

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

<p>MAHMOUD SAAD, INDIVIDUALLY, ZIHRA SAAD, INDIVIDUALLY,</p> <p>PLAINTIFFS,</p> <p>- Vs -</p> <p>CITY OF DEARBORN HEIGHTS, ET AL.,</p> <p>DEFENDANTS.</p>	<p>CIVIL CASE No. 2:10-cv-12635-SJM-MAR</p> <p>PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR PARTIAL SUMMARY JUDGMENT UNDER RULE 56(F)</p> <p>- HONORABLE PATRICK J. DUGGAN -</p>
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- DISTRICT OF ARIZONA
- EASTERN DISTRICT OF MICHIGAN

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REQUEST
FOR PARTIAL SUMMARY JUDGMENT UNDER RULE 56(F)**

QUESTIONS PRESENTED

- I. WHETHER POINTING A PISTOL AT, THREATENING, AND TERRORIZING AN UNARMED (76) YEAR OLD CIVILIAN POSING NO THREAT OVER AN ALLEGED STOP SIGN VIOLATION INVOLVING HER SON CONSTITUTES EXCESSIVE FORCE?**
- II. WHETHER ENTERING A PRIVATE HOME WITHOUT A WARRANT OR OTHER EXIGENCY TO PURSUE A (61) YEAR OLD MAN FOR AN ALLEGED STOP SIGN OFFENSE VIOLATED THE PLAINTIFFS’ FOURTH AMENDMENT RIGHT TO BE SECURE IN THEIR HOME?**
- III. WHETHER DEFENDANT KRAUSE ESTABLISHED AN ENTITLEMENT TO QUALIFIED IMMUNITY?**
- IV. WHETHER THE JOHN DOE OFFICERS ARE LIABLE FOR THEIR ACTIVE PARTICIPATION?**
- V. WHETHER THE CITY OF DEARBORN HEIGHTS IS LIABLE FOR ITS UNCONSTITUTIONAL POLICY REGARDING THE TREATMENT OF DISABLED AND ELDERLY PERSONS?**
- VI. WHETHER THE DEFENDANTS HAVE ESTABLISHED GOVERNMENTAL IMMUNITY ON THE PLAINTIFFS’ STATE LAW COUNTS**

PERTINENT FACTS

1
2 On March 11, 2010, Defendant Krause, a Dearborn Heights Police Officer, was deployed
3 to a residential neighborhood near the intersection of Meadlawn Street and N. Melborn Street
4 and instructed to issue between 18-27 traffic tickets at that location.¹ (Ex. 1 - Depo. Krause
5 113:9 - 114:11).

6 As Joseph Saad (“Joseph”) (61), a non-party to this action, was driving home from work
7 to retrieve his wallet during lunchtime, Defendant Krause was sitting in a police cruiser he had
8 concealed alongside the driveway of a home located at the corner of Meadlawn and N. Melborn
9 (the driveway bordered the Meadlawn side) (Ex. 1 - Depo. Krause 24:6). Joseph was traveling
10 south on Rosetta Street toward the stop sign at the corner of Rosetta and Meadlawn. (Ex. 3 - Aff.
11 J. Saad) (Ex. 1 - Depo. Krause 36:13). As Joseph reached the stop sign, he recalls coming to a
12 stop and turning right (headed East) onto Meadlawn; travelling for approximately 100 feet until
13 making the immediate right turn (headed South) onto N. Melborn; and then driving
14 approximately 200 feet to pull into the driveway of his home (which was the second home from
15 the corner and next door to the property where Defendant Krause had concealed his cruiser).
16 (Ex. 3 - Aff. J. Saad). Joseph parked his car in the driveway, exited through the front door of the
17 car, and **walked** up the paved entryway to the front door. (Ex. 3 - Aff. J. Saad).

18 At no time prior to leaving his vehicle was Joseph aware of Defendant Krause
19 (apparently none of the other 24 motorists Defendant Krause issued tickets to had been either).
20 (Ex. 3 - Aff. J. Saad).

21 As Joseph approached within a few steps of his front door, Defendant Krause shouted out
22 to him. (Ex. 3 - Aff. J. Saad). Startled, Joseph turned around and saw the Defendant standing by
23 his police cruiser. The flashing lights on the cruiser, which Joseph had not seen prior to leaving
24 his vehicle,² were activated. The warning siren had not been used at all. (Ex. 3 - Aff. J. Saad).

25 Joseph stated that he was going inside his home to retrieve his wallet. (Ex. 3 - Aff. J.
26 Saad). Without warning, Defendant Krause pulled out a weapon and attempted to shoot Joseph

26

¹ Defendant Krause had already issued 24 moving violations (16 were for stop sign infractions) over an approximately 4-hour period prior to his encounter with Joseph Saad. (Ex. 2 - Krause Activity Log 3/11/2011).

² This occurred during the daytime.

1 but the weapon misfired. (Ex. 1 - Depo. Krause 57:11 - 58:3). Whether Defendant Krause drew
2 a pistol or a TASER is in dispute.³ In any event, Defendant Krause admits that Joseph believed
3 this was a pistol. (Ex. 1 - Depo. Krause 59:24 - 60:4). This prompted the (61) year old Joseph,
4 who suffers from diabetes and high blood pressure, to rush through his **unlocked** front door in a
5 panic, crying, “The police are going to shoot me.”⁴ (Ex. 3 - Aff. J. Saad) (Ex. 4 - Depo. Z. Saad
6 24:9 - 24:15) (Ex. 1 - Depo. Krause 67:20 - 67:21).

7 Joseph’s (76) year old mother, the Plaintiff Zihra Saad (“Mrs. Saad”) and his (86) year
8 old father, the Plaintiff Mahmoud Saad (“Mr. Saad”), were both inside the home. Joseph’s
9 panicked entry had caused Mrs. Saad to leave her husband’s side and to hurry to the front door.
10 (Ex. 4 - Depo. Z. Saad 24:17 - 24:20). Mr. Saad was left unsupervised, confined to his
11 wheelchair in a room at the end of the hallway leading to the front door. (Ex. 4 - Depo. Z. Saad
12 29:11)

13 When Mrs. Saad reached the front door she stepped onto the front porch. (Ex. 4 - Depo.
14 Z. Saad 25:3 - 25:12). Whether the front door was open is in dispute. Mrs. Saad testified that
15 the front door was “wide open,” but the glass screen door was closed because Joseph had run
16 through the front door into the hallway screaming the police were going to shoot him. (Ex. 4 -
17 Depo. Z. Saad 24:15 - 24:20). Defendant Krause testified that Joseph closed the front door,
18 locked it, and began shouting obscenities at him. (Ex. 1 - Depo. Krause 69:2 - 69:9).

19 Defendant Krause was a few feet away from Mrs. Saad and had his pistol aimed at her
20 demanding to be let inside the home. Fearing that Joseph might have committed a serious
21 offense, she asked the Defendant whether Joseph had killed or run anyone over. Defendant

21

³ Defendant Krause had not shouted the requisite “TASER, TASER, TASER” warning mandated by the Dearborn Heights Police Department’s TASER Guidelines. Further, during his deposition, Defendant Krause testified that the TASER misfired because it had a low battery but could not recall who serviced the unit and could not produce a receipt of service of any kind. Defendant Krause further testified that the TASER featured an LED display, which would have alerted him to a low battery prior to this incident.

⁴ Defendant Krause testified that Joseph “assaulted” him when he drew his firearm, only to retreat into the home when the firearm misfired. The Defendant further testified that even though he had been 30-40 feet away from Joseph, he managed to chase Joseph and to grab onto Joseph’s wrist after re-holstering his firearm prior to Joseph entering the home through the **unlocked** front door.

1 Krause answered, “**He ran a stop sign**” and continued to demand entry into the home. (Ex. 4 -
2 Depo. Z. Saad 25:13 - 26:2).

3 When Mrs. Saad refused to let the Defendant into her home, he threatened that she
4 “would be sorry” and that he would cause a “big scene” at the home. (Ex. 4 - Depo. Z. Saad
5 25:24 - 26:3). Mrs. Saad pleaded for Defendant Krause to calm down, to put his gun away, and
6 to just let Joseph retrieve his wallet from the basement. (Ex. 4 - Depo. Z. Saad 26:4 - 26:6).
7 Defendant Krause ignored her and requested back up officers. (Ex. 4 - Depo. Z. Saad 26:7).

8 Several minutes later, backup officers arrived at the home and “secured” the area,
9 including the backyard and rear sliding door. (Ex. 4 - Depo. Z. Saad 26:8 - 26:15). Some
10 minutes after the initial backup officers had arrived, Defendant Ross arrived with his “excited”
11 and unharnessed police dog even though **none** of the officers present had requested a canine unit.
12 (Ex. 5 - Depo. Duffany 13:25 - 14:6). Up until Defendant Ross had arrived, the scene had been
13 “semi-ordered.” (Ex. 6 - Depo. Ross 19:22 - 20:2). However, once Defendant Ross and his
14 police dog arrived, the scene became “chaotic.”

15
16 I know the canine wasn’t there when I first got there, but at some point I
17 remember hearing the dog barking. We did not specifically request canine show
18 up It was chaotic. We had a woman screaming. At some point I
19 realized canine was on scene.

20
21 (Ex. 5 - Depo. Duffany 13:25 - 14:10).

22 The police dog excited and barking loudly was brought within a few feet of a terrified
23 and screaming Mrs. Saad.

24
25 **J. Clark.** Explain the distance of the police dog with respect to where you
26 were standing?

27
28 **Z. Saad.** **Five feet, four feet . . . he was trying to hold him from me**
29 **because he was jumping to come at me, I don’t know why.**

30
31 **Z. Saad.** **He was barking so loud that I though if, if that dog got a hold**
32 **of one of us, he would shred us apart.** He was big dog to me,
33 and I’ve never been around dogs before.

34
35 **Z. Saad.** **I was terrified. I thought the world was thundering. I never**
36 **heard a dog bark like that.**

37
38 (Ex. 4 - Depo. Z. Saad 61:25 - 62:16).

1 Mrs. Saad remained at her closed front door and told the Defendants, "You're not going
2 through this door." (Ex. 4 - Depo. Z. Saad 26:16 - 26:17). When it became apparent that Mrs.
3 Saad would not let the Defendants into the home, Defendant Ross left the porch and headed
4 toward the backyard. Mrs. Saad begged Defendant Ross and the other officers not to take the
5 dog into the home because, "the old man would just die." Defendant Ross responded, "**I don't**
6 **care.**" (Ex. 4 - Depo. Z. Saad 26:13 - 26:15).

7 The Defendants then forcibly entered the home through the sliding glass doors off the
8 deck leading into the Plaintiff's kitchen. (Ex. 6 - Depo. Ross 26:20). **Later that day**, Defendant
9 Krause submitted a police report which falsely stated that Mr. Saad had "let the officers in."

10
11 **"Officers went to the home and was let in by the suspect's father."**

12
13 (Ex. 7 - Krause Report dated 3/11/2010).

14 This directly conflicted with Defendant Ross's police report, which stated, "Another back
15 up officer had found an open rear door to the home and R/O along with K-9 Ozzy entered the
16 home with the back up officers." (Ex. 8 - Ross Report dated 3/11/2010).

17 When it was learned that Mr. Saad had been confined to his wheelchair in another room
18 approximately 20-30 feet away and which was not even visible from the sliding glass doors the
19 Defendants had forced their way through, Defendant Krause changed his story at his deposition.

20
21 **Mr. Faraj.** What happened at the back door?

22
23 **Krause.** I don't know.

24
25 (Ex. 1 - Depo. Krause 84:17 - 84:18).

26 Once inside, one of the officers opened the front door and Defendant Krause entered the
27 home. (Ex. 1 - Depo. Krause 86:4 - 86:10). Approximately 8-10 officers, including Defendant
28 Ross and the barking police dog were now inside the Plaintiffs' home and had converged near
29 the top of the stairwell leading to the basement of the home. (Ex. 6 - Depo. Ross 27:7 - 27:8).⁵
30 Defendant Ross commanded the dog to bark the entire time and threatened to unleash the
31 barking dog inside the home. Fearing for his parents' safety, the (61) year old Joseph slowly

31

⁵ Defendant Krause testified that there were only a "couple" of the officers in the home.
(Ex. 1 - Depo. Krause 87:8 - 87:18)

1 walked up the stairs with his hands visible and placed out in front of him. The moment Joseph
 2 arrived at the top of the Defendants grabbed him and began shoving him toward the front door.
 3 (Ex. 4 - Depo. Z. Saad 35:3 - 35:9).

4 Mr. Saad who was confined to his wheelchair in a room less than 10 feet away from the
 5 stairwell witnessed the entire episode inside the home and heard the dog's terrifying barks.

6 While shoving Joseph out the front door, the officers began to give deliberately
 7 conflicting orders to Joseph to "put his hands up" and to "put his hands down." (Ex. 3 - Aff. J.
 8 Saad). Although it was physically impossible to comply with these instructions, Joseph,
 9 according to the officers, had "resisted" so the officers forced the (61) year old man to the
 10 ground, forcibly handcuffed him, and then "dragged" and "kicked" him into the backseat of the
 11 police cruiser. (Ex. 3 - Aff. J. Saad).

12 Mrs. Saad recalled:

13 They just start wrestling him and pulling his hand to his back and got him on the
 14 floor and put his hands behind his back and cuffed him, **and he was crying,**
 15 **hollering, you know. You're hurting me.** And they hurt him [T]hey
 16 dragged him They were rough with him . . . They forced him into the car,
 17 you know, like pushed his head down and hard shoving. . . . I just hurt in my
 18 heart.
 19

20 * * * * *

21 **It was —it was terrible how rough they were with him,** and he's heavy set and
 22 they put him in that car and all the windows closed on the car, **and he was**
 23 **screaming, I can't breathe, and they wouldn't let one of the windows down,**
 24 and I'm begging him: Please don't hurt him. Don't you have a mother? Don't
 25 hurt my son, please.
 26
 27

28 (Ex. 4 - Depo. Z. Saad 27:10 - 27:16, 35:3 - 35:9, 36:3 - 36:6;).

29 As Mrs. Saad pleaded with the officers not to hurt her son, one of the officers warned, "If
 30 you don't **behave**, you're going to go in with your son." (Ex. 4 - Depo. Z. Saad 38:10 -38:14).
 31 Fearing her own arrest, Mrs. Saad hurried back to the unsupervised Mr. Saad, only to find that he
 32 had fallen out of his wheelchair onto the floor. "He was on the floor when I went back in." (Ex.
 33 4 - Depo. Z. Saad 40:3). "[A]nd his face was really, really red . . . and I gave him an Atvian, you
 34 know, to settle him down because he was so upset." (Ex. 4 - Depo. Z. Saad 69:8 - 69:12).
 35

1 The next day, Mrs. Saad, who was told Joseph would be released, went to pick Joseph up
2 from the Dearborn Heights Police Station. When she arrived one of the officers she had
3 recognized from the day before refused to release Joseph.

4
5 [T]hey told me he was released. When I got there, they said: No, he's not. And.
6 They were very tough with words with me and I'm not used to this.

7
8 (Ex. 4 - Depo. Z. Saad 41:16 - 41:20; 43:5 - 43:7).

9 On her way home, Mrs. Saad was involved in a minor car accident she can scarcely recall
10 because of how upset she had been. (Ex. 4 - Depo. Z. Saad 44:14 - 45:9).

11 Approximately 4 months later, Mrs. Saad and her husband commenced this action. Some
12 3 days after serving the Summons and Complaint on the Defendants, several Dearborn Heights
13 police officers returned to the Plaintiffs' home and forced their way inside without a warrant for
14 a second time. Once inside, the officers beat and shot Joseph with a TASER. The officers then
15 arrested both Joseph and Mrs. Saad and brought false and malicious criminal charges against
16 them.

17 The charges against Mrs. Saad were thrown out at a preliminary examination held in a
18 City of Dearborn Heights courtroom with the Honorable Mark J. Plewicki presiding. The
19 charges against Joseph were bound over to the Wayne County Circuit Court where Joseph
20 prevailed on a Motion for Directed Verdict at the close of the Prosecution's case-in-chief.

21 In so ruling for Joseph, the Honorable Carole F. Youngblood noted:

22
23 Here, I have to say that these officers have **all** been impeached by the Preliminary
24 Exam transcripts. They have stated several times different things in their
25 testimony.

26
27 **[T]he evidence is too contradictory. There are just too many, too many**
28 **misstatements and statements contradicting each other** to find Officer Keller's
29 testimony in a light more credible. It certainly would not allow any rational juror
30 to find the defendant guilty

31
32 (Ex. 9 - Trial Transcript, 11/22/2010, People v. Joseph Saad, 204:12 - 204:17; 205:22 - 206:2).

33 Today, Mrs. Saad, who still resides in the City of Dearborn Heights because she cannot
34 afford to move her and her husband anywhere else, lives in a perpetual state of fear. She locks
35 all of her doors and windows and is terrified whenever she sees a police car. "When I see them,

1 it's like seeing, seeing the incident all over again . . . Sometimes I hate to go out because I don't
2 want to see a police car." (Ex. 4 - Depo. Z. Saad 67:21 - 67:24).

3 Mrs. Saad is now required to take multiple doses of medicine to help her cope with the
4 fear, stress, anxiety, and sleeplessness the Defendants have caused her to suffer. When Mrs.
5 Saad was asked how else the Defendants have affected her life, she answered:

6 [I] was proud of being an American, being, you know, in the area I was in, and
7 they took all that away from me, you know, and I just feel like all the trust I had
8 in them, they took all that away, and to me they were my protectors, you know.
9 The police department, if I happened to call the police, they come and they take
10 care of you, you know. Its just like my life got hopeless like. There's nobody to
11 protect me, you know.

12
13 (Ex. 4 - Depo. Z. Saad 57:5 - 57:13).

14 Mr. Saad, though he had already been suffering from Alzheimer's and dementia, lives in
15 similar fear. "[H]e started shaking from that day he heard the dog, I know that, because dog next
16 door, when he barks, he starts shaking like this, you know." (Ex. 4 - Depo. Z. Saad 48:9 - 48:11).

17 Joseph has since moved out of the home and is now unable to shoulder the responsibility
18 of caring for his (86) year old father. (Ex. 3 - Aff. J. Saad).

19 The Defendants now seek a dismissal of all of the Plaintiffs' claims against them'
20 asserting that their conduct comported with the United States Constitution and that they
21 discharged their duties in good faith.

22 STANDARD OF REVIEW

23 The Plaintiffs concur with the standard of review set forth in the Defendants' Motion and
24 add only that a court must accept as true the non-movant's evidence and draw "all justifiable
25 inferences" in the non-movant's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S. Ct.
26 2505, 91 L. Ed. 2d 202 (1986).

27 PERTINENT LAW

28 **A. Title 42 U.S.C. § 1983**

29 Title 42 U.S.C. § 1983 ("Section 1983") provides:

30 Every person who, under color of [law], subjects, or causes to be subjected, any
31 citizen of the United States or other person within the jurisdiction thereof to the
32 deprivation of any rights, privileges, or immunities secured by the Constitution
33 and laws, shall be liable to the party injured in an action at law, suit in equity, or
34 other proper proceeding for redress
35

1 Section 1983 was enacted to aid in the “preservation of human liberty and human rights.”
2 *Gomez v. Toledo*, 446 U.S. 635, 638, 100 S. Ct. 1920, 1922, 64 L. Ed. 2d 572, 576 (1980); *Owen*
3 *v. City of Independence*, 445 U.S. 622, 636, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). The
4 purpose of Section 1983 is to deter state actors from using their badge of authority to deprive
5 individuals of their federally guaranteed rights and to provide relief to victims if such deterrence
6 fails. *McKnight v. Rees*, 88 F. 3d 417 (6th Cir. 1996). Deterrence of future abuses of power by
7 persons acting under color of state law is an important purpose of this section. *City of Newport*
8 *v. Fact Concerts, Inc.* 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981). As remedial
9 legislation, Section 1983 is to be construed generously to further its primary purpose. *Owen*, 445
10 U.S. at 636.

11 To succeed on a 42 U.S.C. § 1983 (“§ 1983”) claim, a plaintiff must show that the
12 defendant: (1) acted under color of state law and (2) deprived plaintiff of his or her rights under
13 the United States Constitution. *Upsher v. Grosse Pointe Pub. Sch. Sys.*, 285 F.3d 448, 452 (6th
14 Cir. 2002).

15 ARGUMENT

16 **I. THE DEFENDANTS VIOLATED THE PLAINTIFFS’ FOURTH AMENDMENT** 17 **RIGHT TO BE FREE FROM EXCESSIVE/UNREASONABLE FORCE AND ARE** 18 **THEREFORE LIABLE TO THE PLAINTIFFS UNDER 42 U.S.C. § 1983**

19 **A. Excessive Force**

20 An excessive force claim is analyzed under the Fourth Amendment “objective
21 reasonableness” standard. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 105 L. Ed. 2d
22 1443 (1989). When fact finders are asked to determine whether the force used to effect an arrest,
23 search, or other seizure was “objectively unreasonable,” *Graham* requires them to balance “the
24 nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the
25 countervailing governmental interests at stake.” *Graham* at 396.

26 The reasonableness of a particular use of force is objective and “must be judged from the
27 perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight.
28 *Graham* at 396. The calculus of reasonableness must embody allowance for the fact that police
29 officers are often forced to make split-second judgments-in circumstances that are tense,
30 uncertain, and rapidly evolving- about the amount of force that is necessary in a particular
31 situation. *Graham* at 396-97.

1 The Supreme Court has directed that the pertinent considerations are:

- 2 (1) The severity of the crime at issue;
- 3 (2) Whether the suspect poses an immediate threat to the safety of the officers or
4 others; and
- 5 (3) Whether he is actively resisting arrest or attempting to evade arrest by flight.

6 *Graham* at 396.

7 **1. Excessive Force Does Not Require A “Touching”**

8 The Defendants contend (while citing no case law in support) that since none of the
9 officers “touched” Mrs. Saad or her husband, the Plaintiffs’ excessive force claims must be
10 dismissed. Def. Motion at p. 6. The Supreme Court rejected this contention some 40 years ago
11 and as recently as 2007. A police officer’s mere show of force or authority is subject to Fourth
12 Amendment reasonableness requirements even where no physical force is used. *Brendlin v.*
13 *California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L.Ed. 2d 132 (2007); *Florida v.*
14 *Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991); *Terry v. Ohio*, 392 U.S.
15 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

16 **2. Pointing A Gun At An Unarmed Civilian Posing No Threat**
17 **Constitutes Excessive Force**

18 Virtually every Circuit Court holds that pointing gun at unarmed civilians constitutes
19 excessive force. See *Binay v. Bettendorf*, 601 F.3d 640 (6th Cir. 2010) (pointing a gun at
20 unarmed suspect who poses no danger constitutes excessive force); *Hopkins v. Bonvincino*, 573
21 F.3d 752, 776 (9th Cir. 2009) (clearly established that pointing gun at unarmed misdemeanor
22 arrestee officer knew was not a threat to officer safety, who was outnumbered by officers, was
23 excessive); *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992) (pointing gun at nine-year old
24 boy is excessive force); *Baker v. Monroe Township*, 50 F.3d 1186 (3rd Cir. 1995) (reversing
25 summary judgment in favor of defendant where police officers handcuffed and pointed guns at
26 persons not under suspicion during drug raid);

27 The Fifth Circuit has acknowledged that:

28
29 [A] police officer who terrorizes a civilian by brandishing a cocked gun in front of
30 that civilian's face may not cause physical injury, but he has certainly laid the
31 building blocks for a section 1983 claim against him.

32
33 *Petta v. Rivera*, 143 F.3d 895, 905 (5th Cir.1998) (emphasis in original).

1 This is especially true where, as here, an officer is not entitled to arrest or detain the
 2 plaintiff. *Reese v. Hebert*, 527 F.3d 1253, 1272 (11th Cir. 2008) (even de minimus force violates
 3 Fourth Amendment if officer is not entitled to arrest or detain plaintiff).

4 **C. The Defendants' Of Force Was Objectively Unreasonable**

5 **1. Holding Mrs. Saad At Gunpoint Was Objectively Unreasonable**

6 Defendant Krause pointed a loaded pistol at Mrs. Saad from and demanded to be let into
 7 her home over what was at worst an alleged stop sign infraction by her (61) year old son
 8 occurring less than 200 feet from her home.

9
 10 **Mrs. Saad.** And I asked him: What's the matter? What's going on? Why you
 11 - - why you pointing your gun and you want to shoot? What's the
 12 matter? What's going on? Did he kill somebody? Did he run over
 13 someone?
 14

15 He said: He ran a stop sign.

16
 17 (Ex. 4 - Depo. Z. Saad 25:13 - 25:16).

18 When Mrs. Saad refused to let Defendant Krause into her home, the Defendant
 19 threatened that she would be sorry.

20
 21 **Mrs. Saad.** He said: Let me in.

22
 23 I said: No, I'm not letting you in. You got your gun out and you
 24 want to kill my son and I'm gonna let you in? No.

25
 26 And he said: You'll be sorry.

27
 28 (Ex. 4 - Depo. Z. Saad 25:25 - 26:3).

29 Defendant Krause provided an essentially identical recollection.

30
 31 **Krause.** [A]nd then his mother opened the door and came outside.

32
 33 **Krause.** **I had my pistol drawn at that point . . .**

34
 35 **Mr. Faraj.** [D]id you continue to engage Mrs. Saad?

36
 37 **Krause.** **I was talking to her.**

38
 39 **Krause.** [I] was just asking her to have her son come out and please, you
 40 know **you're going to make this into a bigger deal** than what it
 41 needs to be, you know, ask him to come out, **there's going to be**

1 **several cars show up, police officers, you know, its going to be**
 2 **a big scene out here** and we don't need this.

3
 4 **Faraj.** What was she telling you as you said this to her?

5
 6 **Krause.** [S]he was just pleading with me, please, please, no, no, go away,
 7 please. [J]ust kept repeating please, please, no.

8
 9 (Ex. 1 - Depo. Krause 78:23 - 79:22, 81:15 - 81:22, 82:1 - 82:4).

10 **2. Terrorizing Mrs. Saad With A Barking Police Dog Was Objectively**
 11 **Unreasonable**

12 Defendant Krause followed up on his threat. Minutes later, several armed police officers
 13 arrived and a large unharnessed police dog was brought within a few feet of Mrs. Saad to
 14 frighten her into letting the Defendants inside of her home.

15
 16 **Mrs. Saad.** Within minutes of talking like this, the neighborhood was - - our
 17 street is three quarters of a block. It was full on both sides of
 18 police cars, and they were running out of the car, out of their cars,
 19 with a big dog, well, I thought it was big anyway; it's a German
 20 shepherd, **and I begged them not to take this dog into our home**
 21 **because the old man would just die.** And [Defendant Ross] says
 22 **he didn't care.**

23
 24 **J. Clark.** Explain the distance of the police dog with respect to where you
 25 were standing?

26
 27 **Z. Saad.** **Five feet, four feet,** I don't know, and I—you know, **he was**
 28 **trying to hold him from me because he was jumping to come at**
 29 **me, I don't know why.**

30
 31 **Z. Saad.** **He was barking so loud** that I though if, if that dog got a hold of
 32 one of us, he would **shred us apart**. He was big dog to me, and
 33 I've never been around dogs before.

34
 35 **Z. Saad.** **I was terrified. I thought the world was thundering. I never**
 36 **heard a dog bark like that.**

37
 38 (Ex. 4 - Depo. Z. Saad 26:8 - 26:15, 62:6 - 62:7, 62:14 - 62:16).

39 Every *Graham* factor supports a finding that the Defendants used objectively
 40 unreasonable force against the Plaintiffs. First, there was no crime at issue involving Mrs. Saad.
 41 The Defendants created this firestorm over an alleged stop sign infraction by her son which
 42 occurred less than 200 feet from the home. Second, Mrs. Saad, a (76) year old woman (suffering

1 knee problems no less), posed absolutely no threat to the Defendants to warrant being held and
2 threatened at gunpoint or to warrant being terrorized by an unharnessed police dog that was
3 being commanded to bark at her. (Ex. 6 - Depo. Ross 34:24 - 35:12). Third, Mrs. Saad was not
4 resisting an arrest or attempting to evade an arrest. In fact, neither had Joseph been.

5 The only legitimate “governmental interest at stake” was the apprehension of Mrs. Saad’s
6 son Joseph, an unarmed (61) year old man who was inside the home and who posed no threat of
7 escape or flight, and, who at worst, had committed the minor offense of “disobeying” a stop sign
8 less than 400 feet from his home. There is simply nothing to suggest that pointing a gun at a (76)
9 year-old woman and terrorizing her with a barking police dog furthered this interest. The Fourth
10 Amendment does not yield under these circumstances.

11 For the foregoing reasons, the Plaintiffs respectfully request that this Honorable Court
12 deny the Defendants’ Motion for Summary Judgment on Count One (42 U.S.C. § 1983 -
13 Excessive Force).

14 **D. The Plaintiffs Are Entitled To Summary Judgment**

15 The essential facts are not in dispute.⁶ Defendant Krause held Mrs. Saad at gunpoint
16 while he threatened that he would cause a “big scene.” Further, a large unharnessed police dog
17 under Defendant Ross’s control was barking and lunging at Mrs. Saad a few feet away from her.
18 All of this was over an alleged stop sign infraction by the (61) year old Joseph. This is
19 objectively unreasonable under any standard. As the Eleventh Circuit has acknowledged, even de
20 minimus force violates the Fourth Amendment if the defendant is not entitled to arrest the
21 plaintiff. Accordingly, the Plaintiffs hereby respectfully request that this Honorable Court enter
22 a judgment under Fed. R. Civ. P. 56(f) regarding the Defendants’ liability under Section 1983 for
23 using excessive/unreasonable force against the Plaintiffs in violation of the Fourth Amendment.

23

⁶ The only fact that would appear to be in dispute by the Defendants is whether Defendant Krause was affirmatively threatening Mrs. Saad while holding her at gunpoint and demanding to be let into the home. Defendant Krause’s own testimony establishes that he was. Defendant Krause testified that he was just asking Mrs. Saad to “please” have Joseph come out while his pistol was drawn. However, Defendant Krause further testified that [Mrs. Saad] was “just pleading with me, please, please, no, no.” What Defendant Krause described is the probable response from someone being threatened, not someone who is being asked politely to do something.

1 **II. THE DEFENDANTS VIOLATED THE PLAINTIFFS' FOURTH AMENDMENT**
2 **RIGHT TO BE SECURE IN THEIR HOME FROM UNREASONABLE SEARCH**
3 **AND SEIZURE AND ARE THEREFORE LIABLE TO THE PLAINTIFFS**
4 **UNDER 42 U.S.C. § 1983**

5 **A. The Fourth Amendment Guarantees The Right To Be Secure In**
6 **One's Home**

7 “Physical entry of the home is the chief evil against which the wording of the Fourth
8 Amendment is directed.” *Welsh v. Wisconsin*, 466 U.S. 740, 104 S. Ct. 2091, 80 L. Ed. 2d 732
9 (1984). In terms that apply equally to seizures of property and to seizures of persons, the Fourth
10 Amendment has drawn a firm line at the entrance to the house. *Payton v. New York*, 445 U.S.
11 573, 590, 100 S. Ct. 1371, 1382, 63 L. Ed. 2d 639 (1980). It is a basic principle of Fourth
12 Amendment law that searches and seizures inside a home without a warrant are presumptively
13 unreasonable. *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947, 164 L. Ed. 2d
14 650, 657 (2006).

15 “The warrant requirement ranks among the fundamental distinctions between our form of
16 government where officers are under the law, and the police-state where they are the law.”
17 *Kentucky v. King*, 179 L. Ed. 2d 865, 884 (2011); quoting, *Johnson v. United States*, 333 U.S. 10,
18 17, 68 S. Ct. 2408, 57 L. Ed. 436 (1948).

19 **B. “Exigent Circumstances”**

20 Warrants are generally required to search a person's home or his person unless “the
21 exigencies of the situation” make the needs of law enforcement so compelling that the
22 warrantless search is objectively reasonable under the Fourth Amendment. *King* 179 L. Ed. 2d at
23 884; *Mincey v. Arizona*, 437 U.S. 385, 393-394, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290, 301
24 (1978). The burden of proof is on the government to demonstrate an exigency. *United States v.*
25 *Morgan*, 743 F.2d 1158, 1162 (6th Cir. 1984), citing, *Vale v. Louisiana*, 399 U.S. 30, 34, 90 S.
26 Ct. 1969, 1972, 26 L. Ed. 2d 409, 413 (1970).

27 The Supreme Court has identified four instances that may give rise to exigent
28 circumstances justifying the warrantless entry of a home: (1) “hot pursuit” of a fleeing suspect,
29 (2) the need to prevent imminent destruction of evidence, (3) the need to prevent a suspect's
30 escape, and (4) a risk of danger to the police or others (e.g., to administer “emergency aid” to an
31 occupant or to prevent death/serious harm to police or occupant). *King*, 179 L. Ed. 2d at 884.

1 The “exigent circumstances” exception is unavailable when the police **create** or
2 **manufacture** the exigency by engaging or threatening to engage in conduct that violates the
3 Fourth Amendment. *King*, 179 L. Ed. 2d 865.

4 The Sixth Circuit has set forth three additional factors a court may use when inquiring
5 whether “exigent circumstances” existed: (1) whether the government has demonstrated that the
6 need for immediate action would have been defeated if the police had taken time to secure a
7 warrant; (2) whether the government’s interest is sufficiently important to justify a warrantless
8 search; and (3) whether the defendant’s conduct diminished the reasonable expectation of
9 privacy he would normally enjoy. *United States v. Rohrig*, 98 F.3d 1506, 1518 (6th Cir. 1986).

10 C. The “Hot Pursuit” Exigency

11 The Defendants use the term ‘hot pursuit of a fleeing felon’ as a bright-line approach to
12 justify the warrantless entry of a private residence. The Defendants misconstrue the law. The
13 Supreme Court has repeatedly held that the pertinent consideration is the “gravity of the
14 underlying offense,” whether a felony or not.

15 1. The “Fleeing Felon” Distinction

16 The “felony” distinction traces its genesis to the need to guard against “abusive or
17 arbitrary enforcement and [to ensure] that invasions of the home occur only in case of the most
18 serious crimes.” *Welsh*, 466 U.S. at 750, n. 12, citing, *Payton* 445 U.S. at 616-617 (White, J.,
19 joined by Burger, C.J., & Rehnquist, J., dissenting). However, since *Payton* was decided,
20 arbitrary state laws have undermined the “felony” distinction. Many offenses, which were
21 classified as either misdemeanors, or non-existent, at common law, began to be classified as
22 felonies. This was not lost on our Supreme Court.

23 In *Tennessee v. Garner*, the State argued that the use of deadly force to pursue an
24 apparently unarmed felon was justified under the “fleeing felon” exception. 471 U.S. 1, 105 S.
25 Ct. 1694, 85 L. Ed. 2d, 1 (1985). The Supreme Court rejected the State’s argument, holding that
26 the use of deadly force to prevent the escape of an apparently unarmed suspected felon violated
27 the Fourth Amendment.

28
29 [T]oday the distinction [between a felony and misdemeanor] is minor and often
30 arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common
31 law are now felonies They have also made the assumption that a “felon” is
32 more dangerous than a misdemeanant untenable.
33

1 *Tennessee* at 14.

2 **2. The “Gravity Of The Underlying Offense” Approach**

3 In *Welsh v. Wisconsin*, the Supreme Court directed that the pertinent inquiry is the
4 “gravity of the underlying offense.”

5
6 [I]t is difficult to conceive of a warrantless home arrest that would not be
7 unreasonable under the Fourth Amendment when the underlying offense is
8 extremely **minor**.

9
10 We therefore . . . hold that an important factor to be considered when determining
11 whether any exigency exists is the **gravity** of the underlying offense for which the
12 arrest is being made. . . . [A]pplication of the exigent-circumstances exception in
13 the context of a home entry should rarely be sanctioned when there is probable
14 cause to believe that only a minor offense, such as the kind at issue in this case,
15 has been committed.

16
17 *Welsh* at p. 753. See also, *Brigham City* at 405 (important factor to be considered when
18 determining whether any exigency exists is the gravity of the underlying offense for which the
19 arrest is being made).

20 When the government’s interest is only to arrest for a minor offense, that presumption of
21 unreasonableness is difficult to rebut because the police already bear a heavy burden when
22 attempting to demonstrate an urgent need that might justify warrantless searches or arrests.
23 *Welsh*, 466 U.S. at 743, 749-750.

24 In an oft-cited concurrence in the 1948 Supreme Court case *McDonald v. United States*,
25 Justice Jackson explained the rationale underpinning the “gravity of the underlying offense”
26 approach:

27
28 **This method of law enforcement displays a shocking lack of all sense of**
29 **proportion.** Whether there is reasonable necessity for a search without waiting to
30 obtain a warrant certainly depends somewhat upon the **gravity of the offense**
31 thought to be in progress as well as the hazards of the method of attempting to
32 reach it **It is to me a shocking proposition that private homes, even**
33 **quarters in a tenement, may be indiscriminately invaded at the discretion of**
34 **any suspicious police officer engaged in following up offenses that involve no**
35 **violence or threats of it.** While I should be human enough to apply the letter of
36 the law with some indulgence to officers acting to deal with threats or crimes of
37 violence which endanger life or security, it is notable that few of the searches
38 found by this Court to be unlawful dealt with that category of crime **I do not**
39 **think its suppression is more important to society than the security of the**
40 **people against unreasonable searches and seizures. When an officer**

1 **undertakes to act as his own magistrate, he ought to be in a position to justify**
 2 **it by pointing to some real immediate and serious consequences if he**
 3 **postponed action to get a warrant.**

4
 5 335 U.S. 451, 459-460, 69 S.Ct. 191, 195-196, 93 L.Ed. 153 (1948).

6 The bright-line approach advanced by the Defendants simply does not exist, and, in any
 7 event, would undermine decades of Supreme Court precedent. Their approach treats the “hot
 8 pursuit of a fleeing felon” as the rule and the Fourth Amendment as the exception.

9 **D. The Defendants Cannot Justify A Warrantless Home Entry On The**
 10 **Basis A Minor Traffic Offense**

11 Defendant Krause **admits** that a police officer is prohibited from entering a private
 12 residence absent a warrant to pursue a suspect for a **stop sign** infraction.

13
 14 **Mr. Faraj.** So when are you not allowed to enter a private residence, in
 15 pursuit, if at all?

16
 17 **Krause.** On a civil infraction.

18
 19 **Mr. Faraj.** Give me an example.

20
 21 **Krause.** A **stop sign ticket**.

22
 23 (Ex. 1 - Depo. Krause 91:19 - 91:23).

24 **D. The Defendants Cannot Justify Their Warrantless Home Entry On**
 25 **The Basis Of An Alleged MCL 750.81d Violation**

26 The Defendants contend that Joseph was a “fleeing felon” because he “failed to obey
 27 repeated command to go back to his car” and therefore committed a felony under MCL 750.81d
 28 (Michigan’s “resisting and obstructing” statute). There are many things wrong with this
 29 contention.

30 First, the underlying facts are in dispute. Joseph contends that he was not aware of
 31 Defendant Krause prior to exiting his vehicle.

32 The objective evidence supports this:

33 (1) Joseph had not passed Defendant Krause’s police cruiser prior to turning
 34 onto N. Melborn. (Ex. 1 - Depo. Krause 39:13 - 39:20).

35 (2) Defendant Krause was not in a full-marked police cruiser; he was in a
 36 “**semi-marked**” vehicle. (Ex. 1 - Depo. Krause 42:1 - 42:2).

1 (3) Defendant Krause succeeded in **concealing** the “**semi-marked**” vehicle as
2 evidenced by the number of traffic citations he managed to issue.

3 (4) Defendant Krause contends that Joseph “sped up” after “seeing” the
4 Defendant. (Ex. 1 - Depo. Krause 40:8 - 40:15). But that when Joseph
5 exited his vehicle he “walked” toward the front door. (Ex. 1 - Depo.
6 Krause 47:3, 53:14).

7 See, *Blanchester v. Hester*, 81 Ohio App.3d 815, 612 N.E.2d 412 (1992) (Distance traveled after
8 first alleged encounter with police was extremely short, defendant operated vehicle into his own
9 driveway, and had stopped the vehicle voluntarily, if the defendant was attempting to elude the
10 officer he had an “**unusual way of going about it**”).

11 Further, if as Mrs. Saad testified, the front door of the home were open, this would lend
12 credence to Joseph’s account because if he were attempting to flee Defendant Krause he would
13 not have left the front door open.

14 Second, even if Joseph violated MCL750.81d, which he did not, the gravity of this
15 offense would be exceedingly minor. And since the Defendants have not provided any evidence
16 to demonstrate an “immediate” or “urgent” need which justified the forced, warrantless entry of
17 the Plaintiffs’ home, an alleged MCL 750.81d violation standing alone would be insufficient as a
18 matter of law under *Welsh v. Wisconsin* to rebut the “heavy presumption” of unreasonableness
19 attendant to the “hot pursuit” of a minor offense.

20 Third, Joseph was unaware of any offense which might have given him cause to elude
21 Defendant Krause as he was not committed an arrestable offense—even if indeed committed the
22 alleged stop sign infraction. On this point—the law in Michigan is clear: **flight alone does not**
23 **justify an arrest and does not constitute “resisting” or “obstructing” an officer.** *People of*
24 *the State of Michigan v. Strelow*, 96 Mich. App. 182, 189; 292 N.W.2d 517, 520 (1980) (flight
25 alone does not justify an arrest, particularly when defendant is not fleeing the scene of a crime;
26 therefore, defendant who ran away from police officer who had followed him home over an
27 alleged speeding violation and who was unaware of any violation which would have given him
28 cause to elude the officer could not be guilty of “resisting an officer” fleeing into his home),
29 citing, *People v. Tebedo*, 81 Mich. App. 535; 265 N.W.2d 406 (1978); *People v. Dogans*, 26
30 Mich. App. 411; 182 N.W.2d 585 (1970).

1 The Defendants know this.

2

3 **Mr. Faraj.** Because its not illegal to flee a police officer?

4

5 **Ross.** Right.

6

7 **Mr. Faraj.** Sometimes people flee for reasons, but you've got to know what
8 the reason is right?

9

10 **Ross.** Right.

11

12 (Ex. 6 - Depo. Ross 29:16 - 29:20).

13 Fourth, as aforementioned, it was Defendant Krause's act of pointing his weapon at
14 Joseph which prompted the (61) year old man to rightfully flee into his home for safety. Even if
15 Defendant Krause had drawn a TASER, this would have directly violated the City of Dearborn
16 Heights Police Department's official use of force policy (the "Policy").

17

18 The TASER may be used in situations where a subject is threatening himself, an
19 officer or another person and other means of controlling the subject are not
20 reasonable or could cause injury to the officer, the subject or others.

21

22 (Ex. 10 - Chapter 7, Response to Aggression/Resistance, TASER Guidelines, Dearborn Heights
23 Police Department Operational General Order).

24 Further, the Policy defines a TASER as a "less lethal munition." Under the Policy less
25 lethal munitions can only be used after "reasonable efforts to control a violent individual have
26 failed." (Ex. 10 - Chapter 7, Response to Aggression/Resistance, Authorized Less Lethal
27 Weapon Deployment and Use).

28 Here, Defendant Krause testified that he drew his weapon on Joseph **prior** to the alleged
29 "assault" and "wrist-grip," and that Joseph had fled when the weapon misfired. (Ex. 1 - Depo.
30 Krause 57:11 - 60:13). It is highly questionable proposition that Joseph would have assaulted
31 Defendant Krause after the Defendant had drawn what Joseph (admittedly) reasonably believed
32 was a pistol, only to abandon the assault when the weapon misfired.

33 **F. *Santana, Moosdorf, and Schmidt Are Inapplicable***

34 The Defendants misplace reliance on *Santana*, *Moosdorf*, and *Schmidt*, cases that each
35 turned on an immediate need to preserve evidence.

36 In *Santana*, there was an immediate need to prevent the destruction of contraband.

1 Once Santana saw the police, there was likewise a realistic expectation that any
2 delay would result in destruction of evidence.

3
4 *United States v. Santana*, 427 U.S. 38, 43, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976).

5 In *Moosdorf*, the defendants pursued the plaintiff for a suspected “operating a motor
6 vehicle under the influence of liquor offense” (an arrestable offense) and seized the plaintiff
7 while he was standing inside his open storm door (a “public place”).

8
9 Notably, Plaintiff did not remain behind his storm door during his interaction with
10 the Officers. Instead, he repeatedly came outside, engaged in argument with the
11 Officers, and then retreated indoors.

12
13 (Ex. 11 - *Moosdorf v. Krot*, 2006 U.S. Dist. LEXIS 65609, at *19-20 (E.D. Mich. 2006)).

14 In *Schmidt*, the Eighth Circuit’s decision turned on the fact that Schmidt, a minor who
15 appeared under the influence of alcohol, had kicked a police officer (both arrestable offenses),
16 and voluntarily come back outside of his home to yell at the officer only to retreat when the
17 officer approached thereby diminishing his reasonable expectation of privacy.

18 Here, no immediate or urgent need to forcibly enter the Plaintiffs’ home existed. The
19 Defendants admit that: (1) Joseph was not a threat; (2) Joseph was not armed with a weapon
20 when Defendant Krause confronted him outside the home; (3) when they entered the home they
21 had no reason to believe that Joseph was armed with a weapon; (4) Joseph had not assaulted a
22 police officer; (5) Joseph had made no verbal threats; and (6) **Joseph was not pursued for an**
23 arrestable offense as all of the plaintiffs in *Santana*, *Moosdorf*, and *Schmidt* had been. See
24 (Ex. 5 - Depo. Ross 20:3 - 20:11) (Ex. 6 - Depo. Ross 28:1 - 28:4).

25 Further, no exigency arose by a perceived need to preserve any evidence. The
26 Defendants already possessed all of the evidence—Defendant Krause’s visual observation of the
27 alleged stop sign infraction. The Chief Police for the City of Dearborn Heights Lee Gavin
28 confirmed this.

29 **Mr. Faraj.** Would you agree with me that the overwhelming majority of times
30 the police officer’s word carries the evidentiary burden to get a
31 conviction?

32
33 **Chief Gavin.** Majority of the time.

34
35 (Ex. 12 - Depo. Gavin 66:18 - 66:21).

1 Further, Joseph was not seized in a “public place” when the Defendants as the plaintiffs
2 in *Santana* and *Moosdorf* had been. Joseph, who had rushed into his home out of the fear of
3 being shot with a pistol, was seized while in the basement of his home and had not, at any time,
4 reemerged from the home to engage any of the Defendants.

5 The Eleventh Circuit expressly acknowledged, “this would be a more difficult case if Mr.
6 Schmidt had not reemerged from his home.” That is precisely the case here. Except here,
7 Joseph had not committed an arrestable offense, and, he is not the party asserting his Fourth
8 Amendment rights.

9 **G. Summary Judgment Is Inappropriate Because Whether Exigent**
10 **Circumstances Existed Is A Question Of Fact For The Jury**

11 In the Sixth Circuit, whether an exigency to justify the warrantless entry of a home exists
12 is a question of fact reserved for the jury. *McKenna v. Edgell*, 617 F.3d 432, 441 (6th Cir. 2010);
13 *City of Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002). A trial court may make
14 this determination as a matter of law only when the underlying facts are undisputed, and where
15 the fact-finder could not reach but one conclusion as to the existence of exigent circumstances.
16 *McKenna*, 617 F.3d at 441, citing, *Jones v. Lewis*, 874 F.2d 1125, 1130 (6th Cir. 1989).

17 Multiple questions of fact are in dispute here including whether: (1) Joseph in fact
18 committed a stop sign infraction; (2) Joseph was aware that Defendant Krause had pursued him
19 for a stop sign infraction; (3) Joseph was aware of any offense which might give him cause to
20 elude Defendant Krause; (4) Defendant Krause drew a pistol or a TASER on Joseph; (5) the act
21 of drawing a firearm on Joseph, who had committed no crime or arrestable offense, is what
22 prompted Joseph to rush inside of his home; (6) Defendant Krause grabbed Joseph’s wrist prior
23 to Joseph entered the home; (7) Joseph initially closed and locked the front door; and (8) whether
24 Defendant Krause should have sought a warrant. See, *State v. Hitch*, 491 N.E.2d 1147 (County
25 Ct. 1985) (since original officers had time to get back-up help, they had time to get a warrant).

26 For the foregoing reasons, the Plaintiffs respectfully request that this Honorable Court
27 deny the Defendants’ Motion for Summary Judgment on Count Two (42 U.S.C. § 1983 -
28 Unlawful and Unreasonable Seizure). Further, for the purpose of this request only, the Plaintiffs
29 would respectfully ask the Court to resolve all of the foregoing questions in favor of the
30 Defendants and, on the basis of *Welsh v. Wisconsin* grant the Plaintiffs Summary Judgment
31 under Rule 56(f) for the Defendants unreasonable entry into the Plaintiffs’ home in violation of
32 the Fourth Amendment.

1 **III. DEFENDANT KRAUSE IS NOT ENTITLED TO QUALIFIED IMMUNITY**

2 Qualified immunity is unavailable to government officials whose conduct violates
3 “clearly established statutory or constitutional rights of which a reasonable person would have
4 known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). Qualified
5 immunity rests on whether:

- 6 (1) The Plaintiff has pled a violation of a constitutional right; and
7 (2) If so, whether the right at issue was clearly established at the time of the
8 defendants’ misconduct.

9 *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 73 L. Ed. 2d 396 (2001).

10 The first prong as set forth by the Court in *Katz* is readily met. As discussed above, the
11 Defendants violated the Plaintiffs’ Fourth Amendment right to be free from
12 excessive/unreasonable force and Fourth Amendment right to be free from unreasonable search
13 and seizure of their home and of their person. The only issue then is whether these rights were
14 clearly established as of March 10, 2010.

15 **A. The Plaintiffs’ Fourth Amendment Rights Were Clearly Established**

16 The Sixth Circuit has repeatedly held that “the right to be free from excessive force is a
17 clearly established Fourth Amendment right.” *Binay* at p. 652; *Vance v. Wade*, 546 F.3d 774,
18 784 (6th Cir. 2008); *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 1999); *Walton v. City of*
19 *Southfield*, 995 F.2d 1331, 1342 (6th Cir. 1993). On the basis of the concurrence amongst the
20 Circuit Courts, *supra*, p. 9, it is clearly established that threatening and pointing a weapon at an
21 unarmed civilian posing no threat constitutes excessive force.

22 Defendant Krause understood this.

23
24 **Mr. Faraj.** Would you be permitted, based on your training and experience, to
25 draw a firearm and point it at something or someone as a warning
26 if you have knowledge or you know that the situation does not call
27 for deadly force?
28

29 **Krause.** I don’t think so.
30

31 (Ex. 1 - Depo. Krause 16:21 - 17:2)

32 Further, Defendant Krause admitted that he could not even draw his TASER weapon
33 unless a subject was physically combative. (Ex. 1 - Depo. Krause 17:22 - 18:18).

1 The right to be free from the forced, warrantless entry of one's home was also clearly
2 established.

3
4 [O]ne not need go any further than Supreme Court precedent to see that
5 Cummings' constitutional rights were clearly established. The bedrock Fourth
6 amendment principles in *Payton* and *Welsh* demonstrate that the officers' forced
7 warrantless entry in Cummings' home was presumptively unreasonable, and the
8 Court's exigency decisions in *Warden* and *Santana* clearly show that Sherman
9 and Vaughan had no objectively reasonable basis for believing that their
10 warrantless entry into Cummings' home was supported by the exigency of hot
11 pursuit of a fleeing felon.

12
13 *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005).

14 Defendant Krause's admission that a police officer is not allowed to pursue a citizen into
15 a private residence absent a warrant for a stop sign ticket further confirms this.

16 But even if no case law had ever clearly established the Plaintiffs' Fourth Amendment
17 rights, the Supreme Court has held that prior precedent is unnecessary to clearly establish a right.

18
19 Nor have our decisions demanded precedents that applied the right at issue to a
20 factual situation that is "fundamentally similar" at the level of specificity meant
21 by the Sixth Circuit in using that phrase.

22
23 *U.S. v. Lanier*, 520 U.S. 259, 269, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (*Lanier* reversed a
24 Sixth Circuit decision ruling that a "clearly established right" is one previously identified by the
25 Supreme Court on fundamentally similar facts).

26 Further, the Sixth Circuit denies qualified immunity is unavailable to defendants who
27 mislead and misrepresent facts (Krause falsified his police report and gave a false account of his
28 encounter with Joseph). See, e.g., *Voyticky v. Village of Timberlake*, 412 F.3d 669, 677 (6th Cir.
29 2005); *Ahlers v. Scheibel*, 188 F.3d 365, 373 (6th Cir. 1999); *Hill v. McIntyre*, 884 F.2d 271, 275
30 (6th Cir. 1989).

31 Qualified immunity is not intended to serve as a shield for police officers to violate the
32 Constitution. Because Defendant Krause violated clearly established Constitutional rights of
33 which they had actual knowledge of,⁷ qualified immunity is unavailable. The Plaintiffs therefore

33

⁷ The standard is less than actual knowledge; it is that which a "reasonable person" would have known. *Harlow*, 457 U.S. 818.

1 respectfully request that this Honorable Court deny the Defendants' Motion for Summary
2 Judgment on qualified immunity.

3 **IV. THE JOHN DOE OFFICERS⁸ ARE LIABLE TO THE PLAINTIFFS UNDER 42**
4 **U.S.C. § 1983 FOR THEIR ACTIVE PARTICIPATION IN VIOLATING THE**
5 **PLAINTIFFS' FOURTH AMENDMENT RIGHTS**

6 For reasons already discussed, the now named John Doe Officers, particularly Defendant
7 Ross (the canine officer) and Defendant Duffany (the superior officer on scene), are liable for
8 their active participation in aiding and furthering the violations of the Plaintiffs' Fourth
9 Amendment rights alleged herein.

10 **V. THE CITY OF DEARBORN HEIGHTS IS LIABLE UNDER 42 U.S.C. § 1983 FOR**
11 **ITS FAILURE TO TRAIN AND SUPERVISE POLICE OFFICERS REGARDING**
12 **DISABLED AND ELDERLY PERSONS**

13 The City is liable for failing to properly train and supervise the Defendants regarding
14 dealing with both elderly and disabled citizens. Dearborn Heights Police Chief Lee Gavin
15 admits that his officers receive **no** policy regarding both classes of persons—which comprise
16 significant elements of the population.

17
18 **Mr. Faraj.** Are you aware of a policy by your police department to handle, for
19 example, people with either disabilities, the elderly or juveniles
20 and what I'm getting at is people that are lacking full capacity or
21 competency?
22

23 **Chief Gavin.** Are you asking do we have a policy pertaining to that?
24

25 **Mr. Faraj.** Yes.
26

27 **Chief Gavin.** Not that I'm aware of, no.
28

29 (Ex. 12 - Depo. Gavin 15:18 - 16:1)

30 According to the City of Dearborn Heights Police Chief Lee Gavin, an official
31 policymaker in the City of Dearborn Heights, the current and official policy of the City of
32 Dearborn Heights for dealing with the elderly is for each individual officer to rely on his
33 subjective experience and to have "good communication skills."
34

34

⁸ The Plaintiffs amended the Complaint to include the identities of the "John Doe Officers" officers subsequent to the Defendants' filing of their Motion.

1 **Mr. Faraj.** [D]o you believe that you should have some sort of policy that
2 trains police officers on how to handle the elderly?
3

4 **Chief Gavin.** I just think—no I don't. I think with the officer's experience out
5 there you deal with a wide range of people everyday. **You can't,**
6 **you know, each group you deal with, young, old, this, that,** its
7 just, its with your experience. Communication skills are important.
8

9 (Ex. 12 - Depo. Gavin 18:17 - 19:1).

10 It is the further policy in Dearborn Heights for police officers to "learn as they go" when
11 dealing with the clearly disabled or elderly persons.

12
13 **Mr. Faraj.** So, for example, if someone clearly has Alzheimer's or dementia
14 we don't need to have formal training to tell them that they need to
15 take special care with that person or more care than you would
16 with someone who's not challenged?
17

18 **Chief Gavin.** You learn that with experience.

19
20 (Ex. 12 - Depo. Gavin 18:17 - 19:1).

21 And under the City's official policy, police officers in Dearborn Heights are not under
22 trained to take **any** special precautionary measures when arresting a disabled or elderly person.

23
24 **Mr. Faraj.** Do you have any policy for your police officers when it comes to
25 arresting someone that tells them to take greater care with someone
26 who has, well, the elderly, but what I mean by elderly is someone
27 with degraded capacity, either physical or mental, not just someone
28 who's old?
29

30 **Chief Gavin.** I don't recall having one in there.

31
32 (Ex. 12 - Depo. Gavin 20:6 - 20:12.)

33 Regrettably, the Defendants were not particularly keen on dealing with the elderly Mrs.
34 Mrs. Saad, or the elderly Mr. Saad who suffers from Alzheimer's and Dementia. Consequently,
35 Mrs. Saad lives in a perpetual state of fear inside of her own home and is frightened whenever
36 she sees a police car in her neighborhood. Mr. Saad becomes frightened whenever the dog that
37 lives next door begins to bark.

38 This "guinea pig" policy of dealing with the disabled and the elderly in the City of
39 Dearborn Heights is immoral, inhumane, and demonstrates "deliberate indifference" to basic

1 human rights. See, *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412
2 (1989).

3 To the extent the Defendants would argue as they do that “a single incident is insufficient
4 to establish municipal liability” (Motion at p. 14), this is not the law. The Supreme Court in
5 *Owen* and *Newport* established that “a single decision could constitute an unconstitutional
6 custom or policy regardless of whether such decision was intended to control later decisions.”

7 **Any city in the United States of America which can incentivize its police officers to**
8 **write a minimum number of tickets by permitting that officer to leave work 2 hours early**
9 **but be paid for 4 hours of work at the overtime rate if that quota is met (Ex. 12 - Depo.**
10 **Gavin 59:11 - 59:21) certainly possesses the resources to ensure that these officers are**
11 **adequately trained to exercise due care when dealing with a disabled or elderly person.** The
12 Plaintiffs therefore respectfully request that his Honorable Court deny the Defendants Motion for
13 Summary Judgment on Count Five (42 U.S.C. § 1983 - *Monell* Failure to Train/Supervise).
14 Further, the Plaintiffs respectfully request that this Honorable Court grant them Summary
15 Judgment under Fed. R. Civ. P. 56(f) on this Count.

16 **VI. THE INDIVIDUALLY NAMED DEFENDANTS ARE NOT ENTITLED TO**
17 **GOVERNMENTAL IMMUNITY ON THE PLAINTIFFS’ STATE LAW COUNTS**

18 **A. Michigan’s Governmental Tort Liability Act**

19 The Governmental Tort Liability Act (the “GTLA”), MCL 691.1407, et seq. affords
20 municipal corporations and municipal officers, employees, members, or volunteers immunity
21 from tort liability when all of its criteria are satisfied.

22 Governmental immunity is an affirmative defense and the defendants bear the burden of
23 proof. *Odom v. Wayne County*, 482 Mich. 459, 479, 760 N.W.2d 217 (2008) (footnote omitted).
24 If a trial court finds the parties have equally carried the burden of production concerning the
25 applicability of the doctrine, the court must find for the plaintiff. *Mack v. City of Detroit*, 467
26 Mich. 186, 222; 649 N.W.2d 47, 66 (2002).

27 **1. Negligent Torts**

28 In *Odom*, the Michigan Supreme Court stated that governmental immunity for negligent
29 torts is only available when: (1) the individual was acting or reasonably believed that he was
30 acting within the scope of his authority; (2) the governmental agency was engaged in the
31 exercise or discharge of a governmental function; and (3) the individual's conduct did not

1 amount to gross negligence that was the proximate cause of the injury or damage. *Odom*, 482
2 Mich. 459, 760 N.W.2d 217 (2008).

3 **2. Intentional Torts**

4 Governmental immunity for intentional torts is only available when: (1) the acts were
5 undertaken during the course of employment and the employee was acting, or reasonably
6 believed that he was acting, within the scope of his authority; (2) the acts were undertaken in
7 good faith, or were not undertaken with malice; and (3) the acts were discretionary, as opposed
8 to ministerial. *Odom*, 482 Mich. 459, 760 N.W.2d 217 (2008).

9
10 **B. The Defendants Have Not Met Their Burden Of Proof To Establish**
11 **Governmental Immunity On Any of The Plaintiffs' State Law Claims**

12 The moving party always bears the initial responsibility of informing the district court of
13 the basis for its motion, and identifying those portions of the record which demonstrate the
14 absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323; 106 S.
15 Ct. 2548; 91 L. Ed. 2d 265 (1986).

16 Here, the Defendants contend, without more:

17
18 In this case, the Defendant officers were clearly acting during the course of their
19 employment or reasonably believed they were acting within the scope of their
20 authority. Further, there is no evidence that the alleged acts were not undertaken
21 in good faith.

22
23 Def. Motion at p. 16.

24 This is nothing more than a bare recitation of the *Odom* factors and is insufficient under
25 both *Odom* and *Celotex* to establish the affirmative defense of governmental immunity. The
26 Defendants Motion for Summary Judgment on the Plaintiffs' state law claims is therefore
27 properly denied on this basis alone. In any event, even if the Defendants had met their burden of
28 production, which they did not, the Plaintiffs have presented enough evidence to rebut any *prima*
29 *facie* showing the Defendants might rely on.

30 **C. The Defendants Are Not Entitled To Governmental Immunity For**
31 **Their Intentional Torts Against The Plaintiffs**

32 The Plaintiffs do not dispute that the Defendants acts were discretionary. However, the
33 Defendants are not entitled to governmental immunity because their acts were not undertaken in
34 "good faith" or absent malice.

1 Threatening an unarmed (76) year-old woman while holding her at gunpoint and then
 2 threatening her with a large, barking police dog to frighten her into consenting to the warrantless
 3 entry of her home over an alleged stop sign infraction by her (61) year old son is not good faith
 4 simply because the villain masquerades under color of law.

5
 6 **Z. Saad.** [A]nd the people that I trusted, they're the ones that invaded my
 7 house. People that I looked up to and thought I was protected by
 8 them. You don't know what they did to me **They took all**
 9 **that away from me, being safe and being home in Dearborn**
 10 **where I was born and raised.**

11
 12 (Ex. 4 - Depo. Z. Saad 56:6 - 56:10).

13 Submitting a falsified police report to cover up a Fourth Amendment violation is not
 14 "good faith" and likewise bars immunity. See, e.g., (Ex. 13 - *Richardson v. Nasser*, 2011 U.S.
 15 App. LEXIS 9354) (6th Cir. 2011) (unpublished).

16 **D. The Defendants Are Not Entitled To Governmental Immunity For**
 17 **Causing The Plaintiffs' Emotional Distress**

18 The Defendants are not entitled to governmental immunity because their gross negligent
 19 proximately caused the Plaintiffs' emotional distress.

20 "Gross negligence" is "conduct so reckless as to demonstrate a substantial lack of
 21 concern for whether an injury results." MCL 691.1407(2)(c).

22 **1. The Defendants Were Grossly Negligent With Mrs. Saad**

23 Threatening a visibly frightened and unarmed (76) year old woman at gunpoint evidences
 24 reckless disregard for whether she will suffer injury. Further threatening and terrorizing this
 25 woman with a police dog that is being commanded to bark and which is lunging at her
 26 demonstrates similar disregard.

27 **2. The Defendants Were Grossly Negligent With Mr. Saad**

28 The forced entrance of 8-10 armed police officers and a barking police dog while on
 29 notice that a disabled (86) year old man is inside demonstrates reckless disregard for than man.
 30 Even though Mrs. Saad begged the Defendants not to take the police dog into her home because
 31 Mr. Saad was inside and might die from the shock, Defendant Ross "didn't care." He [Mr. Saad]
 32 was on the floor when I went back in. (Ex. 4 - Depo. Z. Saad, 36:17 - 36:24).

3. The Defendants Were Grossly Negligent With Joseph Saad

Shoving and forcing a non-violent and non-resistant (61) year old man onto the ground and then dragging and kicking him into the backseat of a police cruiser while he was stating that he could not breathe (and then refusing to roll down a single window) demonstrates reckless disregard for that man’s safety.

4. The Defendants’ “Legal Rights”

The Defendants contend they are not liable for causing the Plaintiffs’ emotional distress because an actor is “never liable in tort where he has done no more than to insist upon his legal rights.” Def. Motion at p. 17 (citation omitted).

The Defendants might insist upon their “legal right” to use pistols and police dogs on citizens instead of securing a warrant in a police state. The police state “Bill of Rights” would secure the additional right of police officers to establish a standing presence in residential neighborhoods to issue between 18 - 27 traffic citations to generate revenue, and the further right of police officers to only 2 hours of overtime but be paid for 4 hours of overtime work.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that this Honorable Court deny the Defendants’ Motion in its entirety and grant the Plaintiffs Summary Judgment under Fed. R. Civ. P. 56(f) on Counts One and Two.

RESPECTFULLY SUBMITTED THIS 10TH DAY OF JUNE 2011

HADOUSCO. | PLLC

/s/NEMER N. HADOUS

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2011, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which will send notice of such filing to all attorneys of record in this matter. Since none of the attorneys of record are non-ECF participants, hard copies of the foregoing have not been provided via personal delivery or by postal mail.

HADOUSCO. | PLLC**/s/NEMER N. HADOUS****BY:** NEMER N. HADOUS (AZ: 027529 | CA: 264431)

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