack. That's why I asked consent to search.
BY MR. SCHAEFER:
Q. Now, at the point where you asked consent to search, were any other officers on the scene?
A. No.
Q. So --
A. Well, I'm not sure, but I think no. I'm not sure about that.
Q. Okay.
A. I did tell other officers that I got consent to search.
Q. Okay. So, you asked for consent to search, and Mr. Harrison gave you consent?

20

A. Yes.
Q. Okay. What did you do next?
A. I asked him to open up his knapsack.
Q. Okay.
A. He did. I looked inside. I didn't even touch the knapsack. I actually just looked. He opened it up. I looked inside.
Q. Okay. And what did you see when you looked inside?
A. I thought, best of my recollection there were notes, books and maybe a book.
Q. Okay. So, school materials?
A. Yes.
Q. So, what did you do next?
A. Well, by that time the officers, the other officers arrived and I asked them to take a photograph of him.
Q. And who did you ask to take his photograph?
A. It was either Luke Nagtzaaam or Sergeant Labrecque.
Q. You don't remember which one?
A. I don't remember exactly who I asked.
Q. Okay. And who took the picture?
A. I don't remember who took the picture.
Q. Okay. What rank was Luke Nagtzaam at that point?
A. He was a community officer.
Q. And you said the other was Sergeant Labrecque?
A. Yes.

21

Q. Now, the equipment for taking a photograph in that circumstance, would community officer Luke Nagtzaam normally have a camera for that purpose?
A. He might.
Q. Would Sergeant Steve Labrecque have such a camera?
A. Yes.
Q. So, what did you do after you asked for the photograph?
A. They stepped away towards one of their vehicles and -- I don't remember if I had radio communication or not with or if it was by phone, but I learned that they had found the other Hispanic male on the bike. I knew that by the radio communication that they had found a Hispanic male on a bike.
Q. So, about how much time elapsed between when you looked inside the notebook and when you asked one of the other officers to take his photograph?
MS. REWA: Objection. Misstates the prior testimony.
MR. SCHAEFER: Let me rephrase the question.
BY MR. SCHAEFER:
Q. About how much time elapsed in between when you looked inside the knapsack and you asked for the photo?
A. I don't remember if I asked for the photo first or if I looked in the knapsack.
Q. Okay. When you looked inside the knapsack, did you ask

22

Mr. Harrison any more questions?
A. I think we talked about school.
Q. Okay. And were you talking to him about school before or after his photo was taken?
A. Before.
Q. And what was it that he said about school?
A. He told me where he went to school. He talked about his aspirations, I think.
Q. Okay. And what school did he go to?
A. I think City High, I think is what he said.
Q. Okay. And were you aware of the location of the school he went to?
A. Well, I'm not sure if it's City High or if they have a new name to the school, but it's in the area of Grand Rapids Community College. The location is in the area of Grand Rapids Community College. I don't know the address.
Q. Okay. So then, after you two talked about school someone took Mr. Harrison's photograph?
A. He walked away with a, with one of the -- Luke over to where ever the photograph was taken and it was away from me.
Q. Okay. So, when you said they walked away, you were referring to Mr. Harrison and?
A. With one of the -- either the officer, with Luke and

then went where the cars were parked further down on Lake Drive.
Q. Okay. Can you locate the other two cars, please, on the Exhibit 2 there where they were parked?
A. They were parked in front of me.
Q. In front of you?
A. Yes, meaning they were parked facing the same direction in front.
Q. Okay. So, they were parked --
A. There's more room than the diagram. My car is too big in there. The car is a lot smaller.
Q. Can you indicate the direction north with a north arrow on the diagram, please? Thank you. So, the vehicles for the other officers they would have been parked in front of your vehicle on Lake Drive, basically, south of the lawn area?
A. Yes.
Q. And so, Mr. Harrison and one of the other officers walked away, his picture was taken, anything else happen after that?
A. No.
Q. Was his print taken too?
A. I was told it was. I didn't know at the time. I learned it wasn't until this lawsuit that I learned that a print was taken.

Q. Okay. Now, you saw --
A. I asked for a photo.
Q. Okay, okay. So, you asked for a photo of Mr. Harrison, and you saw them take the photo?
A. I don't know if I was watching that. I don't remember seeing it occur.
Q. Did you ask for a print too?
A. No.
Q. Now, did your attention get diverted when they walked away for the photo?
A. I was -- at that point, I think it was on the radio or I was talking on the phone to the other officer that had found the Hispanic male.
Q. Okay.
A. I don't remember which way I communicated, but I just know that the officer said that that Hispanic male did not have the object that was, that he originally had, so.
Q. Okay. Do you recall who communicated that they had found the Hispanic male on bike?
A. It was over the radio, and I don't know -- I didn't identify who it was by his radio ID number, because I don't know everybody's in the City. But I know who it was that located him.
Q. Okay. And who was that?

A. I was told Officer Newton. The police report says that.
Q. Okay. So, you hear over the radio that the Hispanic male on the bike has been located, what do you do next?
A. Well, I learned that he didn't have the object that he originally had that was obtained from Mr. Harrison.
Q. Okay. Did you ask the officer any questions after you found he located the boy on the bike?
A. No, once I -- all I knew was -- well, I'm sure I asked some questions, but all I remember is him telling me he didn't have the object anymore.
Q. Okay.
A. And that was either on the radio or on a phone.
Q. Okay. Did you tell the officer to get a photograph of the Hispanic male on the bike?
A. No, I think he told me he had ID.
Q. The officer told you that?
A. Yes. Mr. Harrison did not have ID.
Q. So, what happened after you learned from the other officer that he didn't have the object?
A. Well, since this was a situation where it didn't arise to the level of probable cause we let Mr. Harrison walk away.
Q. Did you see anybody search Mr. Harrison's person?
A. No.

Q. Now, in conducting your search of Mr. Harrison's knapsack, did you follow Grand Rapids Police Department policy?
A. In doing what?
Q. In conducting the search of his knapsack.
A. Yes, I had consent to search it, so yes, I did.
Q. And which policy is that that you followed?
A. Well, it's the law. You have to have probable cause in an incident in order to arrest somebody, but you get consent to search somebody you can search them.
Q. Now, the contact that the other officer had with the Hispanic male on the bike, could you see that?
A. No.
Q. Do you know where the other officer encountered that Hispanic male?
A. I knew it was further down Fulton, either near Diamond or Fuller on Fulton, in that general area.
Q. Okay.
A. That's about like a mile away.
Q. So, in terms of your requests for assistance, you asked other officers to come to the scene and you asked other officers to find this Hispanic male on the bike?
A. Yes.
Q. Okay. And once the other officer located the boy on the bike, did you ask that officer to do anything in

DEPO[illegible]TION OF CAPTAIN CURT VANDERKO
6-15-2015

27

particular?
A. No. I asked -- all I remember is him telling me he didn't have the object, and I was aware that he didn't have, or he did have ID. That's all I remember. I didn't give him any instructions on what to do.
Q. Okay. Did you ask the officer to see if the boy on the bike still had the object?
A. Well, my original broadcast was to locate him and he would be carrying the object, so I guess that's asking him to find the young man and the object.
Q. Okay. So, your original broadcast to locate the Hispanic male on the bike referenced that he would also be --
A. Yes.
Q. -- carrying an object?
A. Yes.
Q. Okay. So, then the officer responds that he's encountered the boy on the bike, but he doesn't have the object anymore?
A. Correct.
Q. And so, you didn't ask the officer to get a picture of the boy on the bike?
A. No.
Q. You didn't ask the other officer to get his print?
A. No.

28

Q. You didn't ask the other officer to search him?
A. No.
Q. Did you ask Officer Luke Nagtzaam to search Mr. Harrison?
A. No, I told him -- I do remember saying I have consent to search, because I wanted him -- the reason I told him that is because I had looked in his knapsack, and secondly, I wanted -- I said put it in your police report that I, we or I got consent o search.
Q. Okay.
A. The reason I told him that is because I wanted that in the police report, the consent part.
Q. Okay. Why didn't you follow the person with the object, the boy on the bike?
A. Because, because of logistics, probably more than anything else in the shortness of time. You're talking about seconds. I'm making a turn and I'm seeing this going down and suddenly I have to turn around again. There's a lot of traffic, so instead of making a U-turn on Fulton, which is busy, I quick made a right and thought I would circle around again and see what was happening next. I wanted to see if I could get better or more observations of their behavior, and as I make the corner again to look that's when I seen Mr. Harrison in the park and the other individual is out of

29

sight, so. So, I'm looking for more observations to see what was going on.
Q. But --
A. Then when I see Mr. Harrison in the park I believed that suspicious behavior is what really suddenly motivated me I better check this out instead of drive by or pass.
Q. What did you do in terms of follow up after that incident?
A. Well, I kind of kept my eye on to see if there had been any other police reports that might pop up that might indicate -- that something like this object had been taken, because I don't -- we couldn't find it. That was the problem, so.
Q. Did you have the other officer ask the boy on the bike where the object was?
A. I don't remember that part of it. I didn't ask him to do that. He just told me he didn't have it anymore. I would assume he would have asked. I don't remember if he gave a, you know, said where it was or whether he, you know, asked for it.
Q. Did you ask Mr. Harrison where the object was returned to?
A. He -- well, Mr. Harrison said that he gave it to the Hispanic male, his friend, to bring it back from

30

whoever they borrowed it from.
Q. Okay. And you didn't ask him where that was?
A. He didn't know, he didn't know.
Q. He didn't know?
A. Or he didn't tell me that he knew. He just told me that he didn't know where it was from.
Q. Okay. So, at the end of the encounter you're still thinking that the two boys might have broken the law?
A. I thought there's a possibility, yes.
Q. Even though they were clearly, Mr. Harrison's case, a student walking home from school, is that a yes, you were nodding your head?
A. Well, our crime rate goes up in the City around the time that kids start walking home from school. In fact, there's data nationwide that's the highest time for crime in that age group to occur is that gap in time of the hour or so after kids leave school. So, just because he's coming from school, which I believed that he was based on looking at his notebooks, I believed that he was coming from school. That doesn't mean just because you're coming from school that you can't do something when you're out of school that's against the law.
Q. But he told you they were returning an item for a school project?

DEPO ;ION OF CAPTAIN CURT VANDERKO
6-15-2015

A. Yes.
Q. And you didn't believe that?
A. I wasn't a hundred percent convinced they were telling me the truth, or he was.
Q. And why was that?
A. Just because of the way he was behaving in the woods and the transaction itself. It looked consistent with moving property after it was taken. You got a person that's walking and now he gets it to the person on bike, and the guy on the bike can get away quicker and bring it somewhere else. That's what was going through my mind at that time.
Q. So, you had a report made up on -- take that back. So, after this incident you reviewed police reports for some period of time afterward?
A. I looked for awhile.
Q. Okay. And about how long did you look?
A. Just for a few days. That's why, very common practice to start looking at reports to see if it matches up to field interrogations, see if there's something missing and you can tie it into the report, so.
Q. Did you find anything?
A. No.
Q. Did you have Mr. Harrison's thumbprint run through AFIS?

A. No.
Q. Do you know why his thumbprint was ran through AFIS?
A. No.
Q. Was there any video made of this incident?
A. I'm not sure. I don't have video in my car, in-car video, and I'm not sure if the other cars had it at that time, because that was 2012.
Q. Right.
A. There probably wasn't car video at the time, but I don't know if they had it turned on or not.
Q. So, the car you were driving didn't have the in-car video?
A. No.
Q. But the car that the other Officer Nagtzaam, Sergeant Labrecque and Officer Newton were driving, those would have had in-car video?
A. I'm not absolutely sure. That was in 2012, but I believe they did have in-car video. At the time, I don't know if it was policy to record that type of activity, no.
Q. Do you know if any one of them recorded anything?
A. No.
Q. Were you aware that Mr. Harrison's thumbprint had been run through AFIS?
A. No, not until today I didn't know that. I don't know

if it's true either if it was.
Q. Which Grand Rapids Police Department policies authorize the taking of Mr. Harrison's picture and thumbprint?
A. There are field interrogation procedures. It addresses field, field interrogations and in there it states that you can take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody, and so, in there it outlines the guidelines for taking pictures and prints, as well as writing police reports.
(Deposition Exhibit 3 marked at 10:06 AM)
BY MR. SCHAEFER:
Q. I'm showing you Exhibit 3 there, which is the field interrogation procedures from the Grand Rapids Police Department manual of procedures. Can you identify in there where that policy is in reference to the taking of pictures and prints that you just discussed?
A. Well, I see the problem with procedures, is this updated? This is ten years old.
Q. Well, I guess I can state that it was given to me by your counsel in the last year.
A. Well, I'm just saying it's ten years old.
Q. Okay.
A. So, I would -- can we have some time to talk, because I think this procedure is not up to date?

Q. Well, you can't break in the middle of a question.
MS. REWA: No, you can't.
THE WITNESS: Oh, okay.
BY MR. SCHAEFER:
Q. If it's not in there and it's your perspective that it's not up to date?
A. That's my perspective. That's my answer. I can't answer the question unless I verify that this is up to date procedure.
Q. Okay. So, that particular copy of the field interrogation procedure as Exhibit 3 doesn't have the reference in it to picture and print, correct?
A. I don't know. I have to read the whole procedure.
Q. Okay, well, I'm going to take a moment to let you do that.
A. Okay. Could you re-ask your question again?
MR. SCHAEFER: Please read it back.
(Court reporter read question back)
THE WITNESS: That procedure does not have any reference to picture and print.
(Deposition Exhibit 4 marked at 10:11 AM)
BY MR. SCHAEFER:
Q. I'm showing you Exhibit 4, and I would like you to take a look at that and tell me if you recognize that particular document.

DEPO ION OF CAPTAIN CURT VANDERKO
6-15-2015

35

A. What's the question?
Q. Do you recognize Exhibit 4?
A. Yes.
Q. And what is it?
A. It's the -- it comes out of the Grand Rapids Police Department officer training tasks.
Q. Have you been involved in officer training in your tenure with the department?
A. Yes.
Q. And when was that?
A. Well, back in 1994, '95, '96 I was a commander of the training unit.
Q. Okay. And have you been involved in training since then?
A. Yes.
Q. And when was that?
A. I'm certified ethics instructor, and I was involved in the training in the early part of 2000, I don't know, 1998 maybe to 2003 or four related to that topic.
Q. Okay. Now, the Exhibit 4 there, it does reference the taking of pictures and prints in a field interrogation situation, correct?
A. Yes.
Q. Okay. So, you would agree with the statement that police officers taking photographs and thumbprints

36

known as P and P of individuals with whom they made contact is a commonly known longstanding custom and practice of the Grand Rapids Police Department?
A. When I started in 1980 they were doing P and P's yes.
Q. Okay.
(Deposition Exhibit 5 marked at 10:15 AM)
BY MR. SCHAEFER:
Q. I'd like to give you a moment here to look at Exhibit 5 and once you've had a chance to review it let me know?
A. Okay.
Q. Thank you. Turning your attention to where the paragraph beginning my investigation determined, which goes on from page one to page two, are there any errors in that paragraph that you can identify?
A. Well, I thought it was the truck versus the train engine, fire truck.
Q. Okay.
A. In this document it says fire truck. I thought it was a train engine.
Q. Okay. Anything else? I'll call your attention to one point here where it indicates Harrison was on a bike. It was actually Aguilar who was on the bike?
A. Yes, Harrison was not on the bike.
Q. Okay.
MS. REWA: Is there another question?

37

MR. SCHAEFER: Yeah, I was waiting. He was reading it again.
MS. REWA: Okay.
BY MR. SCHAEFER:
Q. Were there any other errors that you identified in that paragraph?
A. I don't call this an error, but I call it a variance. It says the officers accepted Harrison's explanation and the Captain tells me that he is impressed with the young man's demeanor and courtesy. It is true that he was, had a very good demeanor and was very courteous. I did not fully accept his explanation. That's the difference. So, I accepted his explanation enough to come to the conclusion that we did not have probable cause to arrest him.
Q. And is it true as we sit here today you still don't accept his explanation?
A. I don't accept, because we don't know where or we didn't conclude where this object came from, how they obtained it. That is the part that I'm still suspicious about, because we didn't confirm where it came from. That's the part. I know he went to school. I believe that. I, I believe that he was walking away from school, and he told me the truth that he gave this thing to his friend. And I believe all those things.

38

But we did not confirm, again, even though, other than, I think that was another part of the other officer that the Hispanic male said that they had used it in a project, so that would confirm what Mr. Harrison said about the object that it was used in a project.
Q. So, you have no evidence that the object was stolen?
A. We can't find it, so we can't confirm if it was stolen or not. That's the unknown.
Q. Okay. But -- that means --
A. That's a suspicion, that's a suspicion.
Q. Okay. So, you still have a suspicion today?
A. Yeah, I don't, just because we haven't confirmed where the object came from, that's all.
(Deposition Exhibit 6 marked at 10:23 AM)
BY MR. SCHAEFER:
Q. I'd like to show you Exhibit 6, and I'd like you to read the answer, which again, starts on the first page and goes on to the second page.
A. Yes, I've reviewed it.
Q. Okay. Are there any errors in the answer on Exhibit 6 there that ends on the first page and goes on to the second?
A. No.
Q. Okay. There's a difference in the two, which relates to Exhibit 5, indicates that your interest was peaked

DEPO TION OF CAPTAIN CURT VANDERKO
6-15-2015

39

due to your knowledge that there had been an ongoing problem of burglaries and larcenies from homes in the City and the transaction looked odd, and in Exhibit 6, which indicates that your interest was peaked as there are constant larcenies and burglaries in the neighborhood near the intersection and the transaction looked suspicious. My question is, was your interest peaked because of the problems City wide with larcenies and burglaries or in the neighborhoods around that intersection?
A. The neighborhoods around there historically have had problems with larcenies and home invasions.
Q. Are you saying that the neighborhoods around that intersection have a higher rate of larcenies and burglaries than the rest of the City?
A. No, I'm saying they have more than others. I would say pretty common knowledge that the closer you get to the core of the City the more home invasions and larcenies that you have. As you move further and further away from the core of the City into different neighborhoods you have less and less home invasions and larcenies.
Q. Okay. So, you are saying that the neighborhoods around the intersection shown on Exhibit 2 have a higher rate of larcenies and burglaries than other areas in the City?

40

A. Yes.
Q. Now, to substantiate that, your counsel had given us forty-two incident reports, did you have a chance to review those incident reports?
A. No.
Q. As you were stopped at the red light on that particular day, this wasn't your service area, right?
A. Correct.
Q. So, how would you have been aware of the larcenies and burglaries in the neighborhoods around that intersection?
A. Well, first, I've worked here since 1980. I'm very familiar with the City of Grand Rapids and its crime patterns. Secondly, when I review -- I don't recall 2012 if we had a weekly crime analysis meeting, but a lot of information about the whole City is learned with the meetings that we have on that. We do them once a week, and you constantly can hear, probably the most direct knowledge I have of that area is listening to the police radio every day that I work and hearing the police calls going out and the nature of the calls, the calls being home invasions, larcenies and their sending police officers to take police reports. So, I hear that all the time in certain areas, and this is one of the areas where they dispatch officers, which I hear on

41

the radio, so I listen to the radio a lot.
Q. So, was there a particular pattern of the offenses that you heard about regarding larcenies and burglaries around the intersection of Fulton and Lake Drive?
A. The pattern is that it's a stable consistent pattern of it occurring more there than other places, so you can, you know where the home invasions occur because of your personal knowledge as a police officer listening to police radios and reading police reports and getting summaries. We get bulletins all the time of things that are related to things occurring all different parts of the City, so you -- that's how you grow in your knowledge of what's going on.
Q. Okay. But my question has to do with that particular day as you're stopped at the red light, were you aware of some pattern in that neighborhood where the, there were larcenies and burglaries at some particular time of day?
A. No, there's a constant -- most home invasions, by the way, occur during the daytime, so that's because people are not home and home invasions occur when people are not home, so that's -- if you're going to have home invasions that's going to happen during the daytime. Secondly, again, it is an area known throughout my career, I've been there thirty six years, as a area

42

that has home invasions more so than other areas. That to me is a pattern, so.
Q. Now, as you were stopped at the red light, was there some description in your mind of uninvolved larcenies and burglaries in that neighborhood?
A. No, I had no descriptions.
Q. Did you have any descriptions in your mind of suspects that the police were looking for for uninvolved larcenies and burglaries in that area?
A. No, I had no descriptions specific descriptions, no.
Q. During the week when you stopped Mr. Harrison, who else did you stop in the neighborhoods around that intersection to investigate whether they were involved in larcenies and burglaries?
A. No one else.
Q. Now, you would agree with the characterization in terms of Mr. Harrison that you engaged in a stop, is that right?
A. Contact.
Q. Well, initially it was certainly a contact?
A. He was free to leave.
Q. Well, when you were going and looking in his knapsack, was he free to leave at that point?
A. Yes.
Q. Even though you held his knapsack?

DEPOSITION OF CAPTAIN CURT VANDERKO
6-15-2015

A. No, I didn't hold it. He held it, opened it up.
Q. Are you saying that he was free to leave and he didn't have to show that to you?
A. Correct.
Q. Okay. When you directed the officer to take his photograph he couldn't leave without having his photograph taken, correct?
A. He could have left without a photograph.
Q. He could have?
A. Yes.
(Deposition Exhibit 7 marked at 10:32 AM)
BY MR. SCHAEFER:
Q. I'd like to show you Exhibit 7 and ask if you recognize that document?
A. It looks like a log, activity log.
Q. In terms of the identification of the log, would it be for Dennis Newton?
A. Yes.
Q. On the second page here, can you tell me what this material is here with the, under the notation 15:05-15:25?
A. That's the time.
Q. And does that indicate then that Officer Newton was at Fulton and Lake Drive during that time period?
A. It looks like he inserted the location electronically

instead of inserting the proper location where he was.
Q. Okay. And how would he have downloaded it electronically?
A. That's where the call was originally sent, so he downloaded it where the original call was at.
Q. Okay. And then, he was there to assist on the incident that we've been discussing with Mr. Harrison?
A. Yeah, if that number matches the police report. I don't know if it does.
Q. And then, the sentence on the bottom, can you read that for the record that what it says?
A. Assist 1901 on contact, FI times one Pablo Aguilar.
Q. And what does the 1901 reference?
A. That's Captain Vanderkooi's radio identifier.
Q. Okay. And is their radio identifier the same as your badge number?
A. No.
Q. So, each officer or sergeant or lieutenant or captain, when they're in the field, has a radio identifier?
A. Yes.
Q. Okay. And the FI, what does that refer to?
A. Field interrogation.
Q. Now, did the Police Department manual of procedure require Officer Newton to make a report of his contact with Pablo Aguilar?

A. It requires an officer to write a report on field interrogations. It doesn't have to necessarily be Newton. In this case, I think Luke wrote the report.
(Deposition Exhibit 8 marked at 10:36 AM)
BY MR. SCHAEFER:
Q. So, I'm showing you a document we marked as Exhibit 8. I'll give you a second to look at Exhibit 8, well, not a second more than that.
A. Thank you.
Q. As much time as you need.
A. Okay.
Q. Is it your -- so, that report was prepared by Officer Lucas Nagtzaam, is that correct?
A. Yes.
Q. And that covers the field interrogation that you conducted of Keyon Harrison, is that right?
A. Correct.
Q. And you're saying that also doubles as a report of Officer Newton's field interrogation of Pablo Aguilar?
A. He's covering the incident and is there to, the whole incident. He's writing it from, you know, I asked him to write the report and then he wrote also for Luke.
Q. Now, the Exhibit 3 regarding field interrogations from the manual of procedure, as far as reporting requirements, on page 8-1.7 F1 it indicates officer

shall complete an incident report with a new incident number in all cases where the reasonable suspicion for initiating the stop has not been alleviated and on stops which result in frisk or search situations, (note: This includes consent searchs on persons, vehicles, residents"). I'm showing you what I just read there. Now, pursuant to that policy I just read if Mr., if Officer Newton had searched Mr. Aguilar, he should have done a report on that search, correct?
A. The report was written -- this is all one incident.
Q. Okay.
A. We don't write two separate, we don't get two separate numbers, which is what you're implying what have to do for one incident. We have write it all on one police report with one number.
Q. But the material on the second page is where Officer Nagtzaam reports what happened, correct?
A. Yes.
Q. And shouldn't there be a, a section below that where Officer Newton writes what he did?
A. No, not if the officer, one officer can write for what happened and cover the whole incident.
Q. If Officer Newton searched Mr. Aguilar he should have put that in the report, right?
A. I don't even know if he was searched.

DEPOSITION OF CAPTAIN CURT VANDERKO
6-15-2015

47

Q. My question, though, is pursuant to the policy, if he had searched him he should have put it in the report, correct?
A. I don't know if he searched him or not, so I can't answer that question. And if he had searched him he would have to tell the other officer to put it in the report.
Q. So, that's a yes?
A. If he searched him he should have told the other officer to put it in the police report, yes.
Q. Okay. Now, I'd like to show you in Officer Newton's deposition on page nine, lines seven through nine there is a question asked, okay, and do you recall when you asked him what he was doing what he responded. Answer, he was just horsing around with his friend at the park. And I'll show you that so you can look at it. You can even take time and read more of the questioning, seven, eight, nine and ten.
A. Okay.
Q. So now, as you turned the corner after the light turned green and you proceeded east on Fulton, you saw Pablo Aguilar go east down Fulton on his bike, correct?
A. He was -- I last seen him eastbound while I was going eastbound, same direction. He's behind me. I make the right on Packard and make another right on Lake Drive.

48

Q. And it took you about twenty to thirty seconds to go around the block and encounter Mr. Harrison in the park?
A. That's just an estimate how long it takes.
Q. Now, you never saw Pablo Aguilar in the park with Mr. Harrison, correct?
A. No.
Q. So, this statement of Officer Newton that Mr. Aguilar reported he was just horsing around with his friend at the park, that couldn't be true, correct?
A. I never saw him in the park. I never saw him -- the last I saw him, and I have never seen him ever again, was him going eastbound behind me as I'm making a right onto Packard and then coming back westbound on Lake Drive.
Q. So, to be clear, that statement is not true, correct?
MS. REWA: Objection. It's outside the scope of this witness's knowledge, personal knowledge.
THE WITNESS: I don't know if that's true or not.
BY MR. SCHAEFER:
Q. Well, in the time you were there, did you see Aguilar horsing around with Harrison at the park?
A. Not inside the park.
Q. Okay. You just saw them on the corner?

49

A. I saw them on the sidewalk across Fulton, and that's about the last time I ever saw them.
Q. Okay.
A. Yeah.
Q. So, next Officer Newton was asked, this is his transcript, page eleven, line four through seven, question, and you indicated earlier that you verified his story, what was the story that you verified. Answer, they were chasing birds in the bark or chasing birds or a bird. Now, that's not true, correct?
MS. REWA: Objection. Outside the realm of this witness's personal knowledge.
THE WITNESS: What's not correct?
BY MR. SCHAEFER:
Q. It's not true that they were chasing birds in the park or chasing birds or a bird, correct?
A. I didn't see Mr. Harrison chasing a bird. I didn't see a bird, so -- and I didn't see ever Pablo chasing a bird. Whether they were chasing birds in a park that day in another park or that park or two weeks before chasing birds I can't say for sure.
Q. Now, the transcript that you have read relates to Officer Newton's encounter with Pablo Aguilar during that incident, correct?
MS. REWA: Objection. Outside the knowledge of

50

this personal, personal knowledge of this witness. There's no caption. There's no way he can know.
THE WITNESS: What's the question?
MR. SCHAEFER: Can you read it back?
(Court reporter read question back)
THE WITNESS: You're asking me to read a transcript and then make some assertions. I can only tell you what I saw and what I heard. I can't tell you what somebody else told you in a deposition.
BY MR. SCHAEFER:
Q. Okay. So, you didn't see Harrison and Aguilar in the park?
A. Nope.
Q. You didn't see the two of them chasing birds or a bird?
A. No, I didn't see a bird. I saw behavior that looked suspicious.
Q. If Officer Newton said they were chasing a bird, that would not be true, correct?
A. That's hearsay.
Q. Be honest with me, that's not true, correct?
A. What?
Q. For Officer Newton to say that Aguilar said they were chasing a bird or birds in the park?
MS. REWA: Objection. This is an improper impeachment procedure. This isn't -- the statement

you're trying to impeach is not the statement of this witness. This witness was not present in the deposition. There's prior testimony that this witness did not read deposition testimony in preparation for this, so I object to this procedure.

THE WITNESS: What's the question?

MR. SCHAEFER: Read it back.

(Court reporter read last question back)

MS. REWA: I'm also going to object that he doesn't know what, he does not have personal knowledge of what Aguilar would have told him. Go ahead and read it back to him again.

(Court reporter read last question back)

THE WITNESS: So, your question is if Pablo had said they were casing birds in the park and told Newton, what is my belief if it was true or not, is that your question?

MR. SCHAEFER: No.

BY MR. SCHAEFER:

Q. My question is this --

A. I'm getting it out of the context, go ahead.

Q. My question is this, I'm talking about the facts, okay, I'm not talking about the person representing the facts. What I'm saying is in terms of my question Officer Newton indicated that Pablo Aguilar told him

that he was horsing around in the park with Keyon Harrison and they were chasing a bird or birds, okay. Now, from your personal knowledge there that day, it's not true that Aguilar was in the park with Harrison, correct?

A. Based on what I saw, no, I didn't see him in the park.

Q. And it's not true that Aguilar and Harrison were chasing birds from what you saw?

A. From what I saw, that's not true.

Q. Okay.

MS. REWA: Is now a good time take a break, a five minute break?

MR. SCHAEFER: Sure.

(Off the record at 10:56 AM)

(Back on the record at 11:08 AM)

BY MR. SCHAEFER:

Q. I had one last question related to Officer Newton. He indicated in his deposition there's no written policy as far as when I shall or not shall search somebody, specifically, in this case pertaining to this case. To your knowledge, does the department have policies that guide officers as to when they should or shouldn't undertake a search in a particular case?

A. There's discussion of that in the field interrogation about searchs and the manual of conduct talks about

abiding by the state statutes and the constitution.

Q. The field interrogations part of the manual, that's Exhibit 3, correct?

A. Yes.

Q. And looking at that with regard to the topic of -- on page 8-1.7 where it talks about F, frisks, I'll give you a second to look at that. You would agree that under the policy that we're looking at, Exhibit 3, there was no basis for a frisk of Keyon Harrison on that date, correct?

A. There's no basis to do it without his consent. You can frisk somebody if you have those facts against their consent. That's what really that procedure is about.

Q. Okay. So, on that particular occasion when you were there with Keyon Harrison, there was no basis to frisk him without his consent?

A. There was no basis to believe that he had a weapon, yes, I agree.

Q. Okay. And is it fair to say -- or let me withdraw that. Were you doing a preliminary investigation of criminal activity on that date?

A. Could you define criminal, what you believe to be preliminary investigations? Is that based on our procedure, is that what?

Q. Yes.

A. Can I see it? What's the question again?

Q. In the incident with Keyon Harrison, were you doing a preliminary investigation?

A. If you were to believe that preliminary investigation is one where you get called by a citizen or you get called for service and you go there and do an investigation that's, basically, what I believe is a preliminary investigation. In this case, it was not call by a citizen. It was not a call for service. I initiated it. It was a contact by me, which is covered in field interrogations.

Q. Okay. So, you would agree there was no reported criminal incident that you were responding to?

A. No incident related to this, that it, no.

Q. Okay. Were you reporting a criminal incident when you put out over dispatch that you wanted additional officers to assist you?

A. I was reporting suspicious activity, and I wanted it investigated.

Q. Did you broadcast a 1063?

A. I broadcast to look for the Hispanic male on a bicycle carrying the object.

Q. Okay. And just for the record, how do you define a 1063?

A. It's an old numbers identifier that we don't use

DEPOSITION OF CAPTAIN CURT VANDERKOOI
6-15-2015

55

anymore, which shows your, both of us that we're, few people know what a 1063 is. It's a broadcast where somebody that needs to be stopped for an investigation.
Q. Okay. Did you play a role in developing the, the officer training task materials that we looked at, which were Exhibit 4 there?
A. I did not make this document.
Q. Okay. You weren't on a committee that developed it or anything like that?
A. I'm on the manual procedures committee, but I'm not on. This would have been a document committee, probably by training check.
MR. SCHAEFER: Okay. I don't have any more questions regarding the Keyon Harrison incident.
MS. REWA: Okay.
MR. SCHAEFER: Do you want to do any questions you have in terms of, if you have any, regarding that incident and then I move on to Denishio Johnson or do you want to take them all at the end?
MS. REWA: Well, I've got some questions specific to the incident, but.
MR. SCHAEFER: We're off the record.
(Off the record at 11:16 AM)
(Back on the record at 11:17 AM)
BY MR. SCHAEFER:

56

Q. Captain, we're changing focus here now, and I was going to ask you questions about an incident involving a Denishio Johnson, which took place on August 15, 2011. Do you recall what your assignment was that day?
A. I was captain commander of the southeast service area.
Q. Now, the incident took place at the Michigan Athletic Club, is that correct?
A. Yes.
Q. And that is actually within the boundaries of the service area?
A. Yes.
(Deposition Exhibit 9 marked at 11:24 AM)
BY MR. SCHAEFER:
Q. And I'm going to show you a document marked as Exhibit 9, and direct your attention there to a paragraph headed Captain Curtis Vanderkooi, and if you, why you go ahead and read that, please?
A. Yes.
Q. Okay. Do you see any errors in that paragraph?
A. No.
Q. Okay. Do you recall where you were when you heard the radio traffic?
A. I heard that radio I was sitting in my office. I heard the radio traffic of a call going out to the MAC.
Q. Okay. And what did you do then?

57

A. Well, my office is downtown and it peaked my interest, because we have had a multitude of larcenies from vehicles from the MAC from the day care next door and also in the neighborhood. So, I didn't go out right away, but I had things to wrap up. But then, I went and drove out that way and, which is kind of generally what I do on that day and time. I believe that was close to my lunch hour. It doesn't matter. I drove out there. So, I got there like, takes twenty minutes to drive out there with traffic, maybe thirty minutes after it all, maybe more after it first came out.
Q. So, you went to the scene, specifically, to do what?
A. I just wanted to see what would happen.
Q. Okay. And what did you observe when you first arrived?
A. When I got there they were wrapping up. I did not see Mr. Johnson. I was, I believe was gone when I arrived, so I talked to Officer Edgecomb and Sergeant Bargas and I asked them what happened.
Q. And what did Sergeant Bargas tell you?
A. He told me that they had had the call and they were looking at it as him being a suspect in shopping, so to speak, the parking lot, looking for cars to break into, and that he also was, had did the same thing at the day care next door. And they had a witness that identified him as the person who was looking as he's walking

58

through the parking lots, and they told me they found him nearby. And they me him they had gotten a photograph of him and also took his, got his fingerprints, essentially.
Q. Did you tell Sergeant Bargas okay?
A. I approved what he did.
Q. Okay. What did Officer Edgecomb tell you?
A. Pretty much the same story what happened, I mean, they were, we were talking together when this is -- when I went to talk to Bargas, he's there, so, same story.
Q. Okay. So, what did you do at that point?
A. Drove away.
Q. Okay. Did you do anything on the scene there in terms of directing the officers or the sergeant to do anything?
A. No, it was all over with by the time I got there.
Q. Okay. Did you do anything in terms of follow up?
A. Yes.
Q. And what was that you did?
A. I, that day or the next day I told IBO, I don't know if I e-mailed them or I called them on the phone and asked them to compare those prints with any known latent prints found at the scene of other incidents of larceny from vehicles in that area.
Q. Did you talk to anyone in particular?

DEPO TION OF CAPTAIN CURT VANDERKO
6-15-2015

59

A. I don't remember who it would be. I don't remember if I e-mailed them or talked to them, but if I would have done it would have been with Cecile.
Q. That's Cecile Herald?
A. Yes.
Q. And then, what did you do next?
A. That's it.
Q. Did you ever learn the results of the print comparison?
A. I learned that either wasn't a match or the quality of our prints weren't good enough or the quality of the fingerprints of the crime scene weren't good enough to make a comparison.
Q. What did you do after you learned that there was either no match or the prints weren't of adequate quality to make a print comparison?
A. I didn't do anything further related to this incident.
Q. Did you direct anyone to add Denishio Johnson to the pointer system?
A. No.
Q. Now --
(Deposition Exhibit 10 marked at 11:29 AM)
BY MR. SCHAEFER:
Q. What information was it from the incident that prompted you to suggest that Denishio Johnson's prints should be compared to other larcenies from vehicles at the MAC?

60

A. He was walking through the MAC and the day care looking into cars, which is consistent with what a larcenist from a vehicle would do, so therefore, that behavior was enough for me to believe that further investigation by comparing latents would be a good investigative step to make.
Q. Had there been -- well, at the point when this occurred on August 15, there hadn't been any recent larcenies from cars in the lot there, correct?
A. Not from the lot. There's been in the area. There's been larcenies that whole year in the neighborhood.
Q. What do you mean by the area?
A. That whole area of Burton, Breton, down to Woodmeadow up to Woodcliff.
Q. So, those were from businesses?
A. No, those are home -- people parked cars on their street as well as in their driveways, and also, of course, the businesses that we're talking about here, which is the MAC and the day care center.
Q. Okay. So, my question, though, was those reports of larcenies from cars, were from cars that were patronizing businesses, as well as cars at residences?
A. Yes.
Q. Okay. Was there a particular time of day that was being observed as a pattern for those larcenies?

61

A. The ones from the MAC and the ones from the day care are predominantly daytime.
Q. And the one from the residences were?
A. Predominantly nighttime.
Q. So, simply because Denishio Johnson was walking through the parking lot and he was observed looking into cars, according to witnesses, you thought that was appropriate that Sergeant Bargas took his full set of fingerprints?
A. He consensually obtained the finger prints, so he obtained the finger prints, it is not uncommon to do, to ask for elimination prints as well as DNA eliminations. We ask people what we are focussing on for eliminations for, like I said, DNA and fingerprints. It's a common investigative tactic to either incriminate or eliminate. This could have led, as it did, eliminated him as a suspect, so.
Q. So, you thought it was appropriate for Sergeant Bargas to get his fingerprints?
A. Yes.
Q. And you also thought it was appropriate for Sergeant Bargas to get his photograph?
A. Yes.
Q. But getting back to my question with regard to the Michigan Athletic Club, when this incident took place

62

on August 15, 2011, there hadn't been any recent larcenies from cars at that point, correct?
MS. REWA: Objection to the word recent.
THE WITNESS: Either one or two months prior there had been a rash of them at the MAC.
BY MR. SCHAEFER:
Q. Okay. And would those have been in April and May?
A. Yes.
Q. Now, in the cases that had happened in April, in fact, there was no description of any suspect, correct?
A. I'd have to look at the police reports to answer that question.
(Deposition Exhibits 11-13 marked at 1:35 PM)
BY MR. SCHAEFER:
Q. Just so the record is consistent, we've marked the incident report involving Denishio Johnson with an Exhibit 10 sticker, correct?
A. Yes.
Q. And turning to these three reports from early April 2011 my question was, it's true that in those reports there's no suspect description, correct?
A. The three reports, 11, 12 and 13, there is no suspect descriptions, which would be the incidents in April.
Q. And, in fact, when you talked to Sergeant Bargas, he did not indicate that Denishio Johnson matched the

description of any suspect, correct?
A. He directly matched the description of a person that day suspiciously looking in cars in the parking lot and he was trespassing on MAC property as well as the day care, and he was identified by a witness that called and said that's the person who was looking in the cars trespassing.
Q. And the report of a person earlier that day, what was it that person did?
A. What report are you referring to?
Q. The one you just referred to in your answer.
A. What I'm talking about here, your Mr. Johnson, that report.
Q. Okay. You're not talking about a report of someone else earlier in the day prior to Mr. Johnson?
A. No, I'm talking about Mr. Johnson matched the description that's why, he was looking in cars as though he was looking for something to take. He was trespassing on private property. He matches the description of the call from that case. He was stopped and identified near by. That was Mr. Johnson. That's why he is a suspect in larcenies from vehicles.
Q. Okay.
MR. SCHAEFER: That does it for me.
MS. REWA: Okay. I'm going to jump back to the

incident with Mr. Harrison then.

CROSS-EXAMINATION

BY MS. REWA:

Q. Captain Vanderkooi, when you made -- what vehicle were you driving during the incident with Mr. Harrison?
A. I was driving a tan, unmarked Crown Vic, four door sedan, had no police markings at all.
Q. Why were you driving a tan, unmarked, four door vehicle?
A. That, that's my assigned vehicle that the Police Department gives me to drive.
Q. What were you wearing on the day that you had contact with Mr. Harrison?
A. I was in plain clothes. I was not wearing a uniform. I was wearing a button up short sleeved shirt and khakis.
Q. Why were you not wearing a uniform?
A. I don't remember why, because I almost always do.
Q. Do you work in -- do you work out of uniform on the times other than this Harrison incident?
A. Yes.
Q. But it sounds like you usually wear your uniform?
A. Almost always. If I'm working a full-time, full day eight hours, or now ten, I would wear a uniform. But if it was a part-time, which it might have been, maybe

I was going to work, I would be in plain clothes.
Q. The other officers that responded on the scene, and specifically, were with Harrison, do you recall what Sergeant Labrecque was wearing?
A. He was wearing a uniform, police uniform.
Q. And Officer Nagtzaam?
A. He was wearing a police uniform.
Q. Did you see Officer Newton at the time he contacted Mr. Aguilar?
A. No.
Q. Would you have knowledge of what Officer Newton would be wearing that day?
A. I didn't see him.
Q. Okay. As part of your contact with Mr. Harrison, did you ask him his name?
A. Yes.
Q. And did he tell you what his name was?
A. Yes.
Q. Did you ask for any identification?
A. Yes.
Q. Did he give you any?
A. No.
Q. Why is that?
A. He said he didn't have any.
Q. Why did you ask for a photograph of Mr. Harrison to be

taken?
A. For preservation of identity. We often get people we encounter in the City of Grand Rapids who don't tell us the truth about who they are and they are trying to evade responsibility for whatever misdeeds that may be involved, so they'll give you a wrong name, a false name, false date of birth.
Q. Is there any --
A. What was your question? I don't know if I answered for it fully.
Q. Why would you have asked somebody to take a photograph of Mr. Harrison, so you gave preservation of identity?
A. Right. The second one would be it is, it's a collection of a what does that person look like at that point in time, that day and at that time, what was he wearing, what did he look like, could be what, you know, facial features, was he wearing glasses, what kind of facial hair did he have on his face. All that is preserved so that if later down the road we become aware that a crime was committed within near proximity within near period of time, that photograph would be used to say he matches the description of a suspect that we stopped and this crime happened nearby and this crime, you know, has a description similar to it, and therefore, the photograph would be like evidence to

DEPOSITION OF CAPTAIN CURT VANDERKOOI
6-15-2015

show what he looked like at that point in time. And well, thirdly, of course, well, that's part of the field interrogations, so I think I covered it.

Q. Did you ask Mr. Harrison for permission to take his photograph?

A. I don't remember asking for permission for that. I asked, well, I remember asking consent to look in his knapsack, and then I told him is it okay if we take a picture, and he said yes.

Q. What would have happened if he said no?

A. We wouldn't have taken one.

Q. What would have happened if he said no, you can't search my knapsack?

A. We would not have searched it.

Q. Okay, let me skip backward to the incident with Mr. Johnson. Were you driving the same unmarked vehicle that day?

A. Yes.

Q. What were you wearing that day?

A. A uniform.

Q. Correct me if I'm wrong, but I believe you indicated that you spoke with Officer Edgecomb and Sergeant Bargas on the scene, is that accurate?

A. Yes.

Q. Did you speak with anybody else on the scene?

A. No.

Q. At the time you arrived on scene, was anybody other than Sergeant Bargas or Officer Edgecomb there?

A. I don't remember if anybody else was there.

Q. Okay, I want to segue into both, again, I guess, pertain to both cases. Are you aware that plaintiffs Mr. Harrison and Mr. Johnson are alleging that you have based -- you based your actions in those instances based on their race?

A. Yes, I remember reading what he submitted to the court and said the only reason I stopped Mr. Harrison is because he was black and it was the only reason.

Q. As it pertains to Mr. Harrison, did his race play a factor into your actions that you took on that date?

A. No.

Q. As it pertains to Mr. Johnson, did your actions on that day, did his race have anything to do with your actions on that day?

A. No.

Q. Are you aware that the plaintiffs in these cases are alleging that there are eleven additional allegedly innocent people who have been photographed and printed?

A. Yes.

Q. And or printed, I should say. Have you reviewed the incident reports that were so identified as being the

ones?

A. Yes.

Q. Of people?

A. Yes.

Q. I'd like to go through those incident reports with you. Why don't we mark all these at once?

(Deposition Exhibits 14-23 marked at 11:55 AM)

BY MS. REWA:

Q. So, Captain, I'll have you take a look at Exhibit 14, are you familiar with that document?

A. Yes.

Q. And what is that?

A. Well, it's a list of twelve names, individuals that Mr. Schaefer says are other people, innocent people who were finger -- photographed and fingerprinted that I am somehow related to these incidents.

Q. Okay. So, I want to take a look at the incident reports listed there on the, specific incidents listed there on this. So, let's start with what's been marked Exhibit 15, is that an incident report?

A. Yes.

Q. Can you read out what the incident report number is?

A. 08-057465.

Q. It appears that the incident report marked as Exhibit 15 corresponds to the first line on Exhibit 14, Mr.

Thomas Rice, does that appear accurate?

A. Yes.

Q. Can you tell me your involvement with the incident described in Exhibit 15?

A. Sure. Back July 11th, almost, it was 23:23 hours. It was almost 11:30 PM. I was working with Officer Nemeyer, and we were driving my car. And we went over to Camelot Woods apartment complex, because we had some complaints of direct dealing going on over there. And we were working a special overtime assignment to work on the problem areas in my service area.

Q. And how did you come to interact with to Thomas Rice?

A. We were driving up close to 3811 Camelot Drive and we could see in the dark shadows two individuals who were, appeared to us they were trying to stay in the darkness to, just looked suspicious that they would be staying there, and we felt well, let's get out and talk to them. Because we have a lot of complaints over there, violence going on at Camelot Woods, including drug dealing, so we thought we would get out and talk to these two individuals.

Q. What happened when you got out of the car?

A. As soon as we got out of the car, Mr. Collier proceeded to immediately run, and he ran, Officer Nemeyer pursued him. I grabbed out and grabbed Thomas Rice.

71

Q. And, to your knowledge, did Officer Nemeyer catch up with Mr. Collier?
A. Yes.
Q. What happened when he caught up to him?
A. He arrested him and they did a search of the path where he had ran in the woods and they found a handgun.
Q. And Mr. Thomas, what happened with Mr. Thomas?
A. Mr. Thomas was identified, we took a photograph of him, and then we released him.
Q. Why did you take a photograph of Mr. Thomas?
A. Because he was with the person with the gun, and again, we take a photograph to preserve what he looked like at that time in case both of them have -- they could have done a crime prior to our arrival, and that's why the gentleman with the gun ran. Now, we have preserved what he's wearing by taking a photograph of Collier, who we're allowing to go, so that if we get any reports coming in that they committed a crime that night we would have this evidence on what he was wearing. And secondly, it is also identification for your purposes.
Q. The incident report does not indicate that Mr. Thomas was fingerprinted, was he fingerprinted?
A. No.
Q. The incident report also identifies Mr. Rice as being a black male, were your actions on that night based upon

72

the fact that he is a black male?
A. No.
Q. Let's move on to Exhibit 16, if you can read the incident report number for me on the top of that one?
A. 08-0609272.
Q. And does this incident report number correspond with the line item identifying Julio Santiago on exhibit 16?
A. Yes.
Q. Have you reviewed this incident report identified on Exhibit 16?
A. Yes.
Q. Can you tell me your involvement with this incident report involving Julio Santiago?
A. Yes, I went on a call for service that was a B & E in progress at an address on Darwin, and as I'm riding up I saw Julio riding away from the incident in the near proximity of B & E, and so, I thought I would stop him to make, to determine whether he was involved or not. And I did stop him and we waited for the witnesses to look at him, and they said that he was not involved.
Q. Now --
A. That they saw it being in the involved in the B & E.
Q. Now, the Exhibit 16 incident report indicates that the RO, that's responding officer?
A. Yes.

73

Q. That the responding officer took a picture and print of Julio, to your knowledge was Julio, was Julio photoed and printed?
A. Yes.
Q. Did you do that?
A. No, Barry Bryant did it, and we did it, he had no ID, so we wanted to, you know, verify or keep as evidence who he claimed he was.
Q. Okay.
A. In case we found more witnesses later who would say that there was a lookout or somebody on a bicycle. We would have what he looked like at that point in time.
Q. Now, Exhibit 16 references in the narrative another incident report 08-60968. Have you had a chance to review that incident report?
A. Yes.
Q. Okay. That's actually Exhibit 17, which I'm handing you now. So, Exhibit 17, is that, does that further detail the incident for which you were investigating Mr. Santiago?
A. Yes.
Q. Can you tell me a little bit about the particulars of this burglary, B & E that is described in incident 08-060968?
A. It was a situation where this abandoned, well,

74

unoccupied home was the -- being used by neighborhood juveniles, go inside and smoke marijuana and use other drugs, and so, some witness had seen somebody crawling into it through a window, so he called.
Q. Did the witness provide any description as to the people entering into the home?
A. Yes.
Q. What was that?
A. Three black males, with one going inside.
Q. Was there any more specific detail as to the particulars of any one of these individuals that were identified as getting into the home?
A. No, not, not in the broadcast.
Q. All right. So, Exhibit 16 actually identifies Julio Santiago as a white male, if you take a look at Exhibit 16? That's 17, look at 16.
A. White male, yes.
Q. Why did you stop a -- why did you ask -- did you specifically stop Julio?
A. I saw him first and stopped and asked him to stay, stay and not leave.
Q. Okay. Can you describe Mr. Santiago's physical features to me?
A. Yes, he's a Hispanic male, and he has very, I would say, darker complected Hispanic male.

DEPC TION OF CAPTAIN CURT VANDERKC
6-15-2015

75

Q. Okay.
A. I might add that that house that a group of juveniles have been hanging around there, so if when you see somebody driving away on a bike like he wants to get away from the police, that arises my suspicion that he might be involved or been in there.
Q. Lets's move on to Exhibit 18, which I'm giving you now. Can you tell us, read out what the incident report is on Exhibit 18?
A. 08-076633.
Q. Does that incident report correspond with the incident report listed with the line item including the name. Marcellus Manning on Exhibit 14?
A. Yes.
Q. Can you tell me what your involvement was with the incident described on Exhibit 18?
A. Yes, on September 8 of 2008 around 3:30 PM there was a call that went out retail fraud in progress with them pursuing a female suspect. And she ran across, this is out at the mall, Centerpointe Mall, and she ran across a parking lot, crossed 28th Street, went to the bookstore. And we went to the bookstore and I watched the back door from, and then an officer inside found the suspect, retail fraud suspect inside. She was a female.

76

Q. How did the -- do you know how the police came to have contact with Marcellus Manning?
A. The security personnel related to the original call told us they suspected there were black males also involved and that they might be in a car, and they located a car, inside the car was Mr. Manning. And the car, by the way, had its license plate covered.
Q. Was -- were you involved in the actual making contact of Mr. Manning?
A. No.
Q. Were you on scene and by the car when the police officers made contact with Mr. Manning?
A. No.
Q. The incident report indicates that Mr. Manning was P and P'd and released, did you have any involvement in directing officers, that officers to photo and print Mr. Manning?
A. No. He also -- Mr. Manning had the ID of his brother, so he was giving false ID.
Q. Let's move on to Exhibit 19 I'm handing you, can you read to me incident report number on that one?
A. 080893554.
Q. Does that incident number correspond with the line item on Exhibit 14 listing the name Ricardo Williams?
A. Yes.

77

Q. Can you tell me about your involvement with the incident involving Mr. Williams?
A. Yes, I was sitting in my office. I got a phone call from Officer Nemeyer.
Q. And what was the nature of the phone call?
A. He told me he had stopped a vehicle and the driver had no ID, the passenger had no ID. He found some kind of pills that he believed needed a prescription or to be legal to possess, and he said -- he asked permission to cite the person and release them rather than arrest them. And I gave him permission to release them pending further investigation, so, he did P and P's on both of them.
Q. When you're talking about permission for citation versus arrest, which individual are you referring to?
A. Well, the driver could have been arrested for not -- I think he had double suspensions, and that's why he had no ops on his person, didn't have an ops.
Q. When you say ops, is that a?
A. Operator's license.
Q. And what did you tell Officer Nemeyer as to what he could do?
A. Well, because of the fact that there was pills that could be Vicodin or OxyContin, untested that they could have been engaged in some kind of criminal enterprise,

78

the two of them. So, I said make sure you've got ID or, do P and P's on them, because you're going to cut them both loose. We'll send the pills to vice and they'll do a lab analysis, and then we'll determine if we need to charge either one or both of them with violation of controlled substance act.
Q. Now, the incident report identifies both males in here, but particularly identifies Mr. Williams as a black male, were your actions as they pertain to this incident described in Exhibit 19, did Mr. Williams's race play any factor into your actions?
A. No, I don't even -- pretty certain he didn't even discuss race or he called me, it wasn't race discussed at all. It was the facts what the situation is and he was looking for approval to release. And it was related to the fact that we were very short on the street for calls for service, and that's why I said, you know, go ahead, let him go and stay open for more calls for service. We'll backtrack and determine if those pills are illegal.
Q. Let's discuss what's been marked as Exhibit 20, handing you that one. Can you read out the incident report number for me?
A. Incident number is 09021433.
Q. Okay. And does that incident number correspond with

79

the incident numbers listed for the line items identifying by name Marco Gonzalez Denoso and Julio Castillon on Exhibit 14?
A. Yes.
Q. Can you tell me your involvement with the incident described in Exhibit 20?
A. Yes, there was a murder attempt that happened on March 25, 2009, 6:31 PM and the call went out. I didn't hear it, but I was probably at home, but there was a shooting. Officers went to the scene on Jerome. They learned that there had been one gang, Hispanic gang that was on the porch on a house on Jerome and another opposing Hispanic gang walked by, started taunting each other and then the ones that were on the porch of that address on Jerome, at least one, and also described, there was actually descriptions in the regional broadcast of two armed men chasing the other group and the suspects had come from the porch of 1868 Jerome, chased the other group of Hispanics who were walking past and ended up pursuing one individual in particular. And then, one of the ones with the gun shot and hit the victim in this case, the murder attempt victim. Then, of course, the suspects all temporarily disappeared. The last known of where they were was in 1868 Jerome. So, the officers that were

80

there surrounded the address, established an inner and outer perimeter and called for special response team, and it was an hour later that special response team got there. And then, probably another thirty to forty minutes before I was called and I responded from my home to the incident. And I became this case's critical incident, and I became the incident commander of this critical incident.
Q. Why were you the incident commander?
A. Well, according to procedures the captain that's in charge of the service area becomes the incident commander on his, once he gets on the scene and takes over and he's in charge of the whole incident.
Q. The incident report indicates that Marco Gonzalez Denoso was photographed and printed, do you know why that would have been?
A. Well, he was with the house they surrounded on 1868 Jerome. He came out of the house before I even was on the scene and so did the other individual both came out individually as, and I believe it was a long period of time before they actually came out. And they were secured and identified as suspects, because they were part of the suspects that were on the porch at the beginning, and we had two people with guns. So, we knew who the shooter was, but we weren't sure who the

81

other people was. If you look in the report it says the descriptions. So, it's a dynamic situation where an investigation has just begin, a preliminary investigation, you need to know exactly who is in the crowd that was in the house, what did they see, how were they involved, are they suspects, did they have weapons. And an investigation like this is preliminary, but two days from later, there might be more witnesses that may come up and they might name names or say give descriptions of who else may have had guns, and therefore, preserving what those individuals had as they came out of the suspect's house, what they wore and preserving what they wore would be crucial in an investigation of this nature. Plus their identity is very important. If they didn't have ID, of course, you want to know who they are, because they are either, they are suspects or witnesses to be determined as the investigate unfolds.
Q. So, you explained the reason why Mr. Marco Gonzalez Denoso was P & P'd, so that was, was the reason that he was P & P'd the same as why Julio Castillon was P & P'd?
A. Yes.
Q. Did you -- were you actually involved in the photo and print of either of those individuals?

82

A. No.
Q. Did the race or ethnicity of either of these individuals play any part into the actions of the officers?
A. No. Well, they matched the descriptions from as being all the people involved in this case are Hispanics. The suspects were -- the witnesses were and the victim was Hispanic, so it matched the description that was given to us by people who called us for service.
Q. I'm going to move along to Exhibit 21, hand you that one. Can you read out the incident report number to me?
A. Yes, 10-005468, and it happened on January 25, 2010 at about, started out at 6:15 PM, and it was a murder attempt 1207 Alger.
Q. Okay. And does that incident report Exhibit 21, number 10-005468, does that correspond with the incident report numbers in the line items with the individuals names Keyano Bledsoe and Tony Wimberly and Johnny Walter?
A. Yes.
Q. Can you tell me what was your involvement in this incident?
A. This incident, I was either at home or on my way home, and this occurred over, I heard it over the radio. I

83

believe shots fired at 1207 at Alger Southeast, a victim dove through the front window, picture window to escape from his assailants. The victim who got shot ran eastbound down Alger and two to three black males ran westbound, and that was based upon several witnesses, who said, who saw the incident. And they also described, one witness described the suspects black males get into a gold vehicle. And they had more descriptions than I gave now on the vehicle.

Q. So, what was your personal involvement with, you said you were contacted from home, what did you do once you were contacted?

A. I'm not sure if I was home or if I was in en route home, but I know I was in plain clothes. I turned around and went that direction, went to the call and supervised the investigate that night for a few hours. And then I think I gave a media, the media was all there, so I gave a statement to the media. And I can remember it was a very cold, snowy day. I can remember the picture window and the guy jumping through it was kind of an interesting situation.

Q. The incident report indicates that the three individuals identified on Exhibit 14, that's Mr. Bledsoe, Wimberly and Walter, that they were photographed and printed, were you involved in that

84

photographing and printing?

A. No.

Q. Did you direct any of the officers to photograph and print those individuals?

A. No, that was almost twenty-three hours after the incident at a different location, 1-25 of 2010 at about 5:00 PM, so it's almost twenty-three hours since the crime occurred. One of my officers that works this area stopped a vehicle beginning at Griggs, who matched the description. And he stopped -- Officer Nemeyer called the investigator assigned to the case and he asked him what he wanted him to do. He had these gentlemen in the car matching the description and had the car that matched the description, that was more the key, and the detective assigned to the case Bullat, Detective Bullat, Andy, I guess called him and he was told to do a P and P and to release them.

Q. Did you direct Detective Bullat to P and P these individuals?

A. No.

Q. Let's move on to --

A. There's three in that case, correct?

Q. Correct. Exhibit 22, can you read for me the incident report number identified on Exhibit 22?

A. Yes, it's 11-0896864.

85

Q. And does that incident report number correspond with the line item on Exhibit 14 identifying Michael McCoy?

A. Yes.

Q. Can you tell me about your involvement in the incident described in Exhibit 22?

A. Yes, I was driving by 1810 Breton, which is over there at Breton Village Mall. I saw this individual walking around, and he matched a photograph a detective was circulating that had been involved in a taking of stolen credit cards and he had been, he was running up thousands of dollars worth of credit cards kind all over the metropolitan area. The incident itself where the stolen car was taken from occurred on 29th Street near Breton, so the, it was logical I saw -- he matched the description and looked, or I should say, he looked like the photograph of the person that was seen using the stolen credit card, which the detective had put out to all sworn personnel by e-mail.

Q. And so, what did you do when you observed this person?

A. We talked to him. He said he wasn't involved, but because he looked like the picture we asked permission, he consented, and we took a photograph of him.

Q. And now, the incident report in Exhibit 22 makes reference to another incident report, 11-94808, have you had a chance to look that one over? I'm going to

86

hand you Exhibit 23.

A. I forgot to add there, too, the 1810 Breton case, he had no ID on him.

Q. Have you reviewed the incident report number I just handed you?

A. Yes, it's 11-094808.

Q. And that describes the credit card, the initial theft of the credit card?

A. Yes.

Q. Now, when you said that the individual identified in Exhibit 22, Mr. McCoy, matched the photo, what do you mean he matched the photo?

A. He, the photograph shows a person wearing a blue baseball cap with a design on it and wearing glasses and a certain build. And look at that photograph, looking at the individual that was walking there there was a lot of very similar features. He was wearing a cap that I thought matched and the glasses, and he, in all, had the same physical build and the same color of skin. So, I thought that he matched it, I thought it was worth getting a photograph and sending it to the investigator for follow up.

Q. Now, Exhibit 23 identifies the suspect as L-N-U, F-N-U, what does that mean?

A. Last name unknown, first name unknown.

DEPOSITION OF CAPTAIN CURT VANDERKOOI
6-15-2015

Q. And the race of that suspect is identified as white in Exhibit 23?
A. Correct.
Q. But Mr. McCoy in Exhibit 22 is identified as black in the incident report, is that an accurate statement of what the incident report says Exhibit 22?
A. Yes, the, he's a very light skinned African American, and if you look at the photograph he matches it. The photograph, to me, is not necessarily a white male. It's light sinned black male, so that's why I came to the conclusion that it was worth taking the photograph for further investigation for elimination purposes or incriminating purposes.

MS. REWA: I don't have any more questions.

MR. SCHAEFER: I just had one question on Exhibit 18.

REDIRECT EXAMINATION

BY MR. SCHAEFER:

Q. I just wanted to clear up the second from last paragraph, the bottom of page 32 there, the individual with no ID did give his name of Marcellus Manning, is that correct?
A. Yeah, gave the name, but he had his brother's ID or something on it.
Q. Well, that's what I was wanting to clear up?

A. Yeah. He had no ID, he gave the name of Marcellus Manning, correct.
Q. And that was his name Marcellus Manning, right?
A. As best -- I can't say he was or not. It was never confirmed who he was.
Q. Well, the --
A. He said he was.
Q. The other person there Javonda gave the same name for him when asked, correct?
A. Yes.
Q. Okay. It did happen that Marcellus Manning had his brother's bank card in his wallet, right?
A. Yes.
Q. But he didn't pull the bank card out and say I'm Martae Manning, correct?
A. I wasn't there to, when they even interacted with him, so I'm not sure of all those details.
Q. Well, the report indicates that he had the bank card, right?
A. Yes.
Q. But the report doesn't indicate that he tried to pull the bank card out and claim it was Martae Manning correct?
A. No, it doesn't say that.

MR. SCHAEFER: Thank you. No further questions.

(Deposition ended at 12:30 PM)

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Shawn Breimayer, (CSR-6888) do hereby certify that the foregoing deposition consisting of 90 pages, is a complete, true and correct transcript of the deposition proceedings and testimony of Curt Vanderkooi held in this case on Monday, June 15, 2015; and do also certify that the foregoing transcript is a true and correct transcript of my stenographic notes of said deposition so reported and transcribed by me.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Dated: June 26, 2015

Shawn M. Breimayer, CSR
Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-2020

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

v CASE NO: 14-02166-NO
HON. JAMES R. REDFORD

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS, a Michigan
Municipal Corporation,

Defendants.

DEPOSITION OF SARGEANT ELLIOTT BARGAS
taken before Shawn M. Breimayer, Certified Shorthand Reporter, at the office of GRAND RAPIDS CITY ATTORNEY, 300 Monroe NW, Ste 620, Grand Rapids, MI, Wednesday, March 11, 2015, commencing at 2:09 PM, pursuant to notice.

APPEARANCES:

FOR THE PLAINTIFF: Bernard Schaefer (P40114)
161 Ottawa Ave Ste 502-D
Grand Rapids, MI 49503
(616) 272-4361

FOR THE DEFENDANT: Kristen Rewa (P73043)
Assistant City Attorney
300 Monroe NW Ste 620
Grand Rapids, MI 49503
(616) 456-4026

Reported by: Shawn M. Breimayer, CSR-6888

TABLE OF CONTENTS

DEPOSITION OF SARGEANT BARGAS
3-11-2015

(Deposition commenced at 2:09 PM)

SARGEANT ELLIOTT BARGAS

after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SCHAEFER:

Q. Please state your name for the record?
A. Elliot Bargas. E-l-l-i-o-t-t. B as in boy, a-r-g-a-s.
Q. And how are you employed, sir?
A. I am a police officer for the City of Grand Rapids.
Q. Now, you're a sergeant; right?
A. Yes, I am.
Q. Okay.
A. I am the rank of sergeant.
Q. Well, that's noteworthy, so. Have you ever given a deposition before?
A. No, sir.

MR. SCHAEFER: Okay. A deposition is an opportunity for the attorneys on a case to talk to somebody and have a record made of questions and answers. A couple ground rules involved. When you respond, please use yes no or some other audible response instead of a head nod or mm-hm or mm-mm.

THE WITNESS: Okay.

MR. SCHAEFER: Good. And then, if I ask you a question and it's not clear to you what I'm asking, will you please let me know that?

THE WITNESS: Okay.

MR. SCHAEFER: And then, please try to answer from your personal knowledge and try not speculate or assume or guess or things like that, okay?

THE WITNESS: Okay.

MR. SCHAEFER: Great.

BY MR. SCHAEFER:

Q. This deposition relates to a court case involving an incident that took place on August 15, 2011. Have you had an opportunity to review some of the materials related to that incident?
A. Yes, I have.
Q. Okay. And I, basically, want to ask you to start at the beginning and explain for me what you did, what you saw and heard and that. So, do you recall on that particular date how your attention first became alerted to the need to participate in whatever was going on there at 2500 Burton Southeast?
A. Well, it was over three years ago.
Q. Okay.
A. But I do recall a dispatch call, radio traffic of the witness seeing a subject in the MAC lot. The MAC lot is the Michigan Athletic Club. They were described as trespassing and looking into cars. That same witness provides clothing description, physical description, gender description and race.

Q. Let me stop you there, if you don't mind, because I have to break it down into little pieces?
A. Mm-hm.
Q. The dispatch call, do you recall who that person was that was making the dispatch call?
A. The complainant that called into dispatch I don't recall.
Q. Okay. And I want to kind of clarify for the record, so that I understand as well. When you say you're listening to the dispatch, your radio traffic, you can in that case sometimes hear the actual dispatch employees calling over the radio?
A. Mm-hm.
Q. Sometimes it's other officers, is that correct?
A. That's correct.
Q. So, when you say that you were listening to a dispatch call where a witness had seen a subject and described them, was that a dispatch operator or one of the officers on the scene or the actual witness?
A. It was the dispatch operator.
Q. Okay. So, what did the dispatch operator say that the subject was wearing in terms of clothing, do you recall?

A. Red sweater or shirt over jeans.
Q. Okay. And what was the physical description that the dispatch operator gave?
A. A late teens black male wearing red over jeans and again, you know, that part of it was vague. It was either a sweater, jacket or shirt.
Q. Okay. And the dispatch operator indicated that that information regarding the clothing and the physical description came from a witness at the scene?
A. Yes.
Q. Okay.
A. The witness and, the witness happened to be an employee of the MAC.
Q. Okay. So, you hear the radio traffic and it provides the information we just talked about, what do you do next or what do you hear next?
A. I then hear Officer Edgecomb saying that he sees someone matching that description just west of the MAC, and that he was going to make contact. So, I then start moving in that direction.
Q. Okay, let me stop you there. What was your particular assignment that day?
A. I am a police sergeant in the east service area, so I

7

was, I'm a supervisor over the entire service area of east.
Q. Okay. And were you the only sergeant on duty in the east sector that day at that time?
A. I am the only sergeant assigned, however, there were other sergeants that would have been on duty, but I don't recall who that would have been.
Q. But they would have been assigned to other sectors?
A. Yes.
Q. Okay. And so, and what was the reason that you started moving in that direction when you heard Officer Edgecomb state that he saw someone west of the MAC?
A. Well, prior to this incident I was also aware of previous burglaries in that MAC parking lot, and the subject that had burglarized vehicles there was seen walking or leaving south to, away from the parking lot, so I was responding to assist just in case there had been a foot chase or something to that effect.
Q. And you indicated that Officer Edgecomb said he saw someone fitting that description and he was going to make contact with them?
A. Yes.
Q. So then, after you started moving in that direction, what happened next?
A. He advises that he had contacted him, so the subject

8

didn't run. And while that, while I'm responding, the other officer, Officer Laudenslager, is looking for a second witness that had also called in. And that second witness ultimately identifies the subject that was stopped by Officer Edgecomb as also been seen in the lot looking into cars as though he was trying to do something. And again, I don't know exactly what the words were. I didn't speak to that witness. This was information that was given to me by the officers on the scene by the time I got there.
Q. Okay. When you started moving in that direction?
A. Yes, sir.
Q. Did you hear any other radio traffic before you arrived on scene?
A. I don't recall any other radio traffic.
Q. Okay. You indicated that Officer Edgecomb provided information that the subject did not run?
A. Well, he didn't say that. I'm, I responded just in case he was running, but he had contact with me.
Q. Okay.
A. So, he didn't say that the subject didn't run, he had contact with him.
Q. All right. So, after you start moving in that direction, then Officer Edgecomb, over the radio, indicates he makes contact?

9

A. Yes.
Q. Okay. And did you hear anything else over the radio from either Edgecomb or Officer Laudenslager before you got to the scene?
A. I don't recall if it was as I was arriving to the scene or as when I got there. But I never saw the second witness. I never saw the first witness.
Q. So, let's then get to the point where when you arrive on scene, what is it that you observe?
A. Officer Laudenslager is advising Officer Edgecomb over the radio that there's a positive identification by the second witness of the subject that was stopped by Officer Edgecomb as being the subject that was in the lot looking into cars.
Q. Okay. And at that point you're on scene near Officer Edgecomb?
A. Yes.
Q. Okay. And I didn't mean to put words in your mouth, I was just trying to clarify where you were. So, when you get to the scene, the first thing you do is travel to where Officer Edgecomb is?
A. Yes.
Q. And then, what do you see when you reach Officer Edgecomb?
A. I don't recall if the subject was sitting in the police

10

car with the door open or standing by the police car, by Edgecomb's police car. But again, I see the subject wearing the red over the blue jeans.
Q. And did he have handcuffs on?
A. I don't recall handcuffs.
Q. Okay. So, what is your perspective as far as the description of the subject? How would you describe him?
A. Approximately six foot, late teens to early 20s, black male, wearing a red over blue jeans. And I did speak to him. I saw a close up. He had tattoos on his right arm.
Q. Okay, let me take a step back, though. You arrive, he's either sitting in or standing by the police car?
A. Yes, sir.
Q. I asked you to describe his, him?
A. Mm-hm.
Q. What happens next in terms of who does what?
A. Well, he was identified as the subject in the lot.
Q. Okay.
A. So then, Officer Edgecomb is in the process of trying to identify who the subject is, and he, he tells me that the subject is 15 years old based on his statement, the subject's statement and that he lives on Burning Tree just south of the lot of the MAC.

11

Q. Okay. And then what happens next after that?
A. The, I speak to the subject and, you know, he admits to me that he was looking in, or I mean, that he was in the lot, but that he wasn't looking into cars. And I explained to him that's what the two witnesses believe that you were doing. And then, I speak to him, I ask him his name, again, his birth date. I ask him about his tattoos. And in looking at the subject, he appears older to me than his stated of 15 years old and.
Q. All right, let me take you a step back there, so we make sure we hit every point. At that time you're speaking to the subject, he admitted he had been in the lot, but denies he was looking into cars?
A. Yes, sir.
Q. And as far as what you're following up on at that point concerning what the witnesses said, it was the witnesses' information to you all that the subject had been in the lot and he had been looking into cars, is that correct?
A. Yes.
Q. Okay. And so, that's the information you were following up on?
A. Yes. But there's more to that.
Q. Okay.
A. There had been several burglaries of vehicles in that

12

very lot prior to this incident, and I was aware of that. I was aware that the subject in some of these burglaries was seen leaving the area over the berm south.
Q. Okay.
A. So, now we're not just investigating the allegation of trespassing and meddling and tampering with vehicles, but we're investigating burglaries that had happened in that lot as well.
Q. Okay. And when you say several burglaries, how many is that to you?
A. There were more than four or five that I, that I recall, that I remember of hearing about.
Q. And during what time period?
A. I don't know exactly how many.
Q. Was that four or five burglaries?
A. They were during the day, they were during the day between 9:00 and 1:30, 2:00 o'clock in the afternoon. I recall one being toward the late, later in the day, 5:00 o'clockish, so daytime burglaries.
Q. Okay. And then, the, how many of those several burglaries was there a person seen going over the berm to the south?
A. I don't recall. Maybe two or three.
Q. And at that point, did you have any sense of what the

13

subject or subjects in those burglaries looked like in terms of what their descriptions were?
A. I think one was described as a black male that was bald wearing a hood. There may have been in two incidents.
Q. Okay. Now, in those two incidents, was it the same description or, you said in one instance?
A. Yes.
Q. It was a black male, bald, wearing a hood?
A. Yes, mm-hm.
Q. Okay. Was that same description given in any other incidents?
A. Not that I recall.
Q. Okay. So, we have one incident, the description is black male, bald, wearing hood, were there any descriptions in any other incidents?
A. I'm sure there were. I don't recall.
Q. Okay. So, that one sticks out in your mind?
A. Mm-hm.
Q. Is that a yes?
A. Yes, sir.
Q. And was the age of the individual in that one incident who was black male, bald, wearing a hood described?
A. I don't believe there was an age.
Q. Okay. And was the subject that you were looking at there that Officer Edgecomb had made contact with, was

14

he bald?
A. No, he had short hair.
Q. Okay. So, before we digressed we were at the point where you had been looking at the subject and you had asked him his name and his date of birth and you were looking at that tattoos?
A. Mm-hm.
Q. Do you recall what his name was?
A. Well, he seemed a little standoffish, and when I asked him his name he says it kind of slurred Denishio Johnson. And I've never heard that name before.
Q. Okay. And you were looking at the tattoos and thought he appeared older, why was that?
A. Well, again, I, I recall asking him about the tattoos, where he got them, and he mentioned someplace in the city to me. My understanding is that you must be 18 years old to get a tattoo in the City of Grand Rapids. And I mentioned that, and he said his mother gave him permission. Okay, that's the answer.
Q. Okay. So then, what happened next?
A. Well, I took a picture of him.
Q. Okay.
A. I took a picture of him, because I wasn't aware as to whether we had witnesses from the previous burglaries that could identify a suspect, because I wasn't aware

15

of the police department actually finding anyone from the previous burglaries. I, I thought that there may have been fingerprints left on the previous burglaries. There was a burglary forensics is called out to try and obtain latent fingerprints. So, in the course of this burglary investigation, I took a photograph of Johnson and I also took his fingerprints there on the scene.

Q. Okay. What happened next?

A. Again, we're still not sure who he is.

Q. No, let me ask you to define then, who is the we that's not sure?

A. The officer there, Officer Edgecomb and I.

Q. Okay. Now, I think you mentioned Edgecomb wrote the report?

A. Yes.

Q. Laudenslager you've mentioned. The report also lists as an assisting Officer Curtis Vanderkooi. Do you recall what role Vanderkooi was playing in this event?

A. He showed up at the end. I don't know why his name was even in the report. He did show up at the end and he was on scene.

Q. Okay. So, let me make sure I'm getting this in proper order, did, was there any radio traffic from Vanderkooi that you heard prior to him showing up at the end?

A. No, I don't recall any from Captain Vanderkooi.

16

Q. Okay. Was the radio traffic from other people that you recall hearing after you arrived on the scene?

A. No, I don't.

Q. That's okay to say you don't recall?

A. I'm trying to remember, but I don't, I don't remember.

Q. And I had quit asking you about that after you got on scene, I just wanted to circle back and make sure that there wasn't radio traffic going on, so thank you. So, you and Officer Edgecomb then you said weren't sure, what was it you weren't sure of?

A. Johnson's name. His actual, you know, again, we are trying to ID the subject because of the previous burglaries, so we weren't sure of his name, his age, so I asked him if there was anyone that he could call to come to the scene to help clarify that for us. And someone, I don't know if it was he that called, but someone called his mother to come to the scene, and this was after the photograph had been taken, the prints had been done. So, we're just waiting, at this point, we're just waiting for his mother to show up, and sometime after that, which is, at this point I say that it's, we've ended our investigation, other than waiting for the mother to come to clarify that part of his name. Sometime after that is when Captain Vanderkooi arrives.

17

Q. Did Captain Vanderkooi get there before or after his mother showed up?

A. I think he got there just before the mother showed up. And as a courtesy, I recall explaining to Captain Vanderkooi what we had done and that we were waiting on his mother to show up.

Q. Okay. And what, if anything, did Captain Vanderkooi do at that point?

A. He said okay. He waited, too.

Q. Okay. Then what happened next?

A. I believe another family member arrives, an aunt and then his mother arrives. And I speak to his mother, explained to her why her son was stopped. That two independent witnesses had described her son in the lot looking into cars, and she understood and said that she would make sure that he takes a different route.

Q. Now, did Johnson have any ID?

A. No.

Q. Okay. So, did you confirm with his mother his identity?

A. Yes.

Q. Okay. Did she have any documents to show that or she just verified his name and his age?

A. She, I think, showed us her name and some ID saying that she lived on Burning Tree, which is where he said

18

he lived. And she said yes that's my son, so we took it at face value.

Q. Okay.

A. That was Edgecomb and I.

Q. Okay. What happened next?

A. They leave, I leave, and Edgecomb writes the report.

Q. When you say they leave, it's Johnson, his aunt and his mother?

A. Yes.

Q. And did you review the report after Edgecomb wrote it?

A. I don't recall reviewing that report.

Q. Okay. And was there any direction that you provided to -- let me strike that. You mentioned that you took a picture of Johnson, what did you do with the picture?

A. Well, I then would have submitted the picture with my log. Our computer system allows us to take our digital pictures, the USB card that's in the camera, slip it into the computer and download those pictures onto our log. So, I would have documented the incident report and the pictures that I would have taken. I would have made some notation on the picture stating his name, birth date, any special identifiers like tattoos, something to that effect as part of at least one of the pictures.

Q. And what did you do with the fingerprints?

A. The fingerprint card, it's a fingerprint card, I would have handed that to, I believe I handed it to Officer Edgecomb, because -- I filled out part of it, but I don't recall filling out Johnson's name, because I wasn't sure of how to spell his name. And if you look at the card, that may show a different handwriting. I, I believe it was Officer Edgecomb that filled out his name?
Q. Okay. Perfect segue.
A. All right.
Q. I had received some documents. Let's take a minute, we can go off the record. I just need you to leaf them through and them my request, please, is to go through this stack of documents, try to keep in the same order, but take those documents out that you either created or had some contact with, please?
A. Yes, sir.
Q. So that we can talk about those.
A. Okay.
(Off the record at 2:42 PM)
(Back on the record at 2:51 PM)
MR. SCHAEFER: Well thank you sergeant for separating out the materials. I think we've ended up with nine pages here, and we'll label those as Exhibit 1.

(Deposition Exhibit 1 marked at 2:52 PM)
BY MR. SCHAEFER:
Q. And if you could, please take a moment to go through the pages, and for the record, tell us what each one represents?
A. This is a photograph that I took on the day of the event and it's time stamped 1:56.
Q. And that's page one?
A. Page one.
Q. Okay.
A. And it is a picture of your client, Johnson.
Q. Okay.
A. Number two is a top to bottom picture of Johnson, and that's his name, Denishio.
Q. Denishio?
A. I'm not sure how to pronounce his name. This third one is a picture of a tattoo on his right forearm. It's a cross and initials.
MS. REWA: What page was that?
THE WITNESS: Number three. The initials are DJ is what it appears to be. The fourth one is on the top of his right forearm, and it's a picture of a tattoo of a, looks like K-i-m, and I believe he said that was his mother's name. This number five is a better picture of your client, Johnson, and in the description I noted

diamond ear studs both ears and tattoos in the right forearm. It's got his height, five eleven, approximate weight 170, and his birth date as it was given to me.
BY MR. SCHAEFER:
Q. Stopping on photograph five, you would agree that the picture shows Johnson is not bald; correct?
A. Yes, he's got short hair. He doesn't appear bald.
Q. Okay. And in terms of his build, how would you characterize his build?
A. Well, you know, that was one of the things that was leading me to believe that he was older than he was stating. His build, his muscle tone, he seemed to be built like an older person, someone that had been working out, so I would say solid build. From a distance he looks tall and thin, but up close he's solid.
Q. So then, we were on page six before I interrupted you?
A. Page six is my log.
Q. Can you explain, for the record, what the log is?
A. The log is a summary of the activity that I participate in my work during that day.
Q. So, that page six covers your work activities for the full shift that day?
A. Yes.
Q. Okay.

A. I begin my shift at 5:30. I exit at, well, my last log entry was 16:45, 4:00 o'clock, 4:45.
Q. Okay, thank you.
A. And it's relevance is I have an entry of here of being at 2500 Burton is where the call was, the incident number and the photos of the subject I had taken. Number seven is the print card, and I took these prints of your client, Johnson. It shows his thumbprint, his first finger, second finger, third finger, and pinky. On the front of the card, where's the copy, these are the same, and this would have been the copy of the back of the card.
Q. So, page nine is the back of the card?
A. Page nine is the back of the card.
Q. Page eight is the front?
A. Page eight and seven appear to be copies, the same copy.
Q. Well, page seven is copy of page eight, where there's a, what we would call a post-it note on it?
A. Yes. I didn't put that on there. I'm not, I didn't put that on there.
Q. Okay. So, looking at page eight then in terms of the writing under the words digital print ID card, is all of that your writing or is just some of it your writing?

POSITION OF SARGEANT BARGAS
3-11-2015

23

A. The date is my writing, August 15, 2011, race and sex is my writing, a black male and officer badge is my writing, Edgecomb, Bargas.
Q. Okay. Now, the digital print ID card would normally be used for just taking a thumbprint?
A. It can.
Q. Is it also normally used to take a full set of fingerprints?
A. I have in the past.
Q. Okay. So, in your practice, you've used the digital print ID card for both thumbprints and fingerprints?
A. Yes, sir.
Q. Now, customarily, if someone is taking a full set of prints they would do that on a ten card; is that correct?
A. The ten card, I'm not.
Q. There's a different form that's normally used to take a full set of prints, is that correct?
A. Yes.
Q. But the form that you keep in your cruiser typically is the digital print ID card, is that right?
A. Yes.
Q. So, that's why you use that card?
A. Yes, sir.
Q. Okay. Did you have any discussions with any of the

24

personnel there at the Michigan Athletic Club when you were there on scene?
A. No.
Q. Now, while you were on scene, you did learn that Johnson had not tried to open or enter any of the vehicles in the MAC parking lot; is that correct?
A. Yes.
Q. And what was the reason that you took the photographs of Johnson?
A. For identification purposes.
Q. But you had his mother identify who he was, correct?
A. After I took the pictures, yes.
Q. So, why did you still keep the pictures and load them in your report if his mom had identified him?
A. Because, at this point, your client, Johnson is a possible suspect to these burglaries that had occurred in this lot.
Q. And why is he a possible suspect?
A. By his own admission he was in the lot and he lived in the direction that the previous suspects had fled to. So, this was kind of in the opposite of he comes from the direction, he's in the lot appearing, by victim s, witnesses, to look into cars as though he's trying to get something out of them, and so, that's how he became a suspect in these previous burglaries that had

25

happened there.
Q. But you didn't have a description of the previous suspects who had supposedly fled in the direction where he lived?
A. Vague descriptions. Again, that was based on my knowledge of the previous reports.
Q. So, he didn't match the descriptions of the people who had previously fled in that direction to the south?
A. I did not know that, at the time I did not know that whether he matched or not.
Q. Okay. So, what you had is he had been in the parking lot, witnesses said he had been looking into cars and he lived in the direction of previous suspects that they had fled?
A. In a nutshell, yes, sir.
Q. Okay. And how many occasions had there been suspects who had fled in the same direction as Johnson's residence?
A. I don't recall.
Q. Okay. And what was the reason that you took the fingerprints?
A. Again, for identification purposes. One, I didn't believe who he was. The, and the fingerprints, I wasn't sure if we had any latents from the previous burglaries, so his fingerprints would be compared to

26

previous burglaries. And if we had, it was also courtesy to him. It would eliminate him as a suspect.
Q. And did you make the decision to take the photographs on your own?
A. Yes, sir.
Q. You weren't directed to do that by anyone?
A. No, sir.
Q. Did you make the decision to take the prints on your own?
A. Yes, sir.
Q. And you weren't directed by anyone to do that?
A. No, sir.
Q. Was your taking of the photographs in keeping with departmental policy?
A. Yes.
Q. And was your taking of the prints in keeping with departmental policy?
A. Yes.
Q. Now, did you make arrangements for Mr. Johnson's prints to be compared to prints from previous burglaries?
A. No.
Q. Did you make arrangements for someone else to make that request?
A. No.
Q. Okay. So, when you completed your log entry and loaded

the photographs into the department computer system and gave the print cards to Officer Edgecomb, that completed your involvement in the incident?
A. Yes.
Q. Did you do any follow up on a later date?
A. No.
Q. Did you ask anyone else to do anything on the incident?
A. No.
Q. As a part of your contact with Mr. Johnson, did you undertake a search of him?
A. I don't recall. I thought that I may have, but I wasn't certain. And I believe in my interrogatory I may have noted that I may have. But again, I wasn't sure, but I may have.
Q. Okay. And if you may have searched him, what would have been the basis for that search?
A. I would have been looking for little pieces of porcelain that are commonly used to break out windows, so evidence to tie him into this burglary information.
Q. And when you may have searched him, would have that have been before or after you learned that he had not tried to open any vehicles in the MAC parking lot?
A. That would have been after.
Q. Do you know what the outcome of the -- let me strike that. Do you know if the prints that you took from

Johnson were ever compared to prints from previous burglaries at the MAC parking lot?
A. Well, that's not my job. I would assume that they would have been.
Q. Okay. But remember at the beginning we said we wouldn't assume.
A. Okay.
Q. So, you don't know if they were compared?
A. No.
Q. Okay. And is there someone whose job it would have been to follow up on the incident to have the comparison made?
A. Yes.
Q. And whose job would that have been?
A. The detective that the case would have been assigned to.
Q. And do you know if the case was assigned to a detective?
A. Yes.
Q. And was it assigned to someone?
A. Yes.
Q. Who was it assigned to?
A. Based on the report, I believe it was Officer Walker, Detective Walker.
Q. Going back to when you had indicated Captain Vanderkooi

showed up at the end, you had explained to Captain Vanderkooi what you had done and he said okay and you all waited for Johnson's mother to arrive?
A. Yes, sir.
Q. What, if anything, do you recall that Captain Vanderkooi did after that point?
A. I don't recall what he did after that.
Q. Do you know if he stayed to talk to Mrs. Johnson?
A. I think he was still there when Ms. Johnson arrived, and I don't know if he spoke to her. I don't recall if he spoke to her or not, I don't recall.
Q. Okay. And do you recall him doing anything else while she was there or after she left?
A. No, sir.
MR. SCHAEFER: Okay, I think that's all the questions I have. Thank you very much.
THE WITNESS: Okay.
MS. REWA: I have a couple questions for you, Sergeant. Can we take a five minute break?
MR. SCHAEFER: Sure.
(Off the record at 3:14 PM)
(Back on the record at 3:18 PM)
MS. REWA: Sargeant, I just had a few questions based on the testimony you previously gave.
THE WITNESS: Yes, ma'am.

CROSS-EXAMINATION
BY MS. REWA:
Q. Why did you take a full set of Mr. Johnson's fingerprints?
A. Because again, this was a burglary investigation. It was 1:30 about in the afternoon. The person that described him looking into cars didn't say how he was looking in cars. That didn't go, that wasn't captured. So, you know, I put myself in the place of a bad guy trying to look into a car in the middle of a day, and you've got the reflection from the sun coming back, so it's a possibility that he would have touched the glass with his hands to try to block the sun to look in. So, and also, when I've taken fingerprints in the past sometimes the one fingerprint I take isn't the good finger print, and when latents looks at it they can't do anything with it. So, the, the other fingerprints that I have taken in the past may, may help to identify the person. And I labeled them that way, too, so that they would know which fingerprint I was taking.
Q. And while you were testifying about putting yourself in the shoes of a bad guy, just to reflect for the record, it appeared you were holding your hands up about face level, palms out, is that what you were doing while you were talking?

31

A. Yes, mm-hm.
Q. How did you come to learn about the prior incidents of burglary that we've been discussing in the MAC parking lot?
A. There is a summary of incidents that have happened in the east service area that are captured in the east edge, which is a compilation of prior incidents, criminal activity in various places in the city. And when there is, particularly a rash of larcenies, break-ins, home invasions, there's little maps that are provided to let the officers know to be aware of these incidents.
Q. You said it's a, I believe it's the east edge is the summary of events, is that correct?
A. Yes.
Q. Who creates that?
A. Captain Vanderkooi.
Q. How is this, how do you come to receive this east edge?
A. I received via the computer, via and e-mail from Captain Vanderkooi as everyone else on the team.
Q. What do you mean by team?
A. That would be the east service area, the team.
Q. How often are, how often do you receive the east edge?
A. It depends. If there is a rash that happens over the weekend we may get what's called an east edge light,

32

where these incidents are described and that information is given to the officers. Sometimes we'll get it every two weeks. The captain goes on vacation, it might be a month.
Q. What's the general sort of timeframe in which you, what's the general out put of the east edge, if you know? Let me ask you a better question. How often do you usually get the east edge?
A. I usually would get it once a week, once every two weeks.
Q. I believe you also testified about that at some point after you arrived on scene you came to learn that Mr. Johnson was not trying to open any doors, is that correct? Am I, I want to make sure I get your testimony correct.
MR. SCHAEFER: Objection. Misstates the testimony on the record.
MS. REWA: I'll get warmer.
BY MS. REWA:
Q. Is it your testimony that you came to learn that Mr. Johnson wasn't looking into the windows?
A. No.
Q. I just want to understand?
A. That he was looking in the windows. That was provided by two different witnesses.

33

Q. But at some point you came to learn he wasn't looking into windows?
A. The second witness wasn't sure to what extent he was looking into windows. That was vague, so whether he was, I don't know that.
Q. I guess my question is, how did you receive information regarding whether Mr. Johnson was looking in windows or not?
A. By Officer Edgecomb, by radio, the radio traffic, by the witness that provided the information to the dispatcher, who dispatched the call to us that he, the subject was trespassing in the lot and looking into car windows.
Q. The Detective Walker, did you have any role in assigning him to investigate this case?
A. No, ma'am.
Q. I believe you said you may have searched Mr. Johnson, is that an accurate statement of your testimony?
A. Yes.
Q. How would you, did you ask Mr. Johnson to do a search?
A. I would have asked for his consent to allow me to search his pockets, and if I did search his pockets I asked consent.
Q. We talked previously about a ten card regarding finger prints, do you remember that?

34

A. Yes.
Q. Do you, have you, in the course of your duties as a police officer, yourself fingerprinted someone onto a ten card?
A. No.
Q. Do you know who would actually put somebody's fingerprints onto a ten card?
A. It happens at the jail when someone is taken there and also the forensics personnel that comes out to the scene. They carry them and they've got the apparatus in which to obtain those.
Q. Toward the end of the contact, this interaction that's subject to this case, I believe you testified that Mr. Johnson and his mom and his aunt left the scene, is that correct?
A. Yes.
Q. Do you know, did anybody from the Grand Rapids Police Department request any charges against Mr. Johnson?
A. No.
Q. Why was Mr., why was, why did Mr. Johnson leave?
A. Well, what was described to us was subject that was meddling and tampering in the lot and trespassing, which was a crime that we did not see happen, therefore, he was allowed to leave.
MS. REWA: I don't have any other questions.

Mr. Schaefer might.

MR. SCHAEFER: No, I don't.

(Deposition ended at 3:25 PM)

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Shawn Breimayer, (CSR-6888) do hereby certify that the foregoing deposition consisting of 36 pages, is a complete, true and correct transcript of the deposition proceedings and testimony of Sargeant Elliott Bargas held in this case on Wednesday, March 11, 2015; and do also certify that the foregoing transcript is a true and correct transcript of my stenographic notes of said deposition so reported and transcribed by me.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Dated: March 20, 2015

_____
Shawn M. Breimayer, CSR
Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-2020

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

DENISHIO JOHNSON,

Plaintiff,

v CASE NO: 14-02166-NO
HON. JAMES R. REDFORD

CURT VANDERKOOI, ELLIOTT BARGAS and CITY OF GRAND RAPIDS, a Michigan Municipal Corporation,

Defendants.

DEPOSITION OF DENISHIO JOHNSON
taken before Shawn M. Breimayer, Certified Shorthand Reporter, at the office of BERNARD SCHAEFER,161 Ottawa Ave Ste 212, Grand Rapids, MI, Monday, June 8, 2015, commencing at 1:18 PM, pursuant to notice.

APPEARANCES:

FOR THE PLAINTIFF: Bernard Schaefer (P40114)
161 Ottawa Ave Ste 502-D
Grand Rapids, MI 49503
(616) 272-4361

FOR THE DEFENDANT: Kristen Rewa (P73043)
Patrick J. Lannen (P35171)
Assistant City Attorney
300 Monroe NW Ste 620
Grand Rapids, MI 49503
(616) 456-4026

Also Present: Toni Merriweather

Reported by: Shawn M. Breimayer, CSR-6888

TABLE OF CONTENTS

DEPOSITION OF DENISHIO JOHNSON
6-8-2015

(Deposition commenced at 1:18 PM)

MS. REWA: Mr. Johnson, my name is Kristen Rewa. I'm an assistant city attorney, and I'm representing the defendants in this case. We're going to take your deposition today. Have you ever been deposed before?

THE WITNESS: No, ma'am.

MS. REWA: Okay. Well, everything we're saying today is being taken down by the court reporter sitting right next to you, so it's really important that we speak loudly clearly, that I not talk over you, you not talk over me and that our answers are verbal answers. Sometimes when we get into a conversation we start nodding.

THE WITNESS: Mm-hm.

MS. REWA: She can't take that down.

THE WITNESS: Yeah.

MS. REWA: And along those same lines, when we continue in a conversation we might say mm-hm or mm-mm and those are also hard for her to take down, so try to, you know, make sure yes, no, answer verbally to the best you can.

THE WITNESS: Okay.

MS. REWA: Great. And I might try to help you, you know, if we fall into that I'll help you try to keep a clear record. Again, this is under oath, so I

would ask that you tell truth.

THE WITNESS: Yes.

MS. REWA: Great. Based on what you know, I just want to, you know, what you know.

THE WITNESS: Okay.

MS. REWA: So, please don't assume or speculate or guess. I just want to know what you know and what you remember, okay?

THE WITNESS: Yeah.

MS. REWA: All right.

DENISHIO JOHNSON

after having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MS. REWA:

Q. Did you review any documents to prepare for this deposition?

A. Yeah.

Q. What did you review?

A. I just looked over the police report.

Q. Had you read the police report before?

A. Once, but that would be before.

MR. SCHAEFER: One other ground rule, if at some point I say I object, then don't answer, okay?

THE WITNESS: Yep.

MR. SCHAEFER: And so, we may still have you answer after I've objected, but we like to put those things in the record.

THE WITNESS: Okay.

MR. SCHAEFER: So, the one thing you don't share is things we've talked about.

THE WITNESS: Oh, okay.

MR. SCHAEFER: Because you and I have a privilege to speak and you don't repeat that.

THE WITNESS: Okay.

MR. SCHAEFER: I should make sure we got that clear.

MS. REWA: That reminded me of one more thing as well. I hope to not take up too much of your time, but if you ever need a break, you need to use the restroom, you need some water let us know.

THE WITNESS: Okay.

MS. REWA: The only rule, I guess, with that is if I've asked a question you have to answer the question, and then, you let me if you need a break after that. If there's a question on the table you've got to answer it.

THE WITNESS: Okay.

BY MS. REWA:

Q. Now, I'm going to preface this with, I don't want to know what anyone said, but did you speak with anyone in preparation for your deposition?

A. No, ma'am.

Q. Okay. So, the incident that this case concerns is a contact you had with the Grand Rapids Police Department on August 15, 2011, does that sound correct?

A. Yes, ma'am.

Q. Can you tell me where you were right before the police, you had contact with the police?

A. Sitting down at the corner of the street like just right next to the MAC.

Q. Was it in front of any other buildings?

A. It was in front of the Denny's, yep, in front of the Denny's.

Q. So, you were sitting down -- were you, the location that you were sitting down at, was that on the same side of the street as the MAC?

A. Yes.

Q. Just to clarify, the, I understand that the MAC is the Michigan Athletic Club, is that what the MAC is?

A. Yep.

Q. And is the MAC located on Burton Street?

A. Yes.

Q. Why were you sitting, actually, where specifically w

DEPOSITION OF DENISHIO JOHNSON
6-8-2015

7

you sitting down?
A. Like I was west of the MAC. Like there's a pool right behind where I was sitting at. I was sitting there. There's trees, it's hard. -it's a parking lot, though, where I was sitting at like a little log kind of thing.
MR. SCHAEFER: Like what?
THE WITNESS: You know the thing that's there to stop your car when you park your car?
BY MS. REWA:
Q. Like when of those little yellow things?
A. Yeah, one of those bricks. I was sitting there.
Q. Why were you sitting there?
A. I was waiting for the bus.
Q. Is there a bus stop nearby?
A. Yeah, where I was sitting at there's a bus stop across the street.
Q. Why were you waiting for the bus?
A. Waiting for a friend.
Q. The friend was on the bus?
A. Well, they was supposed to get off the bus.
Q. What friend were you waiting for?
A. My friend Kaliel.
Q. Do you know if he ever got off that bus?
A. No, I don't know, I never knew.
Q. Okay. How did you get to that spot that you were

8

sitting down?
A. Walked.
Q. Can you talk to me, what path did you take to walk there?
A. Well, I walked through the parking lot, the MAC parking lot. It's like, it's the bank and then the school Ridgemoor School. I walked through that parking lot, the Ridgemoor parking lot to get to where I was sitting at.
Q. Where did you, where were you coming from that you walked?
A. I walked around the MAC, so trying to wait for the bus.
Q. Where were you coming from?
A. Home.
Q. And where was that?
A. Right down the street from the MAC.
Q. As I understand, that address was on Burning Tree?
A. Yep.
Q. How long had you been sitting there waiting for the bus prior to the police making contact with you?
A. Well, I can't really remember how long it was, but I know no longer than like thirty minutes. It would probably be like at least fifteen minutes.
Q. Okay. Did you talk to anybody on your walk from home to the spot where you were sitting?

9

A. No.
Q. So, at some point, the police make contact with you?
A. Yep.
Q. Okay. Can you tell me about that?
A. When I was sitting down the police pulled up, then I stood up and they checked me, well, they asked what my name was and my birth date. And after that they checked me, did my fingerprint, took my picture and handcuffed me. And they let me call my mom.
Q. How did you know that it was the police?
A. Well, I seen the car.
Q. Okay. They were driving a police cruiser?
A. Yep.
Q. How many police officers were in the police cruiser?
A. I think it was two. I'm not for sure. Maybe only, there was one or two.
Q. What did the officer -- did an officer speak to you when the police cruiser came up to you?
A. Yeah, yes.
Q. What did the officer say?
A. I don't remember what he said.
Q. Okay. Do you remember the gist of the conversation?
A. I know he asked me what was my name and my birthday, because I didn't have ID on me.
Q. Okay.

10

A. And what was I doing. He asked me that, too.
Q. And did you tell him your name?
A. Yes.
Q. And what did you tell him?
A. My name was Denishio Johnson and my birthday.
Q. Did you recognize that police officer at all?
A. No.
Q. What did you tell the officer that you were doing?
A. Waiting for the bus.
Q. Did you tell him any, anything else?
A. No.
Q. After you gave your information to the officer, what happened next?
A. They called my mom, well, I think I called my mom, but they let me call my mom, and her and my sister came up there.
Q. I think your mom's name is Kim?
A. Yep.
Q. And then, what's your sister's name?
A. Lashonda.
Q. Were they both at home at the time?
A. Yep.
Q. Did the officers ask you about walking through the parking lot?
A. Yeah, yeah, yeah. They asked me was I looking in

11

cars.
Q. What did you tell them?
A. No.
Q. Were you looking into cars?
A. No, but when I pass cars I usually look at myself like from the reflection of the window. I know I did that, but as far as staring into the cars, I didn't do that.
Q. Okay. Did you touch any of the cars?
A. No.
Q. How full was the parking lot when you walked through it?
A. It had a nice amount of cars. It wasn't all the way full, but there was a lot of cars, though.
Q. So, after you told the officer that you were not looking into cars, what happened then?
A. Well, by that time, my mom and them was already on their way.
Q. And you said that the officers let you call for your mom?
A. Yeah, because I think I had my cell phone. I'm not sure, though. I'm not sure if they called or I called, but I know I had my cell phone.
Q. So, after -- how long was it between someone calling your mom and your mom arriving?
A. Like five to ten minutes.

12

Q. What happened during that time?
A. When I was waiting, I was just waiting in the back of the car with the handcuffs.
Q. When did you get handcuffed?
A. After they searched me.
Q. When did they search you?
A. When they first pulled up. They asked a little questions and then they searched me, then they handcuffed.
Q. Did the officers ask to search you?
A. No.
Q. And when you were searched, how many police officers were there?
A. I think it was two.
Q. During the -- and this is kind of moving forward a little bit, but during the entire, during this entire episode, how many police officers were on the scene?
A. There's just one car, so yeah, one car that I remember.
Q. And you were handcuffed after they searched you?
A. Yeah.
Q. And after you're handcuffed, is that when they put you in the back of the car?
A. Yep.
Q. When your mom arrived, were you still sitting in the back of the car?

13

A. Yeah, she had -- I think they had a conversation, so she could see what was going on.
Q. Could you hear what was being said in the conversation?
A. No.
Q. How long did the conversation last?
A. For about a few minutes.
Q. Were you able to see -- how many officers spoke with your mom?
A. The one, just the two, I think, that was there.
Q. Okay. Could you see the officers and your mom while they were in this conversation?
A. I don't remember like.
Q. Okay. So, after there's this conversation with the police officers and your mom, what happens next?
A. Let me out the car.
Q. Was the door open or closed?
A. I can't remember.
Q. What happened after they let you out of the car?
A. I got -- my mom took me home.
Q. Did the officers unhandcuff you?
A. Yep.
Q. Were you in the car or outside of the car when they unhandcuffed you?
A. Outside the car.
Q. Okay. So, when you got out of the car, did they

14

unhandcuff you?
A. Yep.
Q. Was that right away?
A. Yeah, yeah.
Q. Okay. You also said that you had your picture taken?
A. Yeah.
Q. When did that happen in the course of this episode?
A. I think it was after the hand prints.
Q. Okay.
A. Like I can't remember which one was first, but I know for a fact that happened.
Q. Okay. When did -- so, it sounds like, and correct me if I'm wrong, that your photograph, you had your prints taken and then your photo taken?
A. Yeah.
Q. Or --
A. Sound like the right order.
Q. But, at the very least, both of those things happened?
A. Yeah.
Q. In order?
A. Yep.
Q. Okay. When, when were your fingerprints and photograph taken in the course of the entire contact?
A. Incident?
Q. Yeah.

A. The first five minutes.
Q. Had you been handcuffed yet?
A. I don't think I was handcuffed after the photos, yeah, after the photos, until after.
Q. So, the handcuffing came after your photograph?
A. Yeah.
Q. And your fingerprints were done before the photo?
A. Yeah.
Q. Okay. And then you are put in the car?
A. Yep.
Q. In this order of fingerprint, photograph, handcuff, car, where does calling your mom fall into that?
A. When I was inside the car.
Q. Inside the car?
A. Yep.
Q. Then call mom, okay. Did any of the officers tell you why they had made contact with you?
A. Yeah.
Q. What did they say?
A. That it was -- somebody called in about somebody looking into the cars.
Q. When did they tell you that?
A. I think it is in the beginning of the conversation.
Q. Did the officer tell you anything else?
A. No.

Q. Did you talk to anybody other -- okay, so you talked to police officers during this incident?
A. Yep.
Q. And did you --
A. My mom.
Q. You talked to your mom during the incident?
A. Yep.
Q. Did you talk to anybody else during this incident?
A. No.
Q. Did you see anybody else on the scene, not a police officer, but any other person that was on the scene at the time?
A. No.
Q. And so, after you got out of the car and they took your handcuffs off?
A. Got in the car with my mom.
Q. You got in the car with your mom?
A. Yeah.
Q. Did the officers talk to you while your mom was around?
A. No.
Q. Did the officers talk to your mom while you were around?
A. Yeah.
Q. What did they say?
A. Well, I was in the car.

Q. Oh, okay.
A. So, I didn't hear what they said. It was before they let me out of the car.
Q. I was just -- oh, sorry. I was just wondering if after you got out of the car there was any sort of?
A. I don't remember. If there was, I don't remember.
Q. Okay. So, you got in the car with your mom, where did you go?
A. Home.
Q. How many photographs, do you know? Do you know how many photographs the police officers took of you?
A. Well, I just remember the one, the first one, the first picture they took.
Q. And the fingerprints, let me clarify, too, because I think you said handprints, too, what did the police officers actually?
A. All ten fingers.
Q. Okay. So, it was just the tips of the finger?
A. Yeah, I think they did my hands, too, my palms.
Q. Did they ask if they could take your photograph?
A. No.
Q. Did the police officer ask if he could take your fingerprints?
A. No.
Q. You didn't get charged with anything, any crime

resulting from this contact, did you?
A. No.
Q. Okay. Do you know what the Police Department did with the photograph that they took of you?
A. No.
Q. Do you know what the Police Department did with your fingerprints?
A. No.
Q. Did you ever see a copy of the photograph that they took of you?
A. No.
Q. Did you ever see a copy of the fingerprints they took of you?
A. No.
Q. Did the Police Department ever take your photograph again after this event?
A. Yeah.
Q. When was that?
A. It was like the next year, I think. It was a different situation, but yeah, they took it again.
Q. What was different about that situation?
A. Well, they didn't ask me to do the -- that's when I was leaving school. I had just got out of school and we was a group walking, and they stopped the group and then somebody ran and it was shots fired. It was a

lot, right at the school, though.
Q. Okay.
A. And I had to go downtown for that and they took my picture for that.
Q. Did the Grand Rapids Police Department ever take your fingerprints after this incident?
A. Yeah, yes.
Q. When was that?
A. When I got stopped driving with no license.
Q. Tell me how they took your fingerprints in that incident.
A. They did ten fingers, tips. They did it at the actual county, though.
Q. At the, when you say the county, you mean the county jail?
A. Yep.
Q. Was there any other time that you gave your fingerprints to the Grand Rapids Police Department for any reason?
A. No.
MS. REWA: I don't think I have any more questions to ask you, and I can't believe that.
BY MS. REWA:
Q. Going back to this incident on August 15th, I think you said that you didn't have any ID on you, is that right?

A. Yeah.
Q. Did the police officers ask you for your ID?
A. I think when they checked me, I think just when they checked me they didn't find an ID on me.
MS. REWA: Okay, I don't have any more questions.
MR. SCHAEFER: I just have one.
CROSS-EXAMINATION
BY MR. SCHAEFER:
Q. What do you mean when they say when they checked you?
A. Searched my pockets, jeans, just searched me full search.
Q. Okay. And that was at the beginning of the incident?
A. Yeah.
MR. SCHAEFER: Okay.
MS. REWA: I got a follow up question.
REDIRECT EXAMINATION
BY MS. REWA:
Q. Which officer did that search of you?
A. I think it was, his name is Vanderkooi. I'm not sure was the name Vanderkooi. I think it is, though.
Q. What does he look like?
A. Oh, I don't know what he look like.
Q. When did that officer arrive on scene?
A. Like fifteen minutes after I was sitting down.

Q. Was that the officer that first made contact with you was the one that searched you?
A. I don't remember.
Q. You don't remember which one searched you?
A. Yeah, I don't remember.
Q. Okay. Why do you think the officer's name was Vanderkooi?
A. That's what it said on the report.
Q. The report said that a Vanderkooi searched you?
A. Well, not that he searched me, but the name.
Q. The name shows up on the incident report?
A. Yeah.
Q. Okay. Does the incident report say that Vanderkooi searched you?
A. No. As a matter of fact, yeah, yeah, I think it does.
Q. So, if I were to show you a copy of the incident report you can point that out for me?
A. Mm-hm, yes.
(Deposition Exhibit 1 marked at 1:48 PM)
MS. REWA:
Q. Okay. Handing you what's been marked Exhibit 1, does that document look familiar to you?
A. Yep.
Q. What is it?
MR. SCHAEFER: Take your time and read the whole

thing or review it, please.
THE WITNESS: Okay.
MR. SCHAEFER: Okay.
BY MS. REWA:
Q. Are you ready to answer questions about that?
A. Yeah.
Q. Yeah, I don't want to move you too quickly on that. So, I handed you what's been marked Exhibit 1, does that look familiar to you?
A. Yes.
Q. Okay. And what is that document?
A. Well, report? This is the report, right?
Q. The police incident report?
A. Yeah.
Q. I got to do a little dance for the record and identify what it is on paper.
A. Oh, all right.
Q. So, this is the police incident report?
A. Yeah.
Q. Can you point out to me where it says, where it identifies who searched you?
A. Oh, it don't say that he checked me.
Q. The report doesn't say that?
A. No.
Q. I actually see -- yeah, take your time.

DEPOSITION OF DENISHIO JOHNSON
6-8-2015

A. Yeah, it just said he took my fingerprints and my photos, but it don't say that he checked. I don't see that it said that he checked me.
Q. Well, who took your fingerprints and photos?
A. The officer, it says, Officer, oh, Bargas.
Q. Okay. So, if this report says Bargas took a full set of fingerprints from you, does that sound right to you?
A. Yeah, yeah.
Q. Okay. I've also got a couple of other officers named down here, one of them is Greg Edgecomb, do you know what that officer did?
A. No.
Q. Okay. And then, under assisting officers, that's, it appears that that's where Vanderkooi's name shows up, is that right?
A. Yep.
Q. Okay. And I've also got a Eugene Laudenslager on there under assisting officer, does that look right?
A. Yep.
Q. Okay. You just talked about Bargas, what about Laudenslager, what did he do on scene?
A. I don't remember what he did.
Q. Okay.
A. Because I didn't even know who was who, but -- I don't even know who was who at the scene.

Q. Okay. What did the officers look like?
A. I can't remember what they looked like.
Q. You don't have any recollection of any physical characteristics?
A. No, it was so long ago.
Q. Sure. Why do you think it was Vanderkooi that searched you and not one of these other assisting officers?
A. Because I had, when I see the name on here I just guess it was him.
Q. Okay.
MR. SCHAEFER: But you have also explained you don't remember who searched you.
THE WITNESS: Yeah, I don't know which one did.
MR. SCHAEFER: Okay.
BY MS. REWA:
Q. Well, I have those guys, there's a guy sitting behind me, did either of them search you?
A. I can't remember. Well, I think he look familiar.
MR. SCHAEFER: He's the attorney.
THE WITNESS: Oh.
BY MS. REWA:
Q. He's the attorney. This is Bargas.
A. Oh.
Q. So, let me ask this, does it sound accurate based on your memory that Sergeant Bargas took your photographs and your fingerprints?

A. Yeah, but I can't remember. But I didn't know it was you, but I remember what happened. I just don't remember the faces.
Q. Okay. I'm sorry, you?
A. I didn't remember.
Q. You don't remember the faces, okay?
A. Yeah.
Q. So, you don't remember which officer searched you?
A. No.
MS. REWA: Okay, I have no further questions.
MR. SCHAEFER: Okay, thank you.
(Deposition ended at 1:56 PM)

STATE OF MICHIGAN)
) ss.
COUNTY OF KENT)

I, Shawn Breimayer, (CSR-6888) do hereby certify that the foregoing deposition consisting of 26 pages, is a complete, true and correct transcript of the deposition proceedings and testimony of Denishio Johnson held in this case on Monday, June 8, 2015; and do also certify that the foregoing transcript is a true and correct transcript of my stenographic notes of said deposition so reported and transcribed by me.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this deposition was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

Dated: June 18, 2015

Shawn M. Breimayer, CSR
Notary Public, Ionia County, MI
Acting in Kent County, MI
My Commission Expires: 3-20-2020

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

Case No. 14-02166-NO

v.

HON. GEORGE JAY QUIST

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS,
a Michigan Municipal Corporation,

Defendants.

DENISHIO JOHNSON,

Plaintiff,

Case No. 14-07226-NO

v.

HON. GEORGE JAY QUIST

CURT VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS, a Michigan municipal corporation

Defendants.

BERNARD SCHAEFER (P40114)
Attorney for Plaintiff
161 Ottawa Ave. NW, Ste. 212
Grand Rapids, MI 49503
(616) 272-4361

MARGARET P. BLOEMERS (P40853)
PATRICK J. LANNEN (P35171)
KRISTEN REWA (P73043)
Assistant City Attorneys
Attorneys for Defendants
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

ANSWERs TO PLAINTIFFS' REQUESTS TO ADMIT TO DEFENDANT CITY OF GRAND RAPIDS

Contained in Plaintiffs' Fourth Set of Interrogatories, Requests to Admit and Requests for Production of Documents to Defendant City of Grand Rapids

11. Admit that, Police officers taking photos and thumbprints, P&P, of individuals with whom they make contact is a commonly-known, long standing custom or practice of the City of Grand Rapids Police Department.

ANSWER: Defendant City objects to the terms "commonly-known" [sic] and "long standing" because these terms are vague.

Without waiving the objection, Defendant City admits that officers taking photos and thumbprints of individuals is a custom or practice of the City of Grand Rapids and has been for decades. The custom or practice has changed over those years with the evolution of technology. To the extent that "long standing" is meant to convey a "static, unchanging" custom or practice, the City denies the same as untrue. City further notes that "thumbprint" is incomplete because, although it is primarily a thumbprint, another finger or fingers might be printed instead of or in addition to a thumb. Defendant City denies as untrue, incomplete, and inaccurate the characterization of the custom or practice as "taking photos and thumbprints of individuals with whom they make contact" as inaccurate and incomplete. A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident.

13. Admit that the custom or practice of P&P described in Request to Admit #11 above, is applied to innocent citizens encountered by Grand Rapids Police Officers.

ANSWER: Defendants object to the form of Request Thirteen because the term "innocent" is impossible to answer and not a legally relevant term under Fourth Amendment jurisprudence. Without waiving the objection, Defendant City denies as untrue the assertion—express or implied—that the City applies the custom or practice of taking photos and thumbprints as described in Request to Admit #11 in an unconstitutional manner.

Respectfully submitted,

Dated: August 14, 2015

KRISTEN REWA (P73043)
Assistant City Attorney
Attorney for Defendants
Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-4026
(616) 456-4569 FAX

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

v.

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS,
a Michigan Municipal Corporation,

Defendants.

Case No. 14-02166-NO

HON. GEORGE JAY QUIST

DENISHIO JOHNSON,

Plaintiff,

v.

CURT VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS, a Michigan municipal corporation

Defendants.

Case No. 14-07226-NO

HON. GEORGE JAY QUIST

BERNARD SCHAEFER (P40114)
Attorney for Plaintiff
161 Ottawa Ave. NW, Ste. 212
Grand Rapids, MI 49503
(616) 272-4361

MARGARET P. BLOEMERS (P40853)
PATRICK J. LANNEN (P35171)
KRISTEN REWA (P73043)
Assistant City Attorneys
Attorneys for Defendants
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

RESPONSE TO PLAINTIFFS' FOURTH SET OF INTERROGATORIES, REQUESTS TO ADMIT AND REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT CITY OF GRAND RAPIDS

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

General objection: Defendant City objects to this set of discovery requests as untimely because it was not served until July 20, eleven days before the close of fact discovery. The Scheduling Order states:

> *The Court will consider compelling discovery and imposing sanctions for failing to engage in discovery only if the discovery request at issue was timely. A request will be considered timely only if it was served sufficiently in advance of the deadline specified in this paragraph that the applicable time for responding expires prior thereto or within such other time as the Court as agreed to.* No discovery of any kind may occur, even by stipulation of the parties, after case evaluation.

Plaintiffs never indicated they needed additional discovery despite the fact that the parties appeared before the Court on July 10, 2015, which resulted in a modification of the scheduling order for expert witness discovery. Plaintiffs requests were imposed for an improper purpose, namely to harass city employees and the named defendants, delay discovery, and increase the cost of litigation. MCR 2.302 (G). Defendants will seek sanctions on any attempts to compel discovery on these matters.

INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

1. Was any video made of the incident involving Keyon Harrison, Officer Dennis Newton's contact with Pablo Aguilar, or the incident involving Denishio Johnson?

ANSWER: Possibly. Defendant City, after reasonable diligence, could not locate any video of the incidents in question in L3, the digital in-car video system that was utilized by the GRPD on the dates of these incidents. Logs of metadata related to video automatically purged from the Digital in-car video system (L3) identifies the following:

For the Denishio Johnson incident (11-077503):

- 08/15/2011 13:44 Edgcombe, Greg 3547P 007434_110815_174442_0.qbx (Roll 15, page 572)

This is close in time to the date and time listed on the incident report concerning Denishio Johnson and therefore, may have been video of this incident.

Pursuant to the Manual of Procedure, if this file was video of the Johnson incident, it would have been tagged "no citation". (MOP 8-12, In-Car Audio Video System, Bates No. 004971-78). All video is purged from the L3 system automatically in accordance with the automatic retention settings. Retention schedules were changed several times over the years to free up storage space so that new video could be uploaded to the system. GRPD experienced several occasions in which the L3 servers were too full to upload new videos. Retention for no citation, code ID1 was changed from 180 to 150 days on 5/16/2012. (Bates 004979). It is likely that the identified Edgecombe video was purged on or before that date.

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

No similar entry with a similar time was located for Officer Laudenslager on 8/15/11 on Role 15; the closest entry was dated 8/10/11:

08/10/2011 08:43 Laudenslager, Eugene 3360P 011326_110810_124316_0.qbx (R.15, p.563).

No similar entry with a similar time was located for Sgt. Bargas. The closest entries in Roll 15 to the event are hours before and after the incident with Denishio Johnson:

08/15/2011 06:21 Bargas, Elliott 3518P 007400_110815_102101_0.qbx (R15, p.571)

08/15/2011 15:33 Bargas, Elliott 3518P 007400_110815_193329_0.qbx, (R15, p.573)

Role 16 also contains videos dated 8/15/11, but none were identified with Bargas, Edgecombe, or Laudenslager's name.

***For the Keyon Harrison/Pablo Aguilar incident (12-050306)*:**

Metadata log 24 was searched for files dated 5/31/2012 and show entries that were close in time to the date and time listed on the incident report concerning Keyon Harrison and therefore, may have been video of this incident.

For Sgt. LaBrecque, the following entries show up:

05/31/2012 15:09 LaBrecque, Steve 3320P 011324_120531_190900_0.qbx (R.24, p.214)

05/31/2012 15:22 LaBrecque, Steve 3320P 011324_120531_192230_0.qbx (R.24, p.215)

For Officer Newton, the following entries show up:

05/31/2012 15:14 Newton, Dennis 3310P 001364_120531_191413_0.qbx (R.24, p. 214)

For Officer Nagtzaam:

05/30/2012 15:11 Nagtzaam, Lucas 3517P 007418_120530_191141_0.qbx (R. 24, p208)

Roll 26 also contained entries for Ofc Newton dated 5/31/12:

05/31/2012 06:25 Newton, Dennis 3310P 001364_120531_102503_1.qbx
05/31/2012 06:51 Newton, Dennis 3310P 001364_120531_105155_1.qbx
05/31/2012 08:07 Newton, Dennis 3310P 001364_120531_120743_1.qbx
05/31/2012 08:58 Newton, Dennis 3310P 001364_120531_125812_1.qbx (R.25, p.208)

Officer Nagtzaam and Sgt. LaBrecque's name did not show up for any of the 5/31/12 entries on Roll 26.

Pursuant to the Manual of Procedure, if any of these files were videos of the Aguilar/Harrison incident, they would have been tagged "no citation". All video is purged from the L3 system automatically in accordance with the automatic retention settings. Retention schedules were changed several times over the years to free up storage space so that new video could be uploaded to the system. GRPD experienced several occasions in which the L3 servers were too full to upload new

videos. Retention for no citation, code ID1 was changed from 150 to 130 days on 6/21/2012. It is likely that video dated 5/31/12 and tagged ID=1 (no citation) was purged on or around October 8, 2012.

Captain VanderKooi's vehicle was not equipped with an L3 system. (VanderKooi Dep, p.32).

Each metadata log is between 400 and 600 pages. Selections of the discussed logs have been extracted from the originals and provided with this response. (Bates 004980-88). Identified Bates stamped documents are being uploaded to the link provided by counsel.

2. With regard to each of the three incidents described above, if a video was made and it is still available, please produce a copy.

ANSWER: Defendant objects to request 2 as vague; there are only two incidents described in Request 1. Without waiving the objection, see response #1, above.

3. With regard to each of the incidents described above, if a video was made and it is no longer available, explain what happened to it.

ANSWER: See response to #1, above.

Lt. Schnurstein and Sgt. Al Noles (Supervisor, Special Services Unit) assisted in answering questions 1-3.

4. Identify who ran Keyon Harrison's thumb print through AFIS.

ANSWER: Julie Snyder ran the print.

5. Explain why the person identified in the foregoing Interrogatory ran Keyon Harrison's thumb print through AFIS.

ANSWER: There was no local record (KCCF database) for the subject therefore, the print was searched against the known database (AFIS).

6. Was it policy, custom, or practice of the Grand Rapids Police Department to run the thumb prints taken from individuals subjected to a P & P during 2012, through AFIS?

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

ANSWER: It is our practice to check all the submitted P&P cards against the KCCF database. If the person does not appear in the database, the print is searched against the known database (AFIS). Ms. Snyder was trained to use these resources in this sequential order when she was promoted to the Latent Print Unit in 2004. Both of her predecessors practiced this routine as well. The goal remains to attempt to verify the information provided.

7. If your Answer to the foregoing Interrogatory was yes, please produce a copy of the policy or other document which evidences that policy, custom or practice.

ANSWER: There is no written policy. No such documentation exists.

Julie Snyder and Gretchen Ross assisted in answering questions 4-7.

8. Produce copies of all print cards from 2010 and all of the incident reports identified on each card.

RESPONSE: No. Defendant City objects to this request as unduly burdensome and an attempt to cause unnecessary delays and costs in these litigations. MCR 2.302(G). As indicated in City's response to Plaintiffs' Third Set of Interrogatories and Requests for Production of documents, dated 5/6/10, city employees—GRPD staff and the undersigned—spent a considerable amount of time compiling the 2012 and 2011 data which we have already given over: 16.75 hours (2012) and 14.54 hours (2011). For those reasons, the City's May 6, 2015 response stated "Given the amount of work needed to produce these records, Defendant City objects to further production of reports as unduly burdensome." As made apparent in the deposition of Plaintiffs' expert, Dr. William Terrill, Plaintiffs did not begin having their expert analyze data until *June 2015*. By the date of his deposition, August 11, 2015, Dr. Terrill had read only 26 incident reports from 2012 (Terrill Dep, p. 64, 79-80), despite the fact that (1) the 2012 documents were produced to Plaintiffs in February 2015 (2) The City provided 491 incident reports from 2012 (see Bates No. 004951); and (3) City paid Plaintiffs' expert fee of $2,000 in order to depose him. Yet, by August 11, 2015, after close of fact discovery, Plaintiff's expert had read only 5% of the 2012 incident reports produced by the City and 2% of the combined number of incident reports (1,100) produced by the City for 2012 and 2011. Moreover, Plaintiffs told Defendants on April 7, 2015 that they were not seeking 2010 data in an email exchange.

9. Do you compile statistics on the race and sex of:
   a. People who call the GRPD for service;
   b. Crime victims, or
   c. Persons arrested for crimes

RESPONSE: Defendant City objects to Request 9 as overbroad and vague. City does not know what is meant by "compile statistics".

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

a. City does not know what is meant by "call for service" but presumes Plaintiff means persons who contact emergency dispatch services, or 911. City does not ask or collect information pertaining to a 911 caller's race or sex.

b. & c. City does not know what is meant by "crime victim" or "persons arrested for crimes". If a Grand Rapids police officer has a face-to-face interaction with an individual and the interaction is documented in an incident report, civil infraction, or appearance ticket, an officer will attempt to ascertain a person's race/ethnicity and sex and document the information on the ticket and/or incident report. The City's Records Management System (Filemaker) allows officers to designate a status for an individual based on their connection to the facts of an incident. Statuses include "victim" and "arrested." City does not aggregate this information into a list or report in the ordinary course of its operations. To do so would require database engineering which City objects to as being beyond the scope of discovery.

Source: Lt. David Schnurstein

10. If you collect race and gender data and you can report it for the three categories as set forth above, please report the total for each category and the breakdown by race for each category, for 2010, 2011 and 2012.

RESPONSE: Defendant City objects to this request as unduly burdensome, an attempt to cause unnecessary delays and costs in these litigations, MCR 2.302(G), and an attempt to require statistical analysis in the guise of an interrogatory. *McDonald v. Grand Traverse Cnty. Election Comm'n*, 255 Mich. App. 674, 699 (2003). As described in Request 9, City does not aggregate this information into a list or report in the ordinary course of its operations. To do so would require database engineering which City objects to as being beyond the scope of discovery. As described in response to Request # 8, Plaintiffs have not worked their expert such that he could provide no final opinions as of the date of his deposition, despite the considerable amount of time and energy Defendants expended in producing the reports so that Plaintiffs could analyze the data. Plaintiffs should not be granted any additional data for this very reason.

11. Admit that, Police officers taking photos and thumbprints, P&P, of individuals with whom they make contact is a commonly-known, long standing custom or practice of the City of Grand Rapids Police Department.

Answer to this Request to Admit was served on Plaintiffs on August 17, 2015.

12. If the Response to the foregoing Request for Admission is anything other than an admission, state in detail the factual and legal basis for the denial or qualified

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

answer and attach copies of any documents which support your denial or qualified answer.

ANSWER: Defendant City objects to the terms "commonly-known" [sic] and "long standing" in Request 11. Defendants object to Request 12 as vague as to the phrase "legal basis". City's response to request #11 provided the factual basis for the response.

Without waiving the objection, Defendant City admits that officers taking photos and thumbprints of individuals is a custom or practice of the City of Grand Rapids and has been for decades. The custom or practice has changed over those years with the evolution of technology. To the extent that "long standing" is meant to convey a "static, unchanging" custom or practice, the City denies the same as untrue. City further notes that "thumbprint" is incomplete because, although it is primarily a thumbprint, another finger or fingers might be printed instead of or in addition to a thumb. Defendant City denies as untrue, incomplete, and inaccurate the characterization of the custom or practice as "taking photos and thumbprints of individuals with whom they make contact" as inaccurate and incomplete. A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident.

See also, VanderKooi dep, p. 36 and documents already provided in the course of discovery (including MOP and training documents produced under subpoena on 10/23/14, 2011 and 2012 P&P cards (Bates 002087-2546, 001147-1709).

13. Admit that the custom or practice of P&P described in Request to Admit #11 above, is applied to innocent citizens encountered by Grand Rapids Police Officers.

Answer to this Request to Admit was served on Plaintiffs on August 17, 2015.

14. If the Response to the foregoing Request for Admission is anything other than an admission, state in detail the factual and legal basis for the denial or qualified answer and attach copies of any documents which support your denial or qualified answer.

RESPONSE: Defendant City objects Request Fourteen because the term "innocent" is impossible to answer and not a legally relevant term under Fourth Amendment jurisprudence. Without waiving the objection, Defendant City does not

apply the custom or practice of taking photos and thumbprints as described in Request to Admit #11 in an unconstitutional manner.

15. Explain why in 2011 out of a total of 73 innocent people who were subjected to a P&P during a call response stop, 57 of them, or 78%, were African-American, like Denishio Johnson, as shown on the attached list A.

RESPONSE: Defendant City objects to Request 15 as an inappropriate interrogatory because it is nothing more than a request for the City to provide statistical analysis of Plaintiffs' attorney's data in the guise of interrogatories. *McDonald v. Grand Traverse Cnty. Election Comm'n*, 255 Mich. App. 674, 699 (2003). Indeed, plaintiffs' expert has no idea how Plaintiffs' attorney developed this data. (Terrill Dep., p. 67-68, 100-101). Defendant objects to the term "innocent" as vague and legally irrelevant under Fourth and Fourteenth Amendment jurisprudence.

16. Explain why in 2012 out of a total of 79 innocent people who were subjected to a P&P during an officer initiated stop, 59 of them, or 75%, were African-American, like Keyon Harrison and, in 2011, of a total of 158 innocent people who were subjected to a P&P during an officer initiated stop, 118 of them, or 75% were African-American, like Keyon Harrison, as shown on attached lists, B1 and B2.

RESPONSE: Defendant City objects to Request 16 as an inappropriate interrogatory because it is nothing more than a request for the City to provide statistical analysis of Plaintiffs' attorney's data in the guise of interrogatories. *McDonald v. Grand Traverse Cnty. Election Comm'n*, 255 Mich. App. 674, 699 (2003). Defendant City cannot answer this question because City has no idea how Plaintiffs' attorney developed this data. Indeed, Plaintiffs' expert has no idea how Plaintiffs' attorney developed this data. (Terrill Dep., p. 67-68, 100-101). Defendant objects to the term "innocent" as vague and legally irrelevant under Fourth and Fourteenth Amendment jurisprudence.

16 (sic). Identify the race of each officer on the attached lists.

RESPONSE: No. Defendant City objects because this interrogatory is unduly burdensome and an attempt to delay discovery, and increase the cost of litigation. MCR 2.302 (G). Moreover, this is a request for City to compile data onto a document that Plaintiffs' assert is covered by the work product doctrine. This document is one developed by Plaintiffs' attorney; it is not a City document and is not used in the City's ordinary course of its operations. Defendant City further objects to

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

"interrogatory 16" as an unduly burdensome hundred-plus-part interrogatory. Moreover, as explained in Response to Request # 8, Plaintiffs have not worked their expert; he could provide no final opinions as of the date of his deposition, despite the considerable amount of time and energy Defendants expended in producing the reports so that Plaintiffs could analyze the data. Plaintiffs should not be granted any additional data.

Respectfully submitted,

Dated: August 28, 2015

KRISTEN REWA (P73043)
Assistant City Attorney
Attorney for Defendants
Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-4026
(616) 456-4569 FAX

City of Grand Rapids
DEPARTMENT OF LAW
620 CITY HALL
GRAND RAPIDS, MICHIGAN 49503

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

KEYON HARRISON,

Plaintiff,

vs

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS,
a Michigan Municipal Corporation,

Defendants.
_____/

Case No. 14-02166-NO

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR PARTIAL SUMMARY DISPOSITION AND DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court, held in the Kent County Courthouse
in the City of Grand Rapids, on November 18, 2015,

Present: HON. GEORGE JAY QUIST
Circuit Judge

Upon Plaintiff's and Defendants' cross-motions for summary disposition, and the Court being otherwise fully informed, it is hereby ordered and adjudged as follows:

OPINION AND ORDER

I. Issues Presented and Disposition

This case arises out of the Plaintiff's claim that his civil rights were violated under 42 USC 1981 and 1983. Plaintiff moves for partial summary disposition on his 42 USC 1983 claims pursuant to MCR 2.116(C)(10). Defendants, Captain Curt VanderKooi and City of Grand Rapids, also filed motions for summary disposition on all of Plaintiff's claims pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10).

After reviewing the material facts and applicable law, the Court:

1. **DENIES** Plaintiff's motion for partial summary disposition;
2. **GRANTS** Defendant Curt VanderKooi's motion for summary disposition; and,

3. **GRANTS** Defendant City of Grand Rapids motion for summary disposition.

II. Material Facts

Pursuant to deposition cited in both Plaintiff and Defendants' briefs, this case arises out of the following factual scenario:

Plaintiff, a 16-year-old African America male, was walking home from school on May 31, 2012. Defendant Captain Curt VanderKooi (hereafter "VanderKooi") of the Grand Rapids Police Department (hereafter the "GRPD") was driving through the area in an unmarked police vehicle. He was not in uniform and was outside of his service area.

VanderKooi observed Plaintiff approach a young man of Hispanic descent, later identified as Pablo Aguilar (hereafter "Aguilar"). Aguilar was riding his bicycle and carry a large model firetruck or train engine. Plaintiff took the model from Aguilar and walked alongside him for a short distance. Plaintiff handed the model back to Aguilar after they crossed the street, and the pair parted ways.

VanderKooi testified that because he was in an area he knew had a high rate of burglaries and because of the suspicious exchange, he decided to continue to monitor Plaintiff's activity. He circled his vehicle around the block. When he returned to the scene, he saw Plaintiff enter a park, crouch down by some brush, and move his arms a bit.

After observing this activity, VanderKooi parked his vehicle and approached Plaintiff. VanderKooi asked Plaintiff to stop and talk. Plaintiff consented. VanderKooi identified himself, told Plaintiff what he had seen, and asked Plaintiff what he was doing. Plaintiff stated that he was helping his friend carry an internship project home and then went into the park to help an injured bird. VanderKooi testified that he was suspicious of Plaintiff's explanation given the number of burglaries in the neighborhood and because he did not see an injured bird in the area.

VanderKooi asked Plaintiff to wait and called for backup. A uniformed police officer arrived on the scene approximately two minutes later. Another officer was dispatched to locate Aguilar. VanderKooi then asked Plaintiff if he could search his book bag. Plaintiff consented, and the second officer on the scene, Sergeant LaBreque, searched his bag. No

contraband was found. A third officer, Lucas Nagtzaam, arrived and asked if he could search Plaintiff. Again, Plaintiff consented, and nothing illegal was found.

VanderKooi asked for Plaintiff's photo ID. Plaintiff had none. The parties dispute whether VanderKooi then asked Plaintiff if he would submit to a Print and Photograph (P&P) procedure to verify his identity, or simply told Plaintiff he was going to execute a P&P. Plaintiff asked whether he had done something illegal, but eventually consented to the P&P. The process took about two minutes.

Plaintiff asked again why he was being stopped. VanderKooi stated that there were a lot of burglaries in the area and that Plaintiff's exchange with Aguilar appeared suspicious. Plaintiff stated that he understood VanderKooi's concern. No further action was taken and Plaintiff went home.

An incident report was generated and Plaintiff's fingerprints were run through the Kent County Correctional Facility's Database as well as the Automated Fingerprint Identification System. No matches were found. Plaintiff's prints remain on file. His photograph was uploaded into the GRPD's electronic record system.

Plaintiff filed the instant suit claiming that his civil rights were violated under 42 USC 1981 and 1983. He now moves for summary disposition of his 42 USC 1983 claim. He alleges that the stop went on for an unreasonable period of time. He also claims that the P&P violated his Fourth and Fourteenth Amendment rights because it was not based on reasonable suspicion or probable cause, and he did not consent to it. He also claims that the P&P was a 'taking' under the Fifth Amendment and violated his constitutional right to privacy.

Defendants VanderKooi and City of Grand Rapids also move for summary disposition. VanderKooi argues that the stop was reasonable and Plaintiff consented to all contact. He also asserts that Plaintiff's individual claims against him are precluded by qualified immunity. The City of Grand Rapids argues that neither the stop, nor the P&P policy, are unconstitutional.

III. Standard of Review

Under MCR 2.116(C)(7) a defendant may seek to dismiss a claim based on immunity granted by law. In making a decision under MCR 2.116(C)(7), a court must consider all

documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it.

Summary disposition under MCR 2.116(C)(10) is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim."[1] In reviewing the motion, the court considers the evidence in the light most favorable to the nonmoving party.[2] In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence to establish that the essential elements of the claim at issue are satisfied.[3]

The burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists.[4] The nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[5] Conclusory statements are insufficient to create a genuine issue of fact.[6]

IV. Law and Analysis

A. Plaintiff's motion for partial summary disposition of his 42 USC 1983 claims

42 USC 1983 provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such

[1] *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001), citing *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993).
[2] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).
[3] *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), quoting *Celotex Corp v Catrett*, 477 US 317, 331; 106 S Ct 2548 (1986); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[4] *Id.*
[5] *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[6] *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

> officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

For the purposes of his motion for partial summary disposition, Plaintiff does not argue that VanderKooi lacked reasonable suspicion to conduct a brief investigative stop. Plaintiff concedes that he consented to talk and to have his bag searched. It should also be noted that the City of Grand Rapids does not deny that it utilizes its P&P practice, and Plaintiff does not argue that the P&P procedure is unconstitutional on its face.

Plaintiff claims stems from the position that his constitutional rights were violated when VanderKooi detained him for an extended period of time without authority, and executed a P&P without probable cause. Plaintiff also argues that the City's P&P policy constitutes a 'taking' under the Fifth Amendment and violates his constitutional right to privacy. The Court will examine each claim.

i. Length of Stop

The Michigan Supreme Court explained that the following "three tiers" of police-citizen encounters invoke a Fourth Amendment search and seizure analysis: (1) an officer asking a person questions in a public place; (2) an officer stopping a person and conducting a search if the officer has an articulable suspicion that the person has committed, or is about to commit, a crime; and (3) an officer arresting a person based on probable cause.[7] The Court went onto explain:

> "the police must have a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing. As the Supreme Court stated in *United States v. Cortez, supra,* the "articulable reasons" or "founded suspicion" or "particularized suspicion" that criminal activity is afoot must derive from the police officer's assessment of the "whole picture"—the totality of circumstances with which he is confronted."[8]

[7] *People v Shabaz*, 424 Mich 42, 5608 (1985), *cert den'd, Michigan v Shabaz*, 478 U S 1017 (1986).
[8] *Id.* at 59.

In analyzing the propriety of a brief investigatory stop, the courts apply the standard set forth in *Terry v Ohio.*[9] Under *Terry,* the reasonableness of a search or seizure depends on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[10]

In the case of *People v Bryant*,[11] the Michigan Court of Appeals explained that to justify a brief, on-the-scene intrusion, police officers must have a reasonable suspicion, based on objective facts, that the individual detained is involved in criminal activity.[12] The Michigan Supreme Court explained that "in determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars.' Common sense and everyday life experiences predominate over uncompromising standards.[13] Therefore, isolated factors that appear innocent may, in combination, provide a police officer with reasonable suspicion to justify an investigative stop.[14] When analyzing the totality of the circumstances, law enforcement officers are permitted, if not required, to consider the modes or patterns of operation of certain kinds of lawbreakers. A trained officer may draw inferences from this data and makes deductions.[15]

Once it has been determined that the police had a "reasonable suspicion" sufficient to justify a brief stop of an individual, "the intrusiveness of the police activity must be carefully limited to the circumstances that justified the original decision. A police officer may ask questions and pat down the suspect for weapons, but any further detention or search must be based on consent or probable cause."[16]

In the instant case, Plaintiff argues that VanderKooi should have ended the contact after Plaintiff offered an explanation for his actions and allowed his book bag to be searched. To support his claim, Plaintiff cites to the United States Supreme Court case of

---

[9] *Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed2d 889 (1968).
[10] *Id.* at 20.
[11] *People v Bryant*, 135 Mich App 206, 353 NW2d 480 (1984).
[12] *Id.* at 210-11.
[13] *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001) (internal cites omitted).
[14] *Id.* at 193.
[15] *Id.* at 196.
[16] *Bryant* at 211.

Brown v Texas. [17] The defendant in *Brown* was a pedestrian walking in a high crime area. He was stopped by police and asked to identify himself but refused. The officers were unable to identify any specific misconduct by the defendant. Rather, they based the stop on a generalized suspicion. Nevertheless, the defendant was arrested for failure to identify himself- a crime in certain circumstances under Texas law. The defendant was later convicted under the Texas identification statute and appealed. The Court held that when the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment.[18]

The facts of *Brown* are factually and legally distinguishable from the case at bar. For the purposes of this motion, parties agree that VanderKooi had reasonable suspicion to conduct a stop. This Court agrees. VanderKooi observed a suspicious exchange between two young men in an area and at a time of day when crime rates were higher. Plaintiff then entered a park and exhibited strange behavior. Given the totality of the circumstances, reasonable suspicion existed to merit further investigation.

Another important point of distinction is that Plaintiff consented to initial police contact, and continued to consent to various requests as the investigation continued. Plaintiff was asked to stop and talk; he agreed to do so. He was asked if his bag could be searched; he said yes. Plaintiff was then asked or told that his photo and prints needed to be taken for identification purposes; he said "okay." While Plaintiff asked why he was stopped and if he had done anything wrong, he never attempted to leave or ask if he was free to go. Both Plaintiff and Defendant cite to ample deposition testimony to this effect.

Finally, the Court finds that the length of the stop was not unnecessarily long. The constitution does not forbid all seizures, only unreasonable ones.[19] A brief stop of a suspicious individual, in order to maintain the status quo momentarily while more information is obtained, may be reasonable.[20] "If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period

[17] *Brown v Texas* 443 US 47; 99 S Ct 2637; 61 L Ed2d 357 (1979).
[18] *Id.* At 50.
[19] *Terry* at 9.
[20] *Adams v Williams,* 407 US 143, 146; 92 S Ct. 1921, 1923; 32 L Ed2d 612 (1972).

involved in *Terry*..."[21] When assessing whether a detention is too long in duration to be justified as an investigatory stop, the question that must be asked is whether the police were diligently pursuing a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped.[22] The ongoing legality of the detention depends on "the evolving circumstances with which the officer is faced."[23]

The facts of this case make it clear that VanderKooi's contact with Plaintiff was brief. After making initial contact with Plaintiff, VanderKooi called for backup and the pair waited for approximately two minutes. Officers were dispatched to locate Plaintiff's companion. During that time, Plaintiff consented to a search of his bag and agreed to be fingerprinted and photographed for identification purposes. It is undisputed that the P&P took approximately two minutes. According to VanderKooi's Answers to Interrogatories, the entire encounter lasted ten to fifteen minutes. When Plaintiff's story and identification was confirmed and no contraband was found, the officers terminated the investigation and Plaintiff was free to go.

In considering the above, the Court is satisfied that VanderKooi's stop of Plaintiff was reasonable and not of an excessive duration. Plaintiff has failed to establish a genuine issue of material fact on this issue. Therefore, his motion for partial summary disposition is denied.

ii. Search and P&P

The Fourth Amendment's guarantee against unreasonable searches is applicable to states by reason of Due Process Clause of Fourteenth Amendment.[24] Generally, a search conducted without a warrant is unreasonable unless both probable cause and an exception to the warrant requirement exists.[25]

---

[21] *Michigan v Summers,* 452 US 692, 701, n. 12; 101 S Ct. 2587, 2593, n. 12; 69 L Ed.2d 340 (1981).
[22] *People v Chambers*, 195 Mich App 118, 123; 489 NW2d 168 (1992), quoting *United States v Sharpe,* 470 US 675, 686; 105 S Ct. 1568; 84 L Ed2d 605 (1985).
[23] *Williams* at 315.
[24] USC Const Amend 4, 14.
[25] *People v Borchard-Ruthland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999); *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989); *People v Anthony*, 120 Mich App 207, 210; 327 NW2d 441 (1982), lv den 417 Mich 897 (1983), cert den 462 US 1111, 103 S Ct 2463; 77 L Ed2d 1340 (1983).

Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search.[26] The facts of this case establish that VanderKooi had probable cause to believe that Plaintiff might be involved in a criminal activity.

Once probable cause is established, a valid exception to a warrant must exist. One such exception is consent to the search.[27] Courts have long approved consensual searches because it is reasonable for the police to conduct a search once they have been permitted to do so.[28] To be valid, consent must be unequivocal, specified, and freely and intelligently given, without any duress or coercion on the part of the police.[29] A person who voluntary consents to a search is precluded from any later claim of illegality relative to the search.[30]

Whether consent to search has been given is a mixed question of fact and law which the trial court must determine.[31] When the voluntariness of consent is called into question in the context of a criminal case, the party seeking to establish consent must demonstrate that the consent was given by the standard of clear and convincing evidence.[32] However, in establishing the voluntariness of consent, there is no requirement that the consent must be verbally given.[33] Consent to a search may be in the form of words, gesture, or conduct.[34]

The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness - what would the typical reasonable

---

[26] *Williams* at 660.
[27] *People v Castle*, 126 Mich App 203, 208; 337 NW2d 48 (1983).
[28] *Schneckloth v Bustamonte,* 412 US 218, 219; 93 S Ct 2041, 2043; 36 L Ed2d 854 (1973).
[29] *People v Lumpkin*, 64 Mich App 123; 235 NW2d 166 (1975); *People v Galloway*, 259 Mich App 634; 675 NW2d 883 (2003).
[30] *People v Wilbert*, 105 Mich App 631; 307 NW2d 388 (1981).
[31] *US v Matlock*, 415 US 164; 94 S Ct 988; 39 L Ed 2d 242 (1974).
[32] *People v Kaigler*, 368 Mich 281; 118 NW2d 406 (1962); *People v Raybon*, 125 Mich App 295; 336 NW2d 782 (1983).
[33] *People v Frohriep*, 247 Mich App 692; 637 NW2d 562 (2001); *United States v Hinojosa*, 606 F3d 875, 882 (CA 6, 2010).
[34] *Frohriep* at 703; *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004), quoting *United States v Griffin*, 530 F2d 739, 742 (CA 7, 1976).

person have understood by the exchange between the officer and the suspect?[35] In the instant case, Plaintiff concedes that he consented to initial contact with VanderKooi and the subsequent search of his book bag. Plaintiff also testified that he said "okay" when he was asked to participate in a P&P.

Plaintiff stated that he was nervous and scared when speaking with VanderKooi. However, he also testified that VanderKooi remained calm throughout the exchange. There are no allegations that VanderKooi utilized threats, coercion, or an aggressive show of authority when interacting with Plaintiff. Rather, VanderKooi was out of uniform and driving an unmarked police car.

The Court in *Schneckloth v Bustamonte*, held that in determining whether a defendant's will was overborne in a particular case, the Court should assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.[36] Some of the factors taken into account have included the youth of the accused, his education and intelligence, his knowledge of constitutional rights, the length of detention, and the use of physical punishment.[37]

Here, Plaintiff was a 16-year old high school student. There is no claim that Plaintiff suffers from any cognitive deficiency or lacked the capacity to consent. Plaintiff testified that while he was very nervous, the interview was non-confrontational. VanderKooi testified that Plaintiff remained pleasant and cooperative throughout the exchange. As previously discussed, the interview was not of lengthy duration. Plaintiff also felt free to ask the officers several questions during the course of the stop but never asked if he could leave. In considering these circumstances, the officer's present clearly thought they had obtained Plaintiff's consent to a P&P when he responded "okay."

After his deposition was taken, Plaintiff executed an affidavit. He stated that he did not know that he could refuse consent to an officer's request. He also averred that when he said "okay" to the P&P he was merely acknowledging that he heard what VanderKooi said. He did not consent to the procedure.

---

[35] *Illinois v Rodriguez, 149 US 177,* 183-189; 110 S Ct 2793; 111 L Ed 148 (1990); *Florida v Royer,* 460 US 491, 501-502; 103 S Ct 1319; 75 L Ed2d 229 (1983).
[36] *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed2d 854 (1973).
[37] *Id.* at 226.

The Court finds this argument without merit. It is well established that a party cannot create a genuine issue of material fact by executing an affidavit that contradicts unfavorable deposition testimony.[38]

Based on the above analysis, VanderKooi obtained Plaintiff's voluntary consent to execute a P&P. Plaintiff has failed to establish a genuine issue of material fact on this issue. Therefore, his motion for partial summary disposition is denied.

iii. P&P as a 'taking' under the Fifth Amendment

Plaintiff asserts that the City of Grand Rapid's P&P policy constitutes an unconstitutional 'taking.' The Fifth Amendment provides, in part, that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation.

To support his claim, Plaintiff cites to the Michigan Supreme Court case of *Tobin v Michigan Civil Service Commission*.[39] The plaintiffs in that case were civil service employees who asserted that disclosure of their names and home addresses via a Freedom of Information Act request constituted an intrusion into their seclusion, solitude, or private affairs. They argued that the common-law right of privacy protects against four types of invasion of privacy: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[40]

The Court rejected Plaintiff's argument. Most notably it found that individuals have no reasonable expectation of privacy to information readily observable to the general public, in this case names and addresses. A person's name and address is not of a secret or embarrassing nature, and disclosure does not place them in a false light.[41]

Much like the names and addresses in dispute in the *Tobin* case, Plaintiff's face and fingerprints are observable by the general public and not protected under the common

[38] *Kaufman & Payton, PC, v Nikkila*, 200 Mich App 250, 257; 503 NW2d 728 (1993).
[39] *Tobin v Michigan Civil Service Com'n*, 416 Mich 661; 331 NW 2d 184 (1982).
[40] *Id.* at 672 citing Prosser, *Privacy,* 48 Cal L Rev 383, 389 (1960); *Beaumont v. Brown,* 401 Mich. 80, 95 fn 10, 257 N.W.2d 522 (1977); see also 3 Restatement Torts, 2d, § 652A, p. 376.
[41] *Id.* at 673-678.

law right to privacy.[42] Plaintiff has failed to state any other legal authority to support his claims. Therefore, his motion for partial summary disposition is denied.

iv. Constitutional right to privacy

Plaintiff argues that the P&P policy violates his constitutional right to privacy. To support this argument he cites to *Eddy v Moore*.[43] In that case, the plaintiff was photographed and fingerprinted after being charged with a crime. She was later acquitted and requested the return of her picture and prints. The local authorities refused. The Court held that the municipalities' refusal to return the evidence, absent a compelling showing justifying their retention, was a constitutionally defective under the Fourth and Fourteenth Amendments.[44]

The Court does not find the *Moore* case factually analogous to the instant situation. As previously discussed, Plaintiff consented to the P&P procedure at issue. Moreover, *Moore* was analyzed under the Fourth and Fourteen Amendments. It does not address governmental takings under the Fifth Amendment. Additionally, nothing in the case can be interpreted as creating a right to privacy of one's image or fingerprints, or a property right in individual privacy.[45]

Plaintiff fails to point to any state or federal case law that creates a constitutional right to privacy of his face or fingerprints. While Michigan law recognizes a common-law right to privacy arising in tort, Plaintiff as not raised such claims here. [46] Therefore, his motion for partial summary disposition is denied.

v. Conclusion

Plaintiff has failed to bring sufficient evidence that his constitutional rights were violated. Therefore, his motion for partial summary disposition regarding his 42 USC 1983 claim is respectfully denied pursuant to MCR 2.116(C)(10).

---

[42] *Id.* at 672.
[43] *Eddy v Moore*, 487 P 2d 211, 5 Wn App 334 (1979).
[44] *Id.*
[45] *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990); *Tobin v Michigan Civil Serv Comm'n*, 416 Mich 661, 678; 331 NW2d 184 (1982); *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed2d 576 (1967).
[46] *Tobin* 672.

B. Defendant VanderKooi's motion for summary disposition

In his Second Amended Complaint, Plaintiff alleged that VanderKooi's search and seizure violated his rights under the Fourth, Fourteenth, and Fifth Amendments, as well as his constitutional rights to privacy (hereafter referred to collectively as the "1983 claims"). He also alleged that VanderKooi violated his equal protection pursuant to 42 USC 1981 because the stop was racially motivated.

VanderKooi now moves for summary disposition. He argue that the stop was reasonable and not racially motivated. He further argues that Plaintiff's claims are precluded based on qualified immunity.

i. 1983 claims

As previously discussed in subsection (IV)(A) of this opinion, this Court finds that Plaintiff failed to establish a genuine issue of material fact regarding his 1983 claims. Therefore, VanderKooi is entitled to summary disposition on that count pursuant to MCR 2.116(I)(2).

VanderKooi's is also protected by qualified immunity. A police officer may invoke the defense of qualified immunity to avoid the burden of standing trial when faced with a claim that the officer violated a person's constitutional rights.[47] A plaintiff has the burden of overcoming the assertion of qualified immunity at the pretrial stage.[48] The doctrine of qualified immunity protects government officials from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights.[49] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.' "[50] However, immunity will not apply in situations where it would be clear to a reasonable officer that his or her conduct was unlawful in the under the circumstances they confronted.[51]

---

[47] *Walsh v Taylor,* 263 Mich App 618, 635; 689 NW2d 506 (2004).
[48] *Pearson v Callahan,* 555 US 223, 231–232; 129 S Ct 808; 172 L Ed2d 565 (2009).
[49] *Id.* at 231, quoting *Harlowv Fitzgerald,* 457 US 800, 818; 102 S.Ct. 2727; 73 L Ed2d 396 (1982).
[50] *Ashcroft v al–Kidd,* 563 US 731; 131 S Ct. 2074; 179 L Ed 2d 1149 (2011), quoting *Malley v Briggs,* 475 US 335, 341; 106 S Ct 1092; 89 L Ed2d 271 (1986).
[51] *Groh v Ramirez,* 540 US 551, 558–559, 563; 124 S Ct 1284; 157 L Ed2d 1068 (2004); *Walsh v Taylor,* 263 Mich App 618, 636; 689 NW2d 506 (2004).

Here, VanderKooi had reasonable suspicion to stop Plaintiff. The stop was of a reasonable duration. Plaintiff consented to all contact. Therefore, no Fourth or Fourteenth Amendment violation occurred.

The Court also found that the P&P policy in dispute does not constitute a taking under the Fifth Amendment. Finally, Plaintiff has no Constitutional right to privacy in this instance.

Because Plaintiff failed to establish a genuine issue of material fact regarding his 1983 claims and VanderKooi is otherwise protected by qualified immunity, VanderKooi is entitled to summary disposition on that issue pursuant to MCR 2.116(C)(7), 2.116(C)(10) and 2. 116(I)(2).

ii. 1981 claim

The only count that remains is Plaintiff's equal protection claim. 42 USC 1981 provides, in part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Plaintiff claims that VanderKooi initiated a stop and executed a P&P solely because Plaintiff is an African American, in violation of the Fourth and Fourteenth Amendments. However, in *Whren v United States* the United States Supreme Court unanimously held that a police officer's subjective state of mind is irrelevant for Fourth Amendment purposes. [52] If reasonable suspicion for a stop exists, the officer's underlying motivations will not be considered by the Court in determining the lawfulness of the officer's actions as a matter of the Fourth Amendment.

However, the *Whren* Court went on to hold that the Constitution prohibits selective enforcement of the law on the basis of considerations of race under the Fourteenth Amendment.[53] Therefore, if a plaintiff can show that he was subjected to unequal

[52] *Whren v US*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996).
[53] *Id.* at 813.

treatment based upon his race or ethnicity during the course of an otherwise lawful traffic stop, that would be sufficient to demonstrate a violation of the Equal Protection Clause.[54]

A claimant alleging selective enforcement of facially neutral laws must demonstrate that the challenged law enforcement practice had a discriminatory effect and that it was motivated by a discriminatory purpose.[55] To establish discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not subjected to the same enforcement.[56] Discriminatory purpose can be shown by demonstrating that the "'decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.' "[57]

Here, Plaintiff fails to offer evidence tending to show that VanderKooi's stop was racially motivated or discriminatory in purpose. Plaintiff asserts that VanderKooi's discrimination was evident when VanderKooi pursued Plaintiff after witnessing a suspicious exchange of property, instead of the Hispanic individual who received the property.

Determining whether official action was motivated by intentional discrimination "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[58] Discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact that the practice bears more heavily on one race than another.[59]

The Court finds that the facts in the instant case do not support Plaintiff's argument. VanderKooi testified that he witnessed two minority males exchange an object on a street corner. He decided to continue to observe the situation but first had to circle his vehicle around the block. When VanderKooi returned, only Plaintiff remained in the area.

---

[54] *Farm Labor Organization Committee v Ohio State Highway Patrol*, 308 F3d 523; 533 (2002).
[55] *Wayte v United States,* 470 US 598, 608; 105 S Ct 1524; 84 L Ed2d 547 (1985).
[56] *United States v Armstrong,* 517 US 456, 465; 116 S Ct 1480; 134 L Ed2d 687 (1996).
[57] *Wayte,* 470 US at 610, quoting *Personnel Adm'r of Mass v Feeney,* 442 US 256, 279; 99 S Ct 2282; 60 L Ed.2d 870 (1979).

[58] *Village of Arlington Heights v Metro Hous Dev Corp,* 429 US 252, 266; 97 S Ct 555; 50 L Ed2d 450 (1977).
[59] *Washington v Davis,* 426 US 229, 242; 96 S Ct 2040; 48 L Ed2d 597 (1976).

Plaintiff enter a park and continue act in a suspicious manner. VanderKooi then initiated an investigative stop.

Under these circumstances, VanderKooi did nothing more than choose between two reasonable alternatives. Furthermore, it is undisputed that the other young man in question, Pablo Aguilar, was also pursued by other officers. He was not treated differently.

Plaintiff also attempts to establish discriminatory intent by arguing that Aguilar did not have valid identification when he was stopped, but was not photographed or fingerprinted.[60] However, VanderKooi was not overseeing the investigation of Aguilar, and had no personal contact with him. Whether VanderKooi would have executed a P&P on Aguilar calls for speculation, therefore it cannot be used as evidence of racial motivation.[61]

Finally, Plaintiff submitted a printout of forty-two incident reports for the area in question, as well as a crime density chart.[62] However, this information sheds no light on VanderKooi's general exercise of the P&P procedure. Rather, the documents appear to reinforce VanderKooi's position that the area where he observed the incident in question was, in fact, a high crime area with a number of recent burglaries.

Plaintiff also intends on offering the expert testimony of Dr. William Terrill, Ph.D., to prove that VanderKooi's actions were racially motivated. Dr. Terrill compared a sample of P&P reports against Grand Rapids census data and concluded that African American's are subjected to P&P's at a higher rate than other racial groups. For reasons explained in detail in a separate Opinion and Order, Dr. Terrill's testimony is being stricken. Therefore, the Court shall not consider it here.

iii. Conclusion

Based on the above analysis, the Court finds that Plaintiff has failed to establish a genuine issue of material fact regarding his 42 USC 1981 and 1983 claims. Therefore, VanderKooi's motion for summary disposition is granted pursuant to MCR 2.116(C)(7) and (10), as well as MCR 2.116(I)(2).

---

[60] VanderKooi SD exhibit M, affidavit of Pablo Aguilar.
[61] *US v Saucedo*, 226 F3d 782, 790 (2000).
[62] Plaintiff's SD response exhibits 10-12.

C. Defendant City of Grand Rapids motion for summary disposition.

Plaintiff asserts that the City of Grand Rapids is subject to municipal liability under 42 USC 1983 because its P&P policy, as it customarily applied, is unconstitutional. Defendant City of Grand Rapids moves for summary disposition pursuant to MCR 2.116 (C)(10).

The City of Grand Rapids does not deny that the policy exists and is utilized in appropriate situations. The policy is referenced by name only in the GRPD's Manual of Procedures. The practice has been in use for over thirty years and has evolved over time. Training materials indicate that the P&P procedure is used in the context of investigative stops where an individual's identity cannot be ascertained.[63]

The Michigan Court of Appeals summarized municipal liability in the context of a 1983 action in the case of *Davis V Wayne County Sheriff*. It stated:

> "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law. In order to establish such a claim against a municipality or an agency thereof, the plaintiff must show that a policy or custom tantamount to a deliberate indifference for the constitutional rights of others actually caused the violation. Our Supreme Court has held that deliberate indifference requires something more than mere negligence."[64]

Following the *Davis* analysis, the Court must determine that Plaintiff was deprived of a federal right by a person acting under legal authority. VanderKooi was clearly acting under the color of law when he stopped Plaintiff. However, as previously discussed at length in subsection (A) of this opinion, Plaintiff failed to establish that his constitutional rights were violated. Where a court determines that no violation of the plaintiff's constitutional rights occurred, a governmental entity cannot be liable for developing a custom that led to the alleged constitutional violation.[65]

The Court recognizes that a policy or custom itself need not be unconstitutional in order to impose municipal liability under 42 USC 1983.[66] Here, Plaintiff is not

---

[63] Plaintiff's SD exhibit 4; Defendant VanderKooi SD exhibit P and Q.
[64] *Davis v Wayne County Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993), internal citations omitted.
[65] *Floyd v City of Detroit*, 518 F3d 398,411 (2008).
[66] *Canton v Harris,* 489 US 378; 109 S Ct 1197; 103 L Ed2d 412 (1989).

challenging the constitutionality of the P&P policy on its face.[67] Rather, he asserts that the P&P policy is unconstitutionally applied to "innocent citizens." However, a municipality cannot be held liable merely because its employee is a tortfeasor. In other words, there is no *respondeat superior* liability under 42 USC 1983.[68] In very limited case, the courts have held that if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train.[69] Plaintiff brings no such claim here. Moreover, as discussed in subsection (IV)(B) of this opinion, Plaintiff failed to present evident tending to prove that VanderKooi's decision to stop was racially motivated. The testimony of Plaintiff's proposed expert is also stricken.

Because Plaintiff has not brought any evidence that the City of Grand Rapid's P&P policy is unconstitutional on its face or in its application, no genuine issue of material fact exists for trial. Therefore, summary disposition in favor of the city is appropriate pursuant to MCR 2.116(C)(10).

Conclusion and Judgment

Plaintiff has failed to establish that his constitutional rights were violated. Therefore, his motion for partial summary disposition is respectfully **DENIED**. Because no constitutional violations were established, and because qualified immunity applies to VanderKooi, Defendants' motions for summary disposition are **GRANTED.**

The Court is not required to set forth findings of fact and conclusions of law in deciding a motion for summary disposition. [70] Therefore, to the extent that the Court may have failed to address issues raised by the parties in this opinion, the Court adopts the arguments and analysis presented by the Defendants as its own.

This order resolves the last pending claim and closes the case. Plaintiff's case is dismissed with prejudice.

---

[67] See Plaintiff's Second Amended Complaint, paragraph 31.
[68] *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995).
[69] *Harris* at 387.
[70] MCR 2.517(A)(4); *Lud v Howard*, 161 Mich App 603, 614; 411 NW2d 792 (1987).

Dated: 11-18-15

GEORGE JAY QUIST, Circuit Judge (P43884)

Attest: A true copy

Stacy Dilworth, Deputy Clerk

PROOF OF SERVICE

Service of a copy of this document was made by ordinary mail this date upon the parties who have appeared, or their attorneys of record.

11-18-15
DATE

Stacy Dilworth, Judicial Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

DENISHIO JOHNSON,

Plaintiff,

vs

CURT VANDERKOOI, ELLIOT JOHNSON, And CITY OF GRAND RAPIDS, a Michigan Municipal Corporation,

Defendants.
_____/

Case No. 14-07226-NO

OPINION AND ORDER RE: DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court, held in the Kent County Courthouse in the City of Grand Rapids, on November 18, 2015,

Present: HON. GEORGE JAY QUIST
Circuit Judge

Upon Defendants' motions for summary disposition, and the Court being otherwise fully informed, it is hereby ordered and adjudged as follows:

OPINION AND ORDER

I. Issues Presented and Disposition

This case arises out of the Plaintiff's claim that his civil rights were violated under 42 USC 1981 and 1983. Defendants, Captain Curt VanderKooi, Elliot Bargas, and City of Grand Rapids, move for summary disposition of all claims.

After reviewing the material facts and applicable law, the Court:

1. **GRANTS** Defendant Curt VanderKooi and Elliot Bargas's motion for summary disposition; and,

2. **GRANTS** Defendant City of Grand Rapids' motion for summary disposition.

II. Material Facts

Pursuant to deposition testimony cited in both the Plaintiff and Defendants' briefs, this case arises out of the following factual scenario:

On August 15, 2011, a staff person from the Michigan Athletic Club (hereafter "MAC"), called the Grand Rapids Police Department (hereafter "GRPD") to report that a suspicious person was in the MAC parking lot looking into cars. The suspect was described as an African American male, approximately twenty years old, wearing a red shirt and jeans.[1] The MAC had previously experienced problems with day-time thefts from vehicles parked in its lot.[2] The GRPD was aware of the theft problem.[3] Several of the previous break-in suspects were described as young black men. After breaking into vehicles, the suspects would exit the lot by crossing over the berm behind the MAC.[4]

Officer Gregg Edgcombe (hereafter "Edgcombe") and Eugene Laudenslager (hereafter "Laudenslager"), were dispatched to the scene. While searching the area, Edgcombe observed Plaintiff sitting under a tree on a grassy area west of the MAC parking lot. Plaintiff, a fifteen-year-old, African American male, was wearing a red shirt and jeans.

Edgcombe approached Plaintiff and asked him if he was in the MAC parking lot looking into cars. Plaintiff stated that he had walked from his home on Burning Tree Drive, a street located behind the MAC. He walked through the MAC parking lot and stopped at the location where Edgcombe found him. Plaintiff stated that he was waiting for a friend.

Plaintiff testified that he looked at his reflection in car windows while walking through the lot, but denied looking into the cars or attempting to break into any of them. Edgcombe asked Plaintiff for his photo identification. He had none. Edgcombe then asked Plaintiff for his name and date of birth in an effort to verify his identity.

While Edgcombe spoke with Plaintiff, Laudenslager spoke with an eye-witness who observed the same suspicious activity as the MAC employee. Laudenslager had the witness look at Plaintiff from a distance away. The witness identified Plaintiff as the

[1] Defendants' SD exhibit A.
[2] Plaintiff's SD response exhibit 3.
[3] Defendants' Bargas SD exhibit F and L.
[4] Defendants' SD exhibit E and M.

person he saw walking through the MAC parking lot, but stated that he did not see Plaintiff trying to get into any of the vehicles.

Sergeant Elliot Bargas (hereafter "Bargas") then arrived on the scene. He was the sergeant overseeing the service area that day. He joined Edgcombe, but did not initially believe Plaintiff's stated age given his size and the fact that he had multiple tattoos on his arms.

Plaintiff stated that he was searched, fingerprinted and photographed, handcuffed, and placed in a cruiser.[5] He did not remember which officer did what. Bargas testified that he executed the Print and Photograph procedure (hereafter "P&P") to compare with evidence collected from other MAC parking lot burglary investigations, and to ascertain Plaintiff's identity.[6]

Plaintiff's mother was contacted and arrived at the scene shortly afterward. She provided the officers with her photo ID which confirmed that she lived on Burning Tree Drive. She also confirmed Plaintiff's identity and age. Plaintiff then left with his mother. No charges were filed.

Captain Curt VanderKooi (hereafter "VanderKooi") was the last officer to arrive on the scene. He was the captain commander in charge of the service area that day. VanderKooi stated that he overheard radio communication about the investigation while he was at his office. He was aware of multiple car burglaries at the MAC, so he decided to go to the scene to assist. He did not communicate with any of the investigating officers prior to his arrival. When VanderKooi arrived, Bargas had already executed the P&P. VanderKooi stated that while he did not direct Bargas to do the P&P, he approved of the action. [7] VanderKooi also stated that Plaintiff was gone when he got there. He had no direct contact with Plaintiff.

Bargas uploaded Plaintiff's photo into the GRPD's electronic records system. Edgcombe turned Plaintiff's prints into the GRPD's Forensic Services to run against prints found at previous MAC burglaries. However, the prints' quality was insufficient to complete an analysis. The prints remain on file.

---

[5] Defendants' SD exhibit J, pg 15.
[6] Defendants' SD exhibit I, pg 14-15.
[7] Defendant's SD exhibit H, pg 56-57.

Plaintiff filed the instant suit claiming that his rights were violated under the Fourth, Fourteenth, and Fifth Amendments in violation of 42 USC 1981 and 1983. Defendants' move for summary disposition pursuant to MCR 2.116(C)(7) and (10).

III. Standard of Review

Under MCR 2.116(C)(7) a defendant may seek to dismiss a claim based on immunity granted by law. In making a decision under MCR 2.116(C)(7), a court must consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it.

Summary disposition under MCR 2.116(C)(10) is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. "A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim."[8] In reviewing the motion, the court considers the evidence in the light most favorable to the nonmoving party.[9] In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence to establish that the essential elements of the claim at issue are satisfied.[10]

The burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists.[11] The nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.[12] Conclusory statements are insufficient to create a genuine issue of fact.[13]

---

[8] *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720; 635 NW2d 52 (2001), citing *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 485; 502 NW2d 742 (1993).
[9] *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).
[10] *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), quoting *Celotex Corp v Catrett*, 477 US 317, 331; 106 S Ct 2548 (1986); *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).
[11] *Id.*
[12] *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991).
[13] *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

IV. Law and Analysis

1. Defendants' Bargas and VanderKooi's motion for summary disposition

Plaintiff has asserted that his constitutional rights were violated when he was subjected to a P&P without legal justification. 42 USC 1983 provides, in part, that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…"

Therefore, in order for a plaintiff to prevail under 42 USC 1983, he or she must establish that a person acting under legal authority deprived the plaintiff of a constitutional right.

There is no dispute that Bargas and VanderKooi were acting under the color of law when they investigated Plaintiff. Plaintiff must next establish that he was deprived of a constitutional right. He asserts that the P&P executed by Bargas and approved by VanderKooi violated his Fourth, Fourteenth, and Fifth Amendment rights, as well as his constitutional right to privacy. The Court will examine each claim.

i. P&P as a Fourth Amendment search and seizure

Plaintiff's Complaint asserted a limited Fourth Amendment claim. He did not challenge the propriety of the initial stop, search of his person, or detention. Rather, Plaintiff argued that Bargas had no legal cause to justify the P&P procedure.[14] He further argued that VanderKooi is liable for Bargas's actions as a supervisor.

It is well established that the taking of blood, urine, or breath samples is a search under the Fourth Amendment.[15] Virtually any intrusion into the human body will constitute an invasion of protected personal security, and is subject to constitutional scrutiny.[16] However, in *US v. Katz*, the United States Supreme Court held that the Fourth

[14] See Plaintiff's complaint, paragraph 17.
[15] *Relford v Lexington-Fayette Urban County Government*, 390 F 3d 452 (2004); People v Chowdhury, 285 Mich App 509; 775 NW2d 845 (2009);
[16] *Maryland v King*, 133 S Ct 1958; 186 L Ed2d 1 (2013).

Amendment cannot be translated into a general constitutional 'right to privacy.'[17] For violation of an individual's Fourth Amendment rights to occur, that individual must have had a reasonable expectation of privacy in the area searched.[18] What a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection.[19]

Applying the above analysis, the Court in *US v. Dionisio* held that a person's voice, facial characteristics, or handwriting, are constantly exposed to the public and therefore are not subject to Fourth Amendment protections.[20] While the detention of a person for the sole purpose of obtaining fingerprints, without probable cause, has been deemed to violate the Fourth Amendment, that is not the case here.[21]

In the instant case, a MAC staff person called police after witnessing a young man exhibiting suspicious behavior in their parking lot. The MAC parking lot had experienced a string of thefts in recent months. Police arrived on the scene and approached Plaintiff because he matched the suspect description given by two eye-witnesses. Plaintiff admitted to walking through the parking lot and looking at cars, but not into them. He also denied attempting to enter any of the vehicles.

Bargas arrived after Plaintiff had been stopped. He joined Edgcombe who was attempting to verify Plaintiff identify. Bargas then executed a P&P to aid in previous parking lot burglary investigations, and to identity Plaintiff.

Given the Supreme Court's rulings in *Katz* and *Dionisio,* this Court finds that Plaintiff's face and fingerprints are not protected by the Fourth Amendment. Plaintiff was in public and had no reasonable expectation of privacy in his various physical features which were readily observable by the public. Therefore, Bargas did not violate Plaintiff's Fourth Amendment rights when he executed the P&P.

Additionally, the Court notes that the Fourth Amendment does not prohibit all searches and seizures, it only prohibits unreasonable ones.[22] Even if the P&P was a

[17] *US v Katz*, 389 US 347; 88 S Ct 507 (1967).
[18] *People v Taormina*, 130 Mich App 73; 343 NW2d 236 (1983).
[19] *Id.* at 352.
[20] *US v Dionisio*, 410 US 1; 93 S Ct 764 (1973).
[21] *David v Mississippi*, 394 US 721; 89 S Ct 1394 (1969).
[22] *People v Custer*, 465 Mich 319; 630 NW2d 870 (2001).

search and seizure under the Fourth Amendment, the Court finds that Bargas's actions were reasonable under the circumstances.

The reasonableness of any search or seizure depends on whether an officer's action was justified at its inception, and whether it was reasonable in scope.[23] The Michigan Supreme Court explained that "in determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars.' Common sense and everyday life experiences predominate over uncompromising standards." [24] Therefore, isolated factors that appear innocent may, in combination, provide a police officer with reasonable suspicion to justify an investigative stop.[25] Additionally, when analyzing the totality of the circumstances, law enforcement officers are permitted, if not required, to consider the modes or patterns of operation of certain kinds of lawbreakers. A trained officer may draw inferences from this data and makes deductions.[26]

Here, the officers in question had reasonable suspicion to stop Plaintiff. Police received a call reporting suspicious activity in a parking lot that had a number of day-time thefts from cars. Upon arriving at the scene, officers located Plaintiff who matched the suspect description. Plaintiff admitted traveling through the lot and looking at cars, but denied any illegal activity. Plaintiff did not have a valid photo ID and appeared to be older than his stated age. Bargas executed the P&P to assist in identifying Plaintiff, and to compare with evidence collected in other related theft investigations. Given the information known to Bargas at the time of the investigation, his actions were objectively reasonable, and no Fourth Amendment violation occurred.

Plaintiff also attempts to impute liability on VanderKooi despite testimony from all parties that VanderKooi had no direct contact with Plaintiff and arrived on the scene after the investigation was complete. Plaintiff argues that VanderKooi remains liable as a

---

[23] *Terry v Ohio,* 392 US 1, 20; 88 S Ct 1868; 20 L Ed2d 889 (1968).
[24] *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v Nelson,* 443 Mich 626, 632; 505 NW2d 266 (1993).
[25] *Id.* at 193.
[26] *Id.* at 196.

"policymaker" under *Burgess v. Fischer*.[27] However, Plaintiff's reliance on that case is misplaced.

The *Burgess* Court was analyzing the municipal liability framework outlined in *Monell v. Department of Social Services*.[28] *Monell* held that a plaintiff raising a municipal liability claim under 42 USC 1983 must demonstrate that the alleged federal violation occurred because of a municipal policy or custom. A plaintiff may make that showing by establishing that an official with final decision making authority ratified illegal actions.

The *Monell* analysis serves to impose liability on a municipality. It does not create shared employee liability within a chain of command. Here, Plaintiff has not brought any evidence that VanderKooi is a "policymaker" for the City of Grand Rapids, or that he had final decision making power with regard to the P&P practice or policy.

While VanderKooi is the Captain of the service area in question, Plaintiff has failed to establish that VanderKooi directed officers' methods of investigation. Moreover, Plaintiff has failed to establish that the P&P procedure violated his Fourth Amendment rights in this instance. Therefore, VanderKooi's subsequent approval of the P&P procedure is a moot issue.

Plaintiff has not establish a genuine issue of material fact with regard to his Fourth or Fourteenth Amendment claims. Therefore, summary disposition is appropriate pursuant to MCR 2.116(C)(10).

ii. Constitutional right to privacy

Plaintiff has asserted that the P&P policy violated his constitutional right to privacy. To support this argument he cites to the Washington Court of Appeals case of *Eddy v. Moore*.[29] In that case, the plaintiff was photographed and fingerprinted after being charged with a crime. She was later acquitted and requested the return of her picture and prints, but the local authorities refused. The Court held that the municipalities' refusal to return the evidence, absent a compelling showing justifying their retention, was constitutionally defective under the Fourth and Fourteenth Amendments.[30]

---

[27] *Burgess v Fischer*, 735 F3d 462 (2013).
[28] *Monell v Dep't of Soc Servs*, 436 US 658; 98 S Ct 2018 (1978).
[29] *Eddy v Moore*, 487 P 2d 211, 5 Wn App 334 (1979).
[30] *Id.*

The Court finds Plaintiff's argument unpersuasive. The *Eddy* case is not factually or legally analogous to the instant situation. As previously discussed, police had ample reasonable suspicion to stop Plaintiff. He was exhibiting suspicious behavior in an area where a number of thefts had occurred. He also matched the description given by eye-witnesses. While the *Eddy* case indicates that a party may be entitled to return of his or her photo and prints after acquittal, it does not address the initial privacy rights of the photographed and printed individual. Nothing in the case can be interpreted as creating a right to privacy of an individual's image or fingerprints, particularly while out in public. Furthermore, the case does not provide for a property right in individual privacy.[31]

Plaintiff has not pled that his common law right to privacy was violated. Plaintiff fails to point to any other state or federal law that creates a constitutional right to privacy of his face or fingerprints. Therefore, summary disposition is appropriate pursuant to MCR 2.116(C)(10).

iii. P&P as a ' taking' under the Fifth Amendment

Plaintiff asserted that the City of Grand Rapids' P&P policy constituted an unconstitutional 'taking.' The Fifth Amendment provides, in part, that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation.

To support his claim, Plaintiff cites to the Michigan Supreme Court case of *Tobin v. Michigan Civil Service Commission*.[32] The plaintiffs in that case were civil service employees who argued that disclosure of their names and home addresses via a Freedom of Information Act request constituted an intrusion into their seclusion, solitude, or private affairs. They further argued that the common law right of privacy protects against four types of invasion of privacy: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about the

[31] *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990); *Tobin v Michigan Civil Serv Comm'n*, 416 Mich 661, 678; 331 NW2d 184 (1982); *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed2d 576 (1967).

[32] *Tobin v Michigan Civil Serv Comm'n, 416 Mich 661, 672-8; 331 NW2d 184 (1982).*

plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[33]

The Court rejected the plaintiffs' argument. Most notably it found that individuals have no reasonable expectation of privacy to information readily observable to the general public, in this case names and addresses. A person's name and address is not of a secret or embarrassing nature, and disclosure of that information does not place an individual in a false light.[34]

Much like the names and addresses in dispute in the *Tobin* case, Plaintiff's face and fingerprints are observable by the general public and not protected under the common law right to privacy.[35] Plaintiff has failed to state any other legal authority to support his claims. Therefore, summary disposition is appropriate pursuant to MCR 2.116(C)(10).

iv. 42 USC 1981 claim

Plaintiff's Complaint also alleged an equal protection claim. 42 USC 1981 provides, in part, that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Plaintiff claimed that Bargas executed a P&P solely based on the fact that Plaintiff is an African American. However, pursuant to his brief, Plaintiff has abandoned his 42 USA 1981 claim.[36] Therefore, summary disposition is appropriate under MCR 2.116(C)(10).

[33] *Id.* citing Prosser, *Privacy,* 48 Cal L Rev 383, 389 (1960); *Beaumont v. Brown,* 401 Mich. 80, 95 fn 10, 257 NW2d 522 (1977); see also 3 Restatement Torts, 2d, § 652A, p. 376.
[34] *Id.* at 673-678.
[35] *Id.* at 672.
[36] Plaintiff's SD Response brief, pg19-20.

v. Qualified immunity

Bargas and VanderKooi assert that Plaintiff's individual claims against them are precluded by qualified immunity. The doctrine of qualified immunity protects government officials from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights.[37] Qualified immunity may be invoked by police officers and gives them the latitude to make reasonable but mistaken judgments. It "protects 'all but the plainly incompetent or those who knowingly violate the law.' "[38]

Application of qualified immunity is based on the objective reasonableness of an officer's actions.[39] A plaintiff has the burden of overcoming the assertion of qualified immunity at the pretrial stage.[40]

Here, Plaintiff has failed to present evidence tending to prove that Bargas or VanderKooi violated any law or Plaintiff's rights. As previously discussed, an individual's face and fingerprints are not subject to Fourth Amendment protections. Bargas's actions were otherwise reasonable under the circumstances, and VanderKooi did not participate in the investigation at all. The Court also found that the P&P practice does not constitute a taking under the Fifth Amendment, and Plaintiff has no constitutional right to privacy in this instance.

Because Plaintiff failed to establish a genuine issue of material fact regarding his 1983 claims, and abandoned his 1981 claim, and because Bargas and VanderKooi are otherwise shielded by qualified immunity, summary disposition is appropriate pursuant to MCR 2.116(C)(7) and 2.116(C)(10).

---

[37] *Pearson v Callahan,* 555 US 223, 231; 129 S Ct 808; 172 L Ed2d 565 (2009), quoting *Harlowv Fitzgerald,* 457 US 800, 818; 102 S.Ct. 2727; 73 L Ed2d 396 (1982).
[38] *Ashcroft v al–Kidd,* 563 US 731; 131 S Ct. 2074; 179 L Ed 2d 1149 (2011), quoting *Malley v Briggs,* 475 US 335, 341; 106 S Ct 1092; 89 L Ed2d 271 (1986).
[39] *Groh v Ramirez,* 540 US 551, 558–559, 563; 124 S Ct 1284; 157 L Ed2d 1068 (2004); *Walsh v Taylor,* 263 Mich App 618, 636; 689 NW2d 506 (2004).
[40] *Pearson v Callahan,* 555 US 223, 231–232; 129 S Ct 808; 172 L Ed2d 565 (2009).

2. Defendant City of Grand Rapids motion for summary disposition

Plaintiff asserted that the City of Grand Rapids is subject to municipal liability under 42 USC 1983 because its P&P policy, as it is customarily applied, is unconstitutional. Defendant City of Grand Rapids moves for summary disposition pursuant to MCR 2.116 (C)(10).

The City of Grand Rapids does not deny that the P&P policy exists. The policy is referenced in the GRPD's Manual of Procedures, and has been utilized for over thirty years. Training materials indicate that the P&P procedure is used in the context of investigative stops when an individual's identity cannot be ascertained.[41]

When a plaintiff brings a cause of action under 42 USC 1983, he or she must show that he or she was deprived of a federal right, and that the defendant deprived the plaintiff of that right while acting under color of state law. "In order to establish such a claim against a municipality or an agency thereof, the plaintiff must show that a policy or custom tantamount to a deliberate indifference for the constitutional rights of others actually caused the violation. Our Supreme Court has held that deliberate indifference requires something more than mere negligence."[42]

In the instant case, Bargas and VanderKooi were clearly acting under the color of law when investigating Plaintiff. However, as previously discussed at length in subsection (1) of this opinion, Plaintiff failed to establish that his constitutional rights were violated during the investigation. Where a court determines that no violation of the plaintiff's constitutional rights occurred, a governmental entity cannot be liable for developing a custom that led to the alleged constitutional violation.[43]

Additionally, a municipality cannot be held liable merely because its employee is a tortfeasor. In other words, there is no *respondeat superior* liability under 42 USC 1983.[44] In limited case, the courts have held that if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been

---

[41] Plaintiff's SD exhibit 4; Defendant VanderKooi SD exhibit P and Q.
[42] *Davis v Wayne County Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993), internal citations omitted.
[43] *Floyd v City of Detroit*, 518 F3d 398,411 (2008).
[44] *Payton v City of Detroit*, 211 Mich App 375, 393; 536 NW2d 233 (1995).

adequately trained and the constitutional wrong has been caused by that failure to train.[45] Plaintiff brings no such claim here.

Plaintiff sought to offer the expert testimony of Dr. William Terrill, Ph.D., on the issues of police misconduct and racial profiling. However, for reasons explained in detail in a separate opinion, Dr. Terrill's testimony is stricken. Therefore, will not be considered here.

Because Plaintiff has not brought any evidence that the City of Grand Rapids' P&P policy is unconstitutional on its face or in its application, no genuine issue of material fact exists for trial. Therefore, summary disposition is appropriate pursuant to MCR 2.116(C)(10).

Conclusion and Judgment

Plaintiff has failed to establish that his constitutional rights were violated. Furthermore, Plaintiff's claims against the officers in question are precluded by qualified immunity. Therefore, Defendant Bargas and VanderKooi's motion for summary disposition is **GRANTED** pursuant to MCR 2.116(C)(7) and (10).

Plaintiff has also failed to establish a basis for municipal liability. Therefore, Defendant City of Grand Rapids' motion for summary disposition is **GRANTED** pursuant to MCR 2.116(C)(10).

The Court is not required to set forth findings of fact and conclusions of law in deciding a motion for summary disposition.[46] Therefore, to the extent that the Court may have failed to address issues raised by the parties in this opinion, the Court adopts the arguments and analysis presented by the Defendants as its own.

This order resolves the last pending claim and closes the case. Plaintiff's case is dismissed with prejudice.

Dated: 11-18-15

GEORGE JAY QUIST, Circuit Judge (P43884)

[45] *Harris* at 387.
[46] MCR 2.517(A)(4); *Lud v Howard*, 161 Mich App 603, 614; 411 NW2d 792 (1987).

Attest: A true copy

Stacy Dilworth, Deputy Clerk

PROOF OF SERVICE

Service of a copy of this document was made by ordinary mail this date upon the parties who have appeared, or their attorneys of record.

11-18-15
DATE

Stacy Dilworth, Judicial Clerk

STATE OF MICHIGAN

IN THE COURT OF APPEALS

KEYON HARRISON,

Plaintiff-Appellant,

v.

CURT VANDERKOOI, and
CITY OF GRAND RAPIDS,
a Michigan municipal corporation,

Defendants-Appellees.

Court of Appeals
Docket No. 330537

Lower Court
Case No. 14-02166-NO

_____/

BERNARD SCHAEFER (P40114)
Attorney for Plaintiff-Appellant
161 Ottawa Avenue, NW
Suite 212
Grand Rapids, MI 49503
(616) 272-4361

KRISTEN REWA (P73043)
ELLIOT GRUSZKA (P77117)
Assistant City Attorneys
Attorneys for Defendants-Appellees
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

_____/

DEFENDANT-APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Cases

STATUTES

RULES

OTHER AUTHORITIES

I. COUNTER-STATEMENT OF BASIS OF JURISDICTION

Defendants-Appellees Captain Curt VanderKooi and City of Grand Rapids rely on Plaintiff-Appellant's statement of the basis of jurisdiction.

II. COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Valid consent renders a search and seizure conducted without a warrant reasonable under the Fourth Amendment. Consent is valid if it is voluntary, meaning unequivocal, specific and freely and intelligently given. Did Harrison consent to his stop, search of his person, and a photograph and fingerprint procedure when he answer VanderKooi's requests for consent if with "yes" and "okay"?

Circuit Court:	Yes
Appellees:	Yes
Harrison:	No

2. A brief investigatory stop is justified when supported by reasonable suspicion based on specific, articulable facts. VanderKooi witnessed an exchange of a strange object in a park at a time when he reasonably believed crime was more likely to occur. Did VanderKooi have reasonable suspicion to stop Harrison?

Circuit Court:	Yes
Appellees:	Yes
Harrison:	No

3. No Fourth Amendment search takes place if the object or information searched is exposed to the public. A person's face and fingerprints are constantly exposed to the public. Is the taking of a photograph and collection of fingerprints a search under the Fourth Amendment?

Circuit Court:	No
Appellees:	No
Harrison:	Yes

4. A per se taking under the Fifth Amendment requires that the government physically appropriate property or destroy property's economic value. Harrison's right to exploit his likeness was not destroyed when VanderKooi directed his photograph to be taken and Harrison has no right in the physical materials of the photograph. Did a taking occur?

Circuit Court:	No
Appellees:	No
Harrison:	Yes

5. A state actor is entitled to qualified immunity if his actions did not violate clearly established law. No controlling authority has held that taking a fingerprint or a photograph violates the Fourth or Fifth Amendment to the United States Constitution. Is VanderKooi entitled to qualified immunity?

Circuit Court:	Yes
Appellees:	Yes
Harrison:	No

6. The Equal Protection Clause is violated if a state actor applies the law differently to similarly situated persons. VanderKooi supervised the photographing and fingerprinting of Harrison, an African-American, but was not present for the investigation of his friend, a non-African-American. Did VanderKooi violate the Equal Protection Clause?

Circuit Court:	No
Appellees:	No
Harrison:	Yes

7. A municipality can be liable under 42 USC § 1983 when a custom, policy, or practice causes a constitutional violation. Is the City of Grand Rapids liable for a custom or practice where, as here, no constitutional violation occurred?

Circuit Court:	No
Appellees:	No
Harrison:	Yes

8. Whether a witness is qualified as an expert is a matter of the trial court's sound discretion. The trial court determined that Dr. William Terrill, Harrison's proposed expert, does not have the requisite background to testify as a witness and that his methods were not supported by accepted science. Did the trial court abuse its discretion in excluding Dr. Terrill's testimony?

Circuit Court:	Did not answer
Appellees:	No
Harrison:	Yes
Harrison:	Yes

III. COUNTER-STATEMENT OF FACTS AND PROCEDURAL POSTURE

A. Photograph and fingerprinting of Keyon Harrison

On May 31, 2012, at about the time school lets out, Defendant Grand Rapids Police Captain Curt VanderKooi was driving westbound on Lake Drive in the City of Grand Rapids, headed back downtown to his office at police headquarters. (VanderKooi, 6)[1]. He is the Service Area Captain for the (South) East Service Area. He was outside his service area at the time, driving an unmarked police cruiser and was not in uniform. (Harrison, 12, 15-16, 18).

While stopped at a red light on Lake at Fulton, VanderKooi saw two individuals on the sidewalk at the northeast corner of Fulton Avenue and Union Street. (VanderKooi, 7-8). The individual on foot was holding a large object, either a firetruck (Harrison, 8) or a train engine (VanderKooi, 7). He walked up to an individual on a bicycle. VanderKooi perceived the item as an ornamental type that that could be of value. (VanderKooi, 7).

Plaintiff Keyon Harrison was walking home from school along Fulton Street, when he saw schoolmate Pablo Aguilar on his bike struggling with items he was carrying. Harrison helped Pablo by taking the firetruck from him and walking along his bike as they headed east on Fulton. After the boys crossed Union Street, Harrison handed the object back to Pablo and the two parted ways. (Harrison, 12-14).

VanderKooi decided to watch what was going on. (VanderKooi, p.8). He turned right onto Fulton and began heading eastbound. In a matter of seconds, as he drives by, VanderKooi sees Harrison hand the object to Pablo, who begins to ride away. VanderKooi

[1] All referenced exhibits and documentary evidence were originally attached to Defendants' motions for summary disposition, unless otherwise noted.

arrives at the next street, Packard, and turns right, losing sight of the two. (VanderKooi, 9). He took another right at the next street, which was Lake Drive again, and began to head back to the intersection where he first saw the individuals. (VanderKooi, 9).

Meanwhile, Harrison continued to walk along Lake Drive, when he saw an injured bird in a park that divides Lake and Fulton. Harrison followed the bird by kneeling down by it, then walking around it in circles, until he decided to leave it alone. (Harrison, 15).

While driving westbound on Lake Drive again, VanderKooi saw Harrison in a park area near some brush. (VanderKooi, 10). VanderKooi parks his car. (VanderKooi, 12-13). He sees Harrison crouched or on his knees. Harrison has his back to VanderKooi, and is looking in the other direction and moving his arms around a bit. Based on the prior activity with the object and now seeing him in a more secluded position in the park, VanderKooi thought the situation warranted further investigation. (VanderKooi, p.13).

Harrison stood back up, walked twenty feet, and encountered VanderKooi in an unmarked, tan Crown Victoria. (Harrison, 15-16; VanderKooi, 64). Harrison did not see VanderKooi until he parked right next to him. (Harrison, 62). VanderKooi got out of his car and asked if he could speak to Harrison. (Harrison, 15). Harrison said, “Sure.” (Harrison, 16). VanderKooi identified himself and asked Harrison what he was doing. (VanderKooi, 13-14). VanderKooi told Harrison that he saw Harrison carrying a firetruck and thought he was trying to sell the friend something. (Harrison, 16-17; VanderKooi, 14).

Harrison replied, “no, I was just helping him carry his internship project back to his internship. I have to make my way home, so I gave it back to him, let him go on his way.” (Harrison, 17; VanderKooi, 13-14, 18). Harrison also told VanderKooi that he was trying to catch birds. (VanderKooi, 13-14; Nagtzaam, 15; Newton, 11). VanderKooi was aware

that there are a lot of larcenies and home invasions, especially after school in that area, so he was suspicious that Harrison's explanation was not entirely truthful. (VanderKooi, 14-15). VanderKooi did not see a bird. (VanderKooi, 16). Harrison was wearing a black hooded sweatshirt over his school uniform polo, kakis, loafers, and had a sports bag on his back. (Harrison, 18, 27-28). VanderKooi did not notice that this was a school uniform, but did notice his knapsack. (VanderKooi, 18; see also Ex B).

VanderKooi told Harrison to hold on. Harrison waited. VanderKooi called for backup. (Harrison, p.17). They waited about two minutes, then a uniformed officer arrived, whom Harrison describes as tall with grey hair and glasses. (Harrison, 18-19) (LaBrecque, 6, 21). VanderKooi used his radio again to send another officer to locate Pablo and that he would be carrying an object. (Harrison, 19; VanderKooi, 17, 27). VanderKooi told Harrison that he was doing this to make sure their stories are the same. (Harrison, p.19; Nagtzaam, 16-17; Newton, 5-6, 8-11). They wait for about four minutes. VanderKooi and Harrison talk idly. (Harrison, 20-21; VanderKooi, 22; Nagtzaam, 7).

VanderKooi was "calm, collective". (Harrison, 21). The interaction was low key and non-confrontational. (Nagtzaam, 24, 17-18). VanderKooi asked to search Harrison because he suspected contraband. (VanderKooi, 17, 18, 19). Harrison said yes. (Harrison, 22). VanderKooi told other officers that he had consent. (VanderKooi, 19). VanderKooi asked again if he could search Harrison's bag. (Harrison, 26). Harrison states the "the gray-haired officer" (Sgt. LaBrecque) searched his bag. (Harrison 28-29). But VanderKooi says he asked Harrison to open up his knapsack, which Harrison did, and he looked inside. (VanderKooi, 20). A younger officer (Officer Lucas Nagtzaam) arrived and

asked if he could search Harrison. Harrison said yes, so the officer searched him. (Harrison, 22; Nagtzaam, 9-10, 13-14).

VanderKooi asked if Harrison had identification on him; he did not. (Harrison, 30). VanderKooi told Harrison that in order to identify him, VanderKooi would have to take his picture. (Harrison, 30, 35). Harrison replied, “did I do something illegal?” (Harrison, 30). VanderKooi responded, “this was just to make sure that I was who I saw I am.” (Harrison, p.30; VanderKooi, 25, 65-67). Harrison said, “okay,” in a nervous, shaky voice. VanderKooi remained calm and collected. (Harrison, 31).

Officer Lucas Nagtzaam and Sgt. Stephen LaBrecque arrive. (VanderKooi, 20-21). Harrison and LaBrecque stepped away from VanderKooi, towards one of the other cruisers. (VanderKooi, 21). Sgt. LaBrecque took Harrison’s picture as Officer Nagtzaam made conversation with Harrison. (Harrison, 31-33; LaBrecque, 7-8; Nagtzaam, 11).

During this time, VanderKooi learned that an officer found Aguilar but he did not have the object. (VanderKooi, 21, 24-25; Newton, 8-10, 16). VanderKooi could not see this interaction. (VanderKooi, 26; Nagtzaam, 11-12). VanderKooi did not ask anyone to photograph or print him. (Newton, 16-17). VanderKooi thought he had identification. (VanderKooi, 25, 27, 28; Newton, 10). There factual dispute as to whether Aguilar had identification on him. (Newton, 10; Ex M).

Harrison asked VanderKooi if there was anything else he wanted to know. VanderKooi told him that they needed to take his fingerprint. (Harrison, 33). Harrison asked, “why?” VanderKooi responded: “just to clarify again to make sure you are who you say you are.” Harrison said, “okay.” (Harrison, 34). Sgt. LaBrecque took a print of Harrison’s right thumb. (Harrison 36-38; LaBrecque, 8-9; Exhibit C). The process took no

longer than two minutes. (LaBrecque, 10; Harrison, 38). Harrison again asked VanderKooi why he was being stopped. VanderKooi said that he thought he was trying to sell Pablo something and it looked suspicious. VanderKooi explained that here were a lot of burglaries in the City of Grand Rapids. Harrison responded with "I never robbed anyone let alone did anything illegal but I appreciate the concern." Harrison said thank you for your time, shook their hands and headed home. (Harrison, 38-40).

Officer Nagtzaam wrote an incident report. (Nagtzaam, 14, 19-20; Exhibit A). Sgt. LaBrecque uploaded the picture into the GRPD's electronic record system. (LaBrecque, 10-12; Ex D, Response # 4). Sgt. LaBrecque turned in the print card at the end of his shift. (LaBrecque, 13-14). A Latent Print Examiner checked Harrison's thumbprint against the Kent County Correctional Facility's database and then the Automated Fingerprint Identification System ("AFIS"). The searches were nil. (Exhibit Z, Resp # 5-7). The print card resides in a box in the GRPD Latent Print Unit office. (Exhibit K, Resp #15).

B. GRPD custom or practice of photograph and fingerprinting, or "P&P"

The City has developed a custom, practice, or procedure referred to as "picture and print" or "P&P", which the Grand Rapids Police Department uses in the course of its operations. A GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on him and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print may also be taken in the course of a citizen contact or a stop, if appropriate, based on the facts and circumstances of that incident. (Exhibit Y; see also Bargas 25, 30-31; VanderKooi 65-67). P&P has been a practice of the GRPD for over thirty years. (VanderKooi, 36).

There is no specific written policy on P&P, but references to the practice show up

in the GRPD Manual of Procedures ("MOP").[2] The training documents also show how the practice has evolved. For example, when the practice was first implemented, officers took a Polaroid picture of a person and affixed a thumbprint to the back of the photo. (Exhibit Q). At the time of Harrison's stop, the GRPD used digital cameras. (Exhibit R; LaBrecque 10-11).

Patrol sergeants are assigned a fingerprint kit and use a GRPD "print card". (Exhibit R). When an officer fills out a print card, he will turn it in at the end of his shift to a "patrol work box" located in the GRPD headquarters. Print cards are collected from the patrol work box and placed into the Forensics mail box (lobby level). From there, the cards are submitted to the Latent Print Unit, a one-room, limited access office within the Forensic Services Unit. (Ex C, Ex D, Resp 15; Ex Z, Resp #1).

After the cards are processed by the Latent Print Examiners, they are filed and stored under their respective year, in a box. During the course of discovery, Defendant City produced all print cards that were housed in the 2011 and 2012 boxes. (Ex U, Ex V). City also produced the incident reports, appearance tickets, or civil infraction tickets identified or otherwise associated with those print cards. 1,100 incident reports were produced, 609 for 2011 and 491 for 2012.

[2] Defendants' Summary Disposition Exhibit O (Forensic Services Unit, MOP 3-12.1, duties include identifying field interrogation prints; Driver's License Violations, MOP 5-6.3 et seq., directing officers to "P&P" in circumstances in which a person will be issued an appearance ticket in lieu of custodial arrest; Appearance Ticket violation, MOP 10-6.1 et seq., directing officers to "P&P" in circumstances in which a person may be issued a ticket in lieu of custodial arrest. The Field Interrogation chapter of the MOP that was effective in 2011 and 2012, however, does not contain a reference to P&P. (see Exhibit O, MOP 8-1.1 *et seq*).

C. Procedural Posture

Plaintiff filed suit under 42 USC § 1981 and 42 USC § 1983, alleging that Cpt. VanderKooi acted in a discriminatory manner in violation of the Equal Protection Clause; that the contact, search of his backpack, and that taking his photo and thumbprint violated his Fourth Amendment rights, his Fifth Amendment rights against "the taking of private property for public use without just compensation", and his "right to privacy under the U.S. Constitution". Plaintiff also sued the City of Grand Rapids, under 42 USC § 1983, asserting that City's practice of photographing and fingerprinting is illegal under the Fourth Amendment and, as applied, disparately impacts African Americans. (Compl, ¶¶ 21, 28, 29, 30). This case was joined for discovery with *Denishio Johnson v. Curt VanderKooi et al.,* Kent Co. Cir. Ct. 14-07226-NO, COA Docket No. 330536.

Captain VanderKooi moved for summary disposition under MCR 2.117(C)(7) & MCR 2.117(C)(10). City of Grand Rapids moved for summary disposition under (C)(10). Defendants also filed a motion to strike Plaintiff's expert witness, William Terrill, Ph.D. Plaintiff filed a partial motion for summary disposition, seeking a determination that the City's P&P procedure violates the Fourth Amendment, and that the procedure as applied to Harrison violated the Fourth Amendment. The court heard oral argument on the motions at a joint session with hearings on similar motions filed in the *Johnson* case.

The trial court granted the Defendants' motion to strike Dr. Terrill for four reasons. First, Plaintiff failed to establish that Dr. Terrill was qualified to provide his proffered opinion on racial profiling and police misconduct. (Op and Order striking expert, p.4). Second, Terrill's opinion that the officer conduct was unreasonable and racially motivated was not supported by sound principles (calling the process "unclear") and inappropriate

testimony on characteristics or behavior indicators. (Id., at 5). Third, the court found Dr. Terrill's mathematical analysis on racial profiling was speculative because it was "not the product of independent study", was based on inadmissible evidence, and Dr. Terrill demonstrated he had no academic familiarity with racial profiling methodologies. (Id., at 5-6). Finally, the court adopted all the reasons stated in Defendants' brief. (Id., at 6-7)

The Court denied Plaintiff's motion and granted the City and VanderKooi's summary disposition motions, finding that Plaintiff failed to establish that his constitutional rights were violated. First, the court found not only that VanderKooi had reasonable suspicion to conduct a stop but also that "Plaintiff consented to initial police contact, and continued to consent to various requests as the investigation continued." (Sum Disp Op and Order, p.7, 11, 14). The court further found that the length and scope of the interaction was not unreasonable. (Op, p.8, 11, 14). As to the Fifth Amendment and "constitutional right of privacy" claims, the court found Harrison's face and fingerprint are not protected and therefore, there was no legal authority to support Plaintiff's contentions. (Op, p.11-12). Next, the court found that Plaintiff's race discrimination claims fail because Harrison failed to "offer evidence tending to show" that VanderKooi's actions were racially motivated or discriminatory in purpose. (Op, p.14-16). The trial court granted summary disposition to the City because no city employee violated Plaintiff's rights. (Op, p.18).

This appeal followed.

IV. LAW AND ARGUMENT

A. Applicable Standards of Review

This Court reviews *de novo* the trial court's decision to grant summary disposition based upon a showing of immunity granted by law under MCR 2.116(C)(7). *Lavey v Mills*, 248 Mich App 244 (2001). When, as here, the movant has provided contradictory evidence, the nonmovant may not rely on the pleadings, but must rebut the movant's evidence in order to create a genuine issue of material fact. *Yono v Dept of Transp (On Remand)*, 306 Mich App 671 (2014); *Plunkett v Dept of Transp*, 286 Mich App 168; 779 NW2d 263 (2009). Because Captain VanderKooi presented evidence in support of his motion, Harrison cannot rely on his pleadings alone to create a genuine issue of material fact.

This court reviews *de novo* a trial court's decision to grant summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. A trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(C)(5); *Maiden v Rozwood*, 461 Mich 109, 120 (1999). Under either rule, if a party is entitled to judgment as a matter of law, or if the evidence shows no genuine issue of material fact, the trial court should render judgment without delay. MCR 2.116(I)(1).

This Court reviews the order striking William Terrill, Ph.D, as an expert witness for an abuse of discretion. *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548, 561 (2001) (citing *Mulholland v DEC Int'l Corp.,* 432 Mich 395, 402; 443 NW2d 340 (1989)). An abuse of discretion occurs "when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura, Ins*, 482 Mich 507 (2008).

B. Overview of the law on 42 USC § 1983

42 USC § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statute is not a source of rights, but rather, a remedy for violations of rights granted in other federal statutes or the U.S. Constitution. *Lavigne v Forshee*, 307 Mich App 530, 537 (2014). In order to prevail, a Plaintiff must establish that (1) a defendant acted under color of state law and (2) that defendant's conduct deprived plaintiffs of a federal right. *Id.*, at 539. Individual government employees are liable only for their own actions. There is no derivative or supervisory liability. Mere presence, without a showing of direct responsibility for an action, will not subject an officer to liability. *Hall v Shipley*, 932 F2d 1147, 1154 (CA6, 1991).

A municipality is not liable under 42 USC. § 1983 unless some action taken pursuant to official municipal custom, policy, or practice causes a constitutional violation. *Monell v Dep't of Social Services*, 436 US 658, 691 (1978). There is no *respondeat superior* liability. *Jackson v City of Detroit*, 449 Mich 420, 433 (1995) (citing *Monell*, 436 US at 694). Rather, plaintiff must link the municipal custom or practice as the moving force behind the alleged constitutional violations. *Jackson*, *supra* (*citing Monell*, *supra*). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v Thompson*, 563 US 51 (2011) (citations omitted).

C. Harrison cannot maintain a claim for a Fourth Amendment violation when he gave unequivocal, voluntary consent to a stop and search of his person.

Generally, a search and seizure in the absence of reasonable suspicion, probable cause, or a warrant is invalid; one exception to this general requirement is consent. *Schneckloth v Bustamonte*, 412 US 218, 219 (1973); *Lavigne v Forshee*, 307 Mich App 530, 538; 861 NW2d 635 (2014). Valid consent must be voluntary: that is "unequivocal, specific, and freely and intelligently given." *Lavigne*, 307 Mich App at 538 (internal quotation omitted). The voluntary nature of consent is determined under the totality of the circumstances. *Schneckloth*, 412 US at 227; *Lavigne*, 307 Mich App at 538.

Voluntary consent can be given in "words, gesture, or conduct." *United States v Carter*, 378 F3d 584, 587 (CA6 2004). It cannot, however, be based in a mere "acquiescence to a claim of lawful authority." *Bumper v North Carolina*, 391 US 543, 548–49 (1968). Consent also cannot be the result of duress or coercion. *United States v Tillman*, 963 F2d 137, 143 (CA 6 1992).

"If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent." *Kentucky v King*, 563 US 452, 463 (2011). The fact that most people will consent, even if they are not told they are free not to respond or consent, does not eliminate "the consensual nature of the response." *INS v Delgado*, 466 US 210, 216 (1984).

Consent may be limited in scope and also revoked. *People v Powell*, 199 Mich App 492, 496–99; 502 NW3d 353 (1993). The scope of consent is measured by objective reasonableness: what the typical reasonable person would have understood the exchange between the officer and citizen to be. *Florida v Jimeno*, 500 US 248, 251 (1991).

At every step of the way in this case, Harrison consented to the contact and search. (Op, p.7, "Both Plaintiff and Defendant cite to ample deposition testimony to this effect.") When VanderKooi initially stopped to talk to him, VanderKooi asked to speak with him and he said "sure." After Harrison explained his story, which VanderKooi initially disbelieved, VanderKooi asked Harrison to "hold on" while other officers contacted Aguilar. Harrison agreed and they talked idly. VanderKooi asked if he could search Harrison's person and backpack. Harrison said yes. VanderKooi asked for identification, which Harrison did not have. VanderKooi then asked if he could take a P&P. Harrison asked if he had done something illegal, and VanderKooi calmly responded that the P&P was to verify Harrison's identity and asked again for permission. Harrison replied, "okay."

A typical reasonable person would interpret the exchange between Harrison and VanderKooi to be free and consensual. Indeed courts have held that consent was valid in situations where officers acted in a much more coercive and forceful manner. In *United States v Drayton*, 536 US 194 (2002), plain clothed officers with visible weapons and badges boarded a bus. *Id.* at 197. One officer leaned over another passenger to speak with one of the respondents, getting 12 to 18 inches from his face and whispering, asking for permission to search his bag and person. *Id.* at 198. After finding contraband, the officers handcuffed him and asked for his companions consent to search him. Contraband was found on him too. The Court held the encounter to be consensual. *Id.* at 203–206.

In this case, it appears to a reasonable observer that Harrison gave his free and voluntary consent throughout his entire encounter with VanderKooi, including the P&P procedure. Harrison adduced no evidence in the trial court other than a self-serving affidavit he filed attempting to "correct" his deposition testimony to make it seem as though

he was merely acquiescing to VanderKooi's authority. The trial court correctly rejected the document as a sham affidavit attempting to contradict "ample" testimony from Harrison's deposition which established this was a consensual interaction. (Op, 7, 10-11 *citing Kaufman & Payton C v Nikkila*, 200 Mich App 250, 257 (1993)). Because his consent to the entire encounter was voluntary, this Court must affirm the trial court's grant of summary judgment in favor of VanderKooi on Harrison's Fourth Amendment claims.

D. Even if Harrison did not give valid consent, the P&P procedure was within the scope of a valid *Terry* stop.

An officer may, without a warrant, stop a person for investigatory purposes when he has reasonable suspicion of criminal activity based upon specific, articulable facts that are known to him at the time of the stop. *Terry v Ohio*, 392 US 1, 27–28 (1968); *Embody v Ward*, 695 F3d 577, 580 (CA 6 2012). The scope of the stop and the extent of the intrusion must be 'reasonably related in scope to the circumstances which justified the interference.'" *Embody*, 695 F3d at 580. "'[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ....'" *Illinois v Caballes*, 543 US 405, 420 (2005), quoting *Florida v Royer*, 460 US 491, 500 (1983) (plurality opinion). Stated another way, the investigative tool used by the officers must support the original mission of the stop and not prolong the interaction beyond the time reasonably required to complete the mission." *Rodriguez v United States*, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015) (canine drug sniff falls outside the ordinary mission of a traffic stop).

The reasonableness of an officer's suspicion is evaluated under the totality of the circumstances. *United States v Cortez*, 449 US 411, 417 (1981). The officer must

articulate more than general "suspicion or hunch," *United States v Harris*, 192 F3d 580, 584 (CA6 1999), but the court must credit inferences that officers draw from their experiences and specialized training that "might well elude an untrained person." *United States v Arvizu,* 534 US 266, 273 (2002), citing *Cortez,* 449 U.S. at 417–418 (1981).

Contrary to Appellant's argument on appeal, the trial court did not hold that reasonable suspicion existed because this location is a "high-crime area". (AT Br., p. 16-18). Rather, the trial court held that the case Harrison relies upon, *Brown v Texas*, 443 US 47 (1979), is distinguishable. Here, "VanderKooi observed a suspicious exchange between two young men in an area and at a time of day when property crime rates were higher. Plaintiff then entered a park and exhibited strange behavior. Given the totality of the circumstances, reasonable suspicion existed to merit further investigation." (Op granting Sum Disp, p.7).

The trial court properly recognized that area crime trends are a contextual factor—information known to the officer that *cannot* be *the* reason for a stop—but absolutely may inform the totality of the circumstances. *See United States v Young*, 707 F.3d 598, 603-604 (CA6 2012). Plaintiff has not explained to this Court how the specific and articulable facts as to Harrison's peculiar behavior, first handing off property, and then crouching in bushes, did not give VanderKooi—or any reasonable officer with the same facts and thirty years of experience—reasonable suspicion to stop him. That Plaintiff's attorney disagrees with the deductions VanderKooi made in observing Harrison's conduct is legally insufficient to establish error on this issue. *People v Oliver*, 464 Mich 184, 192 (2001). This Court should affirm the trial court's alternative ruling that VanderKooi had reasonable suspicion to stop Harrison.

Additionally, photographing and fingerprinting Harrison was reasonable and within the scope of the stop because verification of Harrison's identity would help confirm or dispel VanderKooi's suspicions regarding a suspicious exchange between two young men and Harrison's further strange behavior in the park. (Op, p.7, 8). VanderKooi's investigative techniques were reasonably related to his original mission and did not prolong the interaction. *Rodriguez*, *supra*.

What is more, taking Harrison's photograph and fingerprint in these circumstances does not constitute a Fourth Amendment search. A "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33 (2001). In delineating what expectations of privacy society will recognize as reasonable, the Supreme Court has stated categorically, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz v United States*, 389 US 347, 351 (1967) (internal citations omitted).

With respect to whether taking Harrison's photograph is a Fourth Amendment search, the result is nearly self-evident.

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. *Like a man's facial characteristics*, or handwriting, his voice is repeatedly produced for others to hear. *No person can have a reasonable expectation* that others will not know the sound of his voice, any more than he can reasonably expect *that his face will be a mystery to the world*.

United States v Dionisio, 410 US 1, 13 (1973) (emphasis added). Because Appellant can have no reasonable expectation of privacy in his facial characteristics or his clothes, taking a photograph does not implicate the Fourth Amendment. The trial court's grant of summary disposition on this issue must be affirmed.

While not stated in case law as categorically, fingerprinting also fails to implicate the Fourth Amendment. In *Davis v Mississippi*, 394 US 721, 722–23 (1969) the petitioner was seized without probable cause or reasonable suspicion, transported 90 miles, and fingerprinted at a remote police station. The fingerprint evidence served as a basis for his indictment and subsequent conviction. *Id.* The Supreme Court held that the fingerprint evidence was inadmissible, because it was the fruit of an unlawful detention. *Id.* at 727. "Detentions for the sole purpose of obtaining fingerprints are … subject to the constraints of the Fourth Amendment." *Id.*

In so doing, however, the Court did not hold that fingerprinting itself is a Fourth Amendment event. Rather, the Court suggested that warrantless detentions for the purpose of obtaining fingerprints may "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id.* "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728. The Court reached this conclusion in part because, "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id* at 727.

In revisiting *Davis* in a subsequent case, the Court clarified its prior holding, noting "in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of fingerprints." *Dionisio*, 410 US at 11 (holding compelled voice sample did not implicate Fourth Amendment). Going even further, the Court stated, "[a]s a result, the Court held in *Davis* that investigatory seizures

for the purpose of obtaining fingerprints are subject to the Fourth Amendment *even though fingerprints themselves are not protected by that Amendment*." *Id.* at 39 (emphasis added). There can be no doubt, therefore, that the taking of fingerprints, in the absence of some other constitutional violation, does not implicate the Fourth Amendment at all.

Nevertheless, the Court again explained its holding in *Davis* in another transportation and fingerprinting case, *Hayes v Florida*, 470 US 811 (1985). There, the Court held that the police illegally seized defendant though coercion when they threatened to arrest him if he didn't accompany them to the police station for fingerprinting. *Id* at 813-814. Again finding that the government's transportation of the defendant violated the Fourth Amendment, the Court went out of its way to state: "There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Id* at 817.

The key distinctions these cases make that Appellant fails to apprehend is that it was the *unlawful detention and transportation* of the petitioner in *Davis* and *Hayes* that rendered the fingerprints inadmissible evidence. Where, as here, Harrison consented to the contact, or alternatively, was lawfully stopped, the taking of a thumbprint while on-scene is permissible. *Davis*, 394 US at 728. One can hardly imagine a more narrowly circumscribed procedure than an officer obtaining a fingerprint at the scene of the stop with a fingerprint card carried with him at all times.

Even if warrantless fingerprinting is a "search" within the meaning of the Fourth

Amendment, it is a reasonable search. "The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy." *People v Jordan*, 187 Mich App 582 (1991), citing *Camara v Municipal Court*, 387 US 523 (1967).

Just this past term, the Supreme Court of the United States held that the Fourth Amendment permits warrantless breath tests but not warrantless blood tests to determine blood alcohol content in drunk driving cases. *Birchfield v N Dakota*, ___ US ___; 136 S Ct 2160, 2172–73 (2016). Relevant here, the Court focused on the degree of intrusion required to access the information law enforcement sought. The Court rejected the contention that a breath test was a significant intrusion because it requires a person to place the mouthpiece of a machine into his or her mouth, noting that it was common to place, for instance, drinking straws into one's mouth. *Id.* at 2177. The Court also noted that it had also upheld warrantless (1) buccal swabs for obtaining DNA, *Maryland v King*, 569 US ___; 133 S Ct 1958, 1969 (2013), and (2) scraping under a suspect's fingernails for evidence of a crime. *Cupp v Murphy*, 412 US 291, 296 (1973). *Birchfield*, 136 S Ct at 2177.

On the other hand, the Court held that taking a blood sample was too intrusive to be conducted without a warrant, in part because it requires piercing the skin and because the blood is part of the body that can contain more information than just alcohol content. *Id.* at 2178. The Court also noted the attendant anxiety that could exist in a citizen's mind as to whether officers would use the blood to obtain other personal information, like DNA. *Id.* The Supreme Court has created a bright line: piercing the skin to obtain evidence generally requires a warrant.

Setting aside the fact that Harrison consented to his fingerprint being taken, his Fourth Amendment claim here must fail. The alleged search of his fingerprint does not raise any serious privacy concerns—after all he, like the vast majority of people exposes his fingerprints to the public on a daily basis. Indeed, many parents voluntarily have their children fingerprinted in case they go missing. Finally, the physical intrusion attendant in having a fingerprint taken is far less than a breath test, buccal swab, or scraping under the fingernails. Thus even if this Court determines both that Harrison did not consent to having his fingerprint taken *and* that fingerprints are—contrary to the clear pronouncements of the Supreme Court—protected by the Fourth Amendment, it still must conclude that the search was reasonable and affirm the trial court's grant of summary disposition in favor of VanderKooi.

E. As a matter of law, the mere act of a state actor taking a photograph of a private citizen cannot constitute a taking under the Fifth Amendment.

Plaintiff also alleged that photographing him constituted an uncompensated taking of his likeness in violation of the Fifth Amendment. Because the trial court rightly recognized that such a takings claim suffers from fatal legal deficiencies—or that in the alternative Appellee was entitled to qualified immunity—the trial court must be affirmed.

Harrison argues that taking of his photograph violated his right to privacy, and because he was not compensated, such action constitutes a taking under the Fifth Amendment. The common law "right to privacy" exists as four distinct causes of action: (1) intrusion on physical solitude; (2) public disclosure of private facts; (3) depiction in a false light; and (4) appropriation of name and likeness. *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296 (2004), quoting *Tobin v. Civil Service Comm.,* 416 Mich. 661

(1982). The cause of action that could possibly fit these facts—and indeed the only "right of privacy" Appellant argues was violated—is the appropriation of his likeness.

The trial court's grant of summary disposition on this claim must be affirmed for two reasons. First, the undisputed facts of this case do not state a claim for the common-law tort of appropriation. Second, even if Appellant has stated a claim for appropriation of his likeness, no court has ever recognized that violation of a common law right can serve as the "property interest" necessary to underlie a takings claim, nor could a court so recognize for more fundamental constitutional reasons.

1. No appropriation within the meaning of the common-law tort took place

Even if we assume for the moment that the purpose of 42 USC § 1983 is to vindicate state common-law rights, cases dealing with the appropriation tort do not delineate specific elements of the tort. Rather, the cause of action is "founded upon 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.'" *Battaglieri*, 261 Mich App at 300–01, quoting Restatement, Torts, 2d, § 652C, comment a. As Appellant is eager to point out, "the right protected by the tort 'is in the nature of a property right.'" *Id* at 301, quoting Restatement, Torts 2d, § 652C, comment b. While the right may be "in the nature" of a property right, the right is *not* a property right that can be taken by the government under the Fifth Amendment.

Whatever the nature of the right, it is violated when a defendant makes "any unauthorized use of a plaintiff's name or likeness, however inoffensive in itself, is actionable if that use results in a benefit to another." *Id.* The elements, undelineated though they may be, are then (1) use of the likeness of another, (2) such that a benefit

accrues to the tortfeasor. The facts of Harrison's case fail on both counts.

First, although "use" is not strictly defined in the case law, it is typically understood to mean that there is some type of publication or communication of the plaintiff's likeness. This principle can be most clearly seen in the context of the privilege against liability for appropriation if the basis for liability is "the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern." *Id.* at 301; *see also Pallas v Crowley, Milner & Co*, 322 Mich 411 (1948) ("We conclude that there are circumstances under which one may have a right of privacy in a photographic likeness which *may give rise to an action* for damages for the unauthorized *publication* thereof." (emphasis added)). In other words, to "use" a person's name or likeness such that his privacy is invaded, that name or likeness must be disseminated to the public. In this case, Appellant failed to show that his image was ever disseminated publicly.

The second element—that the appropriation must be for the benefit of the tortfeasor—is also easily defeated. "A defendant can be 'liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose… The use must be mainly for purposes of trade, without a redeeming public interest, news, or historical value.'" *Battaglieri*, 261 Mich App at 302. Again, Appellant has not submitted evidence that his likeness was used for a commercial purpose. Even if could, use of a plaintiff's likeness is protected by the First Amendment if the communication is a matter of public concern. Here, there is little doubt that detection and prevention of crime by the police is a legitimate matter of public concern. Therefore even if VanderKooi *did* "use" Appellant's likeness and even if such use *did* "result in a benefit" to him, such use is privileged under the First Amendment as

a legitimate matter of public concern.

2. The appropriation of a person's likeness is not a Fifth Amendment Taking as a matter of law.

Even if the taking of Appellant's photograph was an appropriation at common law, such cannot be a Fifth Amendment taking. It is axiomatic that for the government to "take" something from an individual, such that just compensation is required under the Takings Clause, the individual must be *actually deprived* of the property the government has allegedly taken. *See United States v Pewee Coal Co*, 341 US 114, 115 (1951) (holding that that the government has a categorical duty to compensate the former owner of property it physically takes possession of). The law draws a distinction between physical takings and takings that result from regulation, and in the former case the Fifth Amendment's "plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." *Tahoe-Sierra Pres Council, Inc v Tahoe Regl Planning Agency*, 535 US 302, 321 (2002). Here, although not explicitly stated, Appellant appears to be advancing a theory of a physical—otherwise known as categorical or per se taking—and not a regulatory one.

Although most commonly thought of to apply to real property, the Takings Clause applies with equal force to the taking of personal property. *Horne v Dept of Agric*, ___ US ___; 135 S Ct 2419, 2427 (2015) (raisins). Although in general it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa," *Tahoe-Sierra*, 535 US at 323, where, as here, the nature of the takings claims and the claimed property itself is indistinct, both lines of cases are instructive. Indeed, the Takings Clause can be applied

to intangible intellectual property, such as a patent. *Id.* Further, the taking need not deprive an individual of all rights or use of his property. *See United States v General Motors Corp*, 323 US 373 (1945) (temporary occupation of a leasehold requires compensation); *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 (1982) (permanent occupation of small part of apartment building rooftop requires compensation); *United States v Causby*, 328 US 256 (1946) (government planes' intermittent use of private airspace to land requires compensation). But not all impairments of property rights result in a taking. *See Andrus v Allard*, 444 US 51 (1979) (prohibition on sale of artifacts not a taking where owners could still possess, donate, or devise property). "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety" *Id.,* at 65–66. The common thread in all cases is that for a taking to have occurred, the government must impair all or some a person's right to his property for some period of time, such that the person is deprived of the *full* beneficial use of his property.

Here, Harrison has been deprived of nothing. Even if a privacy right in his likeness is a property right that can be taken under the Fifth Amendment, his right to exploit his name and likeness has not been impaired by any actions of the police. He remains free to this day to exploit his likeness in any way he wishes. The fact that a photograph of him exists somewhere in no way impairs his ability to use his likeness howsoever he chooses. Appellant certainly claims no property interest in the paper, ink, and chemicals (or digital megabytes) that comprise the photograph. Assuming, for the sake of argument, that a property right exists in Appellant's likeness, the only way that a government could take

that right would be to somehow bar him from using his likeness in a commercial context. Because that has not happened here, and because Appellant's rights in his likeness have been in no way impacted, the trial court's grant of summary disposition must be affirmed.

F. Captain VanderKooi is entitled to qualified immunity because at the time in question it was not clearly established that taking a photograph and fingerprint of a person during a police-citizen encounter violated the Fourth or Fifth Amendment.

"Government officials, including police officers, are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights." *Aldini v Johnson,* 609 F3d 858, 863 (CA 6 2010) (citation omitted). Defendant VanderKooi is shielded by qualified immunity unless Plaintiff can show: (1) sufficient facts to make out a violation of a constitutional right; and (2) that the right was "clearly established" at the time of the alleged constitutional violation. *Pearson v Callahan*, 555 US 223, 232 (2009), citing *Saucier v Katz*, 533 US 194, 201 (2001). The district court has discretion to decide which prong of the qualified-immunity test "should be addressed first in light of the circumstance." *Id.* at 236. Here, Captain VanderKooi is entitled to qualified immunity because on the date in question taking a photograph and fingerprint of a person by consent or during a valid investigatory stop, was not clearly established as violating the Fourth and Fifth Amendments of the United States Constitution.

The trial court reviewed and granted qualified immunity by looking to the first prong, substantively analyzing the case and finding Harrison's constitutional rights were not violated. (Op, p. 14). This Court should affirm that analysis for the reasons outlined above. But this Court can also look to and decide VanderKooi is entitled to qualified immunity under the second prong, whether the asserted rights were clearly established, because it

is a pure matter of law. *Jackson Co Hog Producers v. Consumers Power Co*, 234 Mich App 72, 116 (1999) ("This Court may affirm a decision of a trial court for reasons different than those relied on by the trial court.").

Under the second prong, the question is "whether the right was so clearly established that a reasonable official would understand that what he is doing violates that right." *Aldini v Johnson*, 609 F3d 858, 863 (CA 6 2010). An officer violates a clearly established constitutional right when "'[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v al-Kidd*, __ US __; 131 S Ct 2074, 2083 (2011). Binding precedent from the Supreme Court or the Sixth Circuit generally is required, but persuasive authority from other circuits that is directly on point may also show clearly established law. *Occupy Nashville v Haslam*, 769 F3d 434, 443 (CA 6 2014).[3]

A plaintiff need not present a court with a case "directly on point" in order to show that the law is clearly established, "but existing precedent must have placed the . . . constitutional question beyond debate." *al–Kidd,* 131 S.Ct., at 2083. There must be specificity in the definition of the right at stake. The Supreme Court has admonished against defining the clearly established law at issue "'at a high level of generality', since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff v Rickard*, 134 S.Ct. 2012, 2023 (2014) (citing *al-Kidd,* 131 S.Ct. at 2080). To judge officers' conduct by such a generalized right would allow plaintiffs "to convert the rule of qualified immunity ...

[3] Although this Court is not bound by decisions of the Sixth Circuit, they are instructive. *Meagher v Wayne State Univ,* 222 Mich App 700, 710 (1997).

into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights". *Anderson v Creighton,* 483 US 635, 639 (1987).

As applied to Plaintiff's Fifth Amendment challenge, Harrison did not present any case to show that it was clearly established than an officer could be sued for just compensation in his individual capacity, let alone that the act of photographing and fingerprinting an individual in the course of a police investigation can constitute a taking. (See Op at 11-12, 14).

As applied to the Fourth Amendment challenge, Plaintiff has not presented any clearly established law to suggest, much less hold, that a photograph constitutes a search. *Katz*, *supra*; *Tobin*, *supra*; *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 668 (1987) (finding no constitutional or common-law privacy implications in release of booking photos under FOIA); see also *Rataj v City of Romulus*, 306 Mich App 735, 752-754 (2014); *Bills v Aseltine*, 958 F2d 697, 707 (CA6 1992) (officer taking a photograph from a location where he has a legal right to be "does not amount to a seizure because it does not 'meaningfully interfere' with any possessory interest.")

Likewise, there is no clearly established law holding that fingerprinting, in the manner Harrison was, is illegal. *Davis, supra*; *Hayes, supra*; *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146 (1990) (compelled fingerprinting in the course of a civil case would not violate the Fourth Amendment because "[t]here is no reasonable expectation of privacy in one's fingerprints."). Indeed, a Supreme Court Justice pointed out that taking a person's photograph is not a search and that Supreme Court has never squarely ruled that taking a person's fingerprint amounts to a search. *Maryland v King*, 569 US __; 133 S Ct 1958, 1986-1988 (2013) (Scalia, dissenting). For

these reasons, this Court should affirm the grant of qualified immunity to Captain VanderKooi.

G. The trial court properly granted summary disposition to VanderKooi on Plaintiff's race discrimination claims because Plaintiff failed to present evidence that tended to show that VanderKooi's actions had a discriminatory effect or was motivated by a discriminatory purpose.

42 USC 1981 states, in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Plaintiff asserts that he pursuing "the full and equal benefit of all laws and proceedings for the security of persons and property." (Exhibit K, Resp #2). Plaintiff also asserts an equal protection claim. The Equal Protection Clause requires that a State not "deny to any person within its jurisdiction the equal protection of the laws," which means similarly situated persons should be treated alike. *City of Cleburne, Tex v Cleburne Living Ctr*, 473 US 432, 439 (1985). To prove a § 1981 or a race-based equal protection claim, a plaintiff must show that the defendant purposefully discriminated in his case on account of his race. *General Building Contractors Assoc, Inc v Pennsylvania,* 458 US 375, 391 (1982). To prevail on a selective enforcement claim, Plaintiff must show that the challenged law enforcement practice had a discriminatory effect and was motived by a discriminatory purpose. *Farm Labor Org Comm v Ohio State Hwy Patrol*, 308 F3d 523, 533-534 (CA 6 2002) (*citing Wayte v United States*, 470 US 598, 608 (1985)). The lower court clearly understood the shared elements of these claims and applied the correct law to its

analysis, contrary to appellant's argument. (see AT Br., p.29, pointing to Sum Disp. Op, p.14).

Purposeful discrimination can be shown by direct or circumstantial evidence. *Vill of Arlington Hts v Metro Hous Dev Corp*, 429 US 252, 266 (1977). The quantum of proof plaintiff must show to establish discriminatory purpose will turn on the nature of the encounter. If this incident was a stop, Harrison must show that VanderKooi's actions were based, at least in part, by a discriminatory motive. *Farm Labor Org Comm*, 308 F3d at 539. If this was a contact, Harrison must prove "that no race-neutral motives played a role in the challenged police conduct." *Id*., at 538 (*citing United States v Travis*, 62 F3d 170 (CA6 1995)). VanderKooi asserts that this was a contact, and thus, the later standard should apply. Regardless, VanderKooi prevails under either standard.

Speculation that an officer acted due to race is insufficient. *United States v Saucedo*, 226 F.3d 782, 790 (CA6 2000). Showing a mere disparate impact is insufficient. 458 US at 383 n 8; see *People v Idziak*, 484 Mich 549, 573-574 (2009). Plaintiff must show "the decision makers in *his* case acted with discriminatory purpose." *United States v Avery*, 137 F3d 343, 355 (CA 6 1997) (emphasis in original).

Appellant argues that there are fact issues that preclude summary disposition, yet he fails to articulate what factual disputes exist. There are no factual disputes. Harrison claims that because VanderKooi picked him over Aguilar, VanderKooi's contact was racially motivated. (Ex K, Resp #1). This is impermissible speculation. *Saucedo*, 226 F.3d at 790. Speculation is not fact. The lower court correctly determined that the record did not contain any evidence (circumstantial or direct) of discriminatory intent.[4] Rather,

[4] Indeed, the only factual dispute is whether Aguilar had identification on him. Assuming

VanderKooi testified that he saw the initial hand-off while he was driving past the boys. VanderKooi lost sight of them and when he drove around the block, only Harrison was visible—all in a manner of about 30 seconds. (VanderKooi, 11; Harrison, 15-16, "20 feet"). VanderKooi explained why he contacted Harrison:

> Q: Why didn't you follow the person with the object, the boy on the bike?
>
> A: Because, because of logistics, probably more than anything else in the shortness of time. You're talking about seconds. I'm making a turn and I'm seeing this going down and suddenly I have to turn around again. There's a lot of traffic, so instead of making a U-turn on Fulton, which is busy, I quick made a right and thought I would circle around again and see what was happening next. I wanted to see if I could get better or more observations of their behavior, and as I make the corner again to look that's when I seen Mr. Harrison in the park and the other individual is out of sight, so. So, I'm looking for more observations to see what was going on.
>
> Q But—
>
> A. Then when I see Mr. Harrison in the park I believe that suspicious behavior is what really suddenly motivated me I better check this out instead of drive by or pass.

(VanderKooi, 29). Harrison's deposition testimony does not, and cannot, contradict this evidence. (Harrison, 61-62, 38-39, discussing vantage point). *Avery*, 137 F3d 343, 354.

Harrison must also show discriminatory effect, either by naming a similarly situated person of a different race who was not prosecuted or by presenting other evidence which "'address[es] the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated.'" *Farm Labor Org Co*, 308 F3d at 534

he did (as that would be most favorable to Harrison), Plaintiff fails to create a genuine issue of material fact as to discriminatory intent. Further, an ID-less Aguilar is still not similarly situated to Harrison because Harrison was the only one left in the vicinity when VanderKooi came back around the block and Harrison was the only one observed engaged in further peculiar conduct in the park.

(quoting *Chavez v Illinois State Police*, 251 F3d 612, 638 (CA7 2001). The lower court found that Aguilar was not similarly situated to Harrison on this record, because VanderKooi had no personal contact with Aguilar during his police contact. (Op., p.16). Nor did Aguilar engage in the peculiar behavior that "really suddenly motivated" VanderKooi. Indeed, the lower court properly rejected plaintiff's arguments of different treatment as speculative. (Op., p.16); *See Farm Labor Organizing Cmtee*, 308 F3d at 535-537 (officer testified he would respond differently based on ethnicity of subjects).

The court concluded that VanderKooi did not treat Harrison differently. (Op, p.16). VanderKooi, who perceived Aguilar as Hispanic, *did* order officers to locate him. (VanderKooi, 8; Harrison, 19). The officer that contacted Aguilar, however, perceived him to be a light-skinned black or Hispanic male (Newton, 12). On these facts, Harrison cannot show that he was treated worse than Aguilar because of race. *See, e.g.*, *Stemler v City of Florence*, 126 F3d 856, 873 (CA 6 1997) (successfully pleaded selective prosecution claim based on homosexuality; plaintiff identified similarly situated person who was perceived by officers to be heterosexual yet not prosecuted).

Plaintiff also asserts statistically based allegations pertaining to Cpt. VanderKooi and the Grand Rapids Police Department. (Exhibit K, Resp #3, 6 and attached list; Exhibit W; 2nd Am Compl ¶22-23, 29). VanderKooi's testimony demonstrates that none of these eleven incidents are remotely similar to this case. (VanderKooi, 68-88; Exhibit K). Plaintiff's generalized statistics are also legally inadequate. General population data fails to capture the relevant reference class. *Avery*, 137 F.3d at 356-358 (reference class in claim of selective enforcement at airport screening is air-traveling population); *Chavez*, 251 F3d at 643- 645 (rejecting census data for selective traffic enforcement claim);

Golden v City of Columbus, 404 F3d 950, 963-965 (CA6 2005) (reference class in claim of discriminatory provision of water services is population eligible for service). The proponent of statistics must demonstrate why general population data is the relevant benchmark. *Golden*, *404* F3d at 963-964. Plaintiff has not done that. (Terrill, 116-120).

Even admissible statistical evidence merely shifts the burden to the defendant to prove race was not a motivating factor. *Avery*, *supra* at 356. Here, VanderKooi's motivation was Harrison's behavior. (VanderKooi, 29, 68). The record fails to show a "circumstantially suspicious sequence of events leading up to the decision" to photograph and print him. *Copeland v Machulis*, 57 F3d 476, 481 (CA 6 1995). Therefore, even if the lower court had considered Plaintiff's statistics, Defendant would have been entitled to summary disposition nevertheless because he proffered uncontroverted evidence of nondiscriminatory motives for his decision to contact Harrison.

H. The trial court properly granted summary disposition to Defendant City of Grand Rapids because no City employee deprived Harrison of a constitutional right. Alternatively, City is entitled to summary judgment because the record does not show a persistent pattern of illegal conduct for which the City was deliberately indifferent.

The trial court granted the City's motion at the earliest stage of the municipal liability analysis: Harrison's constitutional rights were not violated. (Op, 12-14). In short, because his rights in this instance were not violated, he cannot challenge the propriety of P&P as a custom, practice, or procedure. To the extent that this Court also finds that no city employee violated Harrison's constitutional rights (for all the reasons outlined above) the grant of summary disposition to the City must be affirmed. *See Floyd v City of Detroit*, 518 F3d 398, 411 (CA6 2008). Alternatively, even if we assume for sake of argument that a fact question exists as to whether Harrison's constitutional rights were violated—and

continue on with the *Monell* analysis—the City is still entitled to summary judgment on this record. See *People v Jory*, 443 Mich 403, 425 (1993) (affirming trial court's result on different rationale).

There are four generally recognized avenues of pleading and proving a municipal liability claim: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance [of] or acquiescence [to] federal rights violations." *D'Ambrosio v Marino*, 747 F3d 378, 386 (CA6) *cert den* 135 S Ct 758; 190 L Ed 2d 628 (2014) (quoting *Burgess v Fischer,* 735 F3d 462, 478 (CA6 2013).

Plaintiff is not challenging all use of the City's P&P procedure. Rather, he challenges only that GRPD officers use the P&P procedure on "innocent people" during the course of a citizen contact or stop, without probable cause, violates the Fourth Amendment. (AT Br p. 40-41). This theory of liability appears to fall either under the first or fourth avenue.

1. Plaintiff cannot establish that the City's P&P practice is an unlawful custom, policy, or practice under Avenue One.

Although the City's P&P practice may be analyzed under this first avenue, there is a distinction between cases challenging written policies and cases challenging customs or practices, like this case. Namely, a greater quantum of proof is required to prevail on a custom-based challenge because the plaintiff must produce evidence establishing that the custom is what he alleges it to be. *Monell,* 436 US at 691; *Cash v Hamilton Cnty Dep't of Adult Prob*, 388 F.3d 539, 542-43 (CA6 2004); *Thomas v City of Chattanooga*, 398 F3d 426, 433 (CA 6 2005).

Plaintiff appears to allege that P&P violates the Fourth Amendment because officers are photographing and printing "innocent" people. It is true that the GRPD Manual of Procedures chapter on Field Interrogations does indeed instruct officers to be cognizant of the fact that "those persons contacted may be innocent of wrongdoing of any kind" and that officers "should take special care to act in a restrained and courteous manner." (Ex O, 8-1.2). But "innocent" is not a legally relevant standard under the Fourth Amendment. Indeed, in our legal system *everyone* is innocent until proven guilty. *Rawlings v Kentucky*, 448 US 98, 121 (1980) (Marshall, dissenting) ("it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty."). Moreover, case law is clear that conduct, which may appear innocent to some, may nevertheless amount to reasonable suspicion under the totality of the circumstances. *People v Oliver*, 464 Mich 184, 193 (2001) (citing *Terry v Ohio*, 392 US 1 (1968)); *United States v Arvizu*, 534 US 266, 273 (2002).

The Grand Rapids Police Department is doing exactly what the Federal Supreme Court indicated was permissible in *Davis* and *Hayes*: quickly fingerprinting someone in the field on a *reasonable basis* that the procedure would establish or negate an officer's suspicions. (VanderKooi, 66). Plaintiff's position is even weaker on the "picture" portion of the P&P procedure. Under *Katz* and its progeny, a photograph, taken in public, of those parts of the body visible to all, is simply not an action encompassed by the Fourth Amendment. With the advent of social media, dash cam videos, officer body-worn cameras, and the proliferation of smartphone recording of officer-citizen contacts, Plaintiff's position that a static photograph, taken in public, of those portions of plaintiffs'

visage that he holds out to the public is particularly unreasonable, if not antiquated.[5] For these reasons, Plaintiff has failed to show that the City's P&P practice violates the Fourth Amendment under this theory of liability.

2. Plaintiff cannot establish municipal liability under Avenue Four because the record fails to show that the City was deliberately indifferent to a persistent pattern of illegal uses of the P&P procedure.

Harrison's claim that he was targeted for scrutiny because of his race and that "that such actions reflect the custom and practice of some of the Defendant City of Grand Rapids Police Department's personnel" (2nd Am Compl, ¶ 23, 29), as well as the claim that officers use the P&P procedure to photograph and fingerprint "innocent" individuals in a manner that is inconsistent with the Fourth Amendment (see 2nd Am Compl, ¶ 22), sound in the "inaction theory" of municipal liability. (AT Br, p. 42).

To establish municipal liability under Avenue Four, the inaction theory, the plaintiff must show: (1) the existence of a clear and persistent pattern of illegal activity; (2) actual or constructive notice on the part of city officials; (3) the city's tacit approval of the conduct; and (4) that the city's custom was the moving force of the constitutional deprivation. *Thomas,* 398 F.3d at 429. Deliberate indifference requires more than negligence or "sloppy, or even reckless oversights" 398 F.3d at 433. Plaintiffs must show a "history of widespread abuse that has been ignored" by the municipality. *Berry v City of Detroit,* 25 F3d 1342, 1354 (CA6 1994).

[5] McCullough, note CHANGING THE CULTURE OF UNCONSTITUTIONAL INTERFERENCE: A PROPOSAL FOR NATIONWIDE IMPLEMENTATION OF A MODEL POLICY AND TRAINING PROCEDURES PROTECTING THE RIGHT TO PHOTOGRAPH AND RECORD ON-DUTY POLICE, 18 Lewis & Clark Law Rev. 543 (2014).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v Thompson*, 563 US 51; 131 S Ct 1350, 1360; 179 L Ed 2d 417 (2011) (citing *Bd of Co Com'rs of Bryan Co, Okl v Brown*, 520 US 397, 410 (1997)). Michigan Courts have said it "is the reckless disregard of a substantial risk of serious harm; mere negligence, or even gross negligence, will not suffice." *Morden v Grand Traverse Co*, 275 Mich App 325, 334 (2007) (internal citations omitted) (analyzing Eighth Amendment).

3. Plaintiff cannot establish a clear and persistent pattern of illegal conduct.

On this record, Plaintiff cannot establish a "clear and persistent" pattern of illegal conduct. He needs more than a handful of anecdotal accounts in order to establish the required pattern. *See Thomas*, 398 F.3d at 430-431 (Forty-five excessive-force suits in eight years did not constitute pattern absent "data showing what a 'normal' number of excessive force complaints would be"); *Peet v City of* Detroit, 502 F.3d 557, 567-568 (CA6 2007) (three arrests in one investigation insufficient); *D'Ambrosio v Marino*, 747 F3d 378, 388 (CA6 2014) *cert den* 135 S Ct 758 (2014) (Four alleged *Brady* violations over course of decade insufficient); *Connick*, *supra* (same).

The only anecdotal evidence of an alleged illegal application of the P&P practice are the allegations and documentary evidence pertaining to the 2011 stop of Denishio Johnson, the case joined to this one for discovery. (2nd Am Compl, ¶ 24-26). Even if this Court assumes the Johnson incident was unconstitutional, one stop does not create a pattern. *Thomas*, *supra*. Plaintiff also attempted to establish a pattern by alleging that Captain VanderKooi caused eleven innocent people to be P&P'd in five years (2nd Am Complaint ¶ 22-23), even if this evidence was admissible, it is too small a sample to

establish a clear and persistent pattern. *Thomas*, *supra*. Moreover, the record shows that these "anecdotes" are so factually different from Harrison's case—and from each other—that they cannot form a "pattern" much less a clear and persistent one. (VanderKooi 68-88, discussing Exhibit K list).

In the course of discovery, Plaintiff produced spreadsheets created by his attorney of all P&P incident reports of "innocent" people who were photographed and printed. (See, e.g., Exhibit W, Exhibit X). The City has no idea how Plaintiff defined "innocent". Nor did Plaintiff's expert. (Terrill Dep., p. 67-68, 100-101). The only reasonable inference that can be drawn from the record is that Plaintiff's attorney and lay witnesses read the incident reports provided by the City and made a judgment call as to whom they thought were "innocent." (Ex X, Resp. 7, 8 (claiming work product)). As such, record is void of any indication that these incidents were analyzed under the correct legal standard—that is, reasonableness viewed from the prospective of a reasonable officer on the scene—because Plaintiff'. *Id.,* at 433 (citing *Graham v Connor,* 490 US 386 (1989)). Raw numbers of how many people were P&P'd do not show that officers in those instances acted illegally or that the program is unconstitutional. *Thomas*, 398 F3d at 431. The lower court rightly rejected this evidence as inadmissible when reviewing the claim against the City. (Op striking expert, p.5).

4. Plaintiff cannot establish notice or tacit approval of federal rights violations.

To prove deliberate indifference, the plaintiff needs to show that the City was on notice that, without any corrective action to its current P&P practice, "it was 'highly predictable'" that officers would commit the same constitutional violations in the future to

the point of being a conscious disregard for citizens' Fourth Amendment rights. *Connick*, 131 S Ct at 1365 (internal citations omitted).

Plaintiff failed to show that the City has a custom of tolerating an *illegal use of* the P&P procedure because he has not shown that decision makers did nothing in the face of known constitutional problems. For example, in *Bielevicz v Dubinon*, 915 F2d 845 (CA3 1990), the Third Circuit found that the question of whether a police department had a custom of illegal pretextual arrests for public intoxication existed where the former police chief testified that it was common knowledge that officers used a public drunkenness law to arrest people without probable cause and jail them without subsequent prosecutorial or judicial review. *Id*., at 849. Plaintiff cannot produce such evidence. (Ex Y, admit #13).

Plaintiff failed to present evidence of prior instances in which a GRPD officer's use of the P&P procedure was found to be unconstitutional (e.g., in the context of a suppression hearing or criminal appeal). *See*, *e.g.*, *D'Ambrosio*, 747 F3d at 388. What is more, it cannot be said that the City has notice that the P&P practice violates the Fourth Amendment given the state of the law on photographing and fingerprinting, discussed above. See e.g., *Hayes*, *supra*. This lack of evidence is particularly glaring given the fact that the City has had this practice for over thirty years. (VanderKooi, 36).

Harrison alleges he was targeted for scrutiny because of his race and "that such actions reflect the custom and practice of *some* of the Defendant City of Grand Rapids Police Department's personnel" (2nd Am Compl, ¶ 29, emphasis added). To hold the City liable for the actions of "some" of its personnel, without more, is nothing more than an attempt to hold the city to *respondeat superior*. *Monell*, 436 US at 694. In the context of a selective enforcement claim against a municipality, like the discrimination claims against

the officers, the plaintiff must show that invidious discriminatory purpose was a primary motivating factor for the *City*, not just its employees. The Supreme Court has held that such "motivation" evidence, when the defendant is a governmental entity, can include historical background of the decision, specific sequence of events leading up to the challenged decision, departures from the normal procedure sequence, legislative or administrative history, contemporary statements by members of the decision-making body (e.g., meeting minutes), and in extraordinary circumstances, compelled testimony. *Vill of Arlington Hts v Metro Hous Dev Corp*, 429 US 252, 268 (1977).

The record contains no evidence regarding the genesis of the practice, which was already in existence when Captain VanderKooi joined the GRPD more than thirty years ago. (VanderKooi, 36). As a matter of City Commission Policy, the City does not tolerate racism or other forms of invidious discrimination. (Exhibit T). There exists no evidence of invidious motivations or racially derogatory language in any of the documentation pertaining to P&P (Exhibits O, P, Q, R). Even if Plaintiff could prove his allegations that "some of the Defendant City of Grand Rapids Police Department's personnel" are invidiously discriminatory, plaintiff would still have to show that a clear and persistent pattern existed of which the City had notice but deliberately chose to ignore. *Connick*, 131 SCt at 1360.

In short, Plaintiff cannot establish that the City deliberately chose a course of action that it knew would likely cause violations of constitutional rights of citizens who would be subject to being photographed and fingerprinted. *Connick*, *supra*. Therefore, this Court should affirm the lower court's ruling.

I. The Circuit Court's conclusion that Dr. Terrill was not qualified to testify as an expert is well within the range of reasonable and principled outcomes and must be affirmed.

Appellees moved to strike Dr. Terrill because he is not qualified to testify on racial profiling, his opinion on racial profiling is not supported by acceptable methods, and because a jury does not need expert assistance to understand the facts of this case. (see Defs' Mot and Br to Strike Terrill). The trial court agreed.

The trial court began its analysis by stating the correct legal standards governing the admissibility of expert testimony, comprising MRE 702 and relevant Michigan Court of Appeals and Supreme Court case law applying the rule. (Opinion and Order striking expert, at 3–4.) Specifically, the trial court grounded its analysis in the three factors for admitting expert testimony established by MRE 702, *Gilbert v Daimler Chrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), *Daubert v Merrell Dow Pharm*, 509 US 579 (1993), namely: (1) the expert is qualified to give the proposed testimony; (2) the proposed testimony will assist the trier of fact to understand the evidence or determine a fact issue; and (3) the proposed testimony must be based on a recognized form of specialized knowledge. (Op. at 3.). Appellant, on the other hand, attempts to show error by arguing outmoded, pre-*Daubert* standards. (See AT Br, pp. 45-46). Such analysis does not cut the proverbial appellate mustard.

The lower court took note that "there is no doubt that Dr. Terrill has significant training and education in the general field of criminal justice." (*Id.* at 4.) But the court concluded, on the whole, that Appellant had failed to offer "evidence tending to prove that Dr. Terrill is qualified as an expert in the field of police misconduct and/or racial profiling" noting specifically that Dr. Terrill's CV did not clearly specify what type of expert he had

been qualified as in other cases. (*Id.*)

The trial court continued its analysis, holding that even assuming that Dr. Terrill met the first prong of qualifying as an expert, his testimony would not assist the trier of fact in understanding the facts of this case. (*Id.* at 4-5.) The trial court concluded that because Dr. Terrill's proposed mathematical analysis of racial disparity in P&P reports could, in Dr. Terrill's own words, be completed with the "use of ordinary mathematical computations that any lay person can perform" that the proposed testimony was inadmissible because jurors, being laypeople, do not need his assistance in understanding the evidence. (*Id.* at 5.) The trial court also rejected the proffered testimony that the defendant officers' conduct was racially motivated because it was unclear how Dr. Terrill came to this conclusion, and the court therefore concluded that the testimony would not assist the jury in deciding fact questions. (*Id.*)

Finally, the trial court concluded that Dr. Terrill's methods did not meet the third prong of the *Daubert/Gilbert* test. (*Id.* at 5–6.) Specifically, the court cited the lack of peer-reviewed or otherwise authoritative support submitted by Appellant to support Dr. Terrill's comparison of unadjusted U.S. Census data of the City of Grand Rapids to the ratio of African-Americans who are subject to a P&P. (*Id.*) The court therefore concluded that Appellant had failed to meet its burden in showing that his expert's opinion was based on "a recognized form of scientific, technical, or other specialized knowledge." (*Id.*)

Additionally, the trial court concluded that the probative value of the proposed expert testimony was outweighed by its tendency to prejudice the jury, violating MRE 403. (*Id.* at 6.) Specifically, the court cited the lack of expertise in racial profiling, his unfamiliarity with use of adjusted census data, and the fact that any familiarity he does

have is in the context of this litigation. (*Id.*). The court therefore concluded that the proposed testimony was speculative and could only serve to confuse the jury. (*Id.*, citing *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48; 597 NW2d 534 (1999), vacated in part on other grounds, 463 Mich 979; 624 NW2d 188 (2001); *Phillips v Deihm*, 213 Mich App 389; 541 NW2d 566 (1995).)

Appellant states "[t]he principal problems with the trial court's handling of [the expert testimony issue] concerned the trial court's failure to thoroughly examine the nature of his knowledge, skill, experience, training, and education, the reliable principles and methods he has used in other cases and his application of those principles and methods to his case." (AT Br. at 45.) Appellant, failing to apprehend the standard of review applicable to this issue, then goes on for six pages re-litigating the issue of Dr. Terrill's qualifications as if this Court would review the issue de novo.

As demonstrated above, however, the trial court's conclusion in striking Dr. Terrill as an expert was well-reasoned and supported by the law. Indeed, the lower court's ruling that Terrill could not testify as to the reasonableness of the officer's behavior and conduct is consistent with a recent ruling of the United States Supreme Court in a case concerning the use of expert testimony to overcome a defendant officer's claim to qualified immunity: "so long as a reasonable officer could have believed that his conduct was justified,' a plaintiff cannot avoid summary judgment by simply producing an expert's report that an officer's conduct . . . was imprudent, inappropriate, or even reckless." *City & Co of San Francisco, Calif v Sheehan*, 135 S Ct 1765, 1777; 191 L Ed 2d 856 (2015) (internal quotation omitted); *accord Oliver*, *supra* at 192 (*citing People v Nelson*, 443 Mich 626, 632 (1993)) (totality of circumstances "must be viewed 'as understood and interpreted by

law enforcement officers, not legal scholars'").

The trial court also acted well within its discretion when it concluded that Dr. Terrill's statistical opinion was inadmissible for lack of an appropriate methodology. In fact, the trial court's opinion in this case is similar to a recent Michigan Supreme Court case which affirmed a trial court's rejection of an expert opinion at the summary disposition stage. *Elher v Misra*, 499 Mich 11, 14 (2016). In that medical malpractice case, the Court found that the expert's opinion was based on his personal beliefs, unsupported (and in fact, contradicted) by the relevant literature, and not based on reliable principles or methods.

There, Plaintiff failed to identify or submit any support for the expert's opinion, such as peer-reviewed medical literature. Id at 25, 26. Moreover, that plaintiff gave the court no indication regarding the degree of acceptance of his opinion. *Id* at 26. The same is true in this case. (see Order striking expert, p.5-6). Rather than present support for the methodology and opinion, the medical malpractice plaintiff in *Ehler*, like Harrison in this case, "merely pointed to [the expert's] background and experience in regard to the remaining factors, which is generally not sufficient to argue that an expert's opinion is reliable. Id at 26; (see AT Br, pp. 46, 49).

In this case, the lower court incorporated into its opinion by reference the defendants' analysis explaining why Plaintiff's "descriptive statistics" were inconsistent with the acceptable methodologies for determining a relevant benchmark for racial profiling studies used in a variety of discrimination cases. See e.g., *United States v Bass*, 536 US 862, 864 (2002) ("[R]aw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*.") (emphasis in original); *Chavez v Illinois State Police*, 251 F3d 612 (CA7 2001) ("without reliable data on whom Valkyrie

officers stop, detain, and search, and without reliable data indicating the population on the highways where motorists are stopped, detained, and searched, we cannot find that the statistics prove that the Valkyrie officers' actions had a discriminatory effect on the plaintiffs."); *Golden v City of Columbus*, 404 F3d 950, 963-965 (CA6 2005) (census data inappropriate proxy for reference class in case challenging discrimination in provision of water service to tenants); *Floyd v City of New York*, 959 F Supp 2d 540, 576-578, 583 (SDNY 2013). ("[A] valid benchmark requires estimates of the supply of individuals of each racial or ethnic group who are engaged in the targeted behaviors and who are available to the police as potential targets for the exercise of their stop authority."

Appellant also attempts to argue that the trial court should have considered the statistical data on its own, without Dr. Terrill's testimony. (AT Br 43-44). This issue is not properly preserved because it is not stated in Appellant's Statement of Question's presented. *English v Blue Cross Blue Shield of Mich,* 263 Mich App 449, 459; 688 NW2d 523 (2004); MCR 7.212(C)(5). Regardless, the court did not err because the data is inadmissible hearsay. "Plaintiff's analytical team" consists of people that cannot testify: plaintiff's attorney (MRPC 3.7), and/or non-expert witnesses who are offering testimony on facts not within their personal knowledge. The inappropriate hearsay is not "City data" but rather the determination by a coder on "Plaintiff's analytical team" to separate out from the 1,100 incidences some 239 reports of incidents described in the reports have "no evidence of criminal wrongdoing", which is hearsay within hearsay. MRE 701, 702, 805. (See Def Br strike expert, p. 8, incorporated by reference into Opinion striking expert, p. 6-7; AT Br, p.44). Since Terrill did not direct, or even know how, this information culling took place (Plaintiff admits the expert only read the 239 reports) Terrill could not testify

on these matters, either. (See AT Br, p.47).

Finally, Appellant's attempt to have this Court look only to Dr. Terrill's affidavit and not his "irrelevant" and "preliminary" deposition testimony is unsupported by law and, quite frankly, silly. (AT Br., p.50). The silliness is apparent when plaintiff attempts to prove the admissibility of his expert by pointing to his deposition testimony. (*Id*.) Where the Supreme Court found no error in a trial court's striking of an expert at the summary disposition stage based on deposition testimony, Appellant's argument that the trial court's order was "premature" is without merit. *Ehler*, 499 Mich at 16.

"[I]t bears repeating that it is within a trial court's discretion how to determine reliability." *Id*., at 25. The trial court's conclusion is well within the range of reasoned and principled outcomes from which it could have chosen. Whether this Court would come to a different conclusion is immaterial. Because the trial court did not abuse its discretion in excluding Dr. Terrill's testimony, this Court must affirm its judgment.

V. CONCLUSION AND RELIEF REQUESTED

For almost fifty years the United States Supreme Court has held that there is no expectation of privacy in that which a person readily holds out to the public. The everyday physical manifestations that are part of personal identity—facial characteristics, voice and fingerprints are not protected by the Fourth Amendment. Yet Plaintiff-Appellant Harrison asserts that—despite the fact that the record clearly and unambiguously shows that he knowingly and intelligently consented to every aspect of this encounter—the police, nevertheless, need a warrant to photograph his outward appearance and take his fingerprint. This position is not only contrary to long standing case law but also inconsistent with what society deems private in the age of Facebook, body-worn cameras,

and smartphones activated with the swipe of your fingertip. The trial court correctly ruled that Harrison's Fourth and Fifth Amendment rights were not violated when he consented to having his photograph and fingerprint taken. Defendants City of Grand Rapids and Captain VanderKooi ask this Court to affirm the decisions under review.

Respectfully submitted,

CURT VANDERKOOI and **CITY OF GRAND RAPIDS,** *a Michigan Municipal Corporation,*

Dated: August 1, 2016 By: /s/ Kristen Rewa

KRISTEN REWA (P73043)
Assistant City Attorney

Dated: August 1, 2016 By: /s/ Elliot Gruszka

ELLIOT GRUSZKA (P77117)
Assistant City Attorney
Attorneys for Defendant-Appellee
Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

VI. INDEX OF APPENDICES

Appendix A – Order re Motion for Summary Disposition

Appendix B –Order Striking Expert

Appendix C – Color Photo
Original Record: Exhibit B to Defendants' Motion for Summary Disposition

Appendix D – Print Card
Original Record: Exhibit C to Defendants' Motion for Summary Disposition

Appendix E – Oral Argument transcript

Appendix F – Harrison Deposition
Original Record: Exhibit F to Defendants' Motion for Summary Disposition

Appendix G – VanderKooi Deposition
Original Record: Exhibit H to Defendants' Motion for Summary Disposition

STATE OF MICHIGAN

IN THE COURT OF APPEALS

DENISHIO JOHNSON,

Plaintiff-Appellant,

v.

ELLIOTT BARGAS, and
CITY OF GRAND RAPIDS,
a Michigan municipal corporation,

Defendants-Appellees.

Court of Appeals
Docket No. 330536

Lower Court
Case No. 14-07226-NO

_____/

BERNARD SCHAEFER (P40114)
Attorney for Plaintiff-Appellant
161 Ottawa Avenue, NW
Suite 212
Grand Rapids, MI 49503
(616) 272-4361

KRISTEN REWA (P73043)
ELLIOT GRUSZKA (P77117)
Assistant City Attorneys
Attorneys for Defendants-Appellees
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

_____/

DEFENDANT-APPELLEES' BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

I. COUNTER-STATEMENT OF BASIS OF JURISDICTION

Defendants-Appellees Elliott Bargas and City of Grand Rapids rely on Plaintiff-Appellant's statement of the basis of jurisdiction.

II. COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. No Fourth Amendment search takes place if the object or information searched is exposed to the public. A person's face and fingerprints are constantly exposed to the public. Is the taking of a photograph and collection of fingerprints a search under the Fourth Amendment?

   Circuit Court: No
   Appellees: No
   Harrison: Yes

2. A *per se* taking under the Fifth Amendment requires that the government physically appropriate property or destroy property's economic value. Johnson's right to exploit his likeness was not destroyed when Bargas took his photograph and Johnson has no right in the physical materials of the photograph. Did a taking occur?

   Circuit Court: No
   Appellees: No
   Harrison: Yes

3. A state actor is entitled to qualified immunity if his actions did not violate clearly established law. No controlling authority has held that taking a fingerprint or a photograph violates the Fourth or Fifth Amendment to the United States Constitution. Is Bargas entitled to qualified immunity?

   Circuit Court: Yes
   Appellees: Yes
   Harrison: No

4. A municipality can be liable under 42 USC § 1983 when a custom, policy, or practice causes a constitutional violation. Is the City of Grand Rapids liable for a custom or practice where, as here, no constitutional violation occurred?

   Circuit Court: No
   Appellees: No
   Harrison: Yes

5. Whether a witness is qualified as an expert is a matter of the trial court's sound discretion. The trial court determined that Dr. William Terrill, Johnson's proposed expert, does not have the requisite background to testify as a witness and that his testimony would not assist the jury in determining reasonableness of the Defendants' actions. Did the trial court abuse its discretion in excluding Dr. Terrill's testimony?

   Circuit Court: Did not answer
   Appellees: No
   Harrison: Yes

III. COUNTER-STATEMENT OF FACTS AND PROCEDURAL POSTURE

A. Photograph and fingerprinting of Denishio Johnson

In 2011, the Michigan Athletic Club (MAC) was located at 2500 Burton SE Grand Rapids. While in operation, the business had problems in its parking lot, namely breaking into and theft from vehicles parked there. Grand Rapids Police Department officers that were assigned to patrol in in the Southeast (East) service area were well aware of these problems; their captain, Curtis VanderKooi, disseminated emails about this and other crime trends in "the East Edge."[1]

On August 15, 2011, at 1:40pm, the GRPD received a call from an employee of the MAC, stating that she saw someone looking into cars in the parking lot as if to steal something from them. She described the suspect as a black male, approximately twenty years old, wearing a red jacket and blue jeans.[2] The parking lot had many cars in it at the time but was not full.[3]

GRPD Officers Greg Edgcombe and Eugene Laudenslager were dispatched to the call. Edgecombe, as an officer in the East Service Area, where the MAC is located, was aware of several break-ins and thefts from vehicles located in the MAC parking lot. Some of the suspects in those prior incidents were described as young, black males who, after breaking and entering ("B&E") into the vehicles, would exit by walking over the berm behind the MAC.[4] Officer Laudenslager does not recall the facts of this incident but

[1] (Exhibit I, Bargas, 31; Ex L). Unless otherwise noted, all referenced exhibits were attached to Defendants' motions for summary disposition.
[2] (Exhibit A; Exhibit M; Compl, ¶ 11).
[3] (Johnson, 11).
[4] (Exhibit E, Response #4; Exhibit M).

remembers that officers were aware of a string of larcenies of vehicles at the MAC and were concerned with the number of B&E's taking place.[5]

Upon arrival, Officer Edgcombe spoke with the MAC employee. She said the person she saw walked westbound on Burton Street.[6] Officer Edgecombe searched the immediate area and located a person fitting the dispatched description sitting on a grassy hill in or around the Macatawa Bank parking lot, west of the MAC.[7] Officer Edgecombe contacted the subject and asked him about walking through the MAC parking lot looking into cars.[8] Edgecombe also asked for the subject's name and date of birth because he did not have identification on him.[9] The subject identified himself as Denishio Johnson with a date of birth that would have made him fifteen years old.[10]

The subject explained to Officer Edgecombe that he was waiting for a friend and had walked through the MAC parking lot from his home on Burning Tree, which is a street located behind the MAC on the other side of the berm. Officer Edgcombe thought that his route was consistent with the route traveled by suspects of the prior vehicle break-ins. The subject denied trying to open any vehicles.[11]

Meanwhile, in another part of the City, Defendant Sgt. Elliott Bargas, a patrol supervisor over the East Service Area, heard "a dispatch call, radio traffic of the witness seeing a subject in the MAC lot. . . . They were described as trespassing and looking into cars. That same witness provides clothing description, physical description, gender

[5] (Exhibit F).
[6] (Exhibit A; Exhibit E).
[7] (Exhibit A; Exhibit E; Johnson, 6-7; Compl ¶ 9).
[8] (Johnson, 10-11).
[9] (Johnson, 9, 19-20).
[10] (Exhibit A).
[11] (Exhibit A; Exhibit E; Johnson 8, 11).

description and race."[12] Bargas heard dispatch describe a suspect "as a late teens black male wearing red over jeans."[13] He heard Officer Edgcombe announce over the radio that he saw someone matching that description and that he was making contact. Sgt. Bargas started driving in that direction.[14] Bargas was also aware of several incidents of previous burglaries from vehicles in this lot and that a suspect of a prior incident was seen leaving the parking lot and walking south over the berm; "so I was responding to assist just in case there had been a foot chase or something to that effect."[15]

Back at the MAC parking lot, Officer Laudenslager spoke to a male witness who had seen the same suspicious activity as the MAC employee. Laudenslager had the male witness look at the subject from afar. The witness identified the subject as the person he saw walking through the MAC parking lot, but he did not see the subject trying to use the vehicle door handles or otherwise try to get into any vehicles.[16]

Sgt. Bargas arrived on scene after Edgcombe had detained the subject and was in the process of trying to identify him. Edgecombe told Bargas the subject is fifteen years old and lives on Burning Tree, just south of the MAC.[17] Bargas spoke with the subject, who admitted walking through the MAC parking lot, denied looking into cars.[18] Sgt. Bargas thought the subject appeared older than fifteen based on his stature and the fact that he had tattoos on his arms.[19] He did not have any identification on him.[20]

[12] (Bargas, 4-5, 7).
[13] (Bargas, 6).
[14] (Bargas, 6).
[15] (Bargas, 7, 12-13; Exhibit L).
[16] (Exhibit A, Exhibit E; Bargas, 8).
[17] (Bargas, 10; Johnson, 9).
[18] (Bargas, 11, 32-33; Exhibit A).
[19] (Bargas, 11, 14, 21; Exhibit B).
[20] (Bargas, 10, 17; Johnson, 9).

After speaking with the subject, Bargas took photographs of him using his department-issued digital camera. He also took a full set of fingerprints on a GRPD-issued "print card."[21] Johnson's mother was contacted and she came to the scene.[22] She showed the officers her identification, which showed she lived on Burning Tree. She confirmed the person the GRPD officers had stopped was her son, Denishio Johnson. Sgt. Bargas explained the incident and their actions to her.[23] Johnson says he was searched, handcuffed, and placed in a cruiser.[24] He does not remember which officer did what, what any officer looked like, and recalls only one cruiser.[25] After the officers talked with his mother, he was fingerprinted and photographed.[26] Officers did not ask permission to do so. (Johnson, 17). Johnson denies checking out cars; he was checking himself out:

> Q: Were you looking into cars?
>
> A: No, but when I pass cars I usually look at myself like from the reflection of the window. I know I did that, but as far as staring into the cars, I didn't do that."[27]

Johnson left with his mother. No charges were filed.[28]

[21] (Bargas, 14-15, 22; Ex B; Ex C).
[22] (Exhibit A; Johnson, 11; Bargas, 16).
[23] (Exhibit E; Bargas, 16-18; Johnson, 13).
[24] (Johnson, 12). Bargas does not recall handcuffs (Bargas, 9). Edgcombe does not believe Johnson was handcuffed; he cannot remember if he sat in a cruiser. Neither recall a search. (Exhibit E; Bargas, 27). These facts are not material to Plaintiff's claims.
[25] (Johnson, 20-25).
[26] (Johnson, 13-17).
[27] (Johnson, 11).
[28] (Bargas, 34; Johnson, 17-18).

Sgt. Bargas uploaded the photos into the GRPD's records system and the print card was turned in at the end of Edgecombe's shift to the GRPD Forensics Services Unit.[29] Johnson has never seen copies of them.[30]

B. GRPD custom or practice of photograph and fingerprinting, or "P&P".

The City has developed a custom, practice, or procedure referred to as "picture and print" or "P&P", which the Grand Rapids Police Department uses in the course of its operations. A GRPD officer may take a photograph and fingerprint of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print may also be taken in the course of a field interrogation (i.e., a citizen contact or a stop, depending on the circumstances), if appropriate, based on the facts and circumstances of that incident.[31] P&P has been a practice of the GRPD for over thirty years. (VanderKooi, 36).

There is no specific written policy on P&P, but references to the practice show up in the GRPD Manual of Procedures ("MOP").[32] The training documents also show how the practice has evolved. For example, when the practice was first implemented, officers

[29] (Exhibit F, Resp #14; Bargas, 18-19, 26-27).
[30] (Johnson, 17).
[31] Exhibit Y; see also Bargas 25, 30-31; VanderKooi 65-67.
[32] Defendants' Summary Disposition Exhibit O (Forensic Services Unit, MOP 3-12.1, duties include identifying field interrogation prints; Driver's License Violations, MOP 5-6.3 et seq., directing officers to "P&P" in circumstances in which a person will be issued an appearance ticket in lieu of custodial arrest; Appearance Ticket violation, MOP 10-6.1 et seq., directing officers to "P&P" in circumstances in which a person may be issued a ticket in lieu of custodial arrest. The Field Interrogation chapter of the MOP that was effective in 2011 and 2012, however, does not contain a reference to P&P. (see Exhibit O, MOP 8-1.1 *et seq*).

took a Polaroid picture of a person and affixed a thumbprint to the back of the photo.[33] At the time of Johnson's stop in 2011, the GRPD used digital cameras.[34]

Patrol sergeants are assigned a fingerprint kit and use a GRPD "print card".[35] When an officer fills out a print card, he will turn it in at the end of his shift to a "patrol work box" located in the GRPD headquarters. Print cards are collected from the patrol work box and placed into the Forensics mail box (lobby level). From there, the cards are submitted to the Latent Print Unit, a one-room, limited access office within the Forensic Services Unit.[36]

Latent Print Examiners check all the submitted fingerprints on P&P cards against the Kent County Correctional Facility database. If the person does not appear in the database, the print is searched against the known database (Automated Fingerprint Identification System, or "AFIS"). The goal remains to attempt to verify the information provided. The examiners will indicate on the card the results of their examination.[37]

After the cards are processed by the Latent Print Examiners, they are filed and stored under their respective year, in a box. Denishio Johnson's print card, however, was not located in the 2011 set because his card is stored in the case file jacket for another incident report related to one of the unsolved larceny is at the MAC.[38]

[33] (Exhibit Q).
[34] (Bargas, 18).
[35] (Exhibit R).
[36] (Exhibit S, Response 15).
[37] (Exhibit C, Exhibit S; Exhibit Z, Resp #1).
[38] (Exhibit E, Response #13, 15, Exhibit AA).

C. Procedural Posture.

Plaintiff filed this action on August 7, 2014, alleging that Cpt. VanderKooi and Sgt. Bargas acted in a discriminatory manner in violation of the Equal Protection Clause; that taking his photo and fingerprints violated his Fourth Amendment rights, his Fifth Amendment rights against "the taking of private property for public use without just compensation", and his "right to privacy under the U.S. Constitution;" and "his rights protected by 42 USC § 1981 and 42 USC § 1983." Plaintiff also sued the City of Grand Rapids, under 42 USC § 1983, asserting that City's practice of photographing and fingerprinting is illegal under the Fourth Amendment and, as applied, disparately impacts African Americans. (Compl, ¶¶ 21, 28, 29, 30). This case was joined for discovery with *Keyon Harrison v. Curt VanderKooi et al.,* Kent Co. Cir. Ct. 14-02166-NO, COA Docket No. 330537.[39]

Sgt. Bargas and Captain VanderKooi moved for summary disposition under MCR 2.117(C)(7) & MCR 2.117(C)(10). City of Grand Rapids moved for summary disposition under (C)(10). Defendants also filed a motion to strike Plaintiff's expert witness, William Terrill, Ph.D. During the course of summary disposition briefing, Johnson abandoned his race discrimination equal protection/ § 1981 claims against all defendants.[40] The court heard oral argument on the motions at a joint session with hearings on similar motions filed in the *Harrison* case.

The trial court granted the Defendants' motion to strike Dr. Terrill from the Johnson case citing four reasons. First, Plaintiff failed to establish that Dr. Terrill was qualified to

[39] (Exhibit G).
[40] (PL's resp. brief to City's motion, p.6; PL Resp. to Bargas/VanderKooi, p.20; Sum Disp. hearing, p. 29-30; SD Op, p.10).

provide his proffered opinion;[41] Second, Plaintiff failed to establish that the jury needed expert assistance on the reasonableness of the officers' conduct.[42] Third, there was a likelihood for confusion of the issues, specifically, that Dr. Terrill would attempt to inject statistical data of purported racial profiling in this case which is irrelevant because Johnson dropped his racial discrimination claims.[43] Finally, the court adopted all the reasons stated in Defendants' brief.[44]

The Court granted VanderKooi and Bargas' summary disposition motion, finding that the Plaintiff failed to establish that his constitutional rights were violated. Plaintiff did not appeal the grant of summary disposition to Captain VanderKooi. As to Sgt. Bargas, the Court found that his actions were objectively reasonable given the information known to him at the time, "and no Fourth Amendment violation occurred."[45] The Court further found that plaintiff failed to establish any factual or legal basis to show that the taking of his photograph and fingerprints constituted the taking of a recognized property right.[46] Because the court found no evidence of a constitutional violation, it determined that the officers were entitled to qualified immunity from Plaintiff's claims.[47] Likewise, the Court granted summary disposition to the City because no City employee violated Johnson's constitutional rights.[48]

This appeal followed.

[41] (Order striking expert, p.5).
[42] (Id at 5).
[43] (Id at 6).
[44] (Id at 6-7).
[45] (SD Op at 7).
[46] (Op at 9-10).
[47] (Op at 11).
[48] (Op at 12-13).

IV. LAW AND ARGUMENT

A. Applicable Standards of Review

The issues presented in this case are reviewed under two different standards of review. This Court reviews *de novo* the trial court's decision to grant summary disposition based upon a showing of immunity granted by law under MCR 2.116(C)(7). *Lavey v Mills*, 248 Mich App 244 (2001). The Court must take as true the factual allegations of the complaint, unless the movant contradicts them with documentary evidence. *Plunkett v Dept of Transp*, 286 Mich App 168 (2009). When the movant has provided contradictory evidence, the nonmovant may not rely on the pleadings, but must rebut the movant's evidence in order to create a genuine issue of material fact. *Yono v Dept of Transp (On Remand)*, 306 Mich App 671 (2014) Because Sgt. Bargas presented evidence in support of his motion, Johnson cannot rely on his pleadings alone to create a genuine issue of material fact.

This court reviews *de novo* a trial court's decision to grant summary disposition under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. A trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. MCR 2.116(C)(5); *Maiden v Rozwood*, 461 Mich 109, 120 (1999). Under either rule, if a party is entitled to judgment as a matter of law, or if the evidence shows no genuine issue of material fact, the trial court should render judgment without delay. MCR 2.116(I)(1).

Plaintiff's issue 6, which assigns error to the circuit court's order striking William Terrill, Ph.D, as an expert witness, is reviewed under the abuse-of-discretion standard. *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548, 561 (2001), citing

Mulholland v DEC Int'l Corp., 432 Mich 395, 402; 443 NW2d 340 (1989). An abuse of discretion occurs "when the trial court's decision is outside the range of reasonable and principled outcomes." *Moore v Secura, Ins*, 482 Mich 507 (2008).

Likewise, Plaintiff's claim that the court did not read the complaint expansively to include additional Fourth Amendment causes of action is reviewed for abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 536 NW2d 647 (1997) citing *Dacon v Transue*, 441 Mich 315 (1992); *Ben P Fyke & Sons v Gunter Co.,* 390 Mich 649 (1973).

B. Overview of the law on 42 USC § 1983

42 USC § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statute is not a source of rights, but rather, a remedy for violations of rights granted in other federal statutes or the U.S. Constitution. *Lavigne v Forshee*, 307 Mich App 530, 537 (2014). In order to prevail, a Plaintiff must establish that (1) a defendant acted under color of state law and (2) that defendant's conduct deprived plaintiffs of a federal right. *Id.*, at 539. Individual government employees are liable only for their own actions. There is no derivative or supervisory liability. Mere presence, without a showing of direct responsibility for an action, will not subject an officer to liability. *Hall v Shipley*, 932 F2d 1147, 1154 (CA 6, 1991).

A municipality is not liable under 42 USC. § 1983 unless some action taken pursuant to official municipal custom, policy, or practice causes a constitutional violation. *Monell v. Dep't of Social Services*, 436 U.S. 658, 691 (1978). There is no *respondeat*

superior liability. *Jackson v City of Detroit*, 449 Mich 420, 433 (1995) (citing *Monell*, 436 US at 694). Rather, plaintiff must link the municipal custom or practice as the moving force behind the alleged constitutional violations. *Jackson*, *supra* (*citing Monell*, *supra*). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v Thompson*, 563 US 51 (2011) (citations omitted).

C. Johnson's Fourth Amendment claim against Sgt. Bargas is limited to review of his being photographed and fingerprinted because that is the only claim alleged in his complaint, which was never amended.

First we must begin by outlining what this litigation, and this appeal, is not about. In his response to Appellees' motion for summary disposition below, Appellant introduced for the first time in this litigation his theory that the entirety of his encounter with GRPD—the legality of the stop, the duration of the stop, being handcuffed, being searched, and being photographed and fingerprinted—violated his Fourth Amendment rights to be free from unreasonable searches and seizures, rather than just challenging the legality of the warrantless photograph and fingerprinting. (See Pl Resp to VanderKooi/Bargas at 8–10.; see also AT Br 2, 11). Defendant Sgt. Bargas argued below that Plaintiff was seeking to impermissibly expand the scope of the litigation to include claims not pleaded, even though he had never amended or sought to amend his complaint. (Reply at 2–4.) The trial court agreed, stating in its written opinion, "Plaintiff's Complaint asserted a limited Fourth Amendment claim. He did not challenge the propriety of the initial stop, search of his person, or detention. Rather, Plaintiff argued that Bargas had no legal cause to justify the P&P procedure." (Tr. Op. at 5.).

Appellant assigns error to this conclusion, stating in his brief on appeal "[t]he

application of handcuffs falls squarely within the scope of Johnson's claim for the violation of his Fourth Amendment rights. The Complaints states at paragraph 19 that Plaintiff Johnson's constitutionally protected rights that Defendant Bargas violated include the following: b. His rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure [sic]." (AT Br. at 17–18.). As an initial matter, Johnson's failure to formally amend or move to amend the complaint to add any additional Fourth Amendment claims to this litigation—specifically, claims regarding duration of the stop, handcuffing, and search (see, e.g., AT Br, 12, 17-18) , means these issues have not been preserved. *Swickard v Wayne Cty Med Exam'r*, 438 Mich 536, 562 (1991). Moreover, the cursory and fleeting references to these issues in the appellate brief without any analysis or citation to authority (see, e.g., AT BR 11-13, 17-18) are insufficient to "prime the appellate pump," for a review by this Court. See *Mitcham v City of Detroit*, 355 Mich. 182, 203 (1959).

The trial court did not abuse its discretion in determining that Johnson's Complaint pleaded only a cause of action that Bargas' photographing and fingerprinting violated Johnson's Fourth Amendment rights. "Decisions concerning the meaning and scope of pleading, and decisions granting or denying motions to amend pleadings, are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers, supra*. Because the trial court's decision is within the range of reasonable and principled outcomes, it must be affirmed.

"A complaint must provide reasonable notice to opposing parties." *Dacon v Transue*, 441 Mich 315 (1992), citing MCR 2.111(B)(1). The Court went on to explain one justification for this rule: "Leaving a defendant to guess upon what grounds [a] plaintiff

believes recovery is justified violates basic notions of fair play and substantial justice." *Id.*

MCR 2.111(B)(1) requires a complaint to contain "A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." In *Dacon* the plaintiff had attempted to raise a new theory of medical malpractice on the third day of trial: that the defendants should be liable for delaying the administration of antibiotics. *Dacon*, 441 Mich at 319. The plaintiff argued it should be allowed to present this theory because his complaint alleged that "the defendant pediatricians did not provide 'appropriate treatment and/or medication in appropriate dosage and/or duration.'" *Id.* at 329–30. The Supreme Court held that this allegation "does not introduce any issue into the case." *Id.* at 330. The Court explained its reasoning as follows:

> This allegation fails on both counts. First, *it does not refer either specifically or generally to any facts*. The first several paragraphs of plaintiff's complaint set out in detail the underlying facts of the lawsuit. This allegation, unlike the others, *gives no hint of the facts to which it refers*. Without this, the allegation cannot be proper under the court rule. Second, the generality of the allegation defies definition. *It delineates nothing specific about how the pediatricians erred.*

Id. (emphasis added).

Turing to the case at bar, the factual allegations as to the incident in question comprise eleven paragraphs of the Complaint:

> 9. On August 25, 2011, Plaintiff Johnson was sitting on the grass approximately 150 south of Burton Street near the intersection of Breton Avenue in the City of Grand Rapids.
>
> 10. Plaintiff Johnson is an African-American.
>
> 11. Officer Greg Edgcombe contacted Plaintiff Johnson following a call from personnel at the Michigan Athletic Club ("MAC").

12. Despite being told that Plaintiff Johnson had not tried to open or enter any of the vehicles in the MAC parking lot (unlike the initial information), *Sgt. Elliott Bargas took a full set of fingerprints and two photos of Plaintiff Johnson, without probable cause, a search warrant or other legal authority to do so.* [emphasis added]

13. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to photograph Plaintiff Johnson and have the photograph stored in the files and records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.

14. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to take Plaintiff Johnson's fingerprints and have the fingerprints stored in the files and records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.

15. Defendants VanderKooi and Bargas took the above actions against Plaintiff Johnson, because he is an African-American.

16. At no time on August 15, 2011, did Plaintiff Johnson commit any offense in violation of the laws of the City of Grand Rapids, State of Michigan, or the United States.

17. There was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints.

18. The actions taken by Defendant Bargas and VanderKooi, were unreasonable and excessive.

19. Plaintiff Johnson's constitutionally protected rights that Defendant Bargas … violated include the following:

* * *

b. *His rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure.*

* * *

20. As a direct and proximate result of Defendant's conduct, Plaintiff Johnson suffered a loss of freedom, emotional injury, including but not limited to fright, shock, embarrassment, and humiliation, and other constitutionally protected rights described above.

The complaint does not contain any factual allegations to infer that the stop was illegal or that the stop was too long. The complaint makes no mention that Johnson was even searched or handcuffed, let alone, improperly so. The lack of notice is particularly apparent, as Bargas argued below, when one compares Johnson's complaint to the operative complaint in *Harrison v. VanderKooi et al*., Kent Co Cir Ct 14-02166, with which Johnson's case was joined for discovery. The operative complaint in *Harrison does* allege facts and claims that had put Defendants on notice that that lawsuit was challenging all aspects of that encounter. (Def Reply, p.2; citing *Harrison* 2nd Amd Compl, ¶¶ 12-19; see also, Johnson Compl at ¶25, alleging all aspects of *Harrison's* encounter was illegal.).

Plaintiff argues, however, that paragraph nineteen, which states generally that his Fourth Amendment rights were violated, was sufficient to put Defendants on notice. Paragraph nineteen does not inject any possible Fourth Amendment claim into the litigation. A complaint is not a "spot the issue" examination in order to see how many theories defense counsel can read into threadbare allegations. Yet, Plaintiff is asking this Court to fill in the blanks, to "spot an issue" that was not raised in the complaint. Paragraph 19 refers to no facts, in stark contrast to the paragraphs preceding it that go into detail about Appellant's whereabouts, his movement, and the specific actions taken by Appellees of which he complaints. Second, this paragraph delineates nothing specific about *how* Appellees violated his Fourth Amendment rights. It is a blanket statement of law that his Fourth Amendment rights were violated; how they were violated is anyone's guess.

Like the allegations in *Dacon*, "By literally alleging everything, the allegation alleges nothing. Allegations such as this do not provide reasonable notice to defendants

and are not proper under MCR 2.111." *Dacon*, 441 at 330. The complaint gave Defendants no notice that he was alleging any action taken by Appellees violated his Fourth Amendment rights, other than the P&P procedure. The trial court's conclusion to this effect not only falls within the range of reasonable and principled outcome; it is the *only* permissible outcome under the Michigan Court Rules. For this reason this Court must affirm the conclusion of the trial court, and may not consider Appellant's argument that any portion of the stop violated his constitutional rights other than the P&P procedure.

D. Neither photographing a person's outward physical appearance nor fingerprinting an individual on-scene are searches under the Fourth Amendment. Alternatively, if Fourth Amendment events, photographing and fingerprinting Johnson was within the scope of a valid investigatory stop.

Because a person has no reasonable expectation of privacy in either his fingerprints or his physical appearance, photographs of a person's outward physical appearance and collection of fingerprints on the scene and in the course of an otherwise legal investigatory detention, does not violate the Fourth Amendment. In fact, over the course of fifty years, the Supreme Court has repeatedly rejected the notion proffered by Plaintiff in this case: that the Fourth Amendment requires a warrant, or even probable cause, to photograph or fingerprint an individual.

An officer may, without a warrant, stop a person for investigatory purposes when he has reasonable suspicion of criminal active based upon specific, articulable facts that are known to him at the time of the stop. *Terry v Ohio*, 392 US 1, 27–28 (1968); *Embody v Ward*, 695 F3d 577, 580 (CA 6 2012). The scope of the stop and the extent of the intrusion must be 'reasonably related in scope to the circumstances which justified the interference.'" *Embody*, 695 F3d at 580. "'[A]n investigative detention must be temporary

and last no longer than is necessary to effectuate the purpose of the stop [and] the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion ....'" *Illinois v Caballes*, 543 US 405, 420 (2005), quoting *Florida v Royer*, 460 US 491, 500 (1983) (plurality opinion). Stated another way, the investigative tool used by the officers must support the original mission of the stop and not prolong the interaction beyond the time reasonably required to complete the mission." *Rodriguez v. United States*, 135 S. Ct. 1609, 1612, 191 L. Ed. 2d 492 (2015) (canine drug sniff falls outside the ordinary mission of a traffic stop).

The reasonableness of an officer's suspicion is evaluated under the totality of the circumstances. *United States v Cortez*, 449 US 411, 417 (1981). The officer must articulate more than general "suspicion or hunch," *United States v Harris*, 192 F3d 580, 584 (CA 6 1999), but the court must credit inferences that officers draw from their experiences and specialized training that "might well elude an untrained person." *United States v. Arvizu,* 534 US 266, 273 (2002), citing *Cortez,* 449 U.S. at 417–418 (1981). The only question before this Court is whether the photos and fingerprints reasonably fell within the scope of the stop.

Johnson was stopped because he matched the description of, and was subsequently identified by a MAC employee and neighbor, as being a person that appeared be looking into car windows on that day in the MAC parking lot—actions that were sufficiently suspicious to cause the MAC employee to call 911. It is undisputed that vehicles in the MAC parking lot had, in the time prior to this incident, been subjected to break-ins and theft, which crimes were, at the time of Johnson's stop, unsolved. Looking at the facts in a light most favorable to Johnson, he did not match the description of at

least one of the previous car burglars, however he did live in the neighborhood behind the parking lot, consistent with the flight-path one of the suspects. Appellant also asserts that he was not looking into the car windows for items to steal, but rather was looking at his own reflection as he passed by. Nevertheless, reasonable suspicion to stop and investigate him existed because he matched the description provided *that day* by the MAC employee of a suspicious person looking into vehicles at a location where vehicles had been burglarized in the recent past.

Johnson had no identification on him at the time of the stop, and based on his stature and tattoos, appeared to be older than his stated age. Knowing of the previous burglaries, and in order to confirm or dispel his suspicions that Johnson was involved in those prior incidents, he chose to photograph Johnson and take a set of fingerprints on the scene so that he could check Johnson against those suspects in the other vehicle burglaries. Such a nonintrusive investigatory method falls well within the purpose of the stop, is the least intrusive means by which Sgt. Bargas could confirm or dispel his suspicions, and is therefore reasonable under the Fourth Amendment. *Caballes*, 543 US at 420.

What is more, taking Johnson's photographs and fingerprints in these circumstances does not constitute a Fourth Amendment search. A "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33 (2001). In delineating what expectations of privacy society will recognize as reasonable, the Supreme Court has stated categorically, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz v*

United States, 389 US 347, 351 (1967) (internal citations omitted).

With respect to whether taking Appellant's photograph is a Fourth Amendment search, the result is nearly self-evident.

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. *Like a man's facial characteristics*, or handwriting, his voice is repeatedly produced for others to hear. *No person can have a reasonable expectation* that others will not know the sound of his voice, any more than he can reasonably expect *that his face will be a mystery to the world*.

United States v Dionisio, 410 US 1, 13 (1973) (emphasis added). Because Appellant can have no reasonable expectation of privacy in his facial characteristics, his clothes, or the tattoos on his exposed arms, taking photographs of the same does not implicate the Fourth Amendment. The trial court's grant of summary disposition to Bargas must be affirmed.

While not stated in case law as categorically, fingerprinting also fails to implicate the Fourth Amendment. In *Davis v Mississippi*, 394 US 721, 722–23 (1969) the petitioner was seized without probable cause or reasonable suspicion, transported 90 miles, and fingerprinted at a remote police station. The fingerprint evidence served as a basis for his indictment and subsequent conviction. *Id.* The Supreme Court held that the fingerprint evidence was inadmissible, because it was the fruit of an unlawful detention. *Id.* at 727. "Detentions for the sole purpose of obtaining fingerprints are … subject to the constraints of the Fourth Amendment." *Id.*

In so doing, however, the Court did not hold that fingerprinting itself is a Fourth Amendment event. Rather, the Court suggested that warrantless detentions for the purpose of obtaining fingerprints may "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the

traditional sense." *Id.* "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728. The Court reached this conclusion in part because, "Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." *Id* at 727.

In revisiting *Davis* in a subsequent case, the Court clarified its prior holding, noting "in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of fingerprints." *Dionisio*, 410 US at 11 (holding compelled voice recording does not implicate Fourth Amendment). Going even further, the Court stated, "[a]s a result, the Court held in *Davis* that investigatory seizures for the purpose of obtaining fingerprints are subject to the Fourth Amendment *even though fingerprints themselves are not protected by that Amendment*." *Id.* at 39 (emphasis added). There can be no doubt, therefore, that the taking of fingerprints, in the absence of some other constitutional violation, does not implicate the Fourth Amendment at all.

The Supreme Court again explained its holding in *Davis* in another transportation and fingerprinting case, *Hayes v Florida*, 470 US 811 (1985). There, the Court held that the police illegally seized defendant's person though coercion when they threatened to arrest him if he didn't accompany them to the police station for fingerprinting. *Id* at 813-814. Again finding that the government's transportation of the defendant violated the Fourth Amendment, the Court went out of its way to tell us: "There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal

act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch." *Id* at 817.

The key distinctions these cases make that Appellant fails to apprehend is that it was the *unlawful detention and transportation* of the petitioner in *Davis* and *Hayes* that rendered the fingerprinting invalid. To use more modern Supreme Court terminology, transportation-plus-fingerprinting is not the least intrusive means reasonably necessary to confirm or dispel the officer's suspicion. Where, as here, Appellant was already the subject of a lawful investigatory stop, and he was not moved from the scene, the taking of fingerprints under "narrowly circumscribed procedures" is permissible. *Davis*, 394 US at 728. One can hardly imagine a more narrowly circumscribed procedure than an officer obtaining fingerprints at the scene of the stop with a fingerprint card carried with him at all times.

In fact, Sgt. Bargas' deposition testimony as to why he took Johnson's prints and photos mirrors this dicta in *Hayes*:

***Hayes v Florida*, 470 US at 817:**	**Sgt. Bargas' explanation:**
There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch."	"for identification purposes. One, I didn't believe who he was. The, and the fingerprints, I wasn't sure if we had any latents from the previous burglaries, so his fingerprints would be compared to previous burglaries. And if we had, it was also courtesy to him. It would eliminate him as a suspect." (Bargas 25, see also 30-31).

Even if warrantless fingerprinting is a "search" within the meaning of the Fourth Amendment, it is a reasonable search. "The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for

evidence of criminal activity against invasion of the individual's privacy." *People v Jordan*, 187 Mich App 582 (1991), citing *Camara v Municipal Court*, 387 US 523 (1967).

Just this past term, the Supreme Court of the United States held that the Fourth Amendment permits warrantless breath tests but not warrantless blood tests to determine blood alcohol content in drunk driving cases. *Birchfield v N Dakota*, ___ US ___; 136 S Ct 2160, 2172–73 (2016). Relevant here, the Court focused on the degree of intrusion required to access the information law enforcement sought. The Court rejected the contention that a breath test was a significant intrusion because it requires a person to place the mouthpiece of a machine into his or her mouth, noting that it was common to place, for instance, drinking straws into one's mouth. *Id.* at 2177. The Court also noted that it had also upheld warrantless (1) buccal swabs for obtaining DNA, *Maryland v King*, 569 US ___; 133 S Ct 1958, 1969 (2013), and (2) scraping under a suspect's fingernails for evidence of a crime. *Cupp v Murphy*, 412 US 291, 296 (1973). *Birchfield*, 136 S Ct at 2177.

On the other hand, the Court held that taking a blood sample was too intrusive to be conducted without a warrant, in part because it requires piercing the skin and because the blood is part of the body that can contain more information than just alcohol content. *Id.* at 2178. The Court also noted the attendant anxiety that could exist in a citizen's mind as to whether officers would use the blood to obtain other personal information, like DNA. *Id.* The Supreme Court created a bright line: piercing the skin to obtain evidence generally requires a warrant.

Here, the taking of fingerprints for the purposes of confirming or dispelling Johnson's involvement in vehicle break-ins at the MAC was reasonable under the Fourth

Amendment. Appellees' need to search for the purposes of crime detection—in this case vehicle break-ins—far outweighs the intrusion into Johnson's privacy. Like the vast majority of people, Johnson exposes his fingerprints to the public on a daily basis.

Moreover, he has no reasonable basis for anxiety for his fingerprints to be cataloged. Indeed, many parents voluntarily have their children fingerprinted in case they go missing. Further, fingerprint evidence could serve to eliminate Johnson as a suspect in any robbery he was suspected of. (See Bargas, 25). Finally, the physical intrusion attendant in having fingerprints taken is far less than a breath test, buccal swab, or scraping under the fingernails. Thus even if this Court determines both that Johnson did not consent to having his fingerprints taken *and* that fingerprints are—contrary to the pronouncements of the Supreme Court—protected by the Fourth Amendment, it still must conclude that the search was reasonable and affirm the trial court's grant of summary judgment in favor of Appellees.

E. As a matter of law, the mere act of a state actor taking a photograph of a private citizen cannot constitute a taking under the Fifth Amendment.

Plaintiff also alleged that photographing him constituted an uncompensated taking of his likeness in violation of the Fifth Amendment. Because the trial court rightly recognized that such a takings claim suffers from fatal legal deficiencies—or that in the alternative Appellee was entitled to qualified immunity—the trial court must be affirmed.

Johnson argues that Bargas' taking of his photograph violated his right to privacy. The common law "right to privacy" exists as four distinct causes of action: (1) intrusion on physical solitude; (2) public disclosure of private facts; (3) depiction in a false light; and (4) appropriation of name and likeness. *Battaglieri v Mackinac Ctr For Pub Policy*, 261

Mich App 296 (2004), quoting *Tobin v. Civil Service Comm.,* 416 Mich. 661 (1982). The cause of action that could possibly fit these facts—and indeed the only "right of privacy" Appellant argues *was* violated—is the appropriation of his likeness.

The trial court's grant of summary disposition on this claim must be affirmed for two reasons. First, the undisputed facts of this case do not state a claim for the common-law tort of appropriation. Second, even if Appellant has stated a claim for appropriation of his likeness, no court has ever recognized that violation of a common law right can serve as the "property interest" necessary to underlie a takings claim, nor could a court so recognize for more fundamental constitutional reasons.

1. No appropriation within the meaning of the common-law tort took place

Even if we assume for the moment that the purpose of 42 USC § 1983 is to vindicate state common-law rights, cases dealing with the appropriation tort do not delineate specific elements of the tort. Rather, the cause of action is "founded upon 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.'" *Battaglieri*, 261 Mich App at 300–01, quoting Restatement, Torts, 2d, § 652C, comment a. As Appellant is eager to point out, "the right protected by the tort 'is in the nature of a property right.'" *Id* at 301, quoting Restatement, Torts 2d, § 652C, comment b. While the right may be "in the nature" of a property right, the right is *not* a property right that can be taken by the government under the Fifth Amendment.

Whatever the nature of the right, it is violated when a defendant makes "any unauthorized use of a plaintiff's name or likeness, however inoffensive in itself, is actionable if that use results in a benefit to another." *Id.* The elements, undelineated

though they may be, are then (1) use of the likeness of another, (2) such that a benefit accrues to the tortfeasor. The facts of Appellant's case fail on both counts.

First, although "use" is not strictly defined in the case law, it is typically understood to mean that there is some type of publication or communication of the plaintiff's likeness. This principle can be most clearly seen in the context of the privilege against liability for appropriation if the basis for liability is "the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public concern." *Id.* at 301; *see also Pallas v Crowley, Milner & Co*, 322 Mich 411 (1948) ("We conclude that there are circumstances under which one may have a right of privacy in a photographic likeness which *may give rise to an action* for damages for the unauthorized *publication* thereof." (emphasis added)). In other words, to "use" a person's name or likeness such that his privacy is invaded, that name or likeness must be disseminated to the public. In this case, Appellant has neither alleged, nor can he demonstrate, that his image or likeness was ever disseminated publicly. (Johnson, 17-18; Bargas, 18-19).

The second element—that the appropriation must be for the benefit of the tortfeasor—is also easily defeated. "A defendant can be 'liable for the tort of misappropriation of likeness only if defendant's use of plaintiff's likeness was for a predominantly commercial purpose… The use must be mainly for purposes of trade, without a redeeming public interest, news, or historical value.'" *Battaglieri*, 261 Mich App at 302. Again, Appellant has not submitted evidence that Sgt. Bargas used his likeness for a commercial purpose. Even if could, use of Plaintiff's likeness is protected by the First Amendment if the communication is a matter of public concern. Here, there is little doubt that detection and prevention of crime by the police is a legitimate matter of public

concern. Therefore even if Bargas *did* "use" Appellant's likeness and even if such use *did* "result in a benefit" to them, such use is privileged under the First Amendment as a legitimate matter of public concern.

2. The appropriation of a person's likeness is not a Fifth Amendment Taking as a matter of law.

Even if the taking of Johnson's photograph was an appropriation at common law, such cannot be a Fifth Amendment taking. It is axiomatic that for the government to "take" something from an individual, such that just compensation is required under the Takings Clause, the individual must be *actually deprived* of the property the government has allegedly taken. *See United States v Pewee Coal Co*, 341 US 114, 115 (1951) (holding that that the government has a categorical duty to compensate the former owner of property it physically takes possession of). The law draws a distinction between physical takings and takings that result from regulation, and in the former case the Fifth Amendment's "plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." *Tahoe-Sierra Pres Council, Inc v Tahoe Regl Planning Agency*, 535 US 302, 321 (2002). Although not explicitly stated, Appellant appears to be advancing a theory of a physical—otherwise known as categorical or per se taking and not a regulatory one.

Although most commonly thought of to apply to real property, the Takings Clause applies with equal force to the taking of personal property. *Horne v Dept of Agric*, ___ US ___; 135 S Ct 2419, 2427 (2015) (raisins). Although in general it is "inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa," *Tahoe-Sierra*, 535 US at 323,

where, as here, the nature of the takings claims and the claimed property itself is indistinct, both lines of cases are instructive. Indeed, the Takings Clause can be applied to intangible intellectual property, such as a patent. *Id.* Further, the taking need not deprive an individual of all rights or use of his property. *See United States v General Motors Corp*, 323 US 373 (1945) (temporary occupation of a leasehold requires compensation); *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 (1982) (permanent occupation of small part of apartment building rooftop requires compensation); *United States v Causby*, 328 US 256 (1946) (government planes' intermittent use of private airspace to land requires compensation). But not all impairments of property rights result in a taking. *See Andrus v Allard*, 444 US 51 (1979) (prohibition on sale of artifacts not a taking where owners could still possess, donate, or devise property). "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety" *Id.,* at 65–66. The common thread in all cases is that for a taking to have occurred, the government must impair all or some a person's right to his property for some period of time, such that the person is deprived of the *full* beneficial use of his property.

Here, Johnson has been deprived of nothing. Even if a privacy right in his likeness is a property right that can be taken under the Fifth Amendment, his right to exploit his name and likeness has not been impaired by any action Bargas took. He remains free to this day to exploit his likeness in any way he wishes. The fact that photographs of him and a fingerprint card exists somewhere in no way impairs his ability to use his likeness howsoever he chooses. Appellant certainly claims no property interest in the paper, ink,

and chemicals (or digital megabytes) that comprise the photographs taken of him. Assuming, for the sake of argument, that a property right exists in Appellant's likeness, the only way that a government could take that right would be to somehow bar him from using his likeness in a commercial context. Because that has not happened here, and because Appellant's rights in his likeness have been in no way impacted, the trial court's grant of summary disposition must be affirmed.

F. Sgt. Bargas is entitled to qualified immunity because at the time in question it was not clearly established that taking a photograph and fingerprints of a person during a police-citizen encounter violated the Fourth or Fifth Amendment.

"Government officials, including police officers, are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights." *Aldini v Johnson,* 609 F3d 858, 863 (CA 6 2010) (citation omitted). Defendant Officers are shielded by qualified immunity unless Plaintiff can show: (1) sufficient facts to make out a violation of a constitutional right; and (2) that the right was "clearly established" at the time of the alleged constitutional violation. *Pearson v Callahan*, 555 US 223, 232 (2009), citing *Saucier v Katz*, 533 US 194, 201 (2001). The district court has discretion to decide which prong of the qualified-immunity test "should be addressed first in light of the circumstance." *Id.* at 236. Here, Sgt. Bargas is entitled to qualified immunity because on the date in question taking a photograph and fingerprints of a person during a valid investigatory stop, was not clearly established as violating the Fourth and Fifth Amendments of the United States Constitution.

The trial court reviewed and granted qualified immunity by looking to the first prong, substantively analyzing the case and finding Johnson's constitutional rights were not violated. This Court should affirm that analysis for the reasons outlined above. But this

Court can also look to and decide Sgt. Bargas' qualified immunity under the second prong, whether the asserted rights were clearly established, because it is a pure matter of law. *Jackson Co Hog Producers v. Consumers Power Co*, 234 Mich App 72, 116 (1999) ("This Court may affirm a decision of a trial court for reasons different than those relied on by the trial court.").

Under the second prong, the question is "whether the right was so clearly established that a reasonable official would understand that what he is doing violates that right." *Aldini v Johnson*, 609 F3d 858, 863 (CA 6 2010). An officer violates a clearly established constitutional right when "'[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, __ US __; 131 S Ct 2074, 2083 (2011). Existing precedent must place the constitutional question "beyond debate." *Id.* Binding precedent from the Supreme Court or the Sixth Circuit generally is required, but persuasive authority from other circuits that is directly on point may also show clearly established law. *Occupy Nashville v Haslam*, 769 F3d 434, 443 (CA 6 2014).[49]

A plaintiff need not present a court with a case "directly on point" in order to show that the law is clearly established, "but existing precedent must have placed the . . . constitutional question beyond debate." *al–Kidd,* 131 S.Ct., at 2083. There must be specificity in the definition of the right at stake. The Supreme Court has admonished against defining the clearly established law at issue "'at a high level of generality', since doing so avoids the crucial question whether the official acted

[49] Although this Court is not bound by decisions of the Sixth Circuit, they are instructive. *Meagher v Wayne State Univ,* 222 Mich App 700, 710 (1997).

reasonably in the particular circumstances that he or she faced." *Plumhoff v Rickard*, 134 S.Ct. 2012, 2023 (2014) (citing *al-Kidd,* 131 S.Ct. at 2080). To judge officers' conduct by such a generalized right would allow plaintiffs "to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights". *Anderson v. Creighton,* 483 U.S. 635, 639 (1987).

As applied to Plaintiff's Fifth Amendment challenge, Johnson did not present any case to show that it was clearly established than an officer could be sued for just compensation in his individual capacity, let alone that the act of photographing and fingerprinting an individual in the course of a police investigation falls can constitute a taking. (See Op at 10).

As applied to the Fourth Amendment challenge, Plaintiff has not presented any clearly established law to suggest, much less hold, that a photograph constitutes a search. *Katz*, *supra*; *Tobin*, *supra*; *Detroit Free Press, Inc v Oakland Co Sheriff*, 164 Mich App 656, 668 (1987) (finding no constitutional or common-law privacy implications in release of booking photos under FOIA); see also *Rataj v City of Romulus*, 306 Mich App 735, 752-754 (2014); *Bills v Aseltine*, 958 F2d 697, 707 (CA 6 1992) (officer taking a photograph from a location where he has a legal right to be "does not amount to a seizure because it does not 'meaningfully interfere' with any possessory interest".)

Likewise, there is no clearly established law holding that fingerprinting, in the manner Johnson was, is illegal. *Davis, supra*; *Hayes, supra*; *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146 (1990) (compelled fingerprinting in the course of a civil case would not violate the Fourth Amendment because "[t]here is no reasonable expectation of privacy in one's fingerprints."); Indeed, a Supreme Court

Justice pointed out that taking a person's photograph is not a search and that Supreme Court has never squarely ruled that taking a person's fingerprints amounts to a search. *Maryland v King*, 569 US __; 133 S Ct 1958, 1986-1988 (2013) (Scalia, dissenting). For these reasons, this Court should affirm the grant of qualified immunity to Sgt. Bargas.

G. The Trial court properly granted summary disposition to Defendant City of Grand Rapids because no City employee deprived Johnson of a constitutional right. Alternatively, City is entitled to summary judgment because the record does not show a persistent pattern of illegal conduct for which the City was deliberately indifferent.

The trial court granted the City's motion at the earliest stage of the municipal liability analysis: Johnson's constitutional rights were not violated. (Op, 12-14). In short, because his rights in this instance were not violated, he cannot challenge the propriety of P&P as a custom, practice, or procedure. To the extent that this Court also finds that no city employee violated Johnson's constitutional rights (for all the reasons outlined above) the grant of summary disposition to the City must be affirmed. *See Floyd v City of Detroit*, 518 F3d 398, 411 (CA6 2008). Alternatively, even if we assume for sake of argument that a fact question exists as to whether Johnson's constitutional rights were violated—and continue on with the *Monell* analysis—the City is still entitled to summary judgment on this record. See *People v Jory*, 443 Mich 403, 425 (1993) (affirming trial court's result on different rationale).

There are four generally recognized avenues of pleading and proving a municipal liability claim: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance [of] or acquiescence [to] federal rights violations." *D'Ambrosio v Marino*, 747

F3d 378, 386 (CA 6) *cert den* 135 S Ct 758; 190 L Ed 2d 628 (2014) (quoting *Burgess v. Fischer,* 735 F3d 462, 478 (6th Cir.2013)).

Plaintiff is not challenging all use of the City's P&P procedure. Rather, he challenges only that GRPD officers use of the P&P procedure on "innocent people" during the course of a citizen contact or stop, without probable cause, violates the Fourth Amendment. (Compl, ¶ 29; see AT Br p. 29-30). This theory of liability appears to fall either under the first or fourth avenue.

1. Plaintiff cannot establish that the City's P&P practice is an unlawful custom, policy, or practice under Avenue One.

Although the City's P&P practice may be analyzed under this first avenue, there is a distinction between cases challenging written policies and cases challenging customs or practices, like this case. Namely, a greater quantum of proof is required to prevail on a custom-based challenge because the plaintiff must produce evidence establishing that the custom is what he alleges it to be. *Monell,* 436 US at 691; *Cash v Hamilton Cnty Dep't of Adult Prob*, 388 F.3d 539, 542-43 (CA6 2004); *Thomas v City of Chattanooga*, 398 F3d 426, 433 (CA 6 2005).

Plaintiff appears to allege that P&P violates the Fourth Amendment because officers are photographing and printing "innocent" people. It is true that the GRPD Manual of Procedures chapter on Field Interrogations does indeed instruct officers to be cognizant of the fact that "those persons contacted may be innocent of wrongdoing of any kind" and that officers "should take special care to act in a restrained and courteous manner." (Ex O, 8-1.2). But "innocent" is not a legally relevant standard under the Fourth Amendment. Indeed, in our legal system *everyone* is innocent until proven guilty. *Rawlings v Kentucky*, 448 US 98, 121 (1980) (Marshall, dissenting) ("it is easy to forget

that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty."). Moreover, case law is clear that conduct, which may appear innocent to some, may nevertheless amount to reasonable suspicion under the totality of the circumstances. *People v Oliver*, 464 Mich 184, 193 (2001) (citing *Terry v Ohio*, 392 US 1 (1968)); *United States v Arvizu*, 534 US 266, 273 (2002).

The Grand Rapids Police Department is doing exactly what the Federal Supreme Court indicated was permissible in *Davis* and *Hayes*: quickly fingerprinting someone in the field on a *reasonable basis* that the procedure would establish or negate an officer's suspicions. (VanderKooi, 66). Plaintiff's position is even weaker on the "picture" portion of the P&P procedure. Under *Katz* and its progeny, a photograph, taken in public, of those parts of the body visible to all, is simply not an action encompassed by the Fourth Amendment. With the advent of social media, dash cam videos, officer body-worn cameras, and the proliferation of smartphone recording of officer-citizen contacts, Plaintiff's position that a static photograph, taken in public, of those portions of plaintiffs' visage that he holds out to the public is particularly unreasonable, if not antiquated.[50] For these reasons, Plaintiff has failed to show that the City's P&P practice violates the Fourth Amendment under this theory of liability.

[50] McCullough, note CHANGING THE CULTURE OF UNCONSTITUTIONAL INTERFERENCE: A PROPOSAL FOR NATIONWIDE IMPLEMENTATION OF A MODEL POLICY AND TRAINING PROCEDURES PROTECTING THE RIGHT TO PHOTOGRAPH AND RECORD ON-DUTY POLICE, 18 Lewis & Clark Law Rev. 543 (2014).

2. Plaintiff cannot establish municipal liability under Avenue Four because the record fails to show that the City was deliberately indifferent to a persistent pattern of illegal uses of the P&P procedure.

To establish municipal liability under Avenue Four, the inaction theory, the plaintiff must show: (1) the existence of a clear and persistent pattern of illegal activity; (2) actual or constructive notice on the part of city officials; (3) the city's tacit approval of the conduct; and (4) that the city's custom was the moving force of the constitutional deprivation. *Thomas,* 398 F.3d at 429. Deliberate indifference requires more than negligence or "sloppy, or even reckless oversights" 398 F.3d at 433. Plaintiffs must show a "history of widespread abuse that has been ignored" by the municipality. *Berry v City of Detroit,* 25 F3d 1342, 1354 (CA6 1994).

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v Thompson*, 563 US 51; 131 S Ct 1350, 1360; 179 L Ed 2d 417 (2011) (citing *Bd of Co Com'rs of Bryan Co, Okl v Brown*, 520 US 397, 410 (1997)). Michigan Courts have said it "is the reckless disregard of a substantial risk of serious harm; mere negligence, or even gross negligence, will not suffice." *Morden v Grand Traverse Co*, 275 Mich App 325, 334 (2007) (internal citations omitted) (analyzing Eighth Amendment).

3. Plaintiff cannot establish a clear and persistent pattern of illegal conduct

On this record, Plaintiff cannot establish a "clear and persistent" pattern of illegal conduct. He needs more than a handful of anecdotal accounts in order to establish the required pattern. *See Thomas*, 398 F.3d at 430-431 (Forty-five excessive-force suits in

eight years did not constitute pattern absent "data showing what a 'normal' number of excessive force complaints would be"); *Peet v City of* Detroit, 502 F.3d 557, 567-568 (CA6 2007) (three arrests in one investigation insufficient); *D'Ambrosio v Marino*, 747 F3d 378, 388 (CA 6 2014) *cert den* 135 S Ct 758 (2014) (Four alleged *Brady* violations over course of decade insufficient); *Connick*, *supra* (same).

In the lower court, Plaintiff essentially alleged that one GRPD police captain caused eleven innocent people to be P&P'd in five years (Complaint ¶ 21-22), even if this evidence was admissible, it is too small a sample to establish a clear and persistent pattern. *Thomas*, *supra*. Moreover, the record shows that these "anecdotes" are so factually different from Johnson's case—and from each other—that they cannot form a "pattern" much less a clear and persistent one. (VanderKooi 68-88, discussing Ex. K).

In the course of discovery, Plaintiff produced spreadsheets created by his attorney of all P&P incident reports of "innocent" people who were photographed and printed. (See, e.g., Ex W, Ex X). The City has no idea what "innocent" means. Nor does Plaintiff's expert. (Terrill Dep., p. 67-68, 100-101). The reasonable inference that can be drawn from the record is that Plaintiff's attorney and lay witnesses read the incident reports provided by the City and made a judgment call as to whom they thought were "innocent." (Ex X, Resp. 7, 8 (claiming work product)).

Even assuming this is admissible evidence, raw numbers of how many people (even innocent people) were P&P'd do not show that officers in those instances acted illegally or that the program is unconstitutional. *Thomas*, 398 F3d at 431. Neither plaintiff, nor his expert, provided the lower court with a qualitative analysis in an admissible form. *Id*., at 432. Moreover, the Court has no indication that these lists were analyzed under the

correct legal standard, that is, reasonableness viewed from the prospective of a reasonable officer on the scene. *Id.,* at 433 (citing *Graham v Connor,* 490 US 386 (1989)). Plaintiff failed to establish that there is a question of fact as to City liability in the lower court; this Court should affirm the summary disposition ruling.

4. Plaintiff cannot establish notice or tacit approval of federal rights violations

To prove deliberate indifference, the plaintiff needs to show that the City was on notice that, without any corrective action to its current P&P practice, "it was 'highly predictable'" that officers would commit the same constitutional violations in the future to the point of being a conscious disregard for citizens' Fourth Amendment rights. *Connick*, 131 S Ct at 1365 (internal citations omitted).

Plaintiff failed to show that the City has a custom of tolerating an *illegal use of* the P&P procedure because he has not shown that decision makers did nothing in the face of known constitutional problems. For example, in *Bielevicz v Dubinon*, 915 F2d 845 (CA3 1990), the Third Circuit found that the question of whether a police department had a custom of illegal pretextual arrests for public intoxication existed where the former police chief testified that it was common knowledge that officers used a public drunkenness law to arrest people without probable cause and jail them without subsequent prosecutorial or judicial review. *Id*., at 849. Plaintiff cannot produce such evidence. (Ex Y, admit #13).

Plaintiff has not alleged, produced, or gathered evidence of prior instances in which a GRPD officer's use of P&P was found to be unconstitutional (e.g., in the context of a suppression hearing or criminal appeal). *See*, *e.g.*, *D'Ambrosio*, 747 F3d at 388. What is more, it cannot be said that the City has notice that the P&P practice violates the Fourth Amendment given the state of the law on photographing and fingerprinting, discussed

above. See e.g., *Hayes*, *supra*. This lack of evidence is particularly glaring given the fact that the City has had this practice for over thirty years. (VanderKooi, 36).

The only anecdotal evidence of an alleged illegal application of the P&P practice are the allegations and documentary evidence pertaining to the May 31, 2012 contact with Keyon Harrison. (Compl, ¶ 23-25). Even if this Court assumes the Harrison incident was unconstitutional, it cannot establish notice for the Johnson incident because it occurred after the fact. "But contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide notice to the city and the opportunity to conform to constitutional dictates." *Connick*, 131 S Ct at 1360, n.7.

In short, Plaintiff cannot establish that the City deliberately chose a course of action that it knew would likely cause violations of constitutional rights of citizens who would be subject to being photographed and fingerprinted. *Connick*, *supra*. Therefore, this Court should affirm the lower court's ruling.

H. The Circuit Court's conclusion that Dr. Terrill was not qualified to testify as an expert is well within the range of reasonable and principled outcomes and must be affirmed.

Finally, Appellant argues that the trial court erred in granting Appellees' motion to strike his expert witness, Dr. William Terrill. "The determination whether a witness is qualified as an expert and whether the witness' testimony is admissible is committed to the trial court's sound discretion and therefore is reviewed for an abuse of discretion." *Tobin v Providence Hosp*, 244 Mich App 626, 654 (2001), citing *Mulholland v DEC Int'l Corp,* 432 Mich 395, 402 (1989). The trial court's decision to strike Dr. Terrill as an expert and exclude his testimony should be affirmed because the decision to do so is well within the range of reasonable and principled outcomes.

Appellees moved to strike Dr. Terrill because he is not qualified to testify on police misconduct, his opinion is not supported by acceptable methods, and because a jury does not need expert assistance to understand the facts of this case. (See Def Br to strike Terrill). The trial court began its analysis by stating the legal standards governing the admissibility of expert testimony, comprising MRE 702 and relevant Michigan Court of Appeals and Supreme Court case law applying the rule. (Tr. Op. at 3–4.) Specifically, the trial court grounded its analysis in the three factors for admitting expert testimony established by MRE 702, *Gilbert v Daimler Chrysler Corp*, 470 Mich 749 (2004), *Daubert v Merrell Dow Pharm*, 509 US 579 (1993), namely: (1) the expert is qualified to give the proposed testimony; (2) the proposed testimony will assist the trier of fact to understand the evidence or determine a fact issue; and (3) the proposed testimony must be based on a recognized form of specialized knowledge. (Tr. Op. at 4.)

The court took note that "there is no doubt that Dr. Terrill has significant training and education in the general field of criminal justice." (*Id.* at 4–5.) The court concluded, on the whole, that Appellant had failed to offer "evidence tending to prove that Dr. Terrill is qualified to testify to the reasonableness of police conduct" noting specifically that Dr. Terrill's CV did not clearly specify what type of expert he had been qualified as in other cases. (*Id.*at 5.)

The trial court continued its analysis, holding that even assuming that Dr. Terrill met the first prong of qualifying as an expert, his testimony would not assist the trier of fact in understanding the facts of this case. (*Id.* at 5.) The trial court concluded that Dr. Terrill's proposed testimony would not assist the jury because: (1) it would be based on deposition testimony and exhibits, which the jury can understand themselves, and (2) the

reasonableness of a person's conduct is within the ken of understanding of an ordinary person. (*Id.* at 5.) Finally, the trial court concluded that Dr. Terrill's methods did not meet the third prong of the *Daubert/Gilbert* test, because Appellant had failed to demonstrate that Dr. Terrill's opinions were based in any type of specialized knowledge. (*Id.* at 6.)

Additionally, the trial court concluded that the probative value of the proposed expert testimony was outweighed by considerations of undue delay and the presentation of cumulative evidence, violating MRE 403. (*Id.*) Specifically, the court concluded that because the jury could evaluate the same evidence as Dr. Terrill and decide for themselves whether the officers' conduct was reasonable, any testimony given by Dr. Terrill would be cumulative and cause an undue delay. (*Id.*)

Appellant states "[t]he principal problems with the trial court's handling of [the expert testimony issue] concerned the trial court's failure to thoroughly examine the nature of his knowledge, skill, experience, training, and education; the reliable principles and methods he has used in other cases and his application of those principles and methods to his case." (App. Br. at 30.) Appellant, failing to apprehend the standard of review applicable to this issue, then goes on for four pages re-litigating the issue of Dr. Terrill's qualifications as if this Court would review the issue *de novo*.

As demonstrated above, however, the trial court's conclusion that Dr. Terrill should be struck as an expert was well-reasoned and supported by the law. Indeed, the lower court's ruling is consistent with a recent ruling of the U.S. Supreme Court in a case concerning the use of expert testimony to overcome a defendant officer's claim to qualified immunity: "so long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoid summary judgment by simply producing an expert's

report that an officer's conduct . . . was imprudent, inappropriate, or even reckless." *City & Co of San Francisco, Calif v Sheehan*, 135 S Ct 1765, 1777; 191 L Ed 2d 856 (2015) (internal quotation omitted); *accord Oliver*, *supra* at 192 (*citing People v Nelson*, 443 Mich 626, 632 (1993)) (totality of circumstances "must be viewed 'as understood and interpreted by law enforcement officers, not legal scholars'"). (cited in Bargas VanderKooi SD Brief, p.16).

More important here, however, is that the trial court's conclusion is well within the range of reasoned and principled outcomes from which it could have chosen. Whether this Court would come to a different conclusion given the arguments Appellant presents is immaterial. Because the trial court did not abuse its discretion in excluding the testimony of Dr. Terrill, this Court must affirm its judgment.

V. CONCLUSION AND RELIEF REQUESTED

For almost fifty years the United States Supreme Court has held that there is no expectation of privacy in that which a person readily holds out to the public. The everyday physical manifestations that are part of personal identity—facial characteristics, voice and fingerprints, even your breath, are not protected under the Fourth Amendment. Yet Plaintiff-Appellant Johnson asserts that the police need a warrant to photograph his outward appearance and take his fingerprints. This position is not only contrary to long standing federal and state court law but also inconsistent with what society deems private in the age of Facebook, body-worn cameras, and smartphones activated with the swipe of your fingertip. The trial court correctly ruled that Johnson's Fourth and Fifth Amendment rights were not violated when Defendant-Appellee Sgt. Bargas photographed and fingerprinted him during the course of a lawful stop. Defendants City of Grand Rapids and

Sgt. Bargas ask this Court to affirm the decisions under review.

Respectfully submitted,

ELLIOTT BARGAS and **CITY OF GRAND RAPIDS,** *a Michigan Municipal Corporation,*

Dated: August 1, 2016 By: /s/ Kristen Rewa

KRISTEN REWA (P73043)
Assistant City Attorney

Dated: August 1, 2016 By: /s/ Elliot Gruszka

ELLIOT GRUSZKA (P77117)
Assistant City Attorney
Attorneys for Defendant-Appellee
Business Address:
300 Monroe Ave. NW, Ste. 620
Grand Rapids, MI 49503
(616) 456-3181
(616) 456-4569 FAX

VI. INDEX OF APPENDICES

Appendix A – Motion for Summary Disposition Order

Appendix B – Expert Order

Appendix C – Complaint

Appendix D – Color Photos
Original Record: Exhibit B to Defendants' Motion for Summary Disposition

Appendix E – Print Card
Original Record: Exhibit C to Defendants' Motion for Summary Disposition

Appendix F – Denishio Johnson Deposition
Original Record: Exhibit J to Defendants' Motion for Summary Disposition

Appendix G – Sgt. Elliott Bargas Deposition
Original Record: Exhibit I to Defendants' Motion for Summary Disposition

Appendix H – Transcript of Motions for Summary Disposition, Motion for Partial Summary Disposition and Motion to Strike

STATE OF MICHIGAN

COURT OF APPEALS

KEYON HARRISON,

Plaintiff-Appellant,

and

THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN,

Amicus Curiae,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

UNPUBLISHED
May 23, 2017

No. 330537
Kent Circuit Court
LC No. 14-002166-NO

Before: WILDER, P.J., and BOONSTRA and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying his motion for partial summary disposition, granting summary disposition in favor of defendant Captain Curt VanderKooi of the Grand Rapids Police Department (GRPD) under MCR 2.116(C)(7), (C)(10), and (I)(2), and granting summary disposition in favor of defendant City of Grand Rapids (the city) under MCR 2.116(C)(10). Plaintiff also appeals the trial court's order granting defendants' motion to strike plaintiff's expert. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case presents many of the same issues as *Johnson v VanderKooi*, ___ Mich App ___; ___ NW2d ___ (2017); in fact, the cases were consolidated in the trial court for purposes of discovery. Like *Johnson*, this case involves the application of GRPD's "photograph and print" (P&P) procedure during a field interrogation of a minor who lacked official identification. In both cases, the minor was not charged with a crime. We describe the procedure at issue in more depth in *Johnson*. *Id*. at __.

In this case, VanderKooi made contact with plaintiff after observing him walk up to another young man and hand him what appeared to be a large "model type engine to a train." The young man then rode off on his bicycle carrying the object that plaintiff had handed to him.

VanderKooi testified that he decided to continue his observation because the exchange "looked like some kind of transaction between the two." VanderKooi, who was in an unmarked police car, followed plaintiff and observed him enter a park. VanderKooi testified that plaintiff's behavior in the park seemed "suspicious," because plaintiff went into a secluded area of the park, crouched down and began moving his arms.

VanderKooi put out a radio broadcast for an officer to come to the scene and for another officer to find the individual on the bicycle. VanderKooi parked his vehicle, approached plaintiff in the park, identified himself, and asked plaintiff what he was doing. VanderKooi testified that he believed plaintiff said that he was trying to catch birds. VanderKooi further testified that he asked plaintiff what he had been doing across the street, and plaintiff told him that he was walking home from school and that the object plaintiff had been carrying, which he described as the engine of a train, was for a school project. Plaintiff told VanderKooi that he had given the object to a friend who was going to return it to another person. According to VanderKooi, there had been a number of larcenies and home invasions in that area, especially after school, and he was suspicious that plaintiff's story was not truthful. VanderKooi admitted that, if true, plaintiff's story did not reveal any illegal conduct.

When asked why he did not believe plaintiff, VanderKooi testified as follows:

> Well, because his behavior in the park when I first saw him it just, to me, looked like he could, he was acting rather unusual and I was suspecting might be a lookout and that the property was, a lot of times when you get stolen property they'll secrete it at different locations near where they have taken it, and they take things, object by object they take it and deliver it somewhere else. So, that was what was going through my mind when I saw this transaction, and more so I was confirming what was going on looking suspicious the way he was in the park in the woods, wooded area and he was actually kneeling or crouching.

VanderKooi testified that plaintiff was carrying a knapsack, and that he asked for consent to look inside the knapsack. Plaintiff gave consent, so VanderKooi asked him to open up the knapsack. Plaintiff opened it up, and VanderKooi looked inside, where he observed school materials. Plaintiff was not carrying official identification.

At some point after VanderKooi made contact with plaintiff, Officer Luke Nagtzaam and Sergeant Stephen Labrecque of the GRPD arrived at the scene. VanderKooi testified that he asked one of the officers to take a picture of plaintiff and that he did not ask for plaintiff's fingerprints to be taken. However, VanderKooi testified that he later learned, after this lawsuit was initiated, that a print was also taken.

Nagtzaam testified that plaintiff consented to a search of his person, and that Labrecque at some point obtained a P&P from plaintiff. Nagtzaam described the contact between plaintiff and Captain VanderKooi as "low key and non-confrontational." Labrecque testified that he remembered hearing a request for a P&P over the dispatch system, but that he could not remember who had made the request. Labrecque took plaintiff's picture with a digital camera and obtained plaintiff's thumbprint using a GRPD-issued thumbprint card and inkpad.

Labrecque testified that the P&P was quick and would not have taken more than two minutes. Labrecque was not involved with the investigation beyond performing and logging the P&P.

At some point during these events, GRPD Officer Dennis Newton made contact with the individual on the bicycle, who consented to a search, provided identification, and was eventually released. Newton testified that someone from plaintiff's scene reported over the radio that the two boys' stories about the object had matched. Newton informed someone at plaintiff's scene that the individual on the bicycle no longer possessed the object that VanderKooi had seen. VanderKooi testified that, once he learned that the other individual did not have the object, he let plaintiff walk away because the situation did not rise to the level of probable cause.

According to VanderKooi, plaintiff was free to leave during the encounter and could have left without having his picture taken. VanderKooi testified that he recalled asking plaintiff if it was "okay if we take a picture, and he said yes." He testified that no officer would have taken plaintiff's picture if he had said "no." VanderKooi further testified that he did not run plaintiff's thumbprint through the Automated Fingerprint Identification System (AFIS) and had no personal knowledge of any other officer doing so.

Plaintiff testified that he consented to the search of his person and bag. He testified that VanderKooi told him that he needed to take his picture to identify who he was. Plaintiff further testified that he said "okay" in a nervous and shaky voice. Plaintiff described the officers' demeanors during the stop as calm. Plaintiff also testified that he asked why his fingerprint needed to be taken, and that VanderKooi told him it was "just to clarify again to make sure you are who you say you are." Plaintiff testified that he responded "okay." Plaintiff's thumbprint was then taken. Plaintiff testified that VanderKooi told him that he was "good to go" and that plaintiff shook the officers' hands before going home. He testified that he was "freaked out" by the incident and that his mother drove him to and from school for the next two weeks because he was too scared to walk to school after the incident. Plaintiff was 16 years old at the time of the incident.

In March 2014, plaintiff filed suit,[1] alleging claims against VanderKooi under 42 USC § 1981, 42 USC § 1983, and 42 USC § 1988. The complaint alleged that, without probable cause or lawful consent, VanderKooi had directed an officer to search, photograph, and thumbprint plaintiff. The complaint further alleged that VanderKooi had taken these actions because plaintiff was African American; that there was no legal justification for the stop, detention, search, photograph, or thumbprint; and that VanderKooi's actions—individually or by direction to other officers—were unreasonable. The complaint alleged that VanderKooi violated plaintiff's right to equal protection and to equal rights under 42 USC § 1981, as well as plaintiff's Fourth Amendment rights and his constitutional right to privacy. The complaint requested damages, the destruction of the photograph and thumbprint, fees and costs, and any other relief deemed appropriate. Plaintiff later amended his complaint to allege that the P&P

[1] The suit was originally brought by plaintiff's next friend, Anchanet Harrison (his mother), but was eventually amended to name plaintiff, individually, as the named plaintiff.

constituted a taking in violation of his Fifth Amendment rights and to add a claim for municipal liability under 42 USC § 1983.

By stipulated order, plaintiff's case was consolidated with *Johnson* for purposes of discovery only. In 2015, plaintiff moved for partial summary disposition on his Fourth and Fifth Amendment claims, and on his equal protection claim against VanderKooi and his municipal liability claim against the city insofar as they related to the P&P procedure.

Both defendants moved for summary disposition. VanderKooi argued that plaintiff's constitutional rights were not violated and that he was protected by qualified immunity regarding plaintiff's Fourth and Fifth Amendment claims because the law regarding photographing and fingerprinting during an investigatory stop was not clearly established. VanderKooi further argued that he had reasonable suspicion to stop plaintiff, or in the alternative that the contact was a consensual encounter. VanderKooi argued that there was no constitutional right to privacy applicable to this situation, that plaintiff could not show purposeful racial discrimination, and that no taking had occurred. The city argued that plaintiff could not establish a violation of his constitutional rights or that the city was the moving force behind any violation.

Defendants later moved to strike plaintiff's proposed expert witness, Dr. William Terrill, a professor of criminal justice at Michigan State University.

Following a motion hearing (which was combined with the motion hearing in *Johnson*), trial court issued two separate written opinions and orders regarding the motion to strike Dr. Terrill and the motions for summary disposition. With respect to the motion to strike, the trial court held that the proposed testimony was inadmissible under MRE 702 and MRE 403. With regard to VanderKooi's motion for summary disposition, the trial court held that the length of the stop was reasonable and not excessive and that plaintiff had failed to establish a genuine issue of material fact. The trial court further held that plaintiff had consented to the P&P. The trial court determined that no Fifth Amendment taking had occurred and that no constitutional right to privacy apart from that provided by the Fourth Amendment was implicated. The trial court also held that VanderKooi was protected by qualified immunity regarding plaintiff's Fourth and Fifth Amendment claims as related to the P&P procedure. With respect to the § 1981 and equal protection claims, the trial court held that plaintiff had failed to provide evidence of a discriminatory purpose. Accordingly, the trial court granted summary disposition in favor of VanderKooi under MCR 2.116(C)(10), (C)(7), and (I)(2). Finally, the trial court addressed the city's motion for summary disposition and held that plaintiff had failed to establish a violation of his constitutional rights; consequently, summary disposition in favor of the city was proper under MCR 2.116(C)(10).

This appeal followed.

II. CAPTAIN VANDERKOOI

Plaintiff argues that the trial court erred by failing to grant partial summary disposition in his favor on his claims against VanderKooi relative to the ordering of the P&P, and erred by granting summary disposition in favor of VanderKooi on all of the claims against him. We disagree.

A. STANDARD OF REVIEW

We review de novo a trial court's grant of summary disposition. See *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016); see also *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553; 837 NW2d 244 (2013). The trial court denied plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) and granted summary disposition to Captain VanderKooi under MCR 2.116 (C)(7), (C)(10), and (I)(2); therefore, the following standards apply: "A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law" and "may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence; the substance or content of the supporting proofs must be admissible in evidence." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005) (explaining that the complaint's allegations "are accepted as true unless contradicted by documentary submissions"). "A trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish that the moving party is entitled to immunity granted by law."

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. When evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 507 (quotation marks and citation omitted; alteration in original.]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law," which is reviewed de novo on appeal. *Elder v Holloway*, 510 US 510, 516; 114 S Ct 1019, 1023; 127 L Ed 2d 344 (1994). See also *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007). Finally, the application of constitutional provisions is a question of law that this Court reviews de novo. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 685; 819 NW2d 28 (2011), lv den 493 Mich 867 (2012).

B. FOURTH AND FIFTH AMENDMENT CLAIMS RELATED TO THE P&P

With respect to the Fourth and Fifth Amendment claims arising from the P&P procedure, and for the reasons set forth in *Johnson*, ___ Mich App at ___, we hold that VanderKooi was protected by qualified immunity. Consequently, the trial court did not err by denying summary disposition to plaintiff or by granting summary disposition in favor of VanderKooi under MCR 2.116(C)(7).

C. REMAINING FOURTH AMENDMENT CLAIMS

The trial court also did not err by holding that VanderKooi had not violated plaintiff's Fourth Amendment rights by making contact with plaintiff or performing a search of his bag.

A person is liable under 42 USC 1983 if he or she, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 USC 1983. "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993).

"The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' " *Maryland v King*, ___ US ___, ___; 133 S Ct 1958, 1968; 186 L Ed 2d 1 (2013), quoting US Const, Am IV. "A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave." *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). However, "[p]olice officers may make a valid investigatory stop if they possess 'reasonable suspicion' that crime is afoot" without a warrant. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996), citing *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868, 1879; 20 L Ed 2d 889 (1968). Additionally, a search conducted pursuant to consent is an exception to the warrant requirement. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given." *Lavigne v Forshee*, 307 Mich App 530, 538; 861 NW2d 635 (2014) (quotation marks and citation omitted). Consent can "be given in the form of words, gesture, or conduct," but "cannot be established by showing no more than acquiescence to a claim of lawful authority." *Id*. at 540 (quotation marks and citation omitted). The voluntariness of consent is determined by analyzing the totality of the circumstances, and consent may be voluntary even if the defendant does not know that he has a right to refuse consent; "knowledge of the right to refuse consent is one factor to be taken into account, [but] the government need not establish such knowledge as the *sine qua non* of an effective consent." *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417, 421; 136 L Ed 2d 347 (1996) (quotation marks and citation omitted). See also *Borchard-Ruhland*, 460 Mich at 294 (explaining "that the people need not prove that the person giving consent knew of the right to withhold consent").

In this case, the initial contact between plaintiff and VanderKooi was consensual. Plaintiff testified that VanderKooi identified himself and asked to speak with him, and plaintiff said "sure." With respect to the search of his bag, the record also reflects that VanderKooi asked plaintiff for permission to look in the bag, and that plaintiff said "yes." Plaintiff's consent was thus unequivocal, specific, and freely given. *Forshee*, 307 Mich App 530, 538.

Plaintiff argues, however, that the length of his detention was unreasonable. The trial court found both that plaintiff consented to the initial contact and never attempted to leave during the encounter and that, if the contact was a stop, it was based on a reasonable suspicion on VanderKooi's part and was not of excessive duration. Indeed, plaintiff testified that, following the stop, and after VanderKooi heard his explanation, VanderKooi told him to "hold on" and then called for additional officers. Plaintiff, a minor, was told to wait by an adult police officer who summoned more officers to assist him. At the least, therefore, there was a genuine issue of material fact regarding whether plaintiff was seized at that point. *Jenkins*, 472 Mich at 32 (explaining that "[a] 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave").

However, we agree that the stop was based on a reasonable suspicion and that the detention was not of an excessive duration. As our Supreme Court has explained, law enforcement officers are able to "approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest," and the "brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot." *Id*. at 32. Reasonable suspicion is analyzed on a case-by-case basis and takes into account the totality of the circumstances. *Id*. "A determination regarding whether a reasonable suspicion exists must be based on commonsense judgments and inferences about human behavior." *Id*. (quotation marks and citation omitted). Officers are able "to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v Arvizu*, 534 US 266, 273; 122 S Ct 744, 750-751; 151 L Ed 2d 740 (2002). Ultimately, officers must have more than a mere hunch, but reasonable suspicion is a lower standard than probable cause and is much lower than a preponderance of the evidence. See *id*. at 274 ("Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard") (quotation marks and citation omitted). With regard to the length of the detention, a court must examine "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v Sharpe*, 470 US 675, 686; 105 S Ct 1568, 1575; 84 L Ed 2d 605 (1985).

VanderKooi testified that he observed behavior between plaintiff and another individual that at least raised the question of whether a transfer of stolen property had occurred. VanderKooi explained that stolen property was often taken piece by piece and then delivered somewhere else, and he indicated that the transaction he had observed was consistent with moving stolen property, which led to the following thought going through his mind: "You got a person that's walking and now he gets it to the person on the bike, and the guy on the bike can get away quicker and bring it to somewhere else." VanderKooi further explained that, when he observed plaintiff kneeling or crouching in a patch of small trees and grass, he suspected that plaintiff was acting as a lookout. In addition, VanderKooi testified that he had worked for GRPD since 1980 and that he was very familiar with Grand Rapids and its crime patterns. VanderKooi asserted that there were a lot of larcenies and home invasions in the area of the

incident, especially after school, and that home invasions and larcenies were higher the closer one got to the core of the city. VanderKooi explained that most home invasions occurred during the daytime when people were not home and that, during his 36 years as a police officer in the city, he recognized the area where the incident occurred as one where there were more home invasions than other areas.

Although these facts do not rise to the level of probable cause, and individually may be insufficient to support a reasonable suspicion, when the totality of the circumstances is examined, we conclude that the trial court did not err by holding that VanderKooi possessed a reasonable suspicion sufficient to instigate a brief investigatory stop. See *Arvizu*, 534 US at 274 (explaining the holding in *Terry* in the following manner: "Although each of the series of acts was perhaps innocent in itself, we held that, taken together, they warranted further investigation.") (quotation marks and citation omitted); *Jenkins*, 472 Mich at 32. Plaintiff's reliance on *People v Shabaz*, 424 Mich 42; 378 NW2d 451 (1985) is misplaced. *Shabaz* involved a defendant who was merely carrying a bag with indeterminate contents and who fled when he saw a police car. Our Supreme Court stated that flight "might reasonably have heightened the officer's general suspicion . . . . But heightened general suspicion occasioned by the flight of a surveillance subject does not alone supply the particularized, reasoned, articulable basis to conclude that criminal activity was afoot that is required to justify the temporary seizure approved in *Terry*." *Id*. at 62-63.

In this case, by contrast, VanderKooi was able to articulate a particular and reasoned basis for his decision to conduct an investigatory stop: to determine whether plaintiff was involved in the transportation of items stolen during a home invasion or was acting as a lookout. The fact that the circumstances of the incident did not rise to the level of probable cause (a fact that VanderKooi acknowledged) or that VanderKooi's suspicion was ultimately proven to be false, does not negate the reasonableness of his suspicion. *Illinois v Wardlow*, 528 US 119, 126; 120 S Ct 673, 677; 145 L Ed 2d 570 (2000) (explaining that, in allowing investigatory detentions, "*Terry* accepts the risk that officers may stop innocent people").

With regard to the length of the detention, plaintiff argues that the trial court erred by concluding that the entire encounter lasted approximately 10 to 15 minutes, and argues that the police report demonstrates that the encounter lasted 55 minutes. However, the police report does not indicate that the encounter lasted 55 minutes. The police report has two boxes: one for the time of the incident and one for the *report* date and time. The time for the incident is listed as 15:08. The report time is 16:03. The time of the report is not indicative of when the encounter concluded and does not contradict the evidence, in the form of VanderKooi's answer to plaintiff's interrogatories, that it lasted 10 to 15 minutes.

Further, regardless of the precise length of time, the evidence shows that GRPD officers "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *Sharpe*, 470 US at 686. VanderKooi sought to ascertain plaintiff's identity and the origin of the object that he believed may have been stolen. Officers contacted the other individual involved, and the two stories were compared, after which VanderKooi recognized that he lacked probable cause for an arrest and plaintiff was released. The trial court did not err by granting summary disposition in favor of VanderKooi on the ground that no Fourth Amendment violations occurred.

D. EQUAL PROTECTION AND 42 USC § 1981 CLAIMS

Plaintiff also argues that the trial court erred by failing to determine that the P&P procedure violated his Fourteenth Amendment right to equal protection or the requirement under § 1981 that he be afforded equal rights. We disagree.

42 USC § 1981 provides as follows:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The language of § 1981 "establishes four protected interests: (1) the right to make and enforce contracts; (2) the right to sue, be parties, and give evidence; (3) the right to the full and equal benefit of the laws; and (4) the right to be subjected to like pains and punishments." *Phelps v Wichita Eagle-Beacon*, 886 F2d 1262, 1267 (CA 10, 1989). A plaintiff must establish three requirements for a § 1981 claim: "(1) he or she is a member of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute . . . ." *Bellows v Amoco Oil Co*, 118 F3d 268, 274 (CA 5, 1997).

The United States Supreme Court has stated that "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981." *Gratz v Bollinger*, 539 US 244, 276 n 23; 123 S Ct 2411, 2431; 156 L Ed 2d 257 (2003). See also *Grutter v Bollinger*, 539 US 306, 343; 123 S Ct 2325, 2347; 156 L Ed 2d 304 (2003), superseded on other grounds by Const 1963, art 1, § 26 as stated in *Harrington v Scribner*, 785 F3d 1299, 1308 (CA 9, 2015) (explaining that "the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause"). As plaintiff's claim under the Fourteenth Amendment is premised on purposeful discrimination, his claims under § 1981 and § 1983 claims are overlapping.

The Equal Protection Clause of the Fourteenth Amendment is essentially a direction that all persons similarly situated should be treated alike," *Lawrence v Texas*, 539 US 558, 579; 123 S Ct 2472, 2484; 156 L Ed 2d 508 (2003), and it provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," US Const, Am XIV. "Racially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by the framers of the Fourteenth Amendment." *Marshall v Columbia Lea Regional Hosp*, 345 F3d 1157, 1167 (CA 10, 2003). Even consensual searches and seizures "may violate the Equal Protection Clause when they are initiated solely based on racial considerations." *United States v Travis*, 62 F3d 170, 173 (CA 6, 1995), cert den 516 US 1060 (1996).

> The requirements for a claim of racially selective law enforcement draw on what the Supreme Court has called "ordinary equal protection standards." *Armstrong*, 517 U.S. at 465 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). The plaintiff must demonstrate that the defendant's actions had a discriminatory effect and were motivated by a discriminatory purpose, *Armstrong*, 517 U.S. at 465. These standards have been applied to traffic stops challenged on equal protection grounds. *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001); *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533-36 (6th Cir. 2002). [*Marshall*, 345 F3d at 1168. See also *Carrasca v Pomeroy*, 313 F3d 828, 834 (CA 3, 2002) ("To prevail on an equal protection claim in the racial profiling context, Plaintiffs would have to show that the challenged law enforcement practice had a discriminatory effect and was motivated by a discriminatory purpose.").]

Thus, in order to survive a motion for summary disposition, "a plaintiff in a § 1983 suit challenging alleged racial discrimination in traffic stops and arrests must present evidence from which a jury could reasonably infer that the law enforcement officials involved were motivated by a discriminatory purpose and their actions had a discriminatory effect." *Marshall*, 345 F3d at 1168. Discriminatory effect requires a showing that similarly situated individuals of a different race were treated differently. *United States v Armstrong*, 517 US 456, 465; 116 S Ct 1480, 1487; 134 L Ed 2d 687 (1996). A plaintiff may use statistical evidence or identify specific individuals of another race to demonstrate such an effect. *Bennett v Eastpointe*, 410 F3d 810, 818 (CA 6, 2005).

In this case, plaintiff argued that statistical evidence, as well as the fact that VanderKooi had chosen to pursue him instead of the other individual, established a discriminatory effect. Additionally, plaintiff argues that the other person was not subject to the P&P procedure although he did not have identification. The other person did provide an affidavit stating that he was not searched or P&P'd even though he lacked identification. However, both he and plaintiff were subjected to a stop by GRPD officers for the same reason, and Newton testified that the individual on the bicycle provided a school identification card, that he believed the identity was accurate, and that he performed a search to which the individual consented.

With regard to statistical evidence, plaintiff provides an analysis of 439 GRPD incident reports in 2011 and 2012 and concludes that 75% of the officer-initiated encounters described

involved a black subject while only 15% involved white subjects, despite the 2010 Grand Rapids census showing that the city's population as 21% black and 65% white.

With regard to the statistical evidence, federal courts have noted limitations in the use of general census data as a benchmark for proof of discriminatory effect in police encounters. See *Chavez*, 251 F3d at 643-645 (noting that "[i]t is widely acknowledged that the Census fails to count everyone, and that the undercount is greatest in certain subgroups of the population, particularly Hispanics and African–Americans"; explaining that, even assuming the census data was accurate, it did not shed light on the number of minorities driving on the Illinois highways; and concluding that it could "not find that the statistics prove that the Valkyrie officers' actions had a discriminatory effect on the plaintiffs"). However, even assuming that the statistical evidence or the affidavit of the other involved individual sufficed to create a genuine issue of material fact regarding discriminatory effect, plaintiff has failed to demonstrate a discriminatory purpose.

Under the discriminatory purpose requirement, courts "may consider direct evidence of discrimination, statistical evidence showing a discriminatory impact, or other factors that could reveal a discriminatory purpose, like the historical background of the policy." *Mendiola–Martinez v Arpaio*, 836 F3d 1239, 1261 (CA 9, 2016); see also *McCleskey v Kemp*, 481 US 279, 293, 293 n 12; 107 S Ct 1756, 1767; 95 L Ed 2d 262 (1987). The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision." *Marshall*, 345 F3d at 1168.

Although plaintiff asserts that the trial court erred by not analyzing his claims under the burden-shifting framework articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), we conclude the application of that framework would not have altered the outcome. VanderKooi alleged a nondiscriminatory reason for the stop, search, and P&P. Thus, regardless of whether this Court frames the analysis as one under *McDonnell Douglas*, the issue remains the same: construing the evidence submitted by the parties in a light most favorable to plaintiff, did he present sufficient evidence for a reasonable jury to infer that VanderKooi had acted with a discriminatory purpose? We conclude that he did not. None of the evidence presented reveals a racial motivation in VanderKooi's decision-making, and the statistics offered by plaintiff, even assuming that they showed a discriminatory effect in the number of officer-initiated stops in the city of Grand Rapids, are insufficient to demonstrate that VanderKooi acted with a discriminatory purpose in *his* case. See *McCleskey*, 481 US at 292.

Plaintiff therefore failed to present evidence from which a jury could reasonably infer that VanderKooi or other officers on the scene acted with a discriminatory purpose. See *Innovation Ventures*, 499 Mich at 507. Accordingly, the trial court properly granted summary disposition in favor of VanderKooi on plaintiff's § 1981 and equal protection claims.

III. CLAIMS AGAINST THE CITY

Plaintiff argues that the trial court erred by granting summary disposition in favor of the city under MCR 2.116(C)(10). We disagree for the reasons stated in *Johnson*, ___ Mich App at ___, and affirm the trial court's grant of summary disposition in favor of the city.

IV. DEFENDANTS' MOTION TO STRIKE

Finally, plaintiff argues that the trial court erred by granting defendants' motion to strike his proposed expert witness's testimony. We disagree, largely for the reasons stated in *Johnson*, ___ Mich App at ___. We further disagree, with regard to plaintiff's § 1981 and equal protection claims, for the following additional reasons.

MRE 702 governs expert testimony and provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 "requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable," and it "incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc*," 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993). *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016). *Daubert* requires that the trial court ensure all scientific testimony is relevant and reliable. *Id*. at 22-23. Although not dispositive, absence of supporting literature "is an important factor in determining the admissibility of expert witness testimony." *Id*. at 23.

In this case, the trial court noted that plaintiff wished to use Dr. Terrill's testimony to "draw conclusions from the evidence of a racial disparity in P&P reports . . . based on an analysis of incident reports, and the use of ordinary mathematical computations that any lay person can perform . . . ." The trial court reasoned that the trier of fact did not need assistance to understand the facts and evidence and that the process by which Dr. Terrill arrived at his conclusions was unclear. Further, the trial court concluded that plaintiff failed to meet the *Daubert* standard because he did not cite any peer-reviewed literature supporting Dr. Terrill's method of using unadjusted census data. The trial court thus determined, and we agree, that Dr. Terrill's testimony was inadmissible under MRE 702. Plaintiff failed to establish that Dr. Terrill's statistical analysis and resulting opinion was based on sufficient data or reliable methods. When asked whether he was aware of any expert that uses unadjusted census data, Dr. Terrill replied, "I haven't got that far in my analysis or research of adjusted, non-adjusted. It's something that I am going to ponder into very carefully and very thoughtfully." We conclude that the trial court did not abuse its discretion in striking Dr. Terrill's testimony pursuant to MRE 702. See *Elher*, 499 Mich at 28 (holding that the trial court did not abuse its discretion and explaining that, although "peer-reviewed, published literature is not always necessary or sufficient to meet the requirements of MRE 702, the lack of supporting literature, combined with the lack of any other form of support, rendered [the expert's] opinion unreliable and inadmissible under MRE 702").

Affirmed.

/s/ Mark T. Boonstra
/s/ Colleen A. O'Brien

Wilder, P.J., did not participate.

STATE OF MICHIGAN

COURT OF APPEALS

DENISHIO JOHNSON,

Plaintiff-Appellant,

and

THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN,

Amicus Curiae,

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

FOR PUBLICATION
May 23, 2017
9:00 a.m.

No. 330536
Kent Circuit Court
LC No. 14-007226-NO

Before: WILDER, P.J., and BOONSTRA and O'BRIEN, JJ.

BOONSTRA, J.

This case arises out of a police contact between plaintiff and City of Grand Rapids Police Department (GRPD) officers, and the application of what is described as GRPD's "photograph and print" (P&P) policy. The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(7) and (10). Plaintiff appeals by right. We conclude that the trial court correctly held that defendants VanderKooi and Bargas were shielded by qualified immunity and were therefore entitled to summary disposition under MCR 2.116(C)(7), and that defendant City of Grand Rapids was entitled to summary disposition under MCR 2.116(C)(10) regarding plaintiff's claim for municipal liability under 42 USC § 1983. We therefore affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On August 15, 2011, the GRPD received a telephone complaint that an individual eventually identified as plaintiff was walking through the Michigan Athletic Club's (MAC) parking lot in Grand Rapids and was looking into several vehicles as if intending to steal something from the vehicles. Officers Greg Edgcombe and Eugene Laudenslager responded and located plaintiff sitting under a shade tree. Plaintiff told Edgcombe that he had merely walked through the parking lot on his way to where he was sitting, to meet a friend who was taking the

bus. Plaintiff did not have identification with him. According to the police report completed by Edgcombe, numerous items had been stolen from vehicles in the MAC parking lot during the preceding months. The police report stated that some of the reports from the previous incidents contained "descriptions of [a] young black male suspect who left the area over the south parking lot grassy knoll which is directly in the path of where plaintiff lives on Burning Tree Drive." Edgcombe "file checked" his computer system for the name that plaintiff had given him (Denishio Johnson) and did not discover any warrants or previous arrests. Laudenslager spoke with a witness who identified plaintiff as the person who was looking into vehicles but who stated that plaintiff did not try to open or enter any of the vehicles.[1]

Sergeant Elliot Bargas of the GRPD arrived on the scene after Laudenslager and Edgcombe had made contact and spoken with plaintiff. According to Bargas, Edgcombe was in the process of trying to identify who plaintiff was and reported that plaintiff had told him that he was 15 years old and lived on Burning Tree Drive just south of the MAC parking lot. Bargas testified that plaintiff admitted to walking through the parking lot but denied looking into cars. Bargas further testified that plaintiff looked older than 15 years of age and had tattoos. Sergeant Bargas photographed plaintiff in case there were witnesses from the previous thefts who could identify a suspect. Sergeant Bargas also fingerprinted plaintiff because the GRPD had tried to obtain latent prints in the previous incidents. Bargas explained that at the time he performed the P&P on plaintiff, he and Edgcombe still were not sure about plaintiff's actual identity and were trying to verify it. Bargas testified that he asked plaintiff if there was someone he could call to come to the scene and confirm his identity. Sometime after the P&P, plaintiff's mother and another family member arrived. Bargas explained why plaintiff had been stopped (i.e., that two independent witnesses had described her son as looking into vehicles in the parking lot), and that plaintiff's mother verified his identity and indicated that she would make sure that plaintiff took a different route to avoid any future problems. Plaintiff left with his family.

In the meantime, Captain Curtis VanderKooi of the GRPD heard the radio traffic regarding the incident in the MAC parking lot, and went to the scene. VanderKooi testified that he believed he showed up after plaintiff had left and as things were wrapping up at the scene.[2] VanderKooi further testified that Bargas and Edgcombe explained what had occurred, that he approved of Bargas's actions, and that he then drove away. On the following day, VanderKooi requested that plaintiff's fingerprints be compared with any latent prints found at the scene of the other larcenies from vehicles in the area. According to VanderKooi, either there was no match

[1]Edgcombe's report states: "We discovered that [plaintiff] had looked into cars but unlike the initial information he had not tried to open or enter any of the vehicles that he looked into." It is not clear from the record what the phrase "initial information" refers to, as Edgcombe's description of the telephone complaint that prompted his response to the scene only indicates that the complainant described plaintiff as "looking into several cars as he passed by them in the lot as if looking to steal something if it presented it self [sic] to him."

[2] Bargas testified that he thought that VanderKooi arrived while plaintiff was stopped and before plaintiff's mother arrived.

between the prints or the quality of the prints was inadequate to make a comparison. VanderKooi took no further action related to this incident.

Plaintiff testified that he was handcuffed for the P&P procedure and was placed in the back of a police car for 5 to 10 minutes while waiting for his mother to arrive. Plaintiff denied looking into cars, but stated at his deposition that he usually looked at his reflection in car windows as he passed them. Plaintiff denied touching any vehicle. After the officers spoke with plaintiff's mother, they let plaintiff out of the police car and removed his handcuffs. Plaintiff testified that the police did not ask for his consent for the P&P or any search.

On August 7, 2014, plaintiff filed a complaint against Bargas, VanderKooi, and the City of Grand Rapids (the city), alleging violations of 42 USC 1981, 42 USC 1983, and 42 USC 1988. Plaintiff alleged that, without probable cause or legal authority, Bargas took fingerprints and photographs of plaintiff, who was African American. Plaintiff further alleged that the photographs were stored in the GRPD's files and that VanderKooi directed Bargas to take the fingerprints and photographs and to store them. Plaintiff also alleged that Bargas and VanderKooi took these actions against plaintiff because he was African American. In Count I, the complaint raised a claim against Bargas and VanderKooi under 42 USC 1981 and 42 USC 1983, and asserted that they had violated the Equal Protection Clause of the Fourteenth Amendment, US Const, Am XIV,[3] plaintiff's right to be free from unlawful searches and seizures under the Fourth Amendment, US Const, Am IV, his rights under the Fifth Amendment, US Const, Am V, barring the taking of private property without just compensation, and his constitutional right to privacy.

In Count II, plaintiff raised a municipal liability claim against the city under 42 USC 1988. According to the complaint, an analysis of police reports from March 2008 to March 2013 was conducted. The complaint alleged that, in the reports that contained VanderKooi's name and the phrase "P&P" or a similar reference to photograph and print, there were 11 people, including plaintiff, who were innocent of any wrongdoing but who had still had their photographs and prints taken, and an additional person who had only had a photograph taken. The complaint asserted that 75% of those individuals were African American, but the city's population was only 20% African American. The complaint alleged that plaintiff's photograph and prints were taken as part of the city's policy, which was enforced in a discriminatory manner.

On September 3, 2014, defendants filed their answer to the complaint and affirmative defenses. The following affirmative defenses were raised: (1) plaintiff failed to state a claim upon which relief could be granted; (2) the initial contact was a consensual police-citizen encounter; (3) reasonable suspicion supported the initial stop and the actions that followed; (4) the initial stop was reasonable; (5) the actions were not discriminatory or based on race; (6)

[3] The Fourteenth Amendment also provides the basis for claims that a state has denied other federal constitutional rights. See *Rendell-Baker v Kohn*, 457 US 830, 837-838; 102 S Ct 2764; 73 L Ed 2d 418 (1982).

Bargas and VanderKooi were entitled to qualified immunity; (7) plaintiff consented to some or all of defendants' actions; and (8) any claimed damages were caused, in whole or in part, by plaintiff's own actions.

On September 11, 2015, the city and the individual defendants filed separate motions for summary disposition. Bargas and VanderKooi argued that they were entitled to summary disposition under MCR 2.116(C)(7) because they were entitled to qualified immunity given that the law was not clearly established regarding taking fingerprints and photographs during investigatory stops. VanderKooi additionally argued that he was entitled to summary disposition under MCR 2.116(C)(10) because he did not have an active role in the stop. Moreover, Bargas and VanderKooi argued that they were entitled to summary disposition under MCR 2.116(C)(10) because there was no such thing as a constitutional right to privacy, plaintiff could not establish a takings claim, and plaintiff could not establish that he was discriminated against based on race.

The city argued that it was entitled to summary disposition under MCR 2.116(C)(10) because a city employee did not deny plaintiff a constitutional right, the city's P&P practice did not violate the Fourth Amendment, plaintiff could not establish that the city acted with deliberate indifference to the federal civil rights violations, and plaintiff could not establish a pattern, notice, or tacit approval of illegal conduct on the part of the city.

In response, plaintiff stated that he was abandoning his equal protection and § 1981 claims but denied that summary disposition was appropriate with respect to his remaining claims.

Plaintiff planned to have an expert witness, Dr. William Terrill, testify at trial. Dr. Terrill is a professor of criminal justice at Michigan State University. Dr. Terrill provided an affidavit in which he opined that Bargas's actions in performing the P&P procedure in this case were unreasonable. Defendants filed a joint motion to strike Dr. Terrill's proposed testimony. Defendants argued that Dr. Terrill's proposed testimony could be broken down into two categories: numerical opinions on racial profiling and opinions on whether Bargas's actions were reasonable. With respect to the numerical opinions on racial profiling, defendants argued that the opinion was inadmissible and unnecessary to the extent that it involved the ordinary use of computations that any layperson could perform. They further argued that Dr. Terrill was unqualified to testify about racial profiling. Moreover, defendants argued that Dr. Terrill's analysis was unreliable because it used unadjusted census data as a statistical benchmark—an approach rejected by many courts; that the analysis was unreliable because nothing was used as a control; that the analysis was unreliable because his "preliminary opinions" regarding this case were not developed using the same intellectual rigor as his academic work; and that the analysis involved inadmissible hearsay and was unnecessary for the jury to interpret the facts. Finally, defendants argued that Dr. Terrill's opinion contradicted the admissible evidence.

On October 30, 2015, the trial court held a hearing on the motions for summary disposition and the motion to strike. Defendants argued that there was no generalized constitutional right to privacy; that a right to privacy must be tied to a specific amendment; and that, in this case, the applicable amendment is the Fourth Amendment. Thus, defendants maintained that there could not be a separate claim under a general right to privacy and that the proper analysis is under the Fourth Amendment. Plaintiff did not dispute that analysis and agreed that his right to privacy should be evaluated in the context of the Fourth Amendment.

Defendants further argued that people did not have a reasonable expectation of privacy in their fingerprints or in photographs of themselves as they appeared in public. Plaintiff responded that either a search warrant or probable cause in the field was needed to gather the evidence and that "none of the bases that the Fourth Amendment requires" were present to allow the gathering of photographs and fingerprints in this case.

With respect to the Fifth Amendment, defendants argued that there are no property rights implicated in a person's photograph or fingerprints, that the photograph and fingerprints in this case were not published, and that the underlying incident was an application of police powers rather than a taking under the city's eminent domain power. Plaintiff argued that the incident involved a taking of intangible property without just compensation, although he conceded that there were certain instances when police could take someone's photograph and fingerprints as an appropriate exercise of police powers. Plaintiff also conceded that he could not find caselaw indicating that the taking of a fingerprint or photograph by police constituted a taking under the Fifth Amendment, but he maintained that it was an issue of first impression.

Following the hearing, the trial court issued two separate written opinions and orders regarding the motion to strike Dr. Terrill and the motions for summary disposition. With respect to the motion to strike, the trial court acknowledged Dr. Terrill's substantial training and education in the general field of criminal justice but questioned whether he was qualified to give an expert opinion in the instant case. The trial court held that, even assuming that Dr. Terrill was qualified in the area of police conduct similar to the instant case, plaintiff had failed to establish that Dr. Terrill's opinion would assist the trier of fact or that his opinions were based on a recognized form of specialized knowledge. The trial court therefore concluded that plaintiff had failed to satisfy the requirements of MRE 702. In addition, the trial court held that the testimony sought to be introduced did not pass muster under MRE 403 because the information—whether based on Dr. Terrill's statistical analysis or on non-statistical opinion—was unnecessary to assist the jury; plaintiff abandoned the equal protection claims based on race; and the statistical information would only confuse the issues presented to the jury. Accordingly, the trial court granted the motion to strike.

With respect to Bargas and VanderKooi's motion for summary disposition, the trial court noted that the complaint was limited to the P&P procedure and that plaintiff "did not challenge the propriety of the initial stop, search of his person, or detention." The trial court held that plaintiff "was in public and had no reasonable expectation of privacy in his various physical features which were readily observable by the public" and that the P&P did not violate the Fourth Amendment. In the alternative, the trial court noted that the Fourth Amendment only prohibited unreasonable searches and seizure, and it held that, even assuming that the P&P constituted a search and seizure, Bargas's actions were reasonable given the circumstances. Further, the trial court held that plaintiff did not establish that VanderKooi directed Bargas's actions. The trial court also rejected plaintiff's argument that he had a constitutional right to privacy in his fingerprints and facial features. The trial court therefore held that summary disposition was appropriate under MCR 2.116(C)(10) with respect to plaintiff's Fourth Amendment and constitutional right to privacy claim.

Regarding the Fifth Amendment claim, the trial court rejected plaintiff's argument and held that his facial features and fingerprints were "observable by the general public and not

protected under the common law right to privacy." It therefore held that summary disposition was appropriate under MCR 2.116(C)(10). The trial court also held that plaintiff had abandoned his equal protection claim under 42 USC 1981. Consequently, it held that summary disposition was appropriate under MCR 2.116(C)(10).

In addition, the trial court held that qualified immunity applied to all of plaintiff's claims against Bargas and VanderKooi. Therefore, the trial court concluded, "Because Plaintiff failed to establish a genuine issue of material fact regarding his 1983 claims, and abandoned his 1981 claim, and because Bargas and VanderKooi are otherwise shielded by qualified immunity, summary disposition is appropriate pursuant to MCR 2.116(C)(7) and 2.116(C)(10)."

With respect to the city's motion for summary disposition, the trial court held that plaintiff had failed to establish a violation of his constitutional rights and had not established that the policy was unconstitutional on its face or as applied; therefore, summary disposition was appropriate under MCR 2.116(C)(10).

The trial court accordingly dismissed plaintiff's claims with prejudice. This appeal followed.

II. INDIVIDUAL DEFENDANTS

Plaintiff argues that the trial court erred by granting summary disposition in favor of Bargas and VanderKooi on his Fourth and Fifth Amendment claims. Because we find that Bargas and VanderKooi were shielded by the doctrine of qualified immunity, we disagree.

A. STANDARD OF REVIEW

"A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is barred by immunity granted by law" and "may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence; the substance or content of the supporting proofs must be admissible in evidence." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 26; 703 NW2d 822 (2005). "A trial court properly grants a motion for summary disposition under MCR 2.116(C)(7) when the undisputed facts establish that the moving party is entitled to immunity granted by law." *Id*. We review de novo a trial court's grant of summary disposition pursuant to MCR 2.116(C)(7). *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 553; 837 NW2d 244 (2013). Further, we review de novo the question of whether a federal constitutional right was clearly established at the time of the alleged violation so as to preclude the protection of qualified immunity. See *Elder v Holloway*, 510 US 510, 516; 114 S Ct 1019, 1023; 127 L Ed 2d 344 (1994); *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

B. QUALIFIED IMMUNITY GENERALLY

"Qualified immunity is an established federal defense against claims for damages under § 1983 for alleged violations of federal rights." *Id*. A person is liable under 42 USC 1983 if he or she, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 USC 1983. "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York*, 438 Mich at 757-758. "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Davis*, 201 Mich App at 576-577. However, "[a] police officer may invoke the defense of qualified immunity to avoid the burden of standing trial when faced with a claim that the officer violated a person's constitutional rights." *Lavigne v Forshee*, 307 Mich App 530, 542; 861 NW2d 635 (2014).

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 542 (quotation marks and citations omitted). Thus, qualified immunity does not apply if a right was "clearly established" at the time of the violation, such that it "would be clear to a reasonable officer" that his or her conduct was unlawful. *Id*. (citations omitted).

Qualified immunity can apply "even if there were a genuine issue of material fact regarding the underlying [constitutional] claim." *Morden*, 275 Mich App at 340, 342. See also *Messerschmidt v Millender*, 565 US 535, 546; 132 S Ct 1235, 1244; 182 L Ed 2d 47 (2012) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law.") (quotation marks and citation omitted). In order for a right to be clearly established, there must be "binding precedent . . . that is directly on point." *Morden*, 275 Mich App at 340 (quotation marks and citation omitted; alteration in *Morden*).

In *Saucier v Katz*, 533 US 194, 201; 121 S Ct 2151; 150 L Ed 2d 272 (2001), the United States Supreme Court articulated the initial inquiry for determining whether qualified immunity applies: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" If there was no violation of a constitutional right, no further inquiry regarding qualified immunity is required. *Id*. However, "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Id*. "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Id*. at 202, quoting *Anderson v Creighton*, 483 US 635, 640; 107 S Ct 3034; 97 L Ed 2d 523 (1987). In other words, the "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*.; see also *Anderson*, 483 US at 640 ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.") (citation omitted).

In *Pearson v Callahan*, 555 US 223, 231-232; 129 S Ct 808; 172 L Ed 2d 565 (2009), the Court clarified that courts may exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances

in the particular case at hand." *Id*. at 236. See also *Jones v Byrnes*, 585 F3d 971, 975 (CA 6, 2009) (explaining that "*Pearson* left in place [*Saucier's*] core analysis" and that it "need not decide whether a constitutional violation has occurred if we find that the officer's actions were nevertheless reasonable").

In this case, the circumstances lead us to conclude that the second prong of the *Saucier* analysis is dispositive of whether Bargas and VanderKooi are entitled to qualitative immunity. We therefore decline to address whether, taken in the light most favorable to plaintiff, the P&P procedure violated plaintiff's Fourth and Fifth Amendment rights. Rather, for the reasons stated below, we hold that at the time of the alleged violation, the right asserted by plaintiff was not clearly established. *Saucier*, 533 US at 201.

C. FOURTH AMENDMENT RIGHTS

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011). See also *Maryland v King*, ___ US ___, ___; 133 S Ct 1958, 1968; 186 L Ed 2d 1 (2013), quoting US Const, Am IV ("The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' "). There is a dual inquiry for determining whether a search or a seizure is unreasonable: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868, 1879; 20 L Ed 2d 889 (1968).

A person is liable under 42 USC 1983 if he or she, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 USC 1983. "Section 1983 itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). "A cause of action under § 1983 is stated where a plaintiff shows (1) that the plaintiff was deprived of a federal right, and (2) that the defendant deprived the plaintiff of that right while acting under color of state law." *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993). It is undisputed that the officers were acting under the color of state law when the alleged Fourth Amendment violation of plaintiff's rights occurred.

1. NATURE OF PLAINTIFF'S CLAIMS

The factual allegations of plaintiff's complaint relate solely to the taking of plaintiff's photograph and fingerprints. Plaintiff did not challenge his initial stop, the length of his detainment, or the fact that he was handcuffed or placed in a police car, as being unreasonable and violative of his Fourth Amendment rights. Rather, he alleged only that the P&P procedure was an unlawful search and seizure. This Court must limit its review to the allegations contained in the complaint. See *Sutter v Ocwen L Servicing, LLC*, 499 Mich 874; 876 NW2d 244 (2016), see also *Steed v Covey*, 355 Mich 504, 511; 94 NW2d 864 (1959), quoting 41 Am Jur, Pleading,

§ 77, pp 343-345 (explaining the general principles that "[e]very material fact essential to the existence of the plaintiff's cause of action, and which he must prove to sustain his right of recovery, must be averred, in order to let in proof thereof" and that "[e]very issue must be founded upon some certain point, so that the parties may come prepared with their evidence and not be taken by surprise, and the jury may not be misled by the introduction of various matters").

The trial court did not abuse its discretion by limiting plaintiff's claims to those that plaintiff actually pled. The entirety of plaintiff's Count I (against Bargas and VanderKooi) reads as follows:

> 9. On August 25, 2011, Plaintiff Johnson was sitting on the grass approximately 150 south of Burton Street near the intersection of Breton Avenue in the City of Grand Rapids.
>
> 10. Plaintiff Johnson is an African-American.
>
> 11. Officer Greg Edgcombe contacted Plaintiff Johnson following a call from personnel at the Michigan Athletic Club ("MAC").
>
> 12. Despite being told that [plaintiff] had not tried to open or enter any of the vehicles in the MAC parking lot (unlike the initial information), Sgt. Elliott Bargas took a full set of fingerprints and two photos of [plaintiff], without probable cause, a search warrant or other legal authority to do so.
>
> 13. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to photograph Plaintiff Johnson and have the photograph stored in the files and records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.
>
> 14. Upon information and belief, Defendant VanderKooi directed Sgt. Bargas to take Plaintiff Johnson's fingerprints and have the fingerprints stored in the files and records of the City of Grand Rapids Police Department, without probable cause, a search warrant, or legal authority to do so.
>
> 15. Defendants VanderKooi and Bargas took the above actions against Plaintiff Johnson, because he is an African-American.
>
> 16. At no time on August 15, 2011, did Plaintiff Johnson commit any offense in violation of the laws of the City of Grand Rapids, State of Michigan, or the United States.
>
> 17. There was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints.
>
> 18. The actions taken by Defendant Bargas and VanderKooi, were unreasonable and excessive.

> 19. Plaintiff Johnson's constitutionally protected rights that Defendant Bargas and VanderKooi violated include the following:
>
> a. His right to fair and equal treatment guaranteed and protected by the Equal Protection Clause of the Fourteenth Amendment.
>
> b. His rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure.
>
> c. His rights under the Fifth Amendment which bars the taking of private property for public use without just compensation.
>
> d. His right to privacy under the U.S. Constitution;
>
> e. His rights protected by 42 U.S.C. § 1981 and 42 U.S.C. § 1983.
>
> 20. As a direct and proximate result of Defendant's [sic] conduct, Plaintiff Johnson suffered a loss of freedom, emotional injury, including but not limited to fright, shock, embarrassment, and humiliation, and other constitutionally protected rights described above.

Although plaintiff now seeks to expand his claim to encompass a challenge to the length of his detention and his handcuffing, plaintiff's complaint itself reflects no such challenge. Moreover, the record reflects that the focal point of this litigation—from beginning to end—was not the duration of the stop or the handcuffing, but rather the P&P procedure. At the summary disposition hearing, for example, trial counsel argued:

> And that's our point, is you have to be careful when you're going to take somebody's pictures or prints. . . .
>
> * * *
>
> So our contention is, no, there's no reasonable suspicion. There's no probable cause to suspect that Mr. Johnson has done anything, and you don't have the authority under the Fourth Amendment to take his photographs – plural – and take his full set of fingerprints.

The P&P procedure has continued to be the focal point on appeal. For example, plaintiff argues:

> At the time of the encounter with Johnson, the law was clearly established regarding the fact that fingerprints could not be taken without probable cause and for that reason summary disposition on Johnson's Fourth Amendment claim was inappropriate.
>
> * * *
>
> This is a case where a person was subject to detention for the sole purpose of obtaining fingerprints, without probable cause. Such action violates the Fourth Amendment . . . .

* * *

> Thus, it should be clear that the compulsory detention of Johnson in this case for the sole purpose of obtaining his fingerprints, without probable cause, violated the Fourth Amendment of the Constitution.

* * *

> The issue in this case is the appropriateness of the taking of photographs and fingerprints of innocent people.[4]

Notwithstanding this focus, plaintiff cursorily asserts on appeal that the singular reference in paragraph 19(b) of his complaint to "[h]is rights under the Fourth and Fourteenth Amendments to be free from unlawful search and seizure" were adequate to place defendants on notice that he was challenging not only the P&P procedure, but the length of his detention and the fact that he was handcuffed.[5] We disagree.

While Michigan is a notice pleading state, *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011), a complaint must still provide reasonable notice to opposing parties. *Id*.; see also *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992); MCR 2.111(B)(1). A defendant should not be left to "guess upon what grounds plaintiff believes recovery is justified" after reading the complaint. *Dacon*, 441 Mich at 329. Therefore, MCR 2.111(B)(1) requires that a theory of liability be supported by "specific allegations reasonably necessary to inform the adverse party" of the pleader's claims. *Id*. In this case, plaintiff provided specific allegations concerning the P&P procedure; however, the complaint is devoid of any allegations (much less specific ones) concerning the use of handcuffs or the length of plaintiff's detention. In fact, the complaint specifically alleges only that "[t]here was no legal cause to justify the seizure of Plaintiff Johnson's photographic image and fingerprints" and contains absolutely no allegations related to the seizure of plaintiff's person. The complaint's general allegation that the "unreasonable and excessive" actions taken by Bargas and VanderKooi resulted in a violation of his Fourth Amendment rights is the sort of general allegation that "gives no hint of the facts to

---

[4] *Amicus Curiae*, The American Civil Liberties Union of Michigan, confines its arguments in support of plaintiff to the P&P procedure.

[5] We note that on appeal plaintiff appears to challenge only the fact that his detention continued *after* officers on the scene spoke with witnesses and plaintiff himself. While plaintiff does not specify the precise length of time during which the detention was allegedly unreasonable, plaintiff testified at his deposition that he was interviewed by police, his fingerprint and picture were taken, and he was then handcuffed and allowed to call his mother. He further testified that 5 to 10 minutes elapsed from the time that he called his mother and her arrival, and that he was let out of the police car and handcuffs after his mother spoke with police. Bargas testified to a brief interaction with plaintiff's mother wherein she showed him her identification and identified plaintiff as her son.

which it refers." *Dacon*, 441 Mich at 329. It can therefore only be interpreted as referring back to the specific allegations that plaintiff did assert relative to the P&P procedure.

The trial court in this case did not abuse its discretion in declining to read plaintiff's general Fourth Amendment allegation as providing sufficient notice to defendants concerning any and all theories of liability that may have arisen from any portion of plaintiff's interaction with police—particularly where the complaint was devoid of *any* specific allegation concerning the unreasonableness of the seizure of defendant's person. *Id*. at 328. And because plaintiff never sought to amend his complaint to allege such a challenge, the trial court was not obliged to offer such an opportunity, and cannot be found to have committed plain error by failing *sua sponte* to do so. See *Kloain v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006) (holding that the trial court was not required to *sua sponte* offer the plaintiff leave to amend his complaint absent a request for leave to amend or the defendants' written consent to amend).

For all of these reasons, we must confine our analysis of plaintiff's Fourth Amendment challenge and the issue of whether—for purposes of a qualified immunity analysis—plaintiff's alleged constitutional rights were clearly established, to the alleged unlawful search and seizure arising from the officers' use of the P&P procedure.

2. APPLICATION

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038, 2042; 150 L Ed 2d 94 (2001). See also *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652, 1656; 80 L Ed 2d 85 (1984) ("A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed."). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v United States*, 389 US 347, 351; 88 S Ct 507, 511; 19 L Ed 2d 576 (1967) (citations omitted).

When police obtain physical evidence from an individual, there are two different levels at which there might be a potential Fourth Amendment violation. *United States v Dionisio*, 410 US 1, 8; 93 S Ct 764, 769; 35 L Ed 2d 67 (1973). The first level involves the initial " 'seizure' of the 'person' necessary to bring him into contact with government agents," and the second level involves "the subsequent search for and seizure of the evidence." *Id*.

The United States Supreme Court has stopped short of deciding whether a brief detention of an individual for the purpose of fingerprinting, based on a reasonable suspicion (i.e., a *Terry* stop, *Terry*, 392 US at 20), is per se unreasonable. See *Davis v Mississippi*, 394 US 721, 722; 89 S Ct 1394, 1395; 22 L Ed 2d 676 (1969). In *Davis*, the Court explicitly stated that it was not deciding whether, during a criminal investigation, fingerprints could be obtained in the absence of probable cause. See *id*. at 728. ("We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest."). In fact, the Court stated that "[i]t is arguable, however, that, because of the unique nature of the fingerprinting process, such

detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *Id*. at 727-728. The *Davis* Court ultimately decided the issue on the grounds that the petitioner's detention at the police headquarters "was not authorized by a judicial officer," that the "petitioner was unnecessarily required to undergo two fingerprinting sessions," and that the "petitioner was not merely fingerprinted during the [initial] detention but also subjected to interrogation." *Id*. at 728.

The conduct challenged in *Davis* thus occurred at the first level of Fourth Amendment analysis (i.e., the initial seizure of the petitioner's person necessary to bring him into contact with government agents), not the taking of the petitioner's fingerprints. See *Dionisio*, 410 US at 11 ("For in *Davis* it was the initial seizure—the lawless dragnet detention—that violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints."). The *Dionisio* Court further stated that "*Davis* is plainly inapposite to a case where the initial restraint does not itself infringe the Fourth Amendment" *Id*. Further, in discussing whether the collection of a voice recording from a suspect required probable cause, the Court explained that a voice exemplar did not require intrusion into the body like a blood extraction, and it stated, "Rather, this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' " *Id*. at 14-15, quoting *Davis*, 394 US at 727. Therefore, "neither the summons to appear before the grand jury nor its directive to make a voice recording infringed upon any interest protected by the Fourth Amendment . . . ." *Dionisio*, 410 US at 15.

In *Hayes v Florida*, 470 US 811, 814; 105 S Ct 1643; 84 L Ed 2d 705 (1985), the Court concluded that there was no probable cause for the plaintiff to have been arrested, no consent, and no judicial authorization for detaining the defendant for fingerprinting purposes. Although the Court ultimately reversed the defendant's conviction, the reversal was based on the fact that, as in *Davis*, the defendant was forcibly removed from his home without probable cause or a warrant and transported to the police station for the purposes of fingerprinting him. *Id*. at 815-818. Notably, the Court stated, "None of the foregoing implies that a brief detention in the field for the purpose of fingerprinting, where there is only reasonable suspicion not amounting to probable cause, is necessarily impermissible under the Fourth Amendment." *Id*. at 816. The Court explained as follows:

> In addressing the reach of a *Terry* stop in *Adams v. Williams*, 407 U. S. 143, 146 (1972), we observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." Also, just this Term, we concluded that if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information. *United States v. Hensley*, *supra*, at 229, 232, 234. Cf. *United States v. Place*, 462 U. S. 696 (1983); *United States v. Martinez-Fuerte*, 428 U. S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975). There is thus support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the

> suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch. Cf. *United States v. Place*, *supra*. Of course, neither reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification. *Payton v. New York*, 445 U. S. 573 (1980). [*Hayes*, 470 US at 816-817.]

In short, the United States Supreme Court has not definitively held whether fingerprinting someone constitutes a search under the Fourth Amendment. See *Maryland v King*, 569 US ___, ___; 133 S Ct 1958, 1987; 186 L Ed 2d 1 (2013) (SCALIA, J., dissenting); see also *Kaupp v Texas*, 538 US 626, 630 n 2; 123 S Ct 1843, 1846; 155 L Ed 2d 814 (2003). And the Court has suggested that fingerprints are a physical feature regularly exposed to the public. See, e.g., *Dionisio*, 410 US at 14-15. Various federal courts have relied on *Dionisio* in holding that photographing and fingerprinting does not constitute a search under the Fourth Amendment. See, e.g., *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009), citing *Dionisio*, 410 US 14-15 ("The police can obtain both photographs and fingerprints without conducting a search under the Fourth Amendment."); *Rowe v Burton*, 884 F Supp 1372, 1381 (D Alas, 1994), citing *Dionisio*, 410 US at 5-7 ("Courts have consistently refused to accord Fourth Amendment protection to non-testimonial evidence such as photographs of a person, his or her handwriting, and fingerprints. Thus, the photographs and fingerprinting, alone, would not likely constitute a search for purposes of the Fourth Amendment.") (citation omitted). And the Supreme Court has suggested that a brief seizure, based on reasonable suspicion, that includes the collection of information that is regularly exposed to the public, could be permissible. *Hayes*, 470 US at 816-817; see also *Dionisio*, 410 US at 14 (explaining that "[n]o person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world").

Further, although the case did not involve police contact, this Court has also held that "[t]here is no reasonable expectation of privacy in one's fingerprints." *Nuriel v Young Women's Christian Ass'n of Metro Detroit*, 186 Mich App 141, 146; 463 NW2d 206 (1990); see also *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989), citing *Dionisio*, 410 US 14-15. Also, photographing a person as they appear in public does not generally violate any reasonable expectation of privacy. *Sponick v Detroit Police Dept*, 49 Mich App 162, 198-199; 211 NW2d 674 (1973); *Fry v Ionia Sentinel-Standard*, 101 Mich App 725, 728-729; 300 NW2d 687 (1980); see also 3 Restatement Torts 2d, § 652d.

It is therefore not clearly established in the law that fingerprinting and photographing someone during the course of an otherwise valid investigatory stop violates the Fourth Amendment. In fact, prior statements from the United States Supreme Court and this Court suggest that such a procedure would be permissible under the Fourth Amendment if the initial stop was justified by a reasonable suspicion. We therefore conclude that Bargas and VanderKooi were entitled to the protection of qualified immunity regarding defendant's Fourth Amendment claims.

D. FIFTH AMENDMENT RIGHTS

In relevant part, the Fifth Amendment of the United States Constitution provides as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. [US Const, Am V.]

The Fifth Amendment is applicable "to the states through the Fourteenth Amendment, US Const, Am XIV." *AFT Mich v Michigan*, 497 Mich 197, 217; 866 NW2d 782 (2015). A " 'taking' can encompass governmental interference with rights to both tangible and intangible property," and "[t]he term 'property' encompasses everything over which a person may have exclusive control or dominion." *Id*. at 216, 218 (quotation marks and citation omitted). "In order to prevail on a takings claim, a claimant first must demonstrate a cognizable interest in the affected private property." *Mich Soft Drink Ass'n v Dep't of Treasury*, 206 Mich App 392, 402; 522 NW2d 643 (1994), lv den 448 Mich 898 (1995). "The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment." *Maritrans Inc v United States*, 342 F3d 1344, 1352 (CA Fed, 2003). Rather, "existing rules and understandings and background principles derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Id*. (quotation marks and citation omitted).

Plaintiff argued before the trial court that the P&P procedure constituted an unlawful taking of his "image or likeness" without just compensation. This Court and the Michigan Supreme Court have recognized a common-law right of privacy that protects against various types of invasions of privacy including the "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Battaglieri v Mackinac Ctr For Pub Policy*, 261 Mich App 296, 300; 680 NW2d 915 (2004), quoting *Tobin v Mich Civil Serv Comm*, 416 Mich 661; 331 NW2d 184 (1982) (quotation marks and emphasis omitted). Yet, "causes of action for violations of such a right stem from 'the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others.' " *Id*. at 261 Mich App at 300–301, quoting 3 Restatement Torts, 2d, § 652C, comment a. Therefore, a person's likeness and identity "in so far as the use may be of benefit to him or to others" amounts to "property." See *AFT Mich*, 497 Mich at 216. "To generate a compensable taking, the government must assert its authority to seize title or impair the value of property." *Id*. at 218.

In this case, plaintiff made no argument that the value of his likeness was impaired or that any defendant seized title to his likeness. Defendants did not interfere with plaintiff's ability to use his identity or likeness to benefit plaintiff or others and did not prevent plaintiff from carrying out any future endeavors to benefit from his likeness. In addition, plaintiff's photographs and fingerprints were obtained under the police power rather than power of eminent domain. See *Bennis v Michigan*, 516 US 442, 452; 116 S Ct 994, 1001; 134 L Ed 2d 68 (1996) ("The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain."). Plaintiff's counsel admitted to uncovering no caselaw stating that police conduct in

photographing and fingerprinting person for investigatory purposes constituted a governmental taking. Thus, Bargas and VanderKooi were entitled to the protection of qualified immunity with respect to plaintiff's Fifth Amendment claims.

E. CONCLUSION

The alleged constitutional infirmities of the P&P procedure and the rights asserted by plaintiff were not clearly established in view of the preexisting law. See *White v Pauly*, ___ US ___, ___; 137 S Ct 548, 552; 196 L Ed 2d 463 (2017) ("As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case. Otherwise, [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.") (quotation marks and citation omitted; alterations in *White*). Bargas and VanderKooi were therefore entitled to the protection of qualified immunity and to summary disposition under MCR 2.116(C)(7).[6]

III. MUNICIPAL DEFENDANT

Plaintiff also argues that the trial court erred by granting summary disposition in favor of the city on plaintiff's claim for municipal liability. We disagree.

We review de novo a trial court's grant of summary disposition. See *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 506; 885 NW2d 861 (2016). The trial court granted the city's motion for summary disposition under MCR 2.116(C)(10); therefore, the following standards apply:

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. When evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 507 (quotation marks and citation omitted; alteration in original).]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Moreover,

---

[6] We note also that there was no evidence presented to the trial court that VanderKooi participated in the P&P of plaintiff or ordered Bargas to perform the P&P. To the contrary, Bargas testified at his deposition that it was his decision to perform the P&P. Consequently, even apart from the application of qualified immunity, the evidence presented to the trial court would not support plaintiff's claim against VanderKooi, and VanderKooi would be entitled to summary disposition under MCR 2.116(C)(10).

> When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her. [MCR 2.116(G)(4).]

Under 42 USC § 1983, a municipality may be held liable for unconstitutional policies, but § 1983 does not provide for respondeat superior liability. *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995). Accordingly, "[a] municipality cannot be held liable under § 1983 solely because it employs a tortfeasor, and, "in order to sustain a cause of action against a municipality under § 1983, a plaintiff must show that an action pursuant to official municipal policy of some nature caused a constitutional tort." *Id*. (quotation marks and citation omitted). In order for a municipality to be liable, a plaintiff must show that an official municipal policy or custom caused his injury. *Connick v Thompson*, 563 US 51, 60–61; 131 S Ct 1350, 1359; 179 L Ed 2d 417 (2011); *Los Angeles Co, Cal v Humphries*, 562 US 29, 30-31, 36; 131 S Ct 447, 449, 452; 178 L Ed 2d 460 (2010). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick*, 563 at US 61.

In this case, plaintiff argues that the city has a policy of requiring P&Ps of "innocent pedestrians who do not happen to have ID on them." In support of this contention, plaintiff alleges that VanderKooi was involved in eleven incidents over five years where persons "innocent of any wrongdoing," including plaintiff, were subject to the P&P procedure, and another incident where a person was only photographed. The following pieces of documentary evidence submitted to the trial court make reference to this alleged policy or custom:

1. The city's answer to a request for admission, in which the city stated in relevant part:

> [O]fficers taking photos and thumbprints of individuals is a custom or practice of the City of Grand Rapids and has been for decades. The custom or practice has changed over those years with the evolution of technology. . . . [A]lthough it is primarily a thumbprint, another finger or fingers might be printed instead of or in addition to a thumb. . . . A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstance of that incident.

2. Bargas's deposition testimony, in which he agreed that he performed the P&P procedure in accordance with departmental policy.

3. VanderKooi's deposition testimony, in which the following colloquy occurred between VanderKooi and plaintiff's counsel:

> *Q*. Okay. So, you would agree with the statement that police officers taking photographs and thumbprints known as P and P of individuals with whom

they made contact is a commonly known longstanding custom and practice of the Grand Rapids Police Department?

A. When I started in 1980 they were doing P and P's yes.

4. An excerpt from the Grand Rapids Police Manual of Procedures (dated 2004) that contain the following statements relevant to the P&P procedure:

3. Officers issuing appearance tickets shall:

* * *

b. Picture and print all subjects without good identification.

5. An excerpt from the Grand Rapids Police Department Field Training Manual (dated 2009) that contains the following statements relevant to the P&P procedure:

Under the heading **FIELD INTERROGATIONS**:

5. Field Interrogation reports

* * *

d. Disposition of suspect (arrest, picture and print, released, etc).

B. TRAINING CONSIDERATIONS

* * *

9. Picture and print procedures.

6. An excerpt from the same Field Training manual related to traffic violations that lists the actions an officer may take when a motorist is driving with their driver's license suspended, revoked, or denied and states in relevant part:

(3) Issue citation and obtain a picture and print or arrest.

7. An excerpt from the Grand Rapids Police Department Patrol Sergeant Field Training Tasks Manual (which we note indicates that it was revised in 2013, after the incident in question) that provides in relevant part:

TRAFFIC/ACCIDENT PROCEDURES

* * *

3) Picture and Prints.

a) Carry a Digital Camera and related supplies.

b) Photograph subject clearly and take a readable thumbprint.

(1) Record on P&P card, Subject Identifier (name, race, sex, etc). Include License Plate in picture if driver or occupant of vehicle.

We conclude that this evidence does not suffice to show that any alleged violation of plaintiff's constitutional rights was the result of an official municipal policy or custom. Plaintiff argues in his brief on appeal that the trial court erred when it failed "to recognize that the custom and practice that [plaintiff] challenges is not the taking of prints and pictures, generally, but the custom and practice of taking prints and pictures of innocent citizens," specifically the P&P of persons taken in the course of a field interrogation or stop. However, the documentation relied upon by plaintiff does not indicate that the city has a policy of requiring P&Ps during field interrogations and stops. The only references to P&P with respect to field interrogations and stops, as opposed to the writing of "appearance tickets" or citations for driving with a suspended, revoked, or denied driver's license, are found in the guidelines for describing the disposition of the subject in the field interrogation report and the reference to "training considerations" in the Field Training Manual. Nothing about these references instruct GRPD officers to take P&Ps during every field interrogation or stop or every such encounter where the subject lacks official identification or to P&P "innocent citizens." In fact, the majority of the references to the use of the P&P procedures involve its use during the issuance of citations that do not result in arrest; the issuance of these citations would involve, absent bad faith on the part of the issuing officer, at least a good-faith belief that probable cause existed to suspect that an ordinance or statute was violated. See MCL 257.727c; MCL 764.1d; MCL 764.9f; *Detroit v Recorder's Court Judge, Traffic and Ordinance Div*, 85 Mich App 284, 292; 271 NW2d 202 (1978). Further, the Patrol Sergeant Field Training Tasks Manual, to the extent it is even relevant to events that occurred before its revision date, discusses P&Ps not in the context of field interrogations or stops, but rather in the section labelled "TRAFFIC/ACCIDENT PROCEDURES".

We conclude that the action that plaintiff alleges to have caused the deprivation of his rights, i.e., a P&P during a field interrogation or stop, did not "implement[] or execute[] a policy statement, ordinance, regulation, or decision officially adopted and promulgated" by the city, whether through GRPD or otherwise. *Monell*, 436 US at 690. We also conclude that, even viewing the evidence in the light most favorable to plaintiff, see *Innovation Ventures*, 499 Mich at 507, plaintiff did not establish a genuine issue of material fact that his alleged deprivation was caused by an unwritten custom or policy "so persistent and widespread as to practically have the force of law." *Connick*, 563 at US 61.

Contrary to plaintiff's contention, the city has not admitted that plaintiff was subjected to a P&P as a result of a custom or policy. The city did admit that the P&P procedure in general exists and did use the words "custom or practice." However, the city also stated that a P&P was discretionary and dependent on the particular facts of the incident in question: "A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstance of that incident." Further, Bargas's deposition testimony, read in context, indicates that he agreed that his taking of plaintiff's photograph and fingerprints was "in keeping" with departmental policy; Bargas also testified that he made the decision to P&P plaintiff based on the particular circumstances of the case, specifically that he did not believe

plaintiff's claim of identity (apparently based at least in part on Bargas's belief that plaintiff could not have received a tattoo in Grand Rapids if he was under 18), the fact that previous burglaries from cars had been reported in that parking lot, and his belief that latent prints had been taken from the previous burglaries that could either support the conclusion that plaintiff was a suspect in the burglaries or eliminate him as a suspect. Nothing in Bargas's testimony indicates that he was following a custom or policy that had the force of law when he performed a P&P on plaintiff. And VanderKooi's testimony similarly reveals his individualized choices to perform P&Ps or to order them performed in the cases identified by plaintiff.[7]

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Bd of Co Comm'rs of Bryan Co, Oklahoma*, 520 US 397, 405; 117 S Ct 1382; 137 L Ed 2d 626 (1997). In this case, even assuming that plaintiff could demonstrate a violation of his rights, plaintiff cannot show that the city "specifically directed" Bargas to violate plaintiff's rights. *Id*. at 406. Not every constitutional violation by an officer in the field supports a finding of municipal liability for his employer; "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Monell*, 436 US at 693. We therefore conclude that plaintiff failed to raise a genuine issue of material fact concerning whether Bargas's action was taken "under color of some official policy" whether written or unwritten, when the most that can be gleaned from the evidence presented to the trial court was that the P&P procedure was available for use by GRPD officers and could, depending on particularized circumstances, be used during the field interrogation of a person who was never arrested or charged with a crime. The trial court properly granted summary disposition in favor of the city under MCR 2.116(C)(10).

IV. PLAINTIFF'S EXPERT WITNESS

Finally, plaintiff argues that the trial court erred by granting defendants' motion to strike Dr. Terrill's testimony. We disagree. We review for an abuse of discretion a trial court's determinations regarding "[w]hether a witness is qualified to render an expert opinion and the actual admissibility of the expert's testimony." *Tate ex rel Estate of Hall v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). "A trial court does not abuse its discretion when its decision falls within the range of principled outcomes." *Rock v Crocker*, 499 Mich 247, 260; 884 NW2d 227 (2016).

[7] As stated above, VanderKooi did not order Bargas to perform the P&P. Nor did VanderKooi's testimony support the inference that Bargas was acting according to the policy alleged by plaintiff, as VanderKooi testified to his belief that Bargas had "consensually obtained" plaintiff's fingerprints.

MRE 702 governs expert testimony and provides as follows:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 "requires the circuit court to ensure that each aspect of an expert witness's testimony, including the underlying data and methodology, is reliable," and it "incorporates the standards of reliability that the United States Supreme Court articulated in *Daubert v Merrell Dow Pharm, Inc*," 509 US 579, 113 S Ct 2786, 125 L Ed 2d 469 (1993). *Elher v Misra*, 499 Mich 11, 22; 878 NW2d 790 (2016). *Daubert* requires that the trial court ensure all scientific testimony is relevant and reliable. *Id*. at 22-23. Although not dispositive, absence of supporting literature "is an important factor in determining the admissibility of expert witness testimony." *Id*. at 23. Notably, "it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Id*. (quotation marks and citation omitted).

In *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 152; 119 S Ct 1167, 1176; 143 L Ed 2d 238 (1999), the United States Supreme Court held that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." In other words, *Daubert*'s general gatekeeping function applies to all expert testimony—whether the expert relies on scientific principles or "skill- or experience-based observation." *Id*. at 151-152. However, "[t]he trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Id*. at 152. "[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id*. at 153.

The trial court did not abuse its discretion in striking Dr. Terrill's proposed expert testimony concerning the reasonableness of Bargas's actions in the instant case. Plaintiff cites to numerous cases in support of his argument that expert testimony can be used to "educate the trier of fact on police methods and procedures, patterns of expected police response to given situations, and whether those are legal or illegal." However, none of these cases stand for the proposition that expert testimony that invades the province of the jury by making a legal conclusion is permissible. "The opinion of an expert may not extend to the creation of new legal definitions and standards and to legal conclusions." *Lenawee Co v Wagley*, 301 Mich App 134, 160-161; 836 NW2d 193 (2013). Expert witnesses may not invade the province of the jury and are "not permitted to tell the jury how to decide the case." *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996).

In this case, Dr. Terrill's opinion that Bargas's conduct was unreasonable was a legal conclusion based on Terrill's own interpretation of the same facts that a jury would be tasked with interpreting. See *DeMerrell v Cheboygan*, 206 Fed Appx 418, 426-427 (CA 6, 2006) (holding that "Plaintiff–Appellant's expert testified as to a legal conclusion because he stated that "it was objectively unreasonable for Officer White to shoot Mr. DeMerrell" and that the expert made the following other improper legal conclusions: (1) "a reasonable officer on the scene would not have concluded at the time that there existed probable cause that Mr. DeMerrell posed a significant threat of death or serious physical injury to the officer or others" and (2) "use of deadly force by [Officer White] was improper and unnecessary"); *Hygh v Jacobs*, 961 F2d 359, 364 (CA 2, 1992) (comparing expert testimony that a police officer's "conduct was not 'justified under the circumstances,' not 'warranted under the circumstances,' and 'totally improper' " to improper expert testimony that a person was negligent and holding that the expert "testimony regarding the ultimate legal conclusion entrusted to the jury crossed the line and should have been excluded").[8]

Further, although plaintiff does not present argument on this issue, much of Dr. Terrill's testimony related to plaintiff's abandoned equal protection claim and was therefore not relevant to the issues at hand. MRE 401. The trial court did not abuse its discretion in striking Dr. Terrill's testimony. Further, even if Dr. Terrill's testimony was stricken in error, nothing in his testimony would alter our conclusions in Parts II and III, above. Any error in the trial court's granting of defendants' motion to strike was therefore harmless. See *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003); MCR 2.613(A).

Affirmed.

/s/ Mark T. Boonstra
/s/ Colleen A. O'Brien

Wilder, P.J., did not participate.

[8]Lower federal court decisions "are not binding on state courts" but may be persuasive. *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016) (quotation marks and citation omitted).

Michigan Supreme Court
Lansing, Michigan

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

JOHNSON v VANDERKOOI
HARRISON v VANDERKOOI

Docket Nos. 156057-156058. Argued on application for leave to appeal April 12, 2018. Decided July 30, 2018.

Denishio Johnson filed an action in the Kent Circuit Court against the city of Grand Rapids (the City) and Captain Curtis VanderKooi and Officer Elliott Bargas of the Grand Rapids Police Department (GRPD). Johnson asserted claims under 42 USC 1981 and 42 USC 1983, alleging violations of his constitutional rights. The matter originated in 2011 when the GRPD investigated a complaint that a person, eventually identified as Johnson, was looking into vehicles in a parking lot. After GRPD officers stopped Johnson in the parking lot and were unable to confirm his identity or age, Bargas photographed and fingerprinted Johnson in accordance with the City's photograph and print (P&P) procedure. VanderKooi, who arrived at the scene at some point during this process, approved of Bargas's actions. The GRPD regularly used the P&P procedure for gathering identifying information about individuals during the course of a field interrogation or a stop if an officer deemed it appropriate based on the facts and circumstances of that incident. Johnson was ultimately released and was not charged with a crime. VanderKooi, Bargas, and the City moved separately for summary disposition. The court, George J. Quist, J., granted VanderKooi's and Bargas's motions for summary disposition of Johnson's § 1981 and § 1983 claims and also granted the City's motion for summary disposition, holding, in relevant part, that Johnson had failed to establish that the P&P procedure was unconstitutional on its face or as applied. Johnson appealed, and the Court of Appeals, BOONSTRA and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed. 319 Mich App 589 (2017).

Keyon Harrison brought a separate action in the Kent Circuit Court against VanderKooi and the City. Harrison asserted claims under 42 USC 1981, 42 USC 1983, and 42 USC 1988, alleging violations of his constitutional rights. The matter originated in 2012 after VanderKooi saw Harrison give someone a large model train engine. VanderKooi became suspicious and confronted Harrison after following him to a nearby park. Still suspicious after speaking with Harrison, VanderKooi asked another officer to come to the scene and photograph Harrison. An officer arrived and performed a P&P on Harrison. Harrison, too, was released and was not charged with a crime. VanderKooi and the City moved for summary disposition, which the court, George J. Quist, J., granted, holding, in relevant part, that Harrison had not shown that the P&P procedure was unconstitutional. Harrison appealed, and the Court of Appeals, BOONSTRA

and O'BRIEN, JJ. (WILDER, P.J., not participating), affirmed in an unpublished per curiam opinion issued May 23, 2017 (Docket No. 330537).

The reasoning of the Court of Appeals was the same in both cases with regard to municipal liability: the City could not be held liable because neither Johnson nor Harrison had demonstrated that any alleged constitutional violation resulted from a municipal policy or a custom that was so persistent and widespread as to practically have the force of law. The Court of Appeals did not decide whether the P&Ps in these cases violated Johnson's or Harrison's Fourth Amendment right to be free from unreasonable searches and seizures. Johnson and Harrison filed a joint application for leave to appeal in the Supreme Court. The Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 954 (2018).

In an opinion by Justice BERNSTEIN, joined by Justices MCCORMACK, VIVIANO, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

A policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability, and when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions. In these cases, the City conceded that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate. Whether the GRPD's custom of photographing and fingerprinting individuals as part of field interrogations when there was no probable cause for an arrest had become an official policy of the municipality presented a genuine issue of material fact when the City's admissions, the officers' testimony, the GRPD manual, and other training materials were viewed in the light most favorable to plaintiffs. Additionally, genuine issues of material fact remained concerning causation and whether the policy or custom constituted the moving force behind the alleged constitutional violations. Therefore, the Court of Appeals erred by affirming the trial court's orders granting summary disposition in favor of the City regarding municipal liability. Accordingly, Part III of the Court of Appeals' opinions in both cases was reversed, and the cases were remanded to the Court of Appeals to determine whether the P&Ps at issue violated Johnson's and Harrison's Fourth Amendment right to be free from unreasonable searches and seizures.

1. Establishing municipal liability under 42 USC 1983 requires proof that (1) a plaintiff's federal constitutional or statutory rights were violated and (2) the violation was caused by a policy or custom of the municipality. A custom may be an accepted, though unwritten, practice of executing governmental policy that is so permanent and well-settled as to have the force of law. An official policy may consist of formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time. A policy or custom that authorizes municipal employees to perform their duties in a particular manner represents a deliberate decision of the municipality, and an employee's actions in the performance of his or her duties in the manner authorized may be considered acts of the municipality. To survive a municipality's motion for summary disposition of a claim alleging municipal liability, a plaintiff must first identify a policy or custom of the municipality and then point to facts in the record

demonstrating that implementation or execution of that policy or custom caused a violation of the plaintiff's federal constitutional or statutory rights. In this case, the City conceded that the P&P procedure was a custom of the City, and record evidence supported a conclusion that the P&P procedure was also an official policy. The P&P procedure was referenced in the GRPD training manual, which stated that P&Ps were mandatory under some circumstances and that a P&P was something to be included in a field interrogation report. P&P procedures were listed under the heading "training considerations" and slides from a training presentation included one slide showing a model field interrogation report with a photograph and a fingerprint card, as well as slides describing hypothetical situations in which an officer performed a P&P on an individual suspected of criminal activity but for which probable cause to arrest did not exist. The existence of an official policy was further supported by the reasonable inference that public resources were used both to develop the training materials and to train officers. Even without the City's concession, the evidence viewed in the light most favorable to Johnson and Harrison was sufficient for reasonable minds to differ regarding the existence of an official policy or custom authorizing the specific conduct that is alleged to be unconstitutional.

2. A municipality's liability for a municipal employee's conduct requires that the policy or custom under which the employee acted was the "moving force" behind the action that gave rise to the alleged constitutional violation. Simply put, the policy or custom must be the cause of the violation. When the action taken or directed by a municipality violates federal law, then the municipal action is the moving force behind a plaintiff's injury and the requirements of causation are satisfied. A policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability, and when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions. Traditional tort concepts of causation apply to the analysis of causation in the context of municipal liability. To avoid summary disposition, Johnson and Harrison had to demonstrate that reasonable minds could differ about whether the P&P policy or custom was the moving force behind the alleged Fourth Amendment violations. That is, plaintiffs had to point to facts from which a person could reasonably infer that the municipality's policy or custom was the cause in fact and the proximate cause of the alleged constitutional violation. If a policy or custom authorizes, but does not necessarily require, the use of a specific tactic and a police officer acts in accordance with that authorization, then the policy or custom is the cause in fact and the proximate cause of a constitutional violation arising from the use of that tactic. In this case, the municipality authorized the P&P procedure and police officers exercised their discretion in performing P&Ps. It was reasonably foreseeable that performing a P&P in accordance with the policy or custom in this case would result in a Fourth Amendment violation, assuming that taking a person's fingerprints or picture without probable cause of criminal conduct is unconstitutional. The Court of Appeals erroneously concluded that a municipality cannot be held liable unless its policy or custom specifically directed its employees to violate a person's constitutional rights. A municipality may be liable for authorizing the conduct that violates a person's constitutional rights; the municipality need not specifically direct that its employees engage in that conduct.

3. It was unnecessary to decide whether a § 1983 plaintiff must prove deliberate indifference when alleging that the execution of a facially lawful policy or custom caused the plaintiff's injury. Rather, it was sufficient to state that a reviewing court must determine whether

the plaintiff claims that the alleged injury was caused by a municipal action that itself directed or authorized the violation of a federally protected right or whether the plaintiff claims that a municipality's inaction or omission caused municipal employees to violate the plaintiff's rights. The majority agreed with the concurrence that if the theory of liability is premised on some variant of the latter, then the plaintiff must also show deliberate indifference to prevail. When a theory of liability is based on the absence of governmental action, it makes sense to more critically scrutinize claims of governmental culpability for that absence. But the Supreme Court has never explicitly required such critical scrutiny when the government specifically and affirmatively authorized, but did not require, its employees to engage in allegedly unlawful conduct. In this case, plaintiffs alleged that a municipal action authorized a deprivation of federal rights. Thus, whether plaintiffs specifically claimed that the P&P policy was itself facially unconstitutional was beside the point for the purposes of determining whether the Court of Appeals erred.

Part III of the Court of Appeals' judgments reversed and cases remanded to the Court of Appeals to determine whether the P&Ps at issue violated Johnson's or Harrison's Fourth Amendment right to be free from unreasonable searches and seizures.

Justice WILDER, joined by Chief Justice MARKMAN and Justice ZAHRA, concurred in the result reached by the majority but wrote separately to provide guidance to future § 1983 plaintiffs and defendants about what they must demonstrate in order to prevail in a municipal liability case, as well as to provide the clearest guidance possible to lower courts so that they may fairly adjudicate such claims. Specifically, Justice WILDER agreed with the majority that there was a genuine issue of material fact concerning the existence of a municipal policy or custom and whether that policy or custom caused the alleged constitutional violations. A municipality's liability is limited to actions for which the municipality is actually responsible; municipal liability cannot be premised on a respondeat superior theory. If a § 1983 plaintiff alleges that a municipal policy or custom is facially unlawful, he or she need only show that the policy existed and that its implementation caused the violation of his or her federal rights. But if a § 1983 plaintiff alleges that a municipal policy or custom is facially lawful, he or she must show not only that the policy existed and that its execution caused the violation of the plaintiff's federal rights, but also that the municipality was deliberately indifferent to the unlawful way in which that policy was implemented. In this case, Johnson and Harrison went to some length to argue that the deliberate indifference standard did not apply to the instant situation. Consequently, if that were the case, Johnson and Harrison had to show that the municipality's policy of performing P&Ps without probable cause was unconstitutional on its face. The majority suggested that it was unnecessary to address whether the policy itself was facially unconstitutional because the policy authorized the allegedly unconstitutional conduct and, therefore, the alleged constitutional violation was the result of the municipality's actions rather than a failure to train its employees. However, the distinction drawn by the majority was, respectfully, meaningless. An allegation that an employee unconstitutionally applied a facially constitutional policy is the logical equivalent of an allegation that the municipality failed to adequately train its employees in how to constitutionally apply that policy. In either case, the municipality is being held liable because of its failure to ensure that its policy is applied constitutionally. Justice WILDER would have specifically directed the Court of Appeals on remand to decide whether the policy or custom at issue was facially unconstitutional.

Michigan Supreme Court
Lansing, Michigan

OPINION

FILED July 30, 2018

S T A T E O F M I C H I G A N

SUPREME COURT

DENISHIO JOHNSON,

Plaintiff-Appellant,

v No. 156057

CURTIS VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

KEYON HARRISON,

Plaintiff-Appellant,

v No. 156058

CURTIS VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

BEFORE THE ENTIRE BENCH

BERNSTEIN, J.

These consolidated cases arise from two separate incidents where plaintiffs were individually stopped and questioned by Grand Rapids Police Department (GRPD) officers. During these stops, plaintiffs' photographs and fingerprints were taken in accordance with the GRPD's "photograph and print" (P&P) procedures. Alleging that the P&Ps violated their constitutional rights, plaintiffs filed separate civil lawsuits in the Kent Circuit Court against the city of Grand Rapids (the City), as well as against the individual police officers involved. The trial court granted summary disposition in favor of all defendants in both cases. Plaintiffs each appealed by right, and the Court of Appeals affirmed in separate opinions.[1] Relevant to this appeal, both opinions affirmed summary disposition for the City on plaintiffs' municipal-liability claims on the basis that a policy that does not direct or require police officers to take a specific action cannot give rise to municipal liability under 42 USC 1983.

We disagree with the Court of Appeals and hold that a policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability. Additionally, when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions. Accordingly, we reverse in part the judgments of the Court of Appeals, and we remand these cases to the Court of Appeals for further consideration.

---

[1] See *Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017); *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The P&Ps giving rise to these lawsuits took place during two separate incidents. At the time of the incidents, each GRPD patrol officer was assigned as a part of their standard equipment a camera, a fingerprinting kit, and GRPD "print cards" for storing an individual's copied fingerprints. Generally speaking, a P&P involved an officer's use of this equipment to take a person's photograph and fingerprints whenever an officer deemed the P&P necessary given the facts and circumstances. After a P&P was completed, the photographs were uploaded to a digital log. Completed print cards were collected and submitted to the Latent Print Unit. Latent print examiners then checked all the submitted fingerprints against the Kent County Correctional Facility database and the Automated Fingerprint Identification System. After being processed, the cards were filed and stored in a box according to their respective year.

The first incident giving rise to these lawsuits involved the field interrogation of plaintiff Denishio Johnson. On August 15, 2011, the GRPD received a tip that a young black male, later identified as Johnson, had been observed walking through an athletic club's parking lot and peering into vehicles. Officer Elliott Bargas responded to the tip and initiated contact with Johnson. Johnson, who had no identification, told Bargas that he was 15 years old, that he lived nearby, and that he used the parking lot as a shortcut. Bargas was skeptical of Johnson's story, and being aware of several prior thefts in and near the parking lot, he decided to perform a P&P to see if any witnesses or evidence would tie Johnson to those crimes. After Johnson's mother arrived and verified his name and age, Johnson was released. At some point during this process, Captain Curtis

VanderKooi arrived and approved Bargas's actions. Johnson was never charged with a crime.

The second event occurred on May 31, 2012, after VanderKooi observed Keyon Harrison, a young black male, walk up to another boy and hand him what VanderKooi believed was a large model train engine. Suspicious of the hand-off, VanderKooi followed Harrison to a park. After initiating contact, VanderKooi identified himself and questioned Harrison. Harrison, who had no identification, told VanderKooi that he had been returning the train engine, which he had used for a school project. VanderKooi, still suspicious, radioed in a request for another officer to come take Harrison's photograph. Sergeant Stephen LaBrecque arrived a short time later and performed a P&P on Harrison, despite being asked to take only a photograph. Harrison was released after his story was confirmed, and he was never charged with a crime.

Johnson and Harrison subsequently filed separate lawsuits in the Kent Circuit Court, and the cases were assigned to the same judge. Plaintiffs argued, in part, that the officers and the City were liable pursuant to 42 USC 1983 for violating plaintiffs' Fourth and Fifth Amendment rights when the officers performed P&Ps without probable cause, lawful authority, or lawful consent. Both plaintiffs also initially claimed that race was a factor in the officers' decisions to perform P&Ps, though Johnson later dropped that claim.

In two separate opinions, the trial court granted summary disposition in favor of the City pursuant to MCR 2.116(C)(10)[2] and in favor of the officers pursuant to MCR

[2] MCR 2.116(C)(10) allows a party to move the court for judgment on all or part of a claim when, "[e]xcept as to the amount of damages, there is no genuine issue as to any

2.116(C)(7), (10), and (I)(2). Plaintiffs individually appealed by right in the Court of Appeals. In two separate opinions relying on the same legal analysis, the Court of Appeals affirmed the trial court's judgments regarding plaintiffs' municipal-liability claims.[3] Specifically, the Court of Appeals held that the City could not be held liable because plaintiffs did not demonstrate that any of the alleged constitutional violations resulted from a municipal policy or a custom so persistent and widespread as to practically have the force of law. *Johnson*, 319 Mich App at 626-628. The Court of Appeals did not decide whether the P&Ps actually violated either plaintiff's Fourth Amendment rights.

Plaintiffs filed a joint application for leave to appeal in this Court, challenging the Court of Appeals' ruling on the City's liability under 42 USC 1983. They argued that the record demonstrated that the City had a policy or custom of performing P&Ps without probable cause during investigatory stops pursuant to *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968),[4] which may be based on reasonable suspicion of

---

material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."

[3] In both cases, the Court of Appeals also affirmed that the individual officers were entitled to qualified immunity and that the motion to strike each plaintiff's proposed expert witness was properly granted. The Court of Appeals further held that the P&Ps did not violate plaintiffs' Fifth Amendment rights. *Johnson*, 319 Mich App at 618-620; *Harrison*, unpub op at 5. And in *Harrison*, unpub op at 9-11, the panel affirmed that the record did not support Harrison's equal-protection claim. These issues were not presented in plaintiffs' joint application for leave to appeal in this Court.

[4] "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 US at 22.

criminal conduct, and that execution of that policy or custom violated their Fourth Amendment rights. We scheduled oral argument on the application and instructed the parties to address "whether any alleged violation of the plaintiffs' constitutional rights [was] the result of a policy or custom instituted or executed by the defendant City of Grand Rapids." *Johnson v VanderKooi*, 501 Mich 954, 954-955 (2018).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id*. at 120. When reviewing such a motion, "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Id*. A genuine issue of material fact exists when the record "leave[s] open an issue upon which reasonable minds might differ." *Shallal v Catholic Social Servs of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997) (quotation marks and citations omitted).

III. ANALYSIS

The issue presented is whether there exists a genuine issue of material fact as to whether the alleged violations of plaintiffs' Fourth Amendment rights were caused by a policy or custom of the City. Plaintiffs' cause of action arises from 42 USC 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

It is undisputed that a local municipality constitutes a "person" to which 42 USC 1983 applies. *Monell v Dep't of Social Servs of the City of New York*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). Establishing municipal liability under 42 USC 1983 requires proof that: (1) a plaintiff's federal constitutional or statutory rights were violated and (2) the violation was caused by a policy or custom of the municipality. *Id*. For the purposes of this appeal, we assume that plaintiffs' Fourth Amendment rights were violated by the P&Ps performed by the GRPD officers and focus solely on the second prong of the analysis. *Collins v Harker Hts, Texas*, 503 US 115, 121-122; 112 S Ct 1061; 117 L Ed 2d 261 (1992) (holding that whether a legal violation occurred and whether a municipality might be liable for that violation are separate legal inquiries).

A constitutional violation is attributable to a municipality if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 US at 690. Liability may also be based on a "governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels," *id*. at 691, if the "relevant practice is so widespread as to have the force of law," *Bd of the Co Comm'rs of Bryan Co, Oklahoma v Brown*, 520 US 397, 404; 117 S Ct 1382; 137 L Ed 2d 626 (1997).[5] However, liability may not be based on a

[5] In *Monell*, 436 US at 691, the United States Supreme Court wrote:

> Congress included customs and usages [in 42 USC 1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials

respondeat superior theory. *Id*. at 403; *Jackson v Detroit*, 449 Mich 420, 433; 537 NW2d 151 (1995). If the claim is premised on a municipal action that is itself alleged to be unlawful, such as the adoption of the policy at issue in *Monell*, no independent assessment of municipal culpability is necessary. *Brown*, 520 US at 404-405. If, however, a plaintiff does not claim "that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights," then it must be shown that the municipality acted with deliberate indifference to the obvious risk that the failure to take a different course of action would cause the specific kind of injury alleged. *Id*. at 406; *City of Canton, Ohio v Harris*, 489 US 378, 388; 109 S Ct 1197; 103 L Ed 2d 412 (1989). Under either theory of liability, a plaintiff must also establish "an affirmative link between the policy or custom and the particular constitutional violation alleged." *Jackson*, 449 Mich at 433. Stated differently, the policy or custom must be the "moving force" behind the alleged constitutional violation. *Id*., citing *Monell*, 436 US at 694.

Accordingly, to survive summary disposition, a plaintiff must first identify and connect a policy or custom to the municipality, and then point to facts in the record demonstrating that implementation or execution of that policy or custom caused the alleged constitutional violation.

---

could well be so permanent and well settled as to constitute a "custom or usage" with the force of law. [Quoting *Adickes v S H Kress & Co*, 398 US 144, 167-168; 90 S Ct 1598; 26 L Ed 2d 142 (1970).]

A. MUNICIPAL POLICY OR CUSTOM

The first question is whether there existed a policy or custom that was attributable to the City. While the policy in *Monell* was memorialized in writing, this is not a prerequisite for a finding of municipal liability. An " 'official policy' often refers to formal rules or understandings—*often but not always committed to writing*—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v Cincinnati*, 475 US 469, 480-481; 106 S Ct 1292; 89 L Ed 2d 452 (1986) (emphasis added). Governmental customs may also give rise to liability. A "permanent and well settled" practice of governmental officials or employees may "constitute a 'custom or usage' with the force of law." *Monell*, 436 US at 691, quoting *Adickes v S H Kress & Co*, 398 US 144, 168; 90 S Ct 1598; 26 L Ed 2d 142 (1970). Thus, accepted, though unwritten, practices of executing governmental policy may give rise to liability for the purposes of *Monell*.[6]

The use of municipal resources to develop and implement practices and procedures can be evidence supporting the existence of an official policy. For example,

[6] Several federal courts have reached the same conclusion. See, e.g., *Mobley v Detroit*, 938 F Supp 2d 669, 684 (ED Mich, 2012) (finding the defendant liable based on its unwritten operating procedure of detaining, searching, and prosecuting individuals at unlicensed bars without individualized probable cause); *Hunter v Co of Sacramento*, 652 F3d 1225, 1233 (CA 9, 2011) (holding that a jury instruction defining a custom as "any permanent, widespread, well-settled practice or custom that constitutes a standard operating procedure of the defendant" was consistent with *Monell*); *O'Brien v Grand Rapids*, 23 F3d 990, 1004-1005 (CA 6, 1994) (finding illegal a municipal policy allowing the warrantless entry of homes during the management of critical incidents). Although caselaw from the federal circuits and federal district courts is not binding on this Court, it may be considered for its persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

in *O'Brien v Grand Rapids*, 23 F3d 990 (CA 6, 1994), the United States Court of Appeals for the Sixth Circuit concluded that an official policy arose from the development of a critical incident response plan that was silent as to the need for search warrants during such incidents. The defendants had hired an outside expert as a consultant to train police staff and used the expert's philosophy and teachings to develop a procedure manual. *Id*. at 1002 (opinion by Joiner, J.).[7] As a result, the defendants adopted into practice the notion that search warrants were unnecessary when responding to a critical incident. *Id*. The Sixth Circuit ruled that the commitment of money and personnel, coupled with the consistent conduct of the police officers in executing the practice, conclusively established the existence of an official policy that search warrants were unnecessary during critical incidents. *Id*. at 1003-1005.

We also believe that a municipality may be held liable for unlawful actions that it sanctioned or authorized, as well as for those that it specifically ordered. This conclusion is consistent with the controlling caselaw. In *Pembaur*, 475 US at 471, the question was whether a single verbal order from a prosecutor, who was vested with final decision-making authority, could constitute an official municipal policy. The Supreme Court observed that *Monell* had reasoned that "recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially *sanctioned or ordered*." *Id*. at 480 (emphasis added). Therefore, rather than focus on whether the prosecutor's order was a mandatory directive,

[7] Although his opinion was not the lead opinion, Judge Joiner wrote for the majority in *O'Brien* with regard to the city's liability.

the Supreme Court stressed in *Pembaur* that liability could arise from the unconstitutional conduct of an employee only if that conduct was tied to a decision of the municipality. *Id*. at 482-483. Accordingly, the Supreme Court held that liability attaches to a municipality only when "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id*. at 483-484. Once a municipality deliberately adopts a course of action, it may be held liable for its employee's violation of the law arising from the execution of that course of action.

Ordering municipal employees to engage in specific unconstitutional conduct, as occurred in *Pembaur* and *Monell*, will clearly lead to a finding of liability. However, a municipality may also deliberately choose to authorize multiple courses of action. For example, a policy could state: if X, one must then do A, B, or C. Even if only *one* of those options constitutes unconstitutional conduct, municipal liability could still result, because the mere act of sanctioning or authorizing the unconstitutional option was a deliberate choice on the part of the municipality. Moreover, a policy need not be written in mandatory terms in order to conclude that a municipality has acted. A policy may be framed in permissive language: if X, one may then do A, B, or C. An employee pursuing any of these options would still be taking an action linked to a deliberate choice of the municipality, even if no single option was mandated.[8]

[8] This conclusion is consistent with the Sixth Circuit's application of *Monell* and its progeny in *Garner v Memphis Police Dep't*, 8 F3d 358 (CA 6, 1993). In *Garner*, the defendants had a written policy that authorized, but did not require, the use of deadly force to stop certain nonviolent fleeing suspects. *Id*. at 364. Because the defendants could have adopted a more restrictive deadly force policy, their authorization of the use

The Court of Appeals in this case concluded that a municipality may not be held liable unless its policy or custom specifically directed its employees to violate a person's constitutional rights. We disagree. Authorizing or sanctioning specific conduct is also a deliberate choice of a municipality that may give rise to liability. To hold otherwise would allow a municipality to escape liability merely by reframing an obligatory policy in permissive or discretionary terms. At a practical level, it would let municipalities avoid liability for the use of unconstitutional police tactics by adopting the tactics, but stating that they are not mandatory. This would elevate form over substance in a manner that would ignore the culpability attributable to a municipality as a result of its authorization of the tactics in the first instance. Cf. *Monell*, 436 US at 691-692. We do not believe that 42 USC 1983 and the controlling caselaw permit such a loophole. Accordingly, we hold that a policy or custom that authorizes municipal employees to perform their duties in a particular manner represents a deliberate decision of the municipality and an employee's performance of his or her duties in the manner authorized may be considered acts of the municipality.

B. CAUSATION

Once a municipal policy or custom has been identified, a plaintiff must then show that the policy or custom was also the "moving force" behind the action that gave rise to

---

of deadly force to apprehend some nonviolent suspects was "a deliberate choice from among various alternatives," which made that authorization a policy with the force of law. *Id*. Similarly, the United States Court of Appeals for the Second Circuit has said that if a city "impliedly or tacitly authorized, approved or encouraged harassment" of the plaintiff by the police, then "it promulgated an official policy within the meaning of *Monell*." *Turpin v Mailet*, 619 F2d 196, 201 (CA 2, 1980).

the alleged constitutional violation. *Monell*, 436 US at 694. In other words, the policy or custom must be the cause of the violation. The causation element of claims made under 42 USC 1983 should generally "be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v Pape*, 365 US 167, 187; 81 S Ct 473; 5 L Ed 2d 492 (1961), overruled in part on other grounds by *Monell*, 436 US 658. Accordingly, "[t]raditional tort concepts of causation" inform our analysis. *Powers v Hamilton Co Pub Defender Comm*, 501 F3d 592, 608 (CA 6, 2007).

As in a tort action, determining whether causation can be established requires a two-pronged inquiry. A plaintiff must show cause in fact and proximate causation, also known as legal causation. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). The cause in fact element requires proof that " 'but for' the defendant's actions, the plaintiff's injury would not have occurred." *Id*. at 163. Determining proximate causation requires an examination of the foreseeability of consequences and of whether a defendant should be held legally responsible for the consequences of the defendant's conduct. *Id*. Thus, to establish a genuine issue of material fact, a plaintiff must point to facts from which a person could reasonably infer that the municipality's policy or custom was the cause in fact and the proximate cause of the alleged constitutional violation. See, e.g., *Tsao v Desert Palace, Inc*, 698 F3d 1128, 1146 (CA 9, 2012) ("Under *Monell*, a plaintiff must also show that the policy at issue was the 'actionable cause' of the constitutional violation, which requires showing both but for and proximate causation."), quoting *Harper v Los Angeles*, 533 F3d 1010, 1026 (CA 9, 2008); *Bielevicz v Dubinon*, 915 F2d 845, 850 (CA 3, 1990) ("A plaintiff bears the

additional burden of proving that the municipal practice was the proximate cause of the injuries suffered.").

Evidence "that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law" establishes that "the municipal action was the moving force behind the injury . . . ." *Brown*, 520 US at 405. Stated differently, when an employee acts in accordance with a policy or custom that itself authorizes unconstitutional conduct, the policy or custom is the cause of the constitutional injury. It follows that a municipal employee's actions also flow directly from the municipality when those actions are carried out in the manner that the municipality has previously authorized. Accordingly, a municipal policy or custom is the cause in fact and proximate cause of a constitutional violation if the municipality *authorizes*, but does not necessarily require, the specific conduct that constitutes the violation and its employee acted pursuant to that authorization.[9]

---

[9] This standard has been consistently applied by federal circuit courts. In *Garner*, 8 F3d at 364-365, for example, police officers were authorized, but not required, to shoot nonviolent fleeing suspects by the department's deadly force policy. The Sixth Circuit found that when an officer acted pursuant to that authorization and training, the policy was the cause of the decision to use such force as a matter of law. *Id*. at 365. In *O'Brien*, 23 F3d at 1005 (opinion by Joiner, J.), the Sixth Circuit held that causation was established by the execution of the city's critical incident response plan, which implicitly authorized warrantless entries into homes during critical incidents. The United States Court of Appeals for the Tenth Circuit has similarly stated, "[w]hen employees take actions specifically authorized by policy or custom, their actions can be fairly said to be the municipality's." *Simmons v Uintah Health Care Special Serv Dist*, 506 F3d 1281, 1284 (CA 10, 2007). The United States Court of Appeals for the Fourth Circuit has gone so far as to say that independent proof of causation is unnecessary when the conduct authorized is itself unconstitutional. See *Spell v McDaniel*, 824 F2d 1380, 1387 (CA 4, 1987) ("When a municipal 'policy or custom' is itself unconstitutional, i.e., when it directly commands or authorizes constitutional violations, *see, e.g.*, *Monell*, . . . the causal

Contrary to the Court of Appeals' holding, federal caselaw suggests that a policy or custom that gives municipal employees some discretion does not per se sever the causal link. For example, in *Garner v Memphis Police Dep't*, 8 F3d 358, 364 (CA 6, 1993), the defendants' deadly force policy did not require police officers to use deadly force to stop fleeing suspects. However, the deadly force policy was still found to be the "moving force" behind an officer's actions when the officer had been taught that it was "proper to shoot a fleeing burglary suspect in order to prevent escape" and the officer had acted pursuant to that policy. *Id*. at 364-365. Similarly, in *O'Brien*, 23 F3d at 1001, officers maintained the ultimate discretion to determine when a search warrant was necessary in a specific instance. However, when officers followed "the routine practice of not securing warrants during the management of critical incidents," it could be inferred that the policy giving rise to the practice was the moving force behind the alleged constitutional violation. *Id*. at 1004 (opinion by Joiner, J.). In *Chew v Gates*, 27 F3d 1432, 1444 (CA 9, 1994), the defendants had a policy authorizing the use of dogs to find and seize *all* concealed suspects. The officer in *Chew* released a dog because the officer had been informed that he was authorized to do so under the circumstances. *Id*. at 1445. The officer's exercise of discretion in releasing the dog did not break the causal chain where city policy had authorized him to do so. *Id*. at 1446.

As previously stated, when a municipality has approved of specific discretionary employee conduct and an employee acts accordingly, those actions are attributable to the

---

connection between policy and violation is manifest and does not require independent proof.").

municipality. It follows that, when a policy or custom authorizes specific tactics and the municipality instructs its employees regarding the use of those tactics, then that policy or custom is the cause in fact of an employee's subsequent use of those tactics. And when the tactics themselves are illegal, subsequent violations of the law arising from an employee's use of the tactics are foreseeable and flow directly from the municipality's policy or custom. Accordingly, if a policy or custom authorizes the use of a specific tactic and a police officer acts in accordance with that authorization, then the policy or custom is the cause in fact and the proximate cause of a constitutional violation arising from the use of that tactic.

IV. APPLICATION

Turning to the cases before us, we hold that the Court of Appeals erred by holding that plaintiffs failed to establish a genuine issue of material fact with regard to the existence of a municipal policy or custom and with regard to causation.

A. MUNICIPAL POLICY OR CUSTOM

We begin by noting that the City conceded during oral arguments that there is a custom within the GRPD of performing P&Ps during field interrogations and stops. The City's briefs also contain numerous references to its "P&P Custom." On the basis of these concessions alone, we conclude that the City has a practice of performing P&Ps during field interrogations and stops and that the practice legally constitutes a governmental custom within the meaning of *Monell*. Additionally, the City's response to a request for admission described its P&P practices as follows:

> . . . Defendant City admits that officers taking photos and thumbprints of individuals *is a custom or practice of the City of Grand*

> *Rapids* and has been for decades. The custom or practice has changed over those years with the evolution of technology. . . . A photograph and print might be taken of an individual when the individual does not have identification on them and the officer is in the course of writing a civil infraction or appearance ticket. *A photograph and print might be taken in the course of a field interrogation or a stop if appropriate based on the facts and circumstance of that incident*. [Emphasis added.]

Facts admitted in response to a request for admission are "conclusively established unless the court on motion permits withdrawal or amendment of an admission." MCR 2.312(D). It is also undisputed that GRPD officers are not required to make a probable cause determination before performing a P&P. Thus, the City's admission conclusively established both the existence and the City's knowledge of a longstanding "custom or practice" of performing P&Ps "in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident."

Even without the City's concessions, we find that the evidence, when viewed in the light most favorable to plaintiffs, is sufficient for reasonable minds to differ as to the existence of an official policy authorizing the allegedly unconstitutional conduct. First, the GRPD's Officer Training Tasks manual indicates the existence of an official policy. The manual states that P&Ps are *mandatory* for the issuance of a citation for driving without a license or with a suspended license if the subject has no identification. Outside of the traffic citation context, the manual lists a P&P as something to be included in a field interrogation report and lists "[p]icture and print procedures" under the heading "TRAINING CONSIDERATIONS" without further explanation. Also in the record are slides from a GRPD training presentation showing a model field interrogation report, which includes a photograph and a fingerprint card, to record the results of a P&P. Other slides contain hypothetical examples where a P&P was performed on individuals that

officers suspected of criminal activity, though the officers lacked enough information to support an arrest. This suggests that officers were specifically instructed that it was permissible to perform a P&P during field interrogations when there was not probable cause to make an arrest.

Deposition testimony further suggests the existence of an official policy. VanderKooi testified at his deposition that the P&P procedures have been in place since he joined the GRPD in 1980. When asked what GRPD policies authorize a P&P, VanderKooi explained that the GRPD's field interrogation procedures "state[] that you can take a P and P, meaning photograph and print, under circumstances where you're engaged in a contact or stop or detained somebody[;] . . . it outlines the guidelines for taking pictures and prints, as well as writing police reports." He also testified that taking a person's fingerprints is "a common investigative tactic to either incriminate or eliminate" suspicion. In Johnson's case, Bargas testified that the P&P he performed was in accordance with GRPD policy. In Harrison's case, LaBrecque testified that he was called to the location specifically to perform a P&P, which he did, despite the fact that VanderKooi apparently requested only Harrison's photograph. The officers' testimony demonstrates that they treated the GRPD's P&P procedure as an official policy.

The existence of an official policy is additionally supported by the reasonable inference that public resources were used both to develop the training materials discussed earlier and also to train officers. The GRPD is the law enforcement branch of the City, and it is funded by tax revenue that the City allocates for law enforcement purposes. Thus, the GRPD's training materials regarding its P&P procedures were funded by money from the City's coffers. This is analogous to the use of municipal resources in

O'Brien, 23 F3d at 1005 (opinion by Joiner, J.), to hire an outside consultant, hold training sessions, and develop written manuals for a critical incident response plan. Although developing the P&P procedures may have required fewer resources than the response plan in *O'Brien*, the City nonetheless dedicated money and personnel to develop and implement the P&P procedure, and therefore, a reasonable person could infer that the City made a deliberate choice to authorize the use of P&Ps during field interrogations.

The evidence thus supports plaintiffs' theory that there was an official P&P policy, i.e., a "fixed plan[] of action to be followed under similar circumstances consistently and over time." *Pembaur*, 475 US at 480-481. That the City may not have outlined in its training materials what specific facts and circumstances justify performing a P&P does not preclude a juror from inferring that the custom has, over time, evolved into an official policy within the meaning of *Monell*. Therefore, even without the City's concession, there are genuine issues of material fact regarding the existence of an official municipal policy.

B. CAUSATION

As the party opposing summary disposition, plaintiffs bear the burden of demonstrating that reasonable minds could differ about whether the P&P policy or custom was the moving force behind the alleged Fourth Amendment violations. Plaintiffs argued that performing a P&P without first making a probable cause determination violated their constitutional rights. According to plaintiffs, the City's policy is to authorize and train GRPD officers to perform a P&P without first establishing probable cause. In other words, plaintiffs allege that an affirmative municipal action, the

execution of the alleged P&P policy, violates federal law. As stated in *Brown*, 520 US at 405, proof "that the action taken or directed by the municipality . . . itself violates federal law will also determine that the municipal action was the moving force behind the injury" complained of. Thus, if the City's policy or custom is unconstitutional, *Brown* states that causation can be inferred.

The constitutionality of the City's policy or custom has yet to be determined. However, we find that the tort concepts of cause in fact and proximate causation demonstrate that the evidence permits a reasonable inference that the City's P&P policy or custom was the moving force behind the alleged Fourth Amendment violations. First, the City appears to have conceded that the policy or custom was the cause in fact of any alleged constitutional violations.[10] Additionally, circumstantial evidence indicates as much. See *Skinner*, 445 Mich 164 ("[A] plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation."). Bargas agreed that when he performed a P&P on Johnson, it was in accordance with GRPD policies. VanderKooi testified that he wanted a P&P of Harrison to preserve Harrison's identity, which is a primary reason the P&P tactic is used during field interrogations. The training slides and the GRPD manual previously discussed indicate that officers were instructed to use P&Ps

[10] The City stated the following in its supplemental brief filed in this Court:

> The City may freely concede that in the absence of the Field Interrogation P&P Custom, Appellants would not have had their pictures or prints taken during their respective investigatory stops. But . . . even if having their pictures and prints taken during a lawful stop somehow violated their constitutional rights, the Custom itself was *not* the moving force behind those violations.

during field interrogations. Additionally, the City has not argued that the officers in these cases were acting contrary to their training or GRPD policies. In the absence of evidence to the contrary, we think it more reasonable to infer that the officers performed the P&Ps in accordance with their prior training than to infer that the officers acted spontaneously. Thus, a reasonable person could infer that the City's P&P policy or custom was the cause in fact of the alleged Fourth Amendment violations.

Turning to proximate causation, we must consider whether the injury alleged was a foreseeable consequence of the City's policy or custom. See *id*. at 163. More specifically, was it reasonably foreseeable that performing a P&P in accordance with the alleged policy or custom would result in a Fourth Amendment violation? We have no difficulty concluding that the answer is yes.

No party has argued that the officers here did anything other than follow the City's P&P policy or custom. The record shows that GRPD officers were, at a minimum, authorized and trained to perform P&Ps during any field interrogation or stop in which an officer believed a P&P was appropriate. It is reasonably foreseeable that when a police department authorizes and trains its officers to use a specific investigative tactic, the officers will follow that training. While the City suggests that officers must consider the facts and circumstances of each encounter, there is no indication that the officers were instructed that probable cause of criminal conduct was a prerequisite to performing a P&P. The potential problem for the City is that performing a P&P without probable cause might violate a person's Fourth Amendment rights. US Const, Am IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."). If the nonconsensual

fingerprinting of a person without probable cause is unconstitutional, then the execution of the P&P policy authorizing such conduct would result in a constitutional violation. This is sufficient to show that reasonable minds could differ as to proximate causation.

V. RESPONSE TO THE CONCURRENCE

The concurring opinion argues that whenever a 42 USC 1983 plaintiff alleges that that the execution of a facially lawful policy or custom caused his or her injury the claim must be reviewed pursuant to the deliberate indifference standard. We find it unnecessary to adopt or reject that interpretation of the controlling Supreme Court cases. Rather, we think it sufficient for a reviewing court to determine whether the plaintiff claims that the alleged injury was caused by a municipal action that itself directed or authorized the violation of a federally protected right or whether the plaintiff claims that a municipality's inaction or omission caused municipal employees to violate the plaintiff's rights. We agree with the concurrence that if the theory of liability is premised on some variant of the latter, then the plaintiff must also show deliberate indifference to prevail.

No one disputes that we are bound to follow the decisions of the Supreme Court on matters of federal law. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). The United States Supreme Court held in *Canton*, 489 US at 388, "that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." The Supreme Court acknowledged that the training program in *Canton* was lawful, and the Court's analysis focused on the narrow issue of whether a policy of inaction (i.e., the failure to train) could serve as a basis for liability. The

phrases "facially constitutional" or "facially lawful" are noticeably absent from that opinion. And in *Brown*, 520 US at 415-416, the Supreme Court held that the county was not liable for the sheriff's isolated decision to hire a deputy without adequate screening, because the respondent had not shown that the sheriff's decision "reflected a conscious disregard for a high risk that [the deputy] would use excessive force in violation of respondent's federally protected right." The *Brown* Court, 520 US at 407, added the "facially lawful" language to its *restatement* of *Canton*'s holding, but it did not expressly rule that the deliberate indifference standard applies in every case in which a plaintiff argues that the execution of a facially lawful policy or custom caused his or her injury.[11] Instead, the Supreme Court merely said that "[c]laims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof," and that such claims require a showing of deliberate indifference. *Id*. at 406-407. See also *Connick v Thompson*, 563 US 51, 60-61; 131 S Ct 1350; 179 L Ed 2d 417 (2011) (evaluating under the deliberate indifference standard a theory of liability based on a municipality's decision not to provide training on a specific topic to certain employees). When a theory of liability is based on the *absence* of governmental action, it makes sense to more critically scrutinize claims of governmental culpability for that absence. But the Supreme Court has never explicitly required such critical scrutiny when the government

[11] Indeed, the Supreme Court was silent as to whether *Canton* or *Brown* created such a rule in its more recent decision in *Connick v Thompson*, 563 US 51; 131 S Ct 1350; 179 L Ed 2d (2011), which also involved a municipal liability claim premised on an alleged failure to train government employees.

specifically and affirmatively authorized, but did not require, its employees to engage in allegedly unlawful conduct.[12]

In this case, we have an allegation that a municipal action *did* authorize a deprivation of federal rights. Plaintiffs aver that a policy or custom affirmatively authorized the use of a specific investigative tactic during field interrogations and that GRPD officers were trained to believe that it was appropriate to use this tactic in the absence of probable cause. Under plaintiffs' theory, the municipality affirmatively authorized the precise conduct alleged to be unlawful and implemented its policy through the GRPD's training of officers to use a P&P in the manner that is alleged to be unconstitutional. Thus, whether plaintiffs specifically claim that the P&P policy is itself facially unconstitutional is beside the point for the purposes of determining whether the Court of Appeals erred, because the policy or custom identified by plaintiffs represents a municipal action that *itself* "authorized" allegedly unconstitutional conduct. See *Brown*,

[12] The concurrence cites decisions in which *Canton* and *Brown* have been interpreted as requiring application of the deliberate indifference standard in 42 USC 1983 cases involving an alleged injury arising from the execution of a facially lawful policy or custom. At least one federal circuit court has declined to adopt this interpretation. See *Christensen v Park City Muni Corp*, 554 F3d 1271, 1280 (CA 10, 2009) ("If a governmental entity makes and enforces a law that is unconstitutional as applied, it may be subject to liability under § 1983."). It also appears, for reasons that are not readily apparent, that several other federal appellate courts have not addressed the issue or have not found it necessary to expand on *Canton* and *Brown* in the manner that is suggested by the concurrence. See, e.g., *Cash v Co of Erie*, 654 F3d 324, 333-334 (CA 2, 2011); *Jenkins v Bartlett*, 487 F3d 482, 492 (CA 7, 2007); *Young v Providence*, 404 F3d 4, 25-28 (CA 1, 2005); *Daskalea v District of Columbia*, 343 US App DC 261, 269; 227 F3d 433 (2000). Beyond our belief that it is not necessary at this time to adopt or reject the concurring opinion's interpretation of *Canton* and *Brown*, we offer no further opinion as to the merits of the concurrence's position on that issue.

520 US at 406-407.[13] "Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward." *Brown*, 520 US at 404-405. "[T]he conclusion that the action taken or directed by the municipality . . . itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains." *Id*. at 405. Thus, this is a "straightforward" case more akin to *Monell* and *Pembaur* than *Brown* or *Canton*. See *id*. at 404-405.

We took this case to decide only whether any alleged violation of the plaintiffs' constitutional rights was the result of a policy or custom instituted or executed by the City. Having concluded that the Court of Appeals erred by ruling against plaintiffs on this issue, it is unnecessary at this time for us to reach the additional issue addressed by the concurring opinion.[14]

---

[13] As the concurrence acknowledges, in this Court, plaintiffs have declined to argue in the alternative that the GRPD officers inflicted the alleged constitutional injury because of some policy or custom of inaction or omission on the part of the City.

[14] Our opinion should not be read as implying that whether the policy or custom identified by plaintiffs is facially constitutional or facially unconstitutional is irrelevant to this case as a whole. The Court of Appeals has yet to determine whether a constitutional violation occurred, much less whether the City's policy or custom is facially unconstitutional, because it erroneously concluded that no such policy or custom existed. The concurring justices appear eager to indicate how they would decide certain issues that could arise on remand, and what law they would adopt in such circumstances. We merely prefer to wait until those issues are properly presented to us before we opine on the subject further.

VI. CONCLUSION

In summary, we hold that it has been conclusively established by the City's concession that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate. We further hold that, even without the City's concession as to the existence of a custom, the City's admissions, the officers' testimony, the GRPD manual, and the training materials, when viewed in the light most favorable to plaintiffs, are sufficient to create a genuine issue of material fact as to whether the City's custom has become an official policy. Genuine issues of material fact also remain concerning causation. Therefore, the Court of Appeals erred by affirming the trial court's order granting summary disposition based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City. We express no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated. Therefore, we reverse Part III of the Court of Appeals' opinion in both cases. We remand these cases to the Court of Appeals to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures.

Richard H. Bernstein
Bridget M. McCormack
David F. Viviano
Elizabeth T. Clement

STATE OF MICHIGAN

SUPREME COURT

DENISHIO JOHNSON,

Plaintiff-Appellant,

v No. 156057

CURTIS VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

KEYON HARRISON,

Plaintiff-Appellant,

v No. 156058

CURTIS VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

WILDER, J. (*concurring in judgment*).

I concur in the result reached by the majority. I write separately to fully explain the basis of my concurrence, including my understanding of the majority's holdings and the inquiry facing the Court of Appeals on remand. In my judgment, the majority opinion gives insufficient guidance to the bench and the bar concerning the state of the law governing municipal liability. I believe that we owe future § 1983 plaintiffs, who have suffered harm at the hands of a local government unit, and defendants, who need to understand the legal requirements governing their behavior, a thorough understanding of

what they must demonstrate in order to prevail. At the same time, we are also obligated to give the clearest guidance possible to lower courts, so that they may adjudicate such claims as fairly as possible.

I

This case involves the proper application of § 1 of the Ku Klux Klan Act of 1871, now codified as 42 USC 1983. Section 1983 states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The United States Supreme Court has long held that this statute provides a cause of action for those claiming the deprivation of a federal right by a "person" acting under the authority of state law. *Monroe v Pape*, 365 US 167, 171-187; 81 S Ct 473; 5 L Ed 2d 492 (1961), overruled in part on other grounds by *Monell v Dep't of Social Servs of the City of New York*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978).

In *Monell*, the Court held that a local unit of government was a "person" within the meaning of § 1983 and, as such, could be sued under the statute. *Monell*, 436 US at 690. Yet the Court also ruled that the law's text and history compelled the further conclusion that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id*. at 691. In other words, there was no respondeat superior liability under § 1983; a municipality could not be held to account solely because it employed a tortfeasor. *Id*. In order to distinguish between an injury exacted solely by an employee and one attributable

to the municipality, the Court concluded that "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id*. at 694.

Monell admittedly sketched the contours of municipal liability broadly. *Id*. at 695. And it was not until later that the Court refined the scope of municipal liability in *Pembaur v Cincinnati*, 475 US 469, 471; 106 S Ct 1292; 89 L Ed 2d 452 (1986). There, the Court examined whether a conscious decision by a municipal policymaker on a single occasion could constitute an official policy for the purposes of *Monell* liability. The Court answered yes, making it clear that *Monell* was, after all, a case about the allocation of responsibility. *Id*. at 475. *Monell*'s "policy or custom" requirement was "intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Id*. at 479-480. As a logical corollary, liability could attach on the basis of a policymaker's single decision. All that mattered was that the decision was made by an official " 'whose acts or edicts may fairly be said to represent official policy.' " *Id*. at 480, quoting *Monell*, 436 US at 694. This was true regardless of whether the policymaker's decision "officially sanctioned" or otherwise "ordered" the conduct. *Pembaur*, 475 US at 480. In either case, the policymaker's decision represented "a

deliberate choice" on behalf of the municipality to follow a particular course of action. *Id*. at 483 (opinion of Brennan, J.).[1]

Monell and *Pembaur* make it clear that "municipal liability is limited to action for which the municipality is actually responsible." *Id*. at 479-480 (opinion of the Court). Furthermore, liability premised on anything less than " 'acts or edicts [that] may fairly be said to represent official policy' " amounts to legal responsibility premised solely on a respondeat superior theory. *Id*. at 480, quoting *Monell*, 436 US at 694. But since municipalities can only act through living persons, identifying conduct properly attributable to the municipality, in contrast to conduct that is actually the fault of an employee, presents a hard conceptual problem. *Monell* and *Pembaur* were, in fact, easy cases. They involved deliberate, unlawful action on behalf of municipal policymakers. *Monell* represents the situation in which local government officials have chosen to promulgate and implement an unconstitutional directive. In that type of case, the connection between culpable municipal conduct and eventual injury is relatively clear, even though municipal employees are usually responsible for carrying out the unlawful order. Similarly, *Pembaur* embodies the situation in which a municipal policymaker has, himself or herself, chosen to violate federal law. The implementation of this unlawful decision is subsumed by the initial choice to pursue that course of action. So again, the connection between culpable municipal conduct and eventual injury is readily apparent.

[1] Justice Brennan authored the opinion of the Court in *Pembaur*, but only three justices joined Part II(B) of that opinion, *id*. at 481-484.

In *City of Canton, Ohio v Harris*, 489 US 378, 380; 109 S Ct 1197; 103 L Ed 2d 412 (1989), the United States Supreme Court addressed a harder question: whether a municipality could be liable based on its failure to act rather than its affirmative conduct. More specifically, *Canton* asked whether a failure to adequately train municipal employees could ever form the basis of *Monell* liability. *Canton* explained that a municipal policy did not have to be unconstitutional, in and of itself, to implicate *Monell*. *Id*. at 387. But the fact that an employee happened to apply a lawful policy in an unconstitutional manner could not, without more, give rise to municipal liability. *Id*. "[F]or liability would then rest [solely] on [a] respondeat superior" theory. *Id*. Accordingly, in the absence of apparent deliberate conduct, there had to be a degree of fault sufficient to infer that the municipality's inaction represented a conscious decision. *Id*. at 389. Reviewing a range of options, the Court held that inadequate training "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of [those affected]." *Id*. at 388. In the Court's view, this was consistent with the underlying thrust of *Monell* that "[o]nly where a failure to [act] reflects a 'deliberate' or 'conscious' choice by a municipality . . . can a city be liable." *Id*. at 389.[2]

[2] Although not binding on this Court, a number of federal appellate courts have since held that a municipality cannot be deliberately indifferent to a plaintiff's constitutional rights if those rights were not clearly established when the policy or custom was promulgated. See, e.g., *Arrington-Bey v City of Bedford Hts, Ohio*, 858 F3d 988, 994 (CA 6, 2017) (" '[A] municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established.' "), quoting *Hagans v Franklin Co Sheriff's Office*, 695 F3d 505, 511 (CA 6,

Canton's deliberate indifference standard was interpreted by lower federal courts to apply whenever a plaintiff alleged that a federal right was violated pursuant to a policy that was facially lawful. *Gonzalez v Ysleta Indep Sch Dist*, 996 F2d 745, 757-758 (CA 5, 1993) (reviewing decisions from various federal circuits concluding that *Canton* applied whenever a plaintiff claimed that a facially constitutional policy was applied unlawfully by a municipal employee).[3] This is understandable. If *Monell* and *Pembaur* were easy cases because the line between culpable municipal conduct and injury was clear, an allegation that a municipality has failed to prevent its employees from unlawfully executing an otherwise valid policy presents no such obvious line of accountability. For *Monell* purposes, the important question remains whether such a failure to act may constitute a deliberate attempt to commit a constitutional injury. On one side of that line

---

2012); *Szabla v City of Brooklyn Park, Minnesota*, 486 F3d 385, 393 (CA 8, 2007) (en banc) ("[W]e agree with the Second Circuit and several district courts that a municipal policymaker cannot exhibit fault rising to the level of *deliberate* indifference to a constitutional right when that right has not yet been clearly established."), citing *Townes v City of New York*, 176 F3d 138, 143-144 (CA 2, 1999); *Gonzalez v Ysleta Indep Sch Dist*, 996 F2d 745, 759-760 (CA 5, 1993) (stating that a "municipality only can be held liable for a constitutional violation caused by a municipality that manifests at least deliberate indifference to constitutional rights" and that "it may well be . . . that to be deliberately indifferent to rights requires that those rights be clearly established") (quotation marks and citations omitted); *Williamson v City of Virginia Beach, Virginia*, 786 F Supp 1238, 1264-1265 (ED Va, 1992) ("[Even if] the constitutional rights alleged by plaintiff did exist, the conclusion that they were not clearly established negates the proposition that the city acted with deliberate indifference."), aff'd 991 F2d 793 (CA 4, 1993) (Table).

[3] A law is facially unconstitutional if "no set of circumstances exists under which the Act would be valid." *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987).

lies municipal liability; on the other lies vicarious liability for the acts of employees. When viewed in this light, *Canton*'s deliberate indifference standard is simply the functional equivalent of the culpable conduct that setting an unlawful policy presupposes. It is clear from this that a municipality can only be liable for failing to prevent its employees from unconstitutionally implementing a constitutional policy if the municipality was deliberately indifferent to the risk of harm that would follow. That is, only under these circumstances is the failure to act synonymous with a "deliberate," or "conscious," unlawful choice on behalf of the municipality.

The United States Supreme Court later confirmed this understanding of *Canton*. In *Bd of the Co Comm'rs of Bryan Co, Oklahoma v Brown*, 520 US 397, 402; 117 S Ct 1382; 137 L Ed 2d 626 (1997), the Court addressed the question of whether a single hiring decision by a policymaker could be a "policy" that triggered municipal liability. The Court held that it could, in limited circumstances. And in coming to that conclusion, the Court summarized the import of its *Monell* jurisprudence:

> Where a plaintiff claims that a particular municipal action *itself* violates federal law, or directs an employee to do so, resolving these issues of fault and causation is straightforward. . . . [P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably. Similarly, the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains. . . .
>
> * * *
>
> [But c]laims not involving an allegation that the municipal action itself violated federal law, or directed or authorized the deprivation of federal rights, present much more difficult problems of proof. That a plaintiff has suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal

> culpability and causation; the plaintiff will simply have shown that the *employee* acted culpably. We recognized these difficulties in *Canton* v. *Harris* . . . . [A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice. [*Id*. at 404-405, 406-407 (citations omitted).]

According to the *Brown* Court, this legal framework reflected the rigorous standards of culpability and causation necessary to prevent municipal liability from collapsing into respondeat superior. *Id*. at 410. Anything less would ignore what was recognized in *Monell* and repeatedly affirmed: "Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights." *Id*. at 415.

This Court is bound by the decisions of the United States Supreme Court on matters of federal law. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). And municipal liability under § 1983, a federal statute, undoubtedly constitutes such a matter. Accordingly, I believe that this Court is compelled to conclude the following: if a § 1983 plaintiff alleges that a municipal policy or custom is facially *unlawful*, he or she need only show that the policy existed and that its implementation caused the violation of his or her federal rights. But if a § 1983 plaintiff alleges that a municipal policy or custom is facially *lawful*, he or she must show not only that the policy existed and that its execution caused the violation of his or her federal rights, but also that the municipality was deliberately indifferent to the unlawful way in which that policy was implemented. Only then can it be said that a municipality has made a

"deliberate or conscious choice" to direct or sanction unconstitutional conduct. *Pembaur*, 475 US at 483 (opinion of Brennan, J.).[4]

[4] Although it does not control this Court's decision, this understanding of municipal liability under § 1983 is supported by an overwhelming majority of other jurisdictions. See, e.g., *Szabla v City of Brooklyn Park, Minnesota*, 486 F3d 385, 390 (CA 8, 2007) (en banc) ("Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a 'policy' by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers."); *Kelly v Borough of Carlisle*, 622 F3d 248, 264 (CA 3, 2010) ("[I]n order to be held liable for a facially valid policy, [a] municipality must have acted with deliberate indifference."); *Gregory v City of Louisville*, 444 F3d 725, 752 (CA 6, 2006) ("Where the identified policy is itself facially lawful, the plaintiff must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences.") (quotation marks and citation omitted); *American Federation of Labor & Congress of Indus Organizations v City of Miami, FL*, 637 F3d 1178, 1187 (CA 11, 2011) ("If a facially-lawful municipal action is alleged to have caused a municipal employee to violate a plaintiff's constitutional rights, the plaintiff must establish that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. As none of the policies in question here are facially unconstitutional, this presents the plaintiffs with a difficult task.") (quotation marks and citation omitted); *Burge v St Tammany Parish*, 336 F3d 363, 370 (CA 5, 2003) ("Where . . . an alleged policy or custom is facially innocuous, establishing the requisite official knowledge requires that a plaintiff establish that an official policy was promulgated with deliberate indifference to the 'known or obvious consequences' that constitutional violations would result.") (quotation marks and citation omitted); *Gibson v Co of Washoe, Nevada*, 290 F3d 1175, 1186 (CA 9, 2002) ("[A] plaintiff can allege that through its *omissions* the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation. However, because *Monell* held that a municipality may not be held liable under a theory of respondeat superior, a plaintiff must show that the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the constitutional violation.") (citation omitted), overruled on other grounds by *Castro v Co of Los Angeles*, 833 F3d 1060 (CA 9, 2016); *Elkins v McKenzie*, 865 So 2d 1065, 1074 (Miss, 2003) ("While an unconstitutional official policy renders a municipality culpable under § 1983, even a facially innocuous

In this case, plaintiffs have gone to some length to argue in their briefing and during oral argument that the deliberate indifference standard does not apply to this particular controversy.[5] Therefore, because I agree with the majority that plaintiffs claim that the Grand Rapids Police Department had a policy or custom of completing "P&Ps"[6] during field interrogations without probable cause and that this policy caused the violation of plaintiffs' constitutional rights, in my view, under the principles just discussed, plaintiffs must eventually show not only that the complained-of municipal policy existed and that its execution by Grand Rapids Police Department officers caused

---

policy will support liability if it was promulgated with deliberate indifference to the known or obvious consequences that constitutional violations would result.") (quotation marks and citation omitted); *Peak Alarm Co, Inc v Salt Lake City Corp*, 243 P3d 1221, 1247 (Utah, 2010) ("A plaintiff may attack a municipal policy or custom in two ways. A plaintiff may attempt a facial attack on the local government's policy, alleging the policy itself is a violation of federal law. Alternatively, a plaintiff may saddle a municipality with § 1983 liability despite facially valid policies and customs by demonstrating 'deliberate indifference' on the part of the local government.") (citations omitted); *Democracy Coalition v City of Austin*, 141 SW3d 282, 290 (Tex App, 2004) ("To subject a municipality to section 1983 liability, a 'policy' must either be *per se* unconstitutional ('facially unconstitutional') or promulgated in deliberate indifference to the 'known or obvious consequences' that constitutional violations would result (a 'facially innocuous policy').") (citation omitted). But see *Christensen v Park City Muni Corp*, 554 F3d 1271, 1280 (CA 10, 2009) ("If a governmental entity makes and enforces a law that is unconstitutional as applied, it may be subject to liability under § 1983.").

[5] Plaintiffs stated in their appellate brief that the municipality's failure to act was not at issue in this case. Plaintiffs' reply brief stated that the deliberate indifference standard was inapplicable. And in oral argument, plaintiffs explicitly disavowed the need to demonstrate deliberate indifference.

[6] "P&P" means "photograph and print." It refers to the process, performed in the field, of photographing and fingerprinting individuals who have been detained by police officers.

their constitutional injuries, but also that the policy or custom was facially unconstitutional.

II

The majority suggests that in this case it is unnecessary to address whether the policy itself is facially unconstitutional: because the policy authorizes the allegedly unconstitutional conduct, the alleged constitutional violation was the result of the municipality's actions rather than a failure to train its employees. However, with respect, this is a meaningless distinction. An allegation that an employee unconstitutionally applied a facially constitutional policy is the logical equivalent of an allegation that the municipality failed to adequately train its employees in how to constitutionally apply that policy. In either case, the municipality is being held liable because of its failure to ensure that its policy is applied constitutionally. Indeed, if the municipality appropriately trained its employees as to the constitutional manner in which to apply the policy, the municipality would indisputably not be liable if an employee nonetheless applied the policy in an unconstitutional manner.[7]

[7] Recognizing that my view of the law of municipal liability is in accordance with a wide range of jurisdictions, see note 4 of this opinion, the majority notes that "several other federal appellate courts have not addressed the issue or have not found it necessary to expand on *Canton* and *Brown* in the manner that is suggested by the concurrence." *Ante* at 24 n 12. But with the exception of *Christensen v Park City Muni Corp*, 554 F3d 1271, 1278-1280 (CA 10, 2009), all of the cases cited by the majority addressed situations in which a plaintiff specifically alleged that the municipality was deliberately indifferent; none of these cases addressed whether, in the absence of a showing of deliberate indifference, a municipality may be held liable because of the unconstitutional application of a facially lawful policy by municipal employees. See *Cash v Co of Erie*,

III

Today, the majority holds (1) that "a policy or custom that authorizes municipal employees to perform their duties in a particular manner represents a deliberate decision of the municipality and an employee's performance of his or her duties in the manner authorized may be considered acts of the municipality," *ante* at 12, and (2) that "if a policy or custom authorizes the use of a specific tactic and a police officer acts in accordance with that authorization, then the policy or custom is the cause in fact and the proximate cause of a constitutional violation arising from the use of that tactic," *ante* at 16. I concur in the judgment of the majority opinion insofar as it concludes that there is a genuine issue of material fact concerning the existence of a municipal "policy or custom" and whether that "policy or custom" caused the constitutional violations alleged. Additionally, because plaintiffs do not allege deliberate indifference by the city of Grand Rapids, I would specifically direct the Court of Appeals to decide on remand whether the complained-of "policy or custom" was facially unconstitutional. Only by prevailing on that issue can plaintiffs demonstrate that the municipality is actually liable for their

654 F3d 324, 332-339 (CA 2, 2011) (identifying sufficient evidence to support a jury finding that a sheriff acted with deliberate indifference); *Jenkins v Bartlett*, 487 F3d 482, 492-493 (CA 7, 2007) (finding no genuine issue of material fact as to whether there was a constitutional violation and as to whether the municipality was deliberately indifferent); *Young v Providence*, 404 F3d 4, 26-31 (CA 1, 2005) (finding a genuine issue of material fact as to whether the training program was deficient and whether the municipality was deliberately indifferent); *Daskalea v District of Columbia*, 343 US App DC 261, 269; 227 F3d 433 (2000) (concluding that "the jury had more than sufficient evidence upon which to base its finding of deliberate indifference").

alleged injuries. In other words, only then will the connection between culpable municipal conduct and harm be sufficiently firm to implicate *Monell* liability.[8]

Kurtis T. Wilder
Stephen J. Markman
Brian K. Zahra

[8] The majority insinuates that I am going further than necessary by addressing whether plaintiffs must show that the policy or custom at issue was facially unconstitutional in order to recover from defendant. See *ante* at 25 n 14. The fundamental issue in this case is under what circumstances a municipality may be held liable for alleged constitutional violations perpetrated by its employees while acting in accordance with a municipal policy or custom. The majority opinion insinuates that if plaintiffs' constitutional rights were violated, their claims against the municipality may proceed, regardless of whether the complained-of policy or custom was facially unconstitutional. For the reasons stated in this opinion, I conclude that a municipality may only be held liable for violating an individual's constitutional rights as a result of executing a policy or custom of the municipality if the policy or custom is facially unconstitutional or if the policy or custom was enacted with deliberate indifference. This is a pure issue of law that is necessary to the disposition of this case and was briefed by both parties. Accordingly, I believe it is entirely appropriate to explain why I disagree with the majority's insinuation and to describe the analysis that the Court of Appeals should undertake on remand.

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

CURTIS VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

FOR PUBLICATION
November 21, 2019
9:00 a.m.

No. 330536
Kent Circuit Court
LC No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURTIS VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

No. 330537
Kent Circuit Court
LC No. 14-002166-NO

ON REMAND

Before: BOONSTRA, P.J., and O'BRIEN and LETICA, JJ.

BOONSTRA, P.J.

These consolidated appeals[1] are back before this Court on remand from our Supreme Court. The Supreme Court directed that we determine "whether [the challenged policies]

[1] See *Johnson v VanderKooi*, unpublished order of the Court of Appeals, issued November 30, 2018 (Docket Nos. 330536 & 330537).

violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Johnson v VanderKooi*, 502 Mich 751, 780; 903 NW2d 843 (2017). We conclude, under current caselaw, that they did not, and that plaintiffs' Fourth Amendment rights were not violated by the on-site taking of photographs and fingerprints based on reasonable suspicion (i.e., during valid *Terry*[2] stops). We therefore affirm the trial court's orders granting summary disposition in favor of defendant City of Grand Rapids (the City) in these matters.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The facts underlying these appeals are set forth in detail in our previous opinions.[3] Our Supreme Court summarized the relevant underlying facts as follows:

> These consolidated cases arise from two separate incidents where plaintiffs were individually stopped and questioned by Grand Rapids Police Department (GRPD) officers. During these stops, plaintiffs' photographs and fingerprints were taken in accordance with the GRPD's "photograph and print" (P&P) procedures. . . .
>
> * * *
>
> The P&Ps giving rise to these lawsuits took place during two separate incidents. At the time of the incidents, each GRPD patrol officer was assigned as a part of their standard equipment a camera, a fingerprinting kit, and GRPD "print cards" for storing an individual's copied fingerprints. Generally speaking, a P&P involved an officer's use of this equipment to take a person's photograph and fingerprints whenever an officer deemed the P&P necessary given the facts and circumstances. After a P&P was completed, the photographs were uploaded to a digital log. Completed print cards were collected and submitted to the Latent Print Unit. Latent print examiners then checked all the submitted fingerprints against the Kent County Correctional Facility database and the Automated Fingerprint Identification System. After being processed, the cards were filed and stored in a box according to their respective year.
>
> The first incident giving rise to these lawsuits involved the field interrogation of plaintiff Denishio Johnson. On August 15, 2011, the GRPD received a tip that a young black male, later identified as Johnson, had been observed walking through an athletic club's parking lot and peering into vehicles. Officer Elliott Bargas responded to the tip and initiated contact with Johnson. Johnson, who had no identification, told Bargas that he was 15 years old, that he

[2] *Terry v Ohio*, 392 US 1, 30; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

[3] See *Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017); *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537).

lived nearby, and that he used the parking lot as a shortcut. Bargas was skeptical of Johnson's story, and being aware of several prior thefts in and near the parking lot, he decided to perform a P&P to see if any witnesses or evidence would tie Johnson to those crimes. After Johnson's mother arrived and verified his name and age, Johnson was released. At some point during this process, Captain Curtis VanderKooi arrived and approved Bargas's actions. Johnson was never charged with a crime.

The second event occurred on May 31, 2012, after VanderKooi observed Keyon Harrison, a young black male, walk up to another boy and hand him what VanderKooi believed was a large model train engine. Suspicious of the hand-off, VanderKooi followed Harrison to a park. After initiating contact, VanderKooi identified himself and questioned Harrison. Harrison, who had no identification, told VanderKooi that he had been returning the train engine, which he had used for a school project. VanderKooi, still suspicious, radioed in a request for another officer to come take Harrison's photograph. Sergeant Stephen LaBrecque arrived a short time later and performed a P&P on Harrison, despite being asked to take only a photograph. Harrison was released after his story was confirmed, and he was never charged with a crime.

Johnson and Harrison subsequently filed separate lawsuits in the Kent Circuit Court, and the cases were assigned to the same judge. Plaintiffs argued, in part, that the officers and the City were liable pursuant to 42 USC 1983 for violating plaintiffs' Fourth and Fifth Amendment rights when the officers performed P&Ps without probable cause, lawful authority, or lawful consent. Both plaintiffs also initially claimed that race was a factor in the officers' decisions to perform P&Ps, though Johnson later dropped that claim.

In two separate opinions, the trial court granted summary disposition in favor of the City pursuant to MCR 2.116(C)(10) [no genuine issue of material fact] and in favor of the officers pursuant to MCR 2.116(C)(7) [governmental immunity], (10), and (I)(2) [opposing party entitled to judgment]. Plaintiffs individually appealed by right in the Court of Appeals. . . . [*Johnson v VanderKooi*, 502 Mich 751, 757-759; 903 NW2d 843 (2017) (footnote omitted).]

In our previous opinions, we affirmed the trial court's orders granting summary disposition in favor of the individual defendants and the City. *Johnson v VanderKooi*, 319 Mich App 589; 903 NW2d 843 (2017); *Harrison v VanderKooi*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2017 (Docket No. 330537). Relevant to the issue now before us on remand, we concluded in Part III of each opinion that "plaintiffs did not demonstrate that any of the alleged constitutional violations resulted from a municipal policy or a custom so persistent and widespread as to practically have the force of law," *Johnson*, 502 Mich at 760, and we therefore affirmed the trial court's orders granting summary disposition in favor of the City. See, e.g., *Johnson*, 319 Mich App at 626-628 (holding that "plaintiff did not establish a genuine issue of material fact that his alleged deprivation was caused by an unwritten custom or policy 'so persistent and widespread as to practically have the force of law.' "), quoting *Connick v*

Thompson, 563 US 51, 61; 131 S Ct 1350; 179 L Ed 2d 417 (2011). Plaintiffs thereafter filed a joint application for leave to appeal to our Supreme Court.[4]

Our Supreme Court directed that oral argument be scheduled on whether to grant the application or take other action, and ordered that the parties file supplemental briefs addressing "whether any alleged violation of the plaintiffs' constitutional rights were [sic] the result of a policy or custom instituted or executed by [the City]." *Johnson v VanderKooi*, 501 Mich 954; 905 NW2d 233 (2018). Subsequently, after supplemental briefing and oral argument, the Supreme Court reversed Part III of this Court's opinions, stating:

> In summary, we hold that it has been conclusively established by the City's concession that there exists a custom of performing a P&P during a field interrogation when an officer deems it appropriate. We further hold that, even without the City's concession as to the existence of a custom, the City's admissions, the officers' testimony, the GRPD manual, and the training materials, when viewed in the light most favorable to plaintiffs, are sufficient to create a genuine issue of material fact as to whether the City's custom has become an official policy. Genuine issues of material fact also remain concerning causation. Therefore, the Court of Appeals erred by affirming the trial court's order granting summary disposition based on the Court's conclusion that the alleged constitutional violations were not the result of a policy or custom of the City. We express no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated. Therefore, we reverse Part III of the Court of Appeals' opinion in both cases. [*Johnson*, 502 Mich at 781.]

Because this Court, in its earlier opinions, had not reached the issue of whether plaintiffs' Fourth Amendment rights were violated by the P&P procedure, the Supreme Court remanded these cases to this Court "to determine whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Id*. at 780. We subsequently issued an order directing the parties to file supplemental briefs "limited to issues in the scope of the remand from the Michigan Supreme Court."[5] The parties filed supplemental

---

[4] Plaintiffs did not challenge our holdings that the individual police officers were entitled to qualified immunity, that the P&Ps did not violate plaintiffs' rights under the Fifth Amendment, that the trial court properly struck each plaintiff's proposed expert witness and, in *Harrison*, that the record did not support the equal-protection claim. See *Johnson*, 502 Mich at 760 n 3. Additionally, plaintiffs did not challenge our holding in *Harrison* that the *Terry* stop in that case was itself valid, or our holding in *Johnson* that the trial court did not abuse its discretion by declining to read Johnson's general Fourth Amendment allegation as providing sufficient notice to defendants that he was asserting a challenge to the *Terry* stop in that case. These holdings stand as the law of the case. See *Bennett v Bennett*, 197 Mich App 497, 499; 496 NW2d 353 (1992).

[5] See *Johnson v VanderKooi*, unpublished order of the Court of Appeals, entered September 11, 2018 (Docket Nos. 330536 & 330537).

briefs in accordance with that order, and we have additionally considered the arguments presented in those briefs.

II. STANDARD OF REVIEW

We review de novo preserved questions of constitutional law. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 685; 819 NW2d 28 (2011).

III. ANALYSIS

A. FRAMING THE ISSUE BEFORE US

Our Supreme Court directed us to determine on remand "whether the P&Ps at issue here violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures." *Johnson*, 502 Mich at 781. The question before us, therefore, is whether the P&Ps were constitutionally permissible. In answering that question, it is necessary first to precisely identify the nature of plaintiffs' claim relating to the P&Ps. Indeed, our Supreme Court has already done so, describing plaintiffs as arguing "that the record demonstrated that the City had a policy or custom of performing P&Ps without probable cause during investigatory stops . . ., which may be based on reasonable suspicion of criminal conduct, and that execution of that policy or custom violated their Fourth Amendment rights." *Johnson*, 501 Mich at 760. In other words, the linchpin of plaintiffs' claim was, is, and remains that the City's policy or custom was unconstitutional because it allowed P&Ps to be conducted on the basis of reasonable suspicion alone, rather than on the more stringent requirement of probable cause. And in their supplemental briefs in this Court, plaintiffs similarly encapsulated their constitutional argument as follows: "Taking fingerprints without consent is a Fourth Amendment search, and thus unconstitutional when performed as part of a *Terry* stop without probable cause."[6]

---

[6] It is worth noting that the policy or custom at issue, i.e., conducting P&Ps based on reasonable suspicion alone, does not even come into play when probable cause to arrest a suspect exists. Probable cause to arrest (and to therefore conduct searches incident to arrest) provides both constitutional and statutory bases for the taking of photographs and fingerprints independent of any municipal policy or custom. See *Maryland v King*, 569 US 435, 461; 133 S Ct 1958; 186 L Ed 2d 1 (2013) ("the Fourth Amendment allows police to take certain routine 'administrative steps incident to arrest—*i.e.*, . . . book[ing], photograph[ing], and fingerprint[ing.' "); see also. MCL 28.243 (1) ("upon the arrest of a person for a felony or for a misdemeanor . . . the arresting law enforcement agency in this state shall collect the person's biometric data"); MCL 28.241a (defining "biometric data" as including "[f]ingerprint images" and "[d]igital images recorded during the arrest or booking process"); *People v Gill*, 31 Mich App 395, 399; 187 NW2d 707 (1971) ("Since the arrest was constitutionally permissible the subsequent fingerprinting was valid. . . . Given a valid arrest and providing the police conduct does not 'shock the conscience' of the court, it is entirely proper to fingerprint the accused.") (citations and footnote omitted).

We note parenthetically that Justice WILDER, joined by Justices MARKMAN and ZAHRA, stated in a concurring opinion that they would "specifically direct the Court of Appeals to decide on remand whether the complained-of 'policy or custom' was facially unconstitutional." *Johnson*, 502 Mich at 792 (WILDER, J., concurring).

> A local government entity violates § 1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. A city's custom or policy can be unconstitutional in two ways: 1) facially unconstitutional as written or articulated, or 2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers. [*Gregory v City of Louisville*, 444 F3d 725, 752 (CA 6, 2000), citing *Monell v New York City Dep't of Soc Servs*, 436 US 658, 692-94; 98 S Ct 2018; 56 L Ed 2d 611 (1978) (citations omitted).]

While the majority did not frame the issue in the fashion suggested by the concurring Justices, it stated, in response to the concurrence, that its opinion "should not be read as implying that whether the policy or custom identified by plaintiffs is facially constitutional or facially unconstitutional is irrelevant to this case as a whole," noting this Court "has yet to determine whether a constitutional violation occurred, much less whether the City's policy or custom is facially unconstitutional," *id*. at 780 n 14. The Court also noted that it was "express[ing] no opinion with regard to whether plaintiffs' Fourth Amendment rights were violated." *Id*. at 781.

We interpret our Supreme Court's direction to mean that we should determine whether the specific conduct authorized by the City's policy or custom, i.e., the conducting of P&Ps on the basis of reasonable suspicion (rather than probable cause), resulted in a constitutional violation. However, in addressing that question, we note that, in his concurring opinion, Justice WILDER observed that plaintiffs have disavowed the "deliberate indifference standard" necessary to prove their claim if the custom or policy at issue is facially lawful. *Johnson*, 502 Mich at 790 (WILDER, J., concurring); see also *Bd of County Comm'rs v Brown*, 520 US 397, 407; 117 S Ct 1382; 137 L Ed 2d 626 (1997) ("[A] plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiff's rights must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences.").[7] Specifically, Justice WILDER noted:

> Plaintiffs stated in their appellate brief that the municipality's failure to act was not at issue in this case. Plaintiffs' reply brief stated that the deliberate indifference standard was inapplicable. And in oral argument, plaintiffs explicitly disavowed the need to demonstrate deliberate indifference. [*Johnson*, 502 Mich at 790 n 5 (WILDER, J., concurring)]

Consequently, the P&P policy or custom at issue in this case is *only* relevant in the absence of probable cause.

[7] The Supreme Court majority found it "unnecessary to adopt or reject that interpretation of the controlling Supreme Court cases." *Johnson*, 501 Mich at 777.

Our review of the record confirms this. Moreover, the arguments presented by plaintiffs in their supplemental briefs on remand to this Court are, in our judgment, consistent with a purely "facial" (not an "as applied') constitutional challenge to the P&Ps.[8] That is because plaintiffs' challenge is not that a municipal policy or custom, though constitutional, was improperly applied in their particular cases in an unconstitutional manner. Rather, plaintiffs' position is that because the policy or custom authorized the conducting of P&Ps without probable cause, the policy or custom was itself necessarily and inherently, i.e., facially, unconstitutional. In other words, plaintiffs' claim is expressly that the policy or custom was itself unconstitutional *because* it authorized P&Ps on less than probable cause. That, in our judgment, is by its very nature a facial challenge.[9] While our Supreme Court majority has not yet taken a position on that characterization,[10] our judgment is that, by framing the alleged constitutional infirmity as the authorization of P&Ps in the absence of probable cause, the constitutional challenge is necessarily a facial one. A facially unconstitutional custom or policy is one that may not be applied constitutionally in any circumstance. See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007). Consequently, and because plaintiffs' framing of the issue requires us to determine whether the employment of the P&Ps without probable cause constitutes a "search" under the Fourth Amendment, we conclude that our resolution of these cases on remand requires us to determine whether the P&Ps were facially constitutional.

---

[8] We therefore agree with plaintiffs that the deliberate indifference standard does not apply here. And because plaintiffs' constitutional challenge is purely a facial one (not an as-applied one), we need not decide the question that appears to have divided our Supreme Court, i.e., whether the deliberate indifference standard necessarily applies to every as-applied constitutional challenge.

[9] We appreciate that our Supreme Court has held that "a policy or custom that authorizes, but does not require, police officers to engage in specific conduct may form the basis for municipal liability" and that "when an officer engages in the specifically authorized conduct, the policy or custom itself is the moving force behind an alleged constitutional injury arising from the officer's actions." *Johnson*, 501 Mich at 757. However, the mere fact that individual officers have discretion over whether and when to implement an allegedly constitutionally infirm policy or custom (here, to conduct a P&P without probable cause) does not transform the constitutional challenge from a facial one into an as-applied one. To the contrary, the challenge remains to the policy or custom itself, not to the manner in which it was applied in a particular circumstance. To conclude otherwise would effectively hold a municipality liable whenever an individual officer decides to implement a challenged policy or custom. As our Supreme Court has recognized, however, that is not and cannot be the law. *Johnson*, 501 Mich at 763 ("[municipal] liability may not be based on a respondeat superior theory") (citations omitted).

[10] The Supreme Court majority concluded that "whether plaintiffs specifically claim that the P&P policy is itself facially unconstitutional is beside the point for the purposes of determining whether the . . . alleged violation of the plaintiffs' constitutional rights was the result of a policy or custom instituted or executed by the City." *Johnson*, 501 Mich at 779-780. It did not, however, make any judgment about whether plaintiffs' constitutional challenge was in fact a facial one. We conclude that it is.

B. NO CONSTITUTIONAL VIOLATION

We conclude that the P&Ps were constitutionally permissible because, under current caselaw, no constitutionally-protected interest was violated.

The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures . . . ." US Const, Am IV; see also *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *People v Slaughter*, 489 Mich 302, 310-311; 803 NW2d 171 (2011).

When the police obtain physical evidence from a person, the Fourth Amendment is implicated both in the initial " 'seizure' of the 'person' necessary to bring him into contact with government agents," and in "the subsequent search for and seizure of the evidence." *United States v Dionisio*, 410 US 1, 8; 93 S Ct 764, 769; 35 L Ed 2d 67 (1973). Generally, seizure requires probable cause; however, a "*Terry* stop," in which police stop and briefly detain a person based on a "reasonable suspicion" that criminal activity may have occurred, is permissible without probable cause. *Terry*, 392 US at 30. Therefore, "[t]he brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a 'reasonably articulable suspicion' that the person is engaging in criminal activity." *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v LoCicero (After Remand)*, 453 Mich 496, 501-502; 556 NW2d 498 (1996).

A person detained during a valid *Terry* stop does not lose the Fourth Amendment's protection against unreasonable searches, which applies to all seizures of a person, including seizures that involve only a brief detention, short of a traditional arrest. *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). A search is unreasonable if it is not supported by a warrant or an exception to the warrant requirement; in either case, probable cause is still required. See *People v Davis*, 443 Mich 261, 265-266; 505 NW2d 201 (1993).[11] Plaintiffs do not dispute that they were detained in the course of a valid *Terry* stop. Therefore, the issue before us is whether either the fingerprinting portion or the photographing portion of the P&P procedure was a "search" under the Fourth Amendment. We conclude under current caselaw that they were not.

The United States Supreme Court has never explicitly decided whether the act of taking a person's fingerprints or photograph by police is "a search" under the Fourth Amendment. See *Maryland v King*, 569 US 425, 477; 133 S Ct 1958; 186 L Ed 2d 1 (2013) (SCALIA, J., dissenting) ("The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that

[11] An officer may, in the course of a *Terry* stop, conduct a "pat-down" for weapons based on a reasonable suspicion that the person is armed and dangerous. *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996). No party argues that we should analyze the P&Ps under our jurisprudence related to this "stop-and-frisk" exception.

question.").[12] We nonetheless must take heed of what the Supreme Court has said on the subject, even if in dicta. See *FEB Corp v United* States, 818 F 3d 661, 690 n 10 (CA 11, 2016) (stating that "dicta from the Supreme Court is not something to be lightly cast aside, but rather is of considerable persuasive value") (quotation marks and citations omitted); *Surefoot, LC v Sure Foot Corp*, 531 F3d 1236, 1243 (CA 10, 2008) (noting that lower federal courts are "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings") (quotation marks and citation omitted).

The Supreme Court has stated, for example, that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *United States v Katz*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967).[13] And, while the Court has stopped short of deciding the issue, it has on more than one occasion suggested that obtaining fingerprints during *Terry* stops may be permissible, at least in certain circumstances.

In *Davis v Mississippi*, 394 US 721, 727; 89 S Ct 1394; 22 L Ed 2d 676 (1969), the Court suggested, albeit in dicta, that "[d]etentions for the sole purpose of obtaining fingerprints" could, "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[14] Later, in *United States v Dionisio*, 410 US 1, 14; 93 S Ct 764; 35 L Ed 2d 67 (1973), the Court stated, in the context of a compelled voice exemplar:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably

[12] The Supreme Court in *King* held that the taking of a DNA sample by buccal swab, incident to a lawful arrest, was "like fingerprinting and photographing" a reasonable procedure that was permissible under the Fourth Amendment. *King*, 133 S Ct at 465-466.

[13] In *Katz*, the defendant successfully challenged the prosecution's introduction of "evidence of [the defendant's] end of [a] telephone conversation, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls." *Katz*, 389 US at 348.

[14] The *Davis* Court ultimately concluded that the transport of the defendant unwillingly from his home to the police station for the purposes of fingerprinting and interrogation was a "seizure" requiring probable cause. The Court explicitly did not determine whether, during a criminal investigation, fingerprints could be obtained in the absence of probable cause. *Davis*, 394 US at 728.

> expect that his face will be a mystery to the world. [*Id*., 410 US at 14, citing *Katz*, 389 US at 351.][15]

The *Dionisio* Court also likened a voice exemplar to a fingerprint, thereby again suggesting that the taking of fingerprints is not a search under the Fourth Amendment. *Id*. at 15 ("this is like the fingerprinting in *Davis*, where, though the initial dragnet detentions were constitutionally impermissible, we noted that the fingerprinting itself 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.' "), citing to *Davis*, 394 US at 727.

Still later, in *Hayes v Florida*, 470 US 811, 186-187; 105 S Ct 1643; 84 L Ed 2d 705 (1985), the Court again suggested, but did not decide,[16] that the Fourth Amendment could permit the taking of fingerprints in the field based on reasonable suspicion:

> There is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.

Several federal courts have declared that the taking of photographs and fingerprints by the police is not a search. See, e.g., *United States v Farias-Gonzalez*, 556 F3d 1181, 1188 (CA 11, 2009) ("The police can obtain both photographs and fingerprints without conducting a search under the Fourth Amendment."); *United States v Fagan*, 28 MJ 64, 66 (1989) ("[P]eople ordinarily do not have enforceable expectations of privacy in their physical characteristics which are regularly on public display, such as facial appearance, voice and handwriting exemplars, and fingerprints."); *In re Grand Jury Proceedings*, 686 F2d 135, 139 (CA 3, 1982) ("[F]ingerprints can be subject to compelled disclosure by the grand jury without implicating the Fourth Amendment . . . ."); *United States v Sechrist*, 640 F2d 81, 86 (CA 7, 1981) ("The taking of a

---

[15] In *Dionisio*, the voice exemplars were compelled by court orders issued under 18 USC 2518. The judge issuing such an order is required to determine that probable cause exists to believe that the individual affected by the order has committed, is committing, or will commit a particular offense. 18 USC 2518(3). The Court in *Dionisio* therefore did not face the issue of lack of probable cause that is present here. Nonetheless, the Court did make clear its conclusion that a grand jury's "directive to make a voice recording" did not "infringe[] upon any interest protected by the Fourth Amendment." *Dionisio*, 410 US at 15.

[16] The *Hayes* Court held that detention and transport to the police station for the purposes of fingerprinting was the functional equivalent of an arrest; it therefore did not resolve the issue of whether on-site fingerprinting during an investigatory stop was permissible under the Fourth Amendment. *Hayes*, 470 US at 186-187.

person's fingerprints simply does not entail a significant invasion of one's privacy.").[17] However, federal courts have also disapproved of the mass fingerprinting of citizens without *any* individual suspicion of criminal activity. See *United States v Mitchell*, 652 F3d 387, 411 (CA 3, 2011); *United States v $124,570 US Currency*, 873 F2d 1240, 1247 (CA 9, 1989).

This Court also has stated that "the taking of fingerprints is not violative of the prohibition against unreasonable searches and seizures," in part because "[t]here is no reasonable expectation of privacy in one's fingerprints." *Nuriel v Young Women's Christian Ass'n*, 186 Mich App 141, 146; 463 NW2d 206 (1990). The *Nuriel* Court elaborated that "the taking and furnishing of fingerprints does not represent an invasion of an individual's solitude or private affairs."

As we noted in *Johnson*, the issues before the *Nuriel* Court "did not involve police contact." *Johnson*, 319 Mich App at 617. Nonetheless, this statement from *Nuriel* is unambiguous and unqualified. *Nuriel* is binding on this Court. MCR 7.215(J)(1). Consequently, unless the above statements in *Nuriel* were dicta, *Nuriel* compels the conclusion that the taking of fingerprints as part of the P&Ps did not violate the Fourth Amendment. See *Allison v AEW Capital Management, LLP*, 481 Mich 419, 437; 751 NW2d 8 (2008).

We hold that the referenced determinations in *Nuriel* were not dicta. " '[O]biter dictum' is defined as '1. an incidental remark or opinion. 2. a judicial opinion in a matter related but not essential to a case.' " *Id*., quoting Random House Webster's College Dictionary (1997).

In *Nuriel*, this Court considered whether the trial court had abused its discretion by denying the plaintiff's motion to compel fingerprint samples from nonparties to a civil lawsuit. The rationale of the trial court in denying that motion was as follows:

> Right now, you can take this on appeal. I do not think you are entitled to take fingerprints or blood samples of third parties or parties who are not part of a lawsuit. I am concerned about those parties who might be a part of the lawsuit-but go out and take fingerprints of other parties, no. I think it is an invasion of privacy and constitutionally impermissible. [*Nuriel*, 186 Mich App at 146.]

It was in that context that this Court granted leave to consider whether the trial court had abused its discretion. And because the only rationale given by the trial court for its ruling was a constitutional one, it was necessary for this Court to assess the trial court's constitutional reasoning to determine whether it reflected an abuse of discretion.

Only after determining that the trial court's stated reasoning was erroneous as a matter of constitutional law did the *Nuriel* Court ultimately uphold the trial court's denial of the plaintiff's

[17] Decisions of lower federal courts are not binding upon this Court, but may be persuasive. See *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Although plaintiffs dismiss these cases with the cursory claim that they either "overstate the Supreme Court's dicta or did not actually decide whether fingerprinting was a search," they offer no contrary authority.

motion on the basis of a stipulated order between the parties. *Id*. at 148. We cannot conclude under the circumstances presented that this Court's ultimate reliance on an alternative basis for its ruling converted the Court's constitutional analysis into mere dicta. To hold otherwise would essentially mean that a reviewing Court's rejection of a trial court's reasoning in a "right result, wrong reason" case is always dicta, and we decline to so hold. See *Gleason v Mich Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003). Moreover, because this Court is an error-correcting court that is "principally charged with the duty of correcting errors that occurred below," *Burns v Detroit (On Remand)*, 253 Mich App 608, 615; 660 NW2d 85 (2002) (citation omitted), the *Nuriel* Court was required to correct the trial court's constitutional error, at least when allowing it to stand could have affected the plaintiff's rights in the proceedings below.[18] Consequently, although it ultimately may have made no difference to the plaintiff's case, the *Nuriel* Court's correction of the trial court's error on the constitutional issue presented was not "incidental" or superfluous to the adjudication of the plaintiff's appeal, and we therefore reject plaintiffs' characterization of it as mere dicta.

Moreover, even if the *Nuriel*'s rejection of the trial court's constitutional holding was dicta, we find the analysis persuasive. The *Nuriel* Court's analysis comports with the statements to date from the United States Supreme Court and from the other cited federal cases, as well as other statements from this Court. See *People v Hulsey*, 176 Mich App 566, 569; 440 NW2d 59 (1989) (stating that "[a] defendant has no reasonable expectation of privacy in physical characteristics such as a fingerprint or a voice print, both of which are constantly exposed to the public."); *People v Davis*, 17 Mich App 615; 170 NW2d 274 (1969) (stating that "[f]ingerprints, like a man's name, height, color of his eyes, and physiognomy, are subject to non-custodial police inquiry, report and preservation when reasonable investigation requires, even though probable cause for arrest may not exist at the moment."). We therefore conclude that the fingerprint portion of the P&P procedure employed by the officers in these appeals did not violate the Fourth Amendment.[19]

---

[18] We note that, had the *Nuriel* Court decided the constitutional issue differently and affirmed the trial court on the basis of its constitutional ruling, the plaintiff would have been prohibited from seeking to compel any fingerprint samples from any nonparties; in the words of the trial court, such a compulsion would have been "an invasion of privacy and constitutionally impermissible." *Nuriel*, 186 Mich App at 145. By affirming the trial court on the alternative ground that a stipulated order barred the particular motion before the trial court, the plaintiff was not subject to such a broad prohibition. *Id*. at 148. The *Nuriel* case therefore does not implicate this Court's general rule that we will not "unnecessarily" decide constitutional issues, see *J&J Const Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734; 664 NW2d 728 (2003), because had the *Nuriel* Court left intact the trial court's ruling, the plaintiff's rights on remand would at least potentially have been affected.

[19] Plaintiffs seem to acknowledge that, under current caselaw, a "search" generally involves an intrusion into a constitutionally-protected area, such as a person's body or home. See, e.g., *Kyllo v United States*, 533 US 27, 34; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (concluding that the use of a thermal imager to obtain information about the inside of a home was a search). They

Although plaintiffs suggest that this holding would not be consistent with *Davis*'s statement that "detention for the sole purpose of obtaining fingerprints . . . might, under narrowly defined circumstances, be found to comply with the Fourth Amendment" despite a lack of probable cause, see *Davis*, 394 US at 727, we find that argument unconvincing. First, the P&P procedure is not "a detention for the sole purpose of obtaining fingerprints;" rather, it is a tool used by police during an investigation into potential criminal activity, specifically when an individual's identity cannot be confirmed through other means. Moreover, in order to employ the P&P procedure without the consent of an individual, the officers must seize the individual in circumstances comprising, at least, a valid *Terry* stop prompted by a reasonable suspicion; this opinion does not afford, and should not be read as granting, police officers *carte blanche* to perform suspicionless P&Ps on any individual in public who catches their eye. We believe that these protections are sufficient to satisfy *Davis*'s "narrowly defined circumstances" requirement. Moreover, they comport with the Supreme Court's statement in *Hayes* that "[t]here is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act," provided that the fingerprinting is reasonably necessary to the investigation and the procedure is done "with dispatch." *Hayes*, 470 US at 186-187.

The rationale of *Nuriel* and the other cited cases applies at least equally to the taking of photographs. A person's physical appearance is certainly something "a person knowingly exposes to the public." *Katz*, 389 US at 351. Although a person does possess certain property rights to his or her likeness, at least in a commercial sense, see *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995); see also *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003), we cannot reasonably declare the taking of a photograph of plaintiffs that merely depicts them as they appeared in public to be a search under the Fourth Amendment. We therefore

---

therefore primarily confine their argument to what they term "biometric data," such as fingerprints, which they assert is constitutionally protected because its collection relies on technology other than the naked eye. However, the fact that the use of some forms of "sense-enhancing" technology has been deemed to constitute a search does not mean that *all* information that cannot be gleaned using only a human being's natural senses constitutes a search, especially when the existing caselaw points in the other direction. Moreover, the definition of "biometric data" in MCL 28.241a includes such things as scars and tattoos, which are visible to the naked eye. We conclude that the mere fact that the collection of the information at issue involves the use of technology does not, itself, convert that collection into a search under the Fourth Amendment. Plaintiffs have provided no authority to the contrary. And although plaintiffs argue that the "ever-increasing developmental pace of identification technology magnifies the civil liberties impact of concluding that using such identification technologies is not a search," we must also be cognizant of the United States Supreme Court's caution that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." *City of Ontario v Quon*, 560 US 746, 759; 130 S Ct 2619; 177 L Ed 2d 216 (2010).

conclude that the photograph portion of the P&Ps employed by the officers in these appeals also did not violate the Fourth Amendment.[20]

Because we conclude that the P&Ps did not infringe on plaintiffs' Fourth Amendment protections (given that, as plaintiffs concede, they were validly detained) we further conclude that plaintiffs have failed to satisfy their burden of demonstrating that the custom or policy at issue here, i.e., the photographing and printing of individuals during an investigatory stop based on reasonable suspicion but without probable cause, was unconstitutional.

IV. RESPONSE TO SUPPLEMENTAL AUTHORITY

While this case was pending on remand, plaintiffs filed supplemental authority directing this Court to the Sixth Circuit's recent decision in *Taylor v Saginaw*, 922 F3d 328 (CA 6, 2019). In *Taylor*, the Sixth Circuit held that the defendant's practice of making chalk marks on parked vehicles' tires to determine whether the vehicles had been parked longer than the posted time limit was a search under the Fourth Amendment. *Taylor*, 922 F3d at 322. The Sixth Circuit applied the "seldom used 'property-based' approach to the Fourth Amendment search inquiry in *United States v Jones*, 565 US 400; 132 S Ct 945; 181 L Ed 2d 911 (2012)," noting that, "under *Jones*, when governmental invasions *are* accompanied by physical intrusions, a search occurs when the government: (1) trespasses upon a constitutionally protected area, (2) to obtain information." *Id*. (citation omitted, emphasis in original).

Plaintiffs argue that fingerprinting is a physical intrusion on a constitutionally protected area and is therefore a search under *Jones*. This Court has not found, and plaintiffs have not

[20] In their supplemental brief on remand, plaintiffs briefly argue that the City's alleged *retention* of the photographs and fingerprints "causes an ongoing intrusion that is beyond the permissible scope of the stop." We conclude that this issue is beyond the scope of our Supreme Court's remand, and we therefore decline to address it. Moreover, we are cautious of the principle that we should "neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." See *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 570 n 3; 892 NW2d 388 (2016) (quotation marks and citations omitted). Whether or for how long the City may have retained plaintiffs' photographs or fingerprints is undetermined. We will not engage in fact-finding, see *Wolf v Detroit*, 489 Mich 923, 923; 797 NW2d 136 (2011), nor will we remand for additional fact-finding in the current context, see MCR 7.216(A)(5). Not only are plaintiffs' arguments conclusory and beyond the scope of the Supreme Court's remand, but plaintiffs' assertions regarding the alleged retention of the photographs and fingerprints have always been ancillary to and hinged upon plaintiffs' challenge to the photographs and fingerprints as having been obtained as a result of an unlawful search. Because we have concluded that, under our current caselaw, the P&Ps were not "searches" under the Fourth Amendment, we need not address the issue further. Any challenge to the alleged retention of the photographs and fingerprints separate and apart from whether they were unconstitutionally obtained in the first instance is an issue for another day.

provided, cases in which the "trespass" theory has been applied to the collection of fingerprints or the taking of pictures; rather, *Jones* and its progeny typically involve the government's warrantless placement of electronic monitoring devices that collect location data for persons or property, see, e.g., *United States v Powell*, 847 F3d 760 (CA 6, 2017), although the rationale of *Jones* has been applied by our Supreme Court in the context of a police intrusion onto a homeowner's property for the purpose of gathering information (i.e. "knock and talk"), see *People v Frederick*, 500 Mich 228; 895 NW2d 541 (2017). Indeed, Justice SCALIA, who authored *Jones* in 2012, observed the very next year that the Supreme Court had never explicitly decided the issue of whether the taking of fingerprints constituted a search under the Fourth Amendment. See *King*, 133 S Ct at 1987 (SCALIA, J., dissenting). In the absence of any compelling authority to the contrary, we see no reason to alter our conclusions in light of *Taylor*, which is not only not binding on this Court, *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (20043), but is significantly distinguishable, both factually and legally.

V. CONCLUSION

We conclude that the P&Ps at issue did not violate plaintiffs' Fourth Amendment rights under current caselaw, and accordingly affirm the trial court's orders granting summary disposition in favor of the City.

Affirmed.

/s/ Mark T. Boonstra
/s/ Colleen A. O'Brien

STATE OF MICHIGAN

COURT OF APPEALS

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

CURTIS VANDERKOOI, ELLIOTT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

FOR PUBLICATION
November 21, 2019

No. 330536
Kent Circuit Court
LC No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURTIS VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

No. 330537
Kent Circuit Court
LC No. 14-002166-NO

ON REMAND

Before: BOONSTRA, P.J., and O'BRIEN and LETICA, JJ.

LETICA, J. (*concurring*).

I reluctantly concur. Reviewing the federal and state caselaw relied upon by the majority, I cannot disagree with its conclusion that photographing and fingerprinting are not searches under the Fourth Amendment. I am likewise constrained by this Court's prior decisions and the

parties' earlier framing of the issues to address their current claim as solely a facial challenge.[1] Unbounded by these limitations, I would reach a different conclusion.[2]

/s/ Anica Letica

[1] I was not an original member of the panel that decided these cases.

[2] The city has since modified its P&P policy to require a *Terry* [*v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968),] detainee's consent before fingerprinting him or her and to recognize the protections afforded under the Child Identification and Protection Act, MCL 722.771 *et seq*. The act prohibits a governmental unit from fingerprinting a child with limited exceptions. MCL 722.773; MCL 722.774. A governmental unit includes "any political subdivision of the state" as well as "an authorized representative of . . . any political subdivision of the state[.]" MCL 722.772(e). A child is "any person under 17 years of age." MCL 722.772(a). The act permits a governmental unit to "fingerprint a child if fingerprints are voluntarily given with the written permission of the child and parent or guardian, upon the request of a law enforcement officer, to aid in a specific criminal investigation." MCL 722.774(1)(d). "Only 1 set of prints shall be taken and, upon completion of the investigation, the law enforcement agency shall return the fingerprint cards to the parent or guardian of the child." *Id*.