

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

STEVEN SCOZZARI, as Personal
Representative of the Estate of WILLIAM
CHRISTI SCOZZARI, Deceased,

Plaintiff,

Case No: 1:08-cv-10997

vs

Hon. Thomas Ludington

CITY OF CLARE, a municipal corporation, KEN
HIBL, a municipal agent of City of Clare, CHIEF
DWAYNE MIEDZIANOWSKI, as an Agent for
the municipal corporation and as an individual,
OFFICER JEREMY McGRAW, as an agent of
the Municipal corporation, and as an individual,
jointly and severally,

Defendants.

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**DEFENDANTS MIEDZIANOWSKI AND McGRAW'S
MOTION FOR SUMMARY JUDGMENT**

**BRIEF IN SUPPORT OF DEFENDANTS MIEDZIANOWSKI AND McGRAW'S
MOTION FOR SUMMARY JUDGMENT**

PROOF OF SERVICE

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NOW COME the Defendants, CHIEF DWAYNE MIEDZIANOWSKI and OFFICER
JEREMY MCGRAW, by and through their attorneys, Garan Lucow Miller, P.C., and in support of
their motion for summary judgment, state as follows:

1. This motion is brought pursuant to F.R.Civ.P. 56.

2. Plaintiff, Steven Scozzari, as Personal Representative of the Estate of William Christi Scozzari, filed the instant action seeking to impose liability on, *inter alia*, Chief Dwayne Miedzianowski and Officer Jeremy McGraw, for fatal injuries sustained by William Scozzari in the late hours of September 18, 2007, alleging that Scozzari's constitutional rights had been violated by the defendant police officers when they utilized deadly force while acting in self-defense and/or defense of others in the course of their efforts to arrest Scozzari for his assault on Chief Miedzianowski.

3. For the reasons stated in the accompanying brief in support, defendants Miedzianowski and McGraw are entitled to summary judgment as plaintiff's claims do not implicate the deprivation of any right cognizable under 42 U.S.C. §1983 and they are otherwise entitled to qualified immunity from suit as to such claims.

4. Further, Count V is subject to dismissal as plaintiff's amended complaint does not adequately plead a cause of action for a civil conspiracy and there exists no genuine issue of material fact that plaintiff cannot establish a basis for liability under this claim.

5. Moreover, and for the reasons discussed in the accompanying brief in support, plaintiff's state law claims of gross negligence and assault and battery are subject to summary judgment because there exists no independent cause of action for gross negligence under Michigan law and there is no genuine issue of material fact that the defendant officers are entitled to governmental immunity pursuant to M.C.L. 691.1407.

6. Pursuant to Local Rule 7.1, on November 12, 2009, the undersigned sought concurrence from plaintiff's counsel in the relief requested in the instant motion and same was not obtained by the filing of this motion.

WHEREFORE, defendants, Chief Dwayne Miedzianowski and Officer Jeremy McGraw, respectfully request that this Honorable Court grant their Motion for Summary Judgment and dismiss plaintiff's claims against them.

Respectfully submitted:

GARAN LUCOW MILLER, P.C.

/s Roger A. Smith

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Dated: November 13, 2009

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**BRIEF IN SUPPORT OF
DEFENDANTS MIEDZIANOWSKI AND McGRAW'S
MOTION FOR SUMMARY JUDGMENT**

CONCISE STATEMENT OF ISSUE PRESENTED

Whether the defendant police officers are entitled to qualified immunity as to plaintiff's claims under 42 U.S.C. §1983 pertaining to injuries sustained by William Scozzari when deadly force was used in self-defense and/or defense of others during an attempt to arrest Scozzari for his assault on one of the officers.

Whether the defendant police officers are entitled to summary judgment of plaintiff's claim alleging denial of medical attention as there exists no genuine issue of material fact that the defendant officers did not act with deliberate indifference to Scozzari's serious medical needs as is required to sustain a claim under the Fourteenth Amendment.

Whether the defendant officers are entitled to summary judgment of plaintiff's claims under Michigan state law because there exists no independent cause of action for gross negligence and the defendant officers are entitled to governmental immunity pursuant to M.C.L. 691.1407.

Whether the defendant officers are entitled to summary judgment of plaintiff's claim of civil conspiracy as there exists no genuine issue of material fact that plaintiff's amended complaint has not adequately plead an actionable claim and plaintiff cannot establish the requisites to liability under this claim.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Brosseau v. Haugen,

543 U.S. 194; 125 S.Ct. 596; 160 L.Ed.2d 583 (2004)

Davenport v. Causey,

521 F.3d 544 (6th Cir. 2008)

Gaddis v. Redford Twp.,

364 F.3d 763 (6th Cir. 2004)

Graham v. Connor,

490 U.S. 386; 109 S.Ct. 1865; 104 L.Ed.2d 443 (1989)

Livermore v. Lubelan,

476 F.3d 397 (6th Cir. 2007)

Pearson v. Callahan,

___ U.S. ___; 2009 WL 128769 (1/21/09)

Scott v. Harris,

550 U.S. 372; 127 S.Ct. 1769; 167 L.Ed.2d 686 (2007)

Chappell v. City of Cleveland

___ F.3d ___ (6th Cir. 08-4456, November 4, 2009)

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FACTUAL BACKGROUND

On March 7, 2008, plaintiff, Steven Scozzari, as Personal Representative of the Estate of William Christi Scozzari, commenced suit seeking to impose liability on two City of Clare police officers (Chief Dwayne Miedzianowski and Officer Jeremy McGraw), the City of Clare and the City Manager (Ken Hibl) for, *inter alia*, Fourth Amendment violations that allegedly occurred when deadly force was used in self-defense and/or defense of others, during the officers' efforts to arrest William Scozzari for his assault on Chief Miedzianowski. On June 25, 2009, plaintiff filed an amended complaint, attached hereto as Exhibit A.

At approximately 11:00 p.m. on September 18, 2007, Jason Miller, a tenant at the Lone Pine Motel, was in his motel room when he heard approximately five gunshots fired¹. Mr. Miller called the Clare County Central Dispatch and reported that shots were fired and he believed that they were fired from a nearby park. (Miller, 16-19)² Mr. Miller left his room and went outside to the parking lot where, he estimated five to ten minutes later, a police car approached the motel. After a few minutes passed, he heard yelling from near the park and the motel cabins. While most of the yelling was indecipherable, he heard the phrase "get away kid" and "knife." (Miller, 20-23) Mr. Miller then observed Chief Dwayne Miedzianowski running the length of the hotel towards Mr. Miller, appearing as if he was running away from someone. (Miller, pages 25-28, 80).

¹Attached as Exhibit B is a map depicting the general scene of the Lone Pine Motel. The Lone Pine Motel consists of a motel building (the larger rectangle located in the center, bottom of the map) and four cabins (the smaller rectangles at the top of the map). Cabin #17, where William Scozzari resided, is the northwestern most cabin on the map (top left hand cabin).

²Deposition transcripts are attached as Exhibits to the brief as follows: (Exhibit C, Jason Miller); (Exhibit D, Dwayne Miedzianowski); (Exhibit E, Jeremy McGraw); (Exhibit F, Wanetta Gibbons); (Exhibit G, Sheryl Irwin); (Exhibit H, Jeffrey Richardson); (Exhibit I, Jeff Morgan II); (Exhibit J, Nathan Kunik); (Exhibit K, Winifred Bryans); (Exhibit L, Carl Bryans); (Exhibit M, Jeff Morgan, Sr.); (Exhibit N, Minor J.M.); (Exhibit O, James Abel); and (Exhibit P, Jerry Carter).

Chief Miedzianowski testified that, at around 11:00 p.m. on September 18, 2007, he received a dispatch that shots had been fired somewhere north and west of the Lone Pine Motel. Miedzianowski drove towards Shamrock Park and stopped at the corner of McEwan and Wilcox Parkway to wait for McGraw to respond and assist him in investigating the call. (Miedzianowski, 62-63) While waiting, Miedzianowski saw the light of a flashlight from near the VFW building, which was located in the vicinity of the Lone Pine Motel. Miedzianowski then observed a man come around the building and flash the flashlight into the Chief's police car. Miedzianowski radioed in that he had seen a person with a flashlight in the area of the VFW hall. (Miedzianowski, 65-66) The man, later identified as William Scozzari, appeared to Miedzianowski to be carrying a brown stick over his left shoulder. Miedzianowski testified that he believed that Scozzari represented a danger based upon the fact that there had been a report of shots fired near the park, Scozzari was observed walking near the park after hours and near the VFW building which was closed (leading Miedzianowski to consider the possibility that Scozzari was involved in a breaking and entering), Scozzari was carrying a stick which could be used as a weapon and Scozzari was wearing a backpack which could have held the gun used in the shots fired incident. (Miedzianowski, 67-68).

Miedzianowski instructed Scozzari to drop the stick but Scozzari refused and instead responded, "Fuck you, boy" and kept on walking. (Miedzianowski, 65-67, 69) Alarmed by Scozzari's reaction, Miedzianowski followed him, believing that Scozzari could be involved with the report of shots fired near the park. Miedzianowski asked Scozzari to stop but Scozzari refused, again responding, "Fuck you." When Miedzianowski again asked Scozzari to stop, Scozzari turned toward Miedzianowski, said "Fuck you" and drew the stick back. Miedzianowski testified that he believed Scozzari was going to hit him with the stick. (Miedzianowski, 70-76) Miedzianowski

backed up, pulled out his pepper spray,³ and yelled at Scozzari to drop the stick. Scozzari did not drop the stick but, instead, came down with it. Scozzari then reached into his waistband with his right hand and Miedzianowski attempted to spray him with the pepper spray. Miedzianowski was not sure whether Scozzari was hit with the spray because he continued to approach while reaching into his waistband. (Miedzianowski, 77-78)

In order to put a barrier between himself and Scozzari, Miedzianowski hid behind a truck in the parking lot, concerned that Scozzari might retrieve a gun from his waistband. Scozzari then pulled something black and silver out of his waistband which Miedzianowski believed to be a knife. (Miedzianowski, 78) Miedzianowski pulled his service revolver and pointed it at Scozzari. Scozzari then put the knife back into his waistband, turned around and walked into Cabin #17. Miedzianowski believed that he had been assaulted. (Miedzianowski, 80-81).

Officer McGraw received a dispatch at 11:06 p.m. to assist Chief Miedzianowski in investigating the call of shots fired near the park. While en route to the scene, McGraw received three calls from Miedzianowski asking for McGraw's location. According to McGraw, he sensed excitement and agitation in Miedzianowski's voice during these calls. (McGraw, 54, 106, 116-121) Upon arriving at the scene and meeting up with Miedzianowski in the vicinity of Cabin #17, Miedzianowski briefed McGraw on the situation and the two officers then canvassed the area of the cabins. (McGraw, 213-215) While canvassing the area, the officers encountered Mr. Miller in the parking lot of the motel and one of the officers asked him whether he had seen anyone running. Miller responded, "no." (Miller, 33) According to Miller, Miedzianowski made the comment, "He's going to jail tonight" and also made a comment about "mental problems" or "mental issues." (Miller, 33)

³The pepper spray used by Miedzianowski was Freeze +P. (Miedzianowski, 33)

The two officers then approached Cabin #17 and Miedzianowski ordered McGraw to unsheath his taser. When they reached the cabin, Miedzianowski stood to the west of the door, with his gun drawn, and instructed McGraw to knock on the door. (McGraw, 221-225, 232) McGraw knocked on the door and announced, “Police, open the door.” Scozzari opened the door and took one step onto the threshold, within approximately one foot of McGraw. The officers observed Scozzari to be holding something, possibly weapons, in both of his hands. (McGraw, 233, 239-241; Miedzianowski, 95) McGraw testified that he “froze” and took a couple of steps backward (so that he was then five to six feet from Scozzari), stumbled and deployed his taser. Miedzianowski testified that McGraw yelled at Scozzari to drop the weapon and then deployed the taser. (Miedzianowski, 99)⁴ As soon as the taser was deployed, Scozzari turned and went back into the cabin and shut the door. (Miedzianowski, 99; McGraw, 244) McGraw did not believe that Scozzari was actually hit by the taser and, in fact, one of the taser probes was later discovered to have lodged in the threshold area of the cabin. (McGraw, 245; Miedzianowski, 100)

The officers then kicked open the door and observed Scozzari “fumbling” with something in the cabin, causing the officers to begin backing up. Scozzari then appeared in the door with a hatchet in his left hand and a knife in his right hand. (Miedzianowski, 101-103; McGraw, 244, 277) The officers repeatedly told Scozzari to drop the weapons and Scozzari responded by telling the officers to drop their weapons⁵. (Miedzianowski, 103, 106; McGraw, 278-279; Miller, 42)⁶ Scozzari

⁴Mr. Miller confirmed that the officers repeatedly told Scozzari to put down the knife. (Miller, 38-42, 47). Wanetta Gibbons, a resident of a neighboring cabin witnessed the shooting and confirmed that the officers repeatedly told Scozzari to “drop the knife.” (Gibbons, 30, 38-39). Sheryl Irwin and Jeffrey Richardson, also residents of neighboring cabins, also confirmed that the officers repeatedly told Scozzari to drop the knife. (Irwin, 17-18, 26-28; Richardson, 15-16, 32-33)

⁵Mr. Miller testified that he heard a voice other than the officers’ voices say, “Put your gun down.” (Miller, 49)

⁶See footnote 4.

advanced out of the door, taking a couple of steps over a barrier located adjacent to the sidewalk, approaching McGraw. (Miedzianowski, 105; 244-245) McGraw testified that, as Scozzari continued to approach, he did not believe he could reload the taser and so McGraw tossed the taser to the side. McGraw was trying to “scooch” backwards away from Scozzari and stand up as Scozzari, with arms raised and weapons in his hands,⁷ came within four feet of McGraw. McGraw testified that he was afraid for his life and thought he was going to die. (McGraw, 244-246).

With Scozzari within three to four feet of McGraw, Miedzianowski fired four shots at Scozzari⁸. (Miedzianowski, 106-108; McGraw, 246) McGraw, not sure if the shots actually hit Scozzari, also fired shots at Scozzari. Scozzari stopped, turned away from McGraw towards Miedzianowski and McGraw continued to shoot. (McGraw, 249-250) When the single volley of shots ceased, Scozzari turned toward the cabin, took two to three steps and fell face-first onto the ground, in front of the cabin door. (Miedzianowski, 108; McGraw, 179-180, 251-252) Miedzianowski observed weapons in Scozzari’s hands after he fell and still considered Scozzari a danger. (Miedzianowski, 108-109) The officers continued to yell at Scozzari to drop his weapons while Scozzari was on the ground. (Miedzianowski, 109; Miller, 55-56, 58)

Prior to removing the weapons from Scozzari, McGraw went to the neighboring cabins and asked three individuals, Sheryl Irwin, Jeff Morgan, and Jeffrey Richardson to come outside and witness the weapons in Scozzari’s hands, which they did. (McGraw, 255-257; Miedzianowski, 110-

⁷Mr. Miller confirmed that when Scozzari reappeared, he was holding something in his hand that appeared to be six to seven inches long. (Miller, 50-51). Ms. Gibbons confirmed that, while she did not see anything in Scozzari’s hand, she saw Scozzari advance towards the officers, stepping over the wood barrier with his arm extended, all the while the officers repeatedly were yelling for Scozzari to drop the knife. (Gibbons, 38-40)

⁸McGraw’s recollection was that Scozzari got as close as two feet from him before shots were fired. (McGraw, 175-176)

113; Irwin, 33-38; Richardson, 35-37; Jeff Morgan II, 31-32) McGraw then approached Scozzari's body while Miedzianowski covered him. McGraw removed the weapons from Scozzari's hands and placed them to the side of the body. (Miedzianowski, 109; McGraw, 157-164, 257)⁹ McGraw then checked for a pulse, rolled Scozzari over and handcuffed him in front of his body. (McGraw, 163-164, 167)

At 11:26 p.m., Miedzianowski radioed dispatch requesting emergency services and reporting that shots had been fired and a man was down.¹⁰ MMR immediately dispatched a unit and was on-scene by 11:33 p.m. Although MMR was instructed to stage off-site until the scene could be cleared,¹¹ MMR was "at patient" attending to Scozzari by approximately 11:35 p.m. (Kunik, 18-20). Scozzari was transported to the hospital where he was pronounced dead.

Paragraph 19 of plaintiff's Amended Complaint alleges that Scozzari was "unarmed" when he was, "without provocation," shot by the defendant officers. This allegation is directly refuted by the testimony of both officers (Miedzianowski, 95, 101-103; McGraw, 233, 239-241, 244, 277) as well as the testimony of a number of witnesses to the shooting (Miller, 50-51; Gibbons, 38-40; Richardson, 28-29, 32-33). In order to support this allegation, plaintiff will undoubtedly rely upon the testimony of two individuals who did not actually see the shooting but only observed the scene

⁹Ms. Gibbons testified that she observed one of the officers approach the body, reach over, pick something up and toss it aside and then toss something else out into the parking lot. (Gibbons, 42)

¹⁰Jeffrey Richardson testified that he observed Miedzianowski go to his shoulder microphone as soon as the shooting ceased. (Richardson, 34)

¹¹Responding emergency personnel all testified that it was standard protocol for emergency responders to stage off-site until the scene can be cleared and the police are satisfied the scene is safe for the responders to enter. (Kunik, 34; W. Bryans, 7-8, 14-18; C. Bryans, 5-6) In fact, Winifred Bryans testified that even after the scene had been cleared for her to enter, and after she had already approached Scozzari and conducted an initial assessment, someone realized that Scozzari's body had not been checked for weapons. A state trooper thereafter checked Scozzari's body and pulled two knives out of his pockets. (W. Bryans, 10, 16-18)

after Scozzari had been shot and was on the ground. Father and son, Jeff Morgan, Sr., and J.M.,¹² testified that they were watching television in their motel room when they heard shots fired. The witnesses exited their second floor room and walked down to the end of the walkway, looked over the balcony and saw two police officers with their weapons drawn on Scozzari's collapsed body, yelling at Scozzari to drop the weapon. (Jeff Morgan, Sr., 23-26, 30-32; J.M., 10-15). Both Jeff Morgan Sr., and J.M. testified that they did not see any weapon in Scozzari's hands while he lay on the ground. (Jeff Morgan, Sr., 40-41, 45; J.M., 13-15) However, their testimony confirms that the defendant officers were acting in such a manner as to indicate that Scozzari continued to present a danger. (Jeff Morgan, Sr., 56-62; J.M., 13-15).¹³

Jeff Morgan Sr., and J.M. also testified that one of the defendant officers stepped over Scozzari's body after he had been handcuffed, disappeared into Cabin #17 then reappeared with two objects, a knife and a hatchet, and laid them down either in the parking lot (J.M., 15, 29-32) or next to Scozzari's body (Jeff Morgan, Sr., 71-75). This testimony is inconsistent with the testimony of both officers and other eye witnesses who testified to having observed weapons in Scozzari's hands before he was handcuffed and rolled over (Irwin, 33-38; Richardson, 35-37; Jeff Morgan II, 31-32)¹⁴

¹²Consistent with Fed.R.Civ.P. 5.2, the minor's name has been redacted and is referred to by his initials, J.M.

¹³Mr. Morgan testified that the officers told him to get back inside before they approached the body. In addition, the officers were observed by Mr. Morgan as approaching the body cautiously with weapons drawn, poking the body and jumping back a couple of times before turning him over. (Jeff Morgan, Sr., 56-62). J.M. testified that the officers remained with their weapons drawn on Scozzari and yelling at him to drop the knife and drop the weapon. (J.M., 13-15).

¹⁴In addition, J.M.'s testimony regarding numerous details about the incident contradicts virtually every other witness. For example, J.M. testified that one of the defendant officers cuffed Scozzari with his hands behind him (J.M., 26-28) while every other witness, including emergency medical personnel and MSP officers confirmed that Scozzari was cuffed with his hands in the front of his body. Further, J.M.'s testimony that the door to Scozzari's cabin was closed, requiring the officer to turn the handle and step over the body to enter the cabin (J.M., 29-30) contradicts his father's testimony that the door to the cabin was open and he could see inside (Jeff Morgan, Sr., 35-

A review of the witnesses' deposition testimony evidences that neither witness was clear as to when exactly they observed the alleged entrance, considering that they both confirmed that they left the balcony and returned to their room for some period of time during the incident. (Jeff Morgan, Sr., 83-86, 90-97;¹⁵ J.M., 15-16, 37-39)¹⁶

Plaintiff's Amended Complaint alleges that the defendant officers are liable under 42 U.S.C. §1983 for violating Scozzari's Fourth Amendment right not to be subject to an unreasonable search and seizure (Count I). Count I of plaintiff's amended complaint also alleges that the defendant officers violated Scozzari's alleged Fourth Amendment rights when they were "manifestly indifferent to [Scozzari] and his necessity of urgent and prompt medical intervention and failed to initiate life sustaining protocol . . ." Amended Complaint, ¶ 30. In Count III of his amended complaint, plaintiff alleges that the defendant officers committed the state law torts of assault and battery. In Count IV, plaintiff alleges that the defendant officers violated M.C.L. 691.1407 and were liable for gross negligence under state law. Plaintiff alleges in Count V that the defendant officers participated in a civil conspiracy by concealing their wrongdoings in violation of plaintiff's Fourth Amendment rights. In addition, plaintiff alleges that the defendant officers conspired to violate

36). Moreover, J.M. testified that the defendant officers were the only two police officers at the scene the entire evening (J.M., 42) even though there is no dispute that numerous officers from the County of Clare as well as the Michigan State Police responded to the scene and conducted an investigation for hours following the shooting.

¹⁵Jeff Morgan Sr. testified that he observed an officer enter the cabin after he (Morgan) had gone back into his room for a few minutes and had a drink. (Jeff Morgan, Sr., 90-92)

¹⁶Jeff Morgan Sr.'s testimony regarding placement of weapons next to Scozzari's body is consistent with the officers' testimony that McGraw removed weapons from Scozzari's hands and placed them west of his body. (Miedzianowski, 109; McGraw, 157-164, 257). See also (Gibbons, 42). J.M.'s testimony that weapons were placed on the ground near a police car is consistent with the fact that a Michigan State Trooper removed knives from Scozzari's pockets and placed them in the parking lot near a police car *after* emergency medical personnel arrived and learned that no one had checked Scozzari's body for additional weapons. (W. Bryans, 10, 16-18; Abel, 24-25)

plaintiff's First Amendment right of access to the courts and plaintiff's Fourteenth Amendment right to due process.¹⁷

ARGUMENT

I. Plaintiff's Fourth Amendment Excessive Force Claim.

Plaintiff alleges that the conduct of the defendant officers violated Scozzari's rights under the Fourth Amendment to the United States Constitution, giving rise to a cause of action under 42 U.S.C. §1983. Since §1983 does not create substantive rights, but merely provides a cause of action to remedy rights created elsewhere, it is plaintiff's burden to plead and prove a relevant right. *Baker v. McCollan*, 443 U.S. 137, 144 (1979). However, on the record of this case, and taking the facts in the light most favorable to plaintiff, there has been no Fourth Amendment violation. Further, defendants are protected by the doctrine of qualified immunity which requires that this suit be dismissed unless plaintiff can carry his burden of establishing that any right that was arguably violated was "clearly established" on the date of its alleged deprivation. In *Pearson v. Callahan*, ___ U.S. ___; 2009 WL 128769 (1/21/09), the United States Supreme Court explained this qualified immunity, at Slip Opinion, p 6:

* * * Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) [Kennedy, J., dissenting] (citing *Butz v. Economou*, 438 U.S. 478, 507 (1978) (noting that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law")].

¹⁷Count VI of plaintiff's amended complaint alleges a claim under the Americans with Disabilities Act (ADA). However, as admitted by plaintiff in his Reply in support of his Motion to Amend his Complaint (Docket No. 49) and as noted by this Court in its order granting in part and denying in part plaintiff's motion to amend (Docket No. 50), this claim is brought only against the City of Clare and not the defendant officers.

See also, *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Saucier v. Katz*, 533 U.S. 194 (2001); *Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007); *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006). In *Saucier, supra*, the Court dictated a two-step inquiry which initially inquired as to the existence of a potential constitutional violation, and only then asked whether the implicated right was “clearly established”. However, in *Pearson, supra*, the Court held that “the *Saucier* procedure should not be regarded as an inflexible requirement” [Slip opinion, p 2], and that

while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to 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.

Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial. For one thing, there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the “clearly established” prong. “[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the constitutional right happens to be.” *Lyons v. Xenia*, 417 F.3d 565, 581 (CA6 2005) (Sutton, J., concurring). In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all. * * * [Slip Opinion, pp 10-11]

Further, and regardless of the sequence, the Sixth Circuit frequently employs a three-step inquiry, as set forth in *Feathers v. Aey*, 319 F.3d 843, 847-848 (6th Cir. 2003), which also specifically inquires “whether the plaintiff has offered sufficient evidence ‘to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.’” In the case at bar, regardless of the sequence of the inquiry, and under either the two- or three-step approach, the defendant officers are entitled to qualified immunity because plaintiff cannot demonstrate that their actions were objectively unreasonable in light of clearly established law. In *Scott v. Harris*, 550 U.S. 372; 127 S.Ct. 1769, 1176 (2007), the United States Supreme Court reiterated the standards and procedures applicable to motions for summary judgment:

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a “genuine” dispute as to those facts. Fed. Rule Civ. Proc. 56(c). As we have emphasized, “[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial.’” [citation and footnote omitted] “[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” [citation omitted] When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

To the extent that there are disputed facts in the case at bar, none of them constitute a genuine issue of material fact sufficient to defeat this motion for summary judgment.

There is no dispute that the defendant officers attempted to arrest Scozzari while responding to a dispatch of shots fired near the park, after Scozzari had refused Miedzianowski’s command to stop and after he had assaulted Miedzianowski with both a cane and what appeared to Miedzianowski to be a knife. There is no dispute that, when the officers went to his cabin, the officers announced that they were police officers, asked Scozzari to come out and were confronted by Scozzari holding what reasonably appeared to the officers to be a knife and a hatchet. There is also no dispute that Scozzari was repeatedly ordered to drop the weapon but that he failed to do so. There is no genuine dispute that the officers progressed through the use of force continuum,¹⁸ and eventually discharged their weapons in self-defense and/or defense of others and that Scozzari sustained fatal wounds.

In *Tennessee v. Garner*, 471 U.S. 1, 2 (1985), the United States Supreme Court considered the use of deadly force and held that “such force may not be used unless it is necessary to prevent

¹⁸Verbal commands to drop the weapon(s) were repeatedly given, Miedzianowski deployed pepper spray (Freeze +P) and McGraw deployed a taser before deadly force was used.

the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.” In *Graham v. Connor*, 490 U.S. 386, 396-397 (1989), the Court considered a claim of excessive force and held that it was to be analyzed under the Fourth Amendment’s objective reasonableness standard, explaining that the proper application of the Fourth Amendment’s requirement of reasonableness “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” Further, since the analysis of “reasonableness” is an objective one, the reasonableness of the force is to be viewed from the perspective of a reasonable officer on the scene, with recognition that often split-second decisions must be made. As noted in *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008), “[i]t is firstly important to remember what is a ‘reasonable’ belief could also be a mistaken belief, and [] the fact it turned out to be mistaken does not undermine its reasonableness as considered at the time of the acts.”

Sixth Circuit precedent, including *Chappell v. City of Cleveland*, ___ F.3d ___ (6th Circuit, 08-4456, November 4, 2009); *Davenport v. Causey*, *supra*; *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007); and *Gaddis v. Redford Twp.*, 364 F.3d 763 (6th Cir. 2004), supports the conclusion in this case that, even when the record is considered in the light most favorable to plaintiff, there are no genuine issues of material fact which preclude summary judgment in favor of the officers, as their conduct was objectively reasonable and did not violate clearly established law. As the Court noted in *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), where the defendant police officer fired a fatal shot at the driver of a car in flight, and referencing the United States Supreme Court’s caution in

Graham v. Connor, supra, that the conduct of police officers should not be judged with 20/20 hindsight in rapidly evolving situations:

* * * This passage carries great weight in this case, since all parties agree that the events in question happened very quickly. Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes “reasonable” action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. (954 F.2d, 347)

The analysis employed by the Court most recently in *Chappell v. City of Cleveland, supra* is directly applicable to the record of this case and the circumstances confronting the defendant officers. Both cases involve the fatal firing of weapons at a suspect who threatened the officers with a knife, refused the officers’ commands to drop the weapon and continued to approach the officers, coming within seven feet from the officers and causing the officers to believe that they were in immediate harm. The *Chappell* Court stressed that the proper focus is on the defendant officers’ perspective and cautioned against engaging in speculative hindsight:

And ultimately, of course, the objective reasonableness of the detectives’ conduct must be measured in light of what they actually observed in the circumstances confronting them, not in light of speculation that may arise with the benefit of hindsight. (Slip op., page 14, citing *Graham*, 490 U.S. at 397)

Properly judged from the defendant officers’ perspective, the Court held that the plaintiff had failed to raise a genuine issue of material fact that the defendant officers’ use of lethal force was objectively unreasonable:

Most importantly, it is undisputed that Detectives Habeeb and Kraynik were confronted with what they perceived to be an imminent threat of serious harm. Irrespective of any errors that contributed to the circumstances, they were entitled to defend themselves unless their perception is shown by some evidence not to have been reasonable. Considering what the record shows they knew at the moment of McCloud’s attack, their use of deadly force to defend themselves in close quarters against a knife-wielding assailant who had closed to within five to seven feet and was still advancing toward them cannot be deemed objectively unreasonable. See

Livermore, 476 F.3d at 406-407 (expressly rejecting the argument that officers can be liable despite the reasonableness of a seizure if they recklessly created the circumstances which required use of deadly force). (Slip op., page 19)

Further, the Court pointed out that, in order to survive summary judgment, a plaintiff must do more than rely on the allegations in his pleadings or suggest hypothetical plausibilities or doubts based upon a lack of evidence. *Id.* Accordingly, the Court rejected the plaintiff's arguments that it was entitled to rely upon inferences drawn from the lack of conclusive evidence on the decedent's state of mind in order to establish that the officers acted unreasonably. *Id.* In this case, as in *Chappell*, the defendant officers were confronted by a male suspect, armed with a knife and hatchet, who approached the officers with his arm extended and who refused the officers repeated commands to drop the weapon. As in *Chappell*, the suspect came within several feet of the officers,¹⁹ with his arm extended, causing the officers to fear for their lives. Regardless of what were the inner workings of Scozzari's mind, and regardless of whether he understood what was happening or why, there exists no genuine issue of material fact that the defendant officers' conduct in using lethal force was, from the officers' perspectives, objectively reasonable. Finally, as in *Chappell*, ". . . it was [the decedent's] undisputed actions of quickly advancing toward the officers while holding the knife up and refusing to drop it that precipitated their use of deadly force." *Chappell*, slip op at 18.

Further, as recognized by the Court in *Chappell*, under the Sixth Circuit's segmented approach, the legality or propriety of the defendant officers' conduct leading up to the use of force is immaterial to the determination of whether the officers' use of force was objectively reasonable, even if the defendant officers' unreasonable conduct created the circumstances leading up to the use of force. *Chappell*, slip op., at page 17, citing *Livermore*, 476 F.3d at 406-07; *Boyd v. Baeppler*, 215

¹⁹Miedzianowski estimated that Scozzari was between three to four feet from McGraw when he fired his weapon. (Miedzianowski, 106-108). McGraw put the difference at two to three feet. (McGraw, 175-176).

F.3d 594, 599 (6th Cir. 2000); *Claybrook v. Birchwell*, 274 F.3d 1098, 1104-05 (6th Cir. 2001); *Dickerson v. McClellan*, 101 F.3d 1151, 1161-62 (6th Cir. 1996). Accordingly, any argument by plaintiff that the defendant officers did not possess probable cause to believe that Scozzari was a suspect in the shots fired incident or possess probable cause to believe that Scozzari had assaulted Miedzianowski or that the officers committed an illegal entry into Scozzari's cabin, is irrelevant to the question before this court.

Moreover, to the extent that there may be minor conflicts in the testimony, the analysis of *Gaddis v. Redford Township*, *supra*, clarifies that genuine issues of material fact are not thereby created. Noting the difference in testimony concerning what was being held in plaintiff's decedent's hand when the officers confronted him, the *Gaddis* Court concluded that "[t]his sort of minor conflict of perception is common, and is not sufficient by itself to create a material dispute of fact as to the officers' credibility." (364 F.3d, 773)²⁰ Further, quoting from the Fourth Circuit's decision in *Anderson v. Russell*, 247 F.3d 125, 130-131 (4th Cir. 2001), the Sixth Circuit noted at note 8:

In a rapidly evolving scenario such as this one, a witness's account of the event will rarely, if ever, coincide perfectly with the officers' perceptions because the witness is typically viewing the event from a different angle than that of the officer. For that reason, minor discrepancies in testimony do not create a material issue of fact in an excessive force claim, particularly when, as here, the witness views the event from

²⁰ See also, the unpublished opinions of the Sixth Circuit in *DeMerrell v. City of Cheboygan*, 206 Fed.Appx. 418 (6th Cir. 2006); *Lewis v. Adams County*, 244 Fed.Appx. 1 (2007), and *Wysong v. Heath*, 260 Fed.Appx. 848 (6th Cir. 2008), attached hereto as Exhibits Q, R and S discussing the standard for granting summary disposition, and the meaning of "material" and "genuine" when some conflict in testimony may be present. This analysis disposes of Jeff Morgan, Sr.'s and J.M.'s testimony that they did not see anything in Scozzari's hands after he had been shot (Jeff Morgan Sr., 40-41, 45; J.M., 13-15), as every other witness who actually observed the shooting testified that Scozzari appeared to be holding what appeared to be a knife in his hand, with his arm extended toward McGraw, when he was shot by the defendants. Moreover, Jeff Morgan's and J.M.'s testimony about what they witnessed after Scozzari was shot and lying on the ground does not present a "material" question of fact as to whether, at the time they discharged their weapons, the defendant officers' reasonably believed that Scozzari presented a danger to them or to the other officer.

a worse vantage point that [sic] of the officers. . . . Thus, the discrepancies between the officers' testimony and Williams's testimony about the positioning and speed at which Anderson was lowering his hands do not raise an issue of triable fact.

The *Gaddis* Court ultimately concluded that the use of lethal force had been reasonable, noting that the officers had not "crossed the constitutional line by firing sixteen shots at him", noting, *inter alia*, that all of the shots had been fired in a single volley, and that each of the officers' decisions to use their weapons had been justifiable and "the fact that there were two of them, responding simultaneously, thereby producing a larger volley, does not change the reasonableness of their conduct.". (364 F.3d, 763)

Summary judgment in favor of the officers in this case is also justified by the opinion in *Livermore v. Lubelan*, *supra*, where the plaintiff's decedent, Roland Rohm, fled his residence and hid in trees to avoid arrest. He was observed by the defendant officer, Daniel Lubelan, crouched in the woods, holding a rifle. Lubelan believed that he observed Rohm point the gun towards an exposed officer, and he fired two shots at Rohm, killing him. The Sixth Circuit reversed the district court's denial of summary judgment to Lubelan. Considering the totality of the circumstances as alleged by the plaintiff, and notwithstanding evidence that Rohm had not actually been aiming his gun at anyone when he was shot, the Court held that the shooting did not constitute excessive force:

Moreover, in determining whether Rohm posed a threat of serious harm at the time he was shot, we must focus on Sgt. Lubelan's perspective * * *.

* * * Sgt. Lubelan testified that he saw an officer exposed through the hatch of the LAV before he fired at Rohm, and that he fired at Rohm in order to prevent Rohm from firing at the LAV. Even assuming that Rohm was not aiming his rifle at the LAV when he was shot, we nonetheless conclude that Sgt. Lubelan had probable cause to believe that Rohm posed a serious threat to the officers in the LAV – particularly Sgt. Homrich – due to his proximity to the LAV while armed with a rifle,

his prior violent behavior,²¹ and his continued refusal to surrender and face arrest.
* * * (476 F.3d, 405) (emphasis added)²²

See also, *Davenport v. Causey, supra*, where the Court reversed the district court's denial of summary judgment, holding that the force used in shooting the unarmed suspect was constitutionally reasonable in light of the circumstances presented, noting that "[e]very new case can also present new circumstances that are relevant in determining whether that particular situation required deadly force; there is no 'easy-to-apply legal test in the Fourth Amendment context,' [citation omitted] and instead judges are to look to the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (521 F.3d, 551-552)

Finally, defendants are entitled to summary judgment premised on their qualified immunity from suit because any arguable constitutional violation which might be found in the record of this case was not "clearly established" on September 18, 2007. As noted by the United States Supreme Court in *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004), "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably

²¹ At the time of the shooting, both officers possessed knowledge of Scozzari's prior violent behavior and possession of weapons. Based upon Miedzianowski's interaction with Scozzari near the VFW hall, both officers knew that Scozzari was in possession of at least one knife, that he had threatened Miedzianowski with the knife, and that Scozzari had verbally and physically refused Miedzianowski's commands to stop and put down his cane. Moreover, at the time of the shooting, the officers still reasonably believed that Scozzari was involved in the shots fired near the park and, hence, might also be in possession of a gun. (Miedzianowski, 88-89)

²² There is no dispute that, from McGraw's and Miedzianowski's perspectives, immediately before shots were fired, Scozzari was approaching McGraw with a knife and a hatchet in his hands with his arm extended. Even if the officers' mistakenly believed that Scozzari was holding a weapon, their undisputed perception of the imminent harm presented by Scozzari justified their use of force. *Chappell, supra*. McGraw testified to feeling threatened by Scozzari's actions in continuing to approach and refusing to respond to the officers' repeated commands to drop the weapon. (McGraw, 244-246) In fact, Miedzianowski reported to Michigan State Police Detective Sergeant Jerry Carter that Miedzianowski was concerned he had waited too long to use lethal force and that Scozzari had gotten too close to McGraw by the time he fired his gun. (Carter, 160-161)

misapprehends the law governing the circumstances she confronted.” The *Brosseau* Court also emphasized that “this inquiry ‘must be undertaken in light of the specific context of the case, not as a broad general proposition’” (543 U.S., 198) and, accordingly, the general tests set forth in *Graham v. Connor, supra* and *Tennessee v. Garner, supra* are “cast at a high level of generality” (543 U.S., 199), which is generally not sufficient for purposes of determining an officer’s qualified immunity in the specific fact situation presented. As stated by the Court in *Saucier v. Katz*, 533 U.S. 194, 206 (2001), qualified immunity operates “to protect officers from the sometimes ‘hazy border between excessive and acceptable force.’” It is submitted that plaintiff will not be able to sustain his burden in this case of demonstrating that the officers’ conduct clearly falls on the wrong side of that border by pointing to Supreme Court or Sixth Circuit precedent²³ which would have placed them on notice that their reaction to the threat posed by Scozzari was excessive.

II. Plaintiff’s Allegation of a Fourth Amendment Claim for Deliberate Indifference to Scozzari’s Serious Medical Needs.

In Count I of his complaint, plaintiff also alleges that the defendant officers are liable under 42 U.S.C. §1983 for violating Scozzari’s Fourth Amendment right because they were “manifestly indifferent to [Scozzari] and his necessity of urgent and prompt medical intervention and failed to initiate life sustaining protocol. . . .” Amended Complaint, ¶30. Plaintiff alleges that the defendant officer improperly waited three minutes and nineteen seconds after having shot Scozzari before summoning emergency services and then prohibited emergency services from accessing the scene for an “undetermined” period of time. *Id.* Plaintiff’s claim is without factual basis or legal support and summary judgment is warranted.

²³ *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993).

While plaintiff's complaint alleges a claim under the Fourth Amendment, there is no recognized right to medical care guaranteed under the Fourth Amendment and plaintiff's Amended Complaint fails to offer any legal basis for such a claim. Accordingly, plaintiff has failed to adequately plead a claim for relief and this claim should be dismissed. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1948-50 (2009).

To the extent that this Court is inclined to construe plaintiff's complaint as alleging a claim under the Fourteenth Amendment, the government has a duty under the Due Process Clause to provide medical care to one who has been injured while being apprehended by the police. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244; 103 S.Ct. 2979; 77 L.Ed.2d 605. Liability in this regard attaches if a plaintiff can show that a government official acted with deliberate indifference to a substantial risk of serious medical harm and injuries resulted. To establish a violation under § 1983 of the right to adequate medical care, a plaintiff must show defendants acted with "deliberate indifference to serious medical needs." *Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir.2001) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). "Deliberate indifference is not mere negligence. Deliberate indifference requires that the defendants knew of and disregarded a substantial risk of serious harm to [a plaintiff's] health and safety." *Id.* (citing *Farmer v. Brennan*, 511 U.S. 825, 835-37, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). In other words, the defendant's behavior must rise above even gross negligence and must instead constitute recklessness in a criminal sense. *Farmer*, 511 U.S. at 837.

"There are two parts to the claim, one objective, one subjective. For the objective component, the detainee must demonstrate the existence of a sufficiently serious medical need. For the subjective component, the detainee must demonstrate that the defendant possessed a sufficiently culpable state of mind in denying medical care." *Carter v. City of Detroit*, 408 F.3d 305, 311 (6th Cir. 2005)

(internal citations and quotations omitted). The “culpable state of mind” part of the subjective component requires that “[t]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Weaver v. Shadoan*, 340 F.3d 398, 410 (6th Cir.2003) (quoting *Farmer*, 511 U.S. at 837). Then, the official must actively disregard the risk. *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir.2001) (citing *Farmer*, 511 U.S. at 837).

The defendant officers do not dispute that they were aware that Scozzari had been shot and do not dispute that it would be reasonable to infer that they also had knowledge, at that time, that a gun shot injury carries with it a substantial risk of serious harm if immediate medical care were not provided. However, plaintiff does not identify an injury or condition that resulted from or was caused by a delay in medical care. In other words, there is no evidence to suggest that delayed medical care worsened Scozzari’s injuries or otherwise caused him additional harm. Moreover, there is no evidence to suggest that the defendant officers subjectively intended further harm. Rather, the record shows that Chief Miedzianowski responded immediately by reporting the incident and by requesting emergency medical response. Further, the record evidences that MMR dispatch received a call at 11:27 p.m. and immediately dispatched a unit. MMR was on-scene by 11:33 p.m. and, although they were instructed to stage off-site until the scene could be cleared, MMR was “at patient” attending to Scozzari by approximately 11:35 p.m. Kunik, pages 18-20. There is simply no record evidence to support plaintiff’s allegation that the defendant officers acted with deliberate indifference in summoning emergency medical attention. Plaintiff’s §1983 claim premised on a failure to provide medical care fails.

III. Plaintiff's state law assault and battery claim.

A. Chief Miedzianowski is absolutely immune.

Immunity from tort liability is afforded to governmental agencies and individual governmental actors pursuant to M.C.L. §691.1407 et seq. Immunity under the statute is to be broadly applied. *Nawrocki v. Macomb Co. Road Comm.*, 463 Mich. 143, 155-156 (2000). There are two types of immunity available to individual governmental actors under the statute - absolute immunity for high-level officials and governmental immunity for lower-level officials. Absolute immunity is afforded to legislators and the elective or highest appointive executive official of all levels of government under M.C.L. §691.1407(5):

Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative or executive authority.

To be entitled to absolute immunity under the statute, the individual need only prove that (1) he is in the class of persons specifically entitled to immunity under the statute; and (2) the actions complained of were taken within the scope of his authority. *American Transmissions, Inc. v. Attorney General*, 454 Mich. 135, 139 (1997), citing *Ross v. Consumers Power Co. (On Rehearing)*, 420 Mich. 567, 592 (1984).

Under Michigan law, Miedzianowski, as the Chief of Police, the highest appointive official of that level of government, is afforded absolute immunity for those acts taken within the scope of his authority. *Meadows v. Detroit*, 164 Mich. App. 418, 418 N.W.2d 100 (1987). In determining whether an official's actions fall within his or her legislative authority, a court must consider several factors, including "the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." *American*

Transmissions, supra at 139. There is no “intent” exception to absolute immunity. *Id.* In addition, there is no gross negligence exception applicable to employees covered by absolute immunity. *Nalepa v. Plymouth-Canton Community School District*, 207 Mich. App. 580, 588-589 (1994).

In this case, there exists no genuine issue of material fact that Chief Miedzianowski was acting with the scope of his authority when he shot Scozzari while attempting to effect his arrest. Regardless of whatever motive plaintiff may attempt to ascribe to Miedzianowski’s conduct and regardless of whether his conduct amounted to gross negligence (which it did not, see *infra*), Chief Miedzianowski is absolutely immune from liability for assault and battery pursuant to M.C.L. 691.1407(5).

B. The defendant officers are entitled to immunity pursuant to M.C.L. 691.1407(2).

In *Odom v. Wayne County*, 482 Mich. 459; 760 N.W.2d 217 (2008), the Michigan Supreme Court considered the statutory governmental immunity available to a deputy sheriff against claims of intentional torts. The Court held that the determination of the immunity available to lower level governmental employees under M.C.L. 691.1407(2) for such allegations would be governed by the test enunciated in *Ross v. Consumers Power (On Rehearing)*, 420 Mich. 567; 363 N.W.2d 641 (1984). Accordingly, immunity is available in this case if it is determined that (1) the acts taken by the defendant officers were taken during the course of their employment and while they were acting, or reasonably believed that they were acting, within the scope of their authority; (2) the acts were taken in good faith; and (3) the acts were discretionary-decisional, as opposed to ministerial-operational. The decision of a police officer to determine the amount of force necessary to effect an

arrest is a discretionary-decisional act which reflects conduct taken during the course of his employment and within the scope of his authority. *Odom, supra* at 476²⁴.

Further, the record of this case presents no facts from which it could be found that the actions of the defendant officers were not taken in good faith. The *Odom* Court discussed the element of “good faith” and concluded that it was the absence of malice. 420 Mich., at 474-475. Given the undisputed facts of this case, and regardless of whether this Court agrees that the defendant officers’ use of force was objectively reasonable, there was no malicious intent evidenced in the decision to use deadly force against Scozzari under the circumstances presented. Rather the record evidences that the officers reasonably believed that Scozzari presented a danger to themselves and their fellow officer. Accordingly, the defendant officers are immune from liability and this state law claim should be dismissed.

IV. Plaintiff’s gross negligence claim.

In Count IV of his amended complaint, plaintiff alleges that the defendant officers’ alleged use of excessive force constituted gross negligence which is actionable under M.C.L. 691.1407. While establishing that a governmental official’s conduct amounted to “gross negligence” is a prerequisite to avoiding that official’s statutory governmental immunity, it is not an independent cause of action. The only cause of action available to plaintiff for allegations of this nature would be for assault and battery which has already been pled, and the fact that these allegations do not

²⁴As the *Odom* Court noted at 420 Mich, at 476, citing *Ross, supra*:

“Discretion,” on the other hand, “implies the right to be wrong.’” Discretionary acts “require personal deliberation, decision and judgment.” Although the decision need not be extraordinary, governmental immunity is not afforded for “every trivial decision” an actor may make. Granting immunity to an employee engaged in discretionary acts allows the employee to resolve problems without constant fear of legal repercussions.

suffice to assert such a cause of action does not provide a basis for creating a new cause of action to avoid those infirmities. See, e.g., *VanVorous v. Burmeister*, 262 Mich. App. 467, 483; 687 N.W.2d 132 (2004), where the Michigan Court of Appeals rejected the plaintiff's attempt to transform a claim of excessive force into a claim of gross negligence: "Thus, plaintiff's claim of gross negligence is fully premised on her claim of excessive force. As defendants correctly note, this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence." So, too, the "gross negligence" claim of plaintiff herein is fully premised on his claim of excessive force. See, *Livermore v. Lubelan*, *supra*, where, after citing *VanVorous*, the Court concluded: "Livermore's claim of gross negligence against Sgt. Lubelan is therefore not cognizable under Michigan law . . ." and *Wilson v. City of Detroit*, C.A. #271522 (3/6/07), 2007 WL 677739, *1, attached hereto as Exhibit T, which stated, in reference to plaintiff's claim for gross negligence, "[a]lthough stated as a separate claim, the gross negligence claim appears to merely be a pleading in avoidance of governmental immunity." Accordingly, plaintiff's gross negligence claim against the defendant officers must be dismissed.

V. Plaintiff's Civil Conspiracy Claim.

In Count V of his amended complaint, plaintiff alleges that the defendant officers conspired with others to "conceal, distort, cover-up, ratify and condone their wrongdoings and that of others by concealment/destruction of evidence, premature investigation and feigned ignorance. . ." It is this alleged conduct which plaintiff alleges violated *plaintiff's* Fourth Amendment rights. Amended Complaint, ¶54. In addition, it is this alleged conduct which plaintiff alleges violated *plaintiff's* First Amendment right of access to the courts and his Fourteenth Amendment right to substantive due process. Amended Complaint, ¶ 55.

However, plaintiff is named as the personal representative of the Estate of William Scozzari and, hence, cannot maintain any cause of action in this suit which plaintiff, Steven Scozzari, believes may have accrued to him personally. The only causes of action which have accrued to plaintiff have accrued by virtue of the Wrongful Death Statute, which are specifically limited to those causes of action which William Scozzari possessed at the time of his death. M.C.L. 600.2922. William Scozzari's First, Fourth or Fourteenth Amendment rights were not implicated by the defendant officers' alleged conspiratorial conduct pertaining to the investigation of the shooting incident nor has plaintiff alleged any legal or factual basis in support of such a claim. *Twombly, supra.*²⁵ Hence, plaintiff's claim should be dismissed.

CONCLUSION

For the reasons presented herein, Defendants Chief Dwayne Miedzianowski and Officer Jeremy McGraw are entitled to summary judgment of plaintiff's amended complaint, in its entirety.

Respectfully submitted:

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²⁵See also *Gutierrez v. Lynch*, 826 F.2d. 1534, 1538-1539 (6th Cir. 1987) and *Spadafore v. Gardner*, 330 F.3d 849 (6th Cir. 2003), where the Sixth Circuit has held that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state a claim under §1983.

INDEX OF EXHIBITS

Exhibit A	Plaintiff's First Amended Complaint
Exhibit B	Map depicting the general scene of the Lone Pine Motel
Exhibit C	Deposition Transcript of Jason Miller taken December 3, 2008
Exhibit D	Deposition Transcript of Dwayne Miedzianowski taken June 30, 2009
Exhibit E	Deposition Transcript of Jeremy T. McGraw taken June 23, 2009
Exhibit F	Deposition Transcript of Wanetta Gibbons taken October 24, 2008
Exhibit G	Deposition Transcript of Sheryl Irwin taken April 3, 2009
Exhibit H	Deposition Transcript of Jeffrey Richardson taken January 16, 2009
Exhibit I	Deposition Transcript of Jeff Morgan, II taken July 27, 2009
Exhibit J	Deposition Transcript of Nathan Kunik taken August 14, 2009
Exhibit K	Deposition Transcript of Winifred Bryans taken August 14, 2009
Exhibit L	Deposition Transcript of Carl Bryans taken August 14, 2009
Exhibit M	Deposition Transcript of Jeff Morgan, Sr. taken July 27, 2009
Exhibit N	Deposition Transcript of J.M. taken July 27, 2009
Exhibit O	Deposition Transcript of James Abel taken September 11, 2008
Exhibit P	Deposition Transcript of Det. Sgt. Jerry Carter taken October 22, 2008
Exhibit Q	<i>Monica DeMerrell v. City of Cheboygan, et al.</i> , 206 Fed.Appx. 418 (6th Cir. 2006)
Exhibit R	<i>Teresa Lewis v. Adams County, et al.</i> , 244 Fed.Appx. 1 (2007)
Exhibit S	<i>John Wysong v. City of Heath</i> , 260 Fed.Appx. 848 (6th Cir. 2008)
Exhibit T	<i>Wilson v. City of Detroit</i> , C.A. #271522 (3/6/07), 2007 WL 677739

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

CERTIFICATE OF SERVICE

I hereby certify that on **November 13, 2009**, my assistant, Susan M. Westphal, electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the foregoing document to the following non-ECF participants: **N/A**

Respectfully submitted:

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