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**Friday, May 8, 2020**

***Via Electronic Mail Only***

**Barry County Sheriff Dar Leaf  
Barry County Sheriff's Office**

Re: MEMORANDUM – Potential Civil Liability Under State and Federal  
Law Arising Out of Enforcement of Executive Orders that Call for  
Suppressing Constitutional Rights

File: 8204-050620

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Dear Sheriff Leaf,

Attached is a Memorandum of Law that discusses generally the potential civil liabilities faced by the Barry County Sheriffs Office (BCSO) and the personnel that work for said office in the enforcement of executive orders suppressing certain freedoms arising out of the state and federal government's COVID-19 pandemic response.

The memorandum is developed in general terms as it is meant to convey the reality that all governmental entities and employees of Barry County that seek to enforce these current executive orders are at risk of incurring enormous civil liability.

Thank you for allowing me to assist you with this matter. If you or anyone in the Barry County government would like to discuss the contents of this memorandum or has any questions of me, please do not hesitate to contact me as soon as possible so that we can schedule a call.

Sincerely,



Carson J. Tucker, JD, MSEL

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MEMORANDUM OF LAW

***Potential Civil Liability Under State and Federal Law Arising Out of Enforcement of  
Executive Orders that Call for Suppressing Constitutional Rights***

INTRODUCTION

The following memorandum discusses the potential causes of action under state and federal law that can be used to subject governmental entities to civil liability for the enforcement of executive orders that curtail or suppress basic constitutional rights under the First Amendment (including, but not limited to, freedom of speech, assembly, movement), the Second Amendment, the Fourth Amendment, and the Eighth Amendment.

There are basis principles that apply to potential civil liability in state and federal court actions against governmental entities arising out of the performance by governmental entities of the law enforcement / prosecutorial function. This memorandum offers a conclusion that in many cases governmental entities are potentially liable under certain state and federal laws if their actions in enforcing executive orders designed to restrict civilian leisure, recreational and commercial activities, peaceful assembly, religious services, and movement or travel violate fundamental constitutional rights.

Remarkably, and it should be emphasized throughout this memorandum, the very nature and content of the current executive “lockdown” orders are in and of themselves describing potential violations of fundamental constitutional rights, freedom of speech, freedom of worship, freedom of assembly, freedom of movement, freedom from unreasonable detention, confinement, dispersion, restraints, searches and seizures, excessive force, and privacy in ones papers and effects. Because civil liability under state and federal law is directly tied to knowledge on the part of prosecutors and law enforcement that they are violating constitutional rights, enforcement of these orders which actually describe such violations gives rise to a *de facto* presumption of liability in nearly every case.

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A. Governmental Entities and Individual Governmental Employees Can Be  
Liable for Wrongs and Constitutional Violations Under Either or Both  
Federal and State Law

a. *Federal Law*

Generally, the government and its individual employees are immune from ordinary civil suits by virtue of some form of governmental immunity. Under federal law, harm that arises out of ordinary government functions and the performance of those functions are generally immune from civil liability unless certain “constitutional” violations and certain actions and conduct can be proved. 42 USC § 1983. See also *Baker v McCollan*, 443 US 137; 99 S Ct 2689; 61 L Ed 2d 4333 (1979).

Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Individual employees are entitled to “qualified” immunity; meaning, they may commit what would constitute a civil (negligent) wrong in a single incident or transaction, but because the law was not clearly established or because their conduct did not rise to a certain level or standard, for example, objectively unreasonable use of force, deliberate indifference to the medical needs of an inmate, etc., they will not be held liable. They committed a wrong, but they were entitled to *qualified* immunity because the “constitutional right” allegedly violated had not been “authoritatively declared” at the time

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they acted. *Baker, supra* at 139. *Baker* also established the second aspect – the “conduct” in which an individual engages must surpass a certain level or standard in order for it to be subject to scrutiny under 42 USC § 1983 – the conduct must be tethered to a “constitutional” right, and the individual officer must have violated that right by conduct that is more than negligence or unintentional omission.

By the same token, a “supervisor” or “manager” can be individually liable under 42 USC § 1983, but only if it can be proved that they themselves were “deliberately indifferent” to the constitutional rights of the individual plaintiff.

In *most* instances, if the individual is entitled to qualified immunity arising out of a single incident, his or her employer (the governmental entity) will also not be liable. There is a small (debatable) exception to this if the claimant alleging injury can prove that the individual’s conduct was the result of an unconstitutional custom, practice, or policy. Generally, however, this must be proved by the existence of multiple, similar violations over time; “a pattern or practice” of actions or conduct carried out in compliance with what is in essence an unconstitutional policy, custom, or course of action, and in some cases, a “lack” of a proper policy, custom, procedure or course of action (although this is the most difficult and tenuous form of 42 USC § 1983 liability to prove).

Generally, there is no “respondeat superior” liability for the employer / entity for the single actions or conduct of an employee arising out of a single incident. *Board of County Comm’rs of Bryan County v Brown*, 520 US 397 (1997).

A governmental entity, i.e., a city, a county, etc., can also be held liable as an institution for federal constitutional violations if their actions and conduct in the performance of functions and the implementation of policy constitute “deliberate indifference” to the rights of individual citizens. *Monell v New York Dep’t of Soc Servs*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978) and *City of Canton (Ohio) v Harris*, 489 US 378; 109 S Ct 1197; 103 L Ed 2d 412 (1989). This type of liability can be imposed against the entity itself. In most cases, it must be shown that the entity was the moving force behind underlying constitutional violations that occurred on a continuous basis and in multiple instances.

Supervisory level employees and executive level employees, like prosecutors, and sheriffs, can also implicate the liability of the governmental entity if they execute policies

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that are unconstitutional on behalf of their employer under this same principle. This type of liability encompasses claims against “policymakers” and official decision makers, if the official implemented and enforced a policy, practice, custom or usage that was the moving force behind the constitutional violation. In such cases, the municipality can be liable if such policies, practices, customs and/or usages can be proved to have existed, have been implemented and were the moving force behind the alleged constitutional violation.

Thus, in essence there are “three” separate ways that a governmental entity and/or a governmental employee can be held liable for a constitutional violation under federal law. Even if it can be proved that an individual was “deliberately indifferent” they might be entitled to qualified immunity if they did not violate a “clearly established” right. In this case, a municipality can still be held “liable” even if the individuals are entitled to qualified immunity, because the municipality’s policies, practices, customs, usages, when implemented could have led to the constitutional violations being alleged.

*b. State Law*

As with the federal system, there is also a general, protective layer of immunity that insulates governmental entities and employees from liability under state law tort actions, such as personal injury, malicious prosecution, false arrest / false imprisonment, etc. In Michigan, this “immunity” is preexisting and inherent in the performance of all governmental functions. *Mack v City of Detroit*, 467 Mich 186; 649 NW2d 47 (2002).

The Michigan Legislature has provided for several “exceptions” to this general, preexisting immunity. In the context of law enforcement / prosecutorial functions, MCL 691.1407 allows a claimant to recover damages for injuries proximately caused by his or her gross negligence in the performance of his or her functions. As opposed to federal causes of action against law enforcement officers for excessive force, unreasonable search and seizure, false arrest and/or imprisonment, which are based on an “objectively reasonable” standard of conduct, the “gross negligence” exception to immunity is based on a “subjective” standard; officers who act in “good faith” in accordance with the law and in the performance of their duties are immune. If their actions and conduct were undertaken in good faith, judges and jurors cannot “second guess” their reactions under an “objective” lens. The conduct must be considered from the law enforcement officer’s subjective perspective at the time he or she engaged in the conduct under consideration. MCL 691.1407(2), (8)(a). See also *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008)

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(the case I argued and won in the Supreme Court establishing the “subjective good faith” exception for law enforcement officers in the state of Michigan).

Importantly, *Odom* noted that individual governmental employees may still be held liable if they knowingly commit an *intentional* tort against an individual, like false imprisonment, false arrest, and/or malicious prosecution. This latter point is likely to be brought to the forefront of the discussion if an when law enforcement officers and/or prosecutors attempt to limit citizens’ rights on the basis of executive orders that are not actually required by statutory law. A “knowing” arrest, infringement, or prosecution under these circumstances *would not* be immunized under Michigan’s Governmental Tort Liability Act (GTLA), MCL 691.1401, et seq.

Importantly, while governmental entities and individual (lower level) governmental employees can be held liable under this exception to governmental immunity, subsection (5) provides “absolute” immunity to the highest level law enforcement, prosecutorial and judicial officers in a county. MCL 691.1407(5).

A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority.

See also *Petipren v Jaskowski*, 494 Mich 190, 193; 833 NW2d 247 (2013), wherein the Michigan Supreme court held that the term “executive authority,” as used in MCL 691.1407(5), encompassed all authority vested in the highest appointive executive official of a level of government by virtue of his or her role in the executive branch, including the authority vested in the official to engage in tasks that might also be performed by lower-level employees. “Under the statute’s plain terms, when the highest appointive executive official of a level of government acted within the scope of his or her executive authority, the official was entitled to absolute immunity. There was no genuine issue of material fact that a police chief’s executive authority encompassed the authority to preserve the peace and conduct an arrest; therefore, he was absolutely immune under MCL 691.1407(5) from tort liability arising from the arrest.” *Petipren, supra*.

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#### B. Requirements of a Constitutional Violation for Civil Rights Actions

As previously mentioned, the violation of established constitutional rights is generally the first question to address when considering whether and to what extent a governmental entity, official, or lower-level employee can be held liable under 42 USC § 1983. *Baker v McCollan*, 443 US 137; 99 S Ct 2689; 61 L Ed 2d 4333 (1979). The bulk of § 1983 cases come under alleged violations of the Fourth Amendment (right to be free from unreasonable search and seizure and to have privacy in ones effects, etc.) and the Eighth Amendment (cruel and unusual punishment) in the context of arrest, detention and incarceration (each of these different).

However, other constitutional grounds exist to bring 42 USC § 1983 actions. Those grounds are particularly relevant under current circumstances surrounding efforts to restrict public movement and association due to the COVID-19 epidemic. These include violation of one's First Amendment rights to speech, to peaceably assemble, and to express one's religious beliefs through worship. Other potential constitutional amendments that may be implicated in 1983 suits are the Second Amendment right to keep and bear arms, and the Fifth Amendment right to property, and the right not to be deprived of that property without due process of law and just compensation.

#### C. Analysis

Under either federal or state law, the violation of constitutional rights that can occur by law enforcement officers during citation, arrest, detention, dispersion and interference with the First Amendment and Second Amendment rights of citizens is remarkably easy to envision during this unique time. Executive orders (that are not law and have not passed through the necessary checks and balances of constitutional compliance that the legislature is required to observe) that purport to restrict citizens' rights to private and commercial activity, to gather for protest or peaceful worship, to travel from one place to another, and to engage in the sale of goods and commerce (all currently being implemented) are constitutionally suspect.

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However, their enforcement depends on local and state law enforcement personnel. Yet, these clearly established constitutional rights exist and cannot be suppressed, waived, or cast aside, even in times of state and national emergency. The rights guaranteed by the Bill of Rights (the First Ten Amendments) do not wane or fade under the building crescendo of national crisis.

Prosecutors and law enforcement officers are charged with the knowledge of these basic constitutional rights: the First Amendment guarantees that citizens can engage in many of the activities that are purportedly restricted by so-called expedient and emergent executive orders and “lockdowns”. Freedom of speech, freedom of movement and travel, freedom of expression and worship, and freedom to be free from government-dictated forms of compliance that limit exercise of these freedoms are all clearly established and well-known, and frequently exercised rights. Yet, they are currently forbidden. Prosecutors, supervisory and executive level law enforcement personnel and their employees expose themselves and the relevant governmental entity to constitutional tort liability under 42 USC § 1983 if they choose to enforce these “rules” rather than respect the constitutional rights of the citizenry.

Likewise, the seizure of property implicates the Second Amendment where legally held firearms are confiscated or “saved” or “stored” during peaceable assembly. The seizure of property also implicates the Fourth Amendment as people have a right to be free from unreasonable searches and seizures and secure in their personal effects and papers. Likewise, arrest, detention, diversion, dispersion, confinement and/or interference with movement can also implicate the Fourth Amendment right to be free from unreasonable searches and seizures, excessive force, detention, false imprisonment, incarceration, etc. These are all clearly established rights. In the absence of legislation that has at least presumably been proposed, debated, vetted and voted upon by the representatives of the citizenry, there is no lawful or legitimate justification that could be cited as an excuse for actions or conduct that essentially effect a violation of the Fourth Amendment.

Once a person is “detained” and/or “incarcerated” the law enforcement personnel, and prosecutors, etc., may be held liable for actions and conduct that were “deliberately indifferent” to the known and established rights of the inmate. This includes provision of adequate medical care and maintenance for the person’s

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survival. This is the standard established under the Eighth Amendment.

Local officials, prosecutors, county sheriffs and all employees who act on behalf of these entities in following mere executive-level orders (and not law) are at risk of civil liability under 42 USC § 1983. Not only would the counties and high-level officials be potentially liable under § 1983, but a successful civil suit could render triple damages and the payment by the losing party of the other party's reasonably incurred attorney fees. Depending on the nature of the injuries and the extent of the violation in a given case, the liability could easily reach hundreds of thousands of dollars – for each case brought!

With the exception of the “absolutely immune” prosecutors and county sheriffs and police chiefs, see MCL 691.1407(5), state law provides no greater protections for law enforcement personnel who are charged with carrying out and enforcing these rules.

If the individual governmental employee is “intentionally” committing a tort, like false imprisonment, malicious prosecution, etc., then the GTLA offers no protection. See *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008).

Furthermore, since these basic, fundamental rights are clearly established and a part of everyday life, the law enforcement officer and government personnel involved in attempting to control them would subject himself or herself to the “gross negligence” exception to immunity. “Gross negligence” is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(8)(a). The “gross negligence” must be the proximate cause of the injuries complained of. Even though *Odom* established a “subjective” standard of liability under state law, it did not foreclose that an individual governmental employee might be grossly negligent in *failing* to follow the law, or in following an executive order that is clearly not, in fact, the law. The “good faith” exception developed in *Odom* only matters if the actions and conduct complained of can be said to be based on the performance of a *legitimate* government function. Without the “law” to rely on, an individual governmental employee is left with no choice but to either abide by the suspect “executive order” or risk their job in failing to do so.

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In either case, guidance is needed before prosecutors and county sheriffs / law enforcement supervisors and officers know what to expect in the coming weeks.

#### CONCLUSION

Given the nature of the restrictions that have been unilaterally placed upon the citizenry by executive order (or fiat), enforcement gives rise to potential constitutional tort and state liability. Nearly all of the restrictions currently in place directly impact the First Amendment, Second Amendment, Fourth Amendment, and Fifth Amendment, with matters concerning detainment, detention and incarceration also implicating the Eighth Amendment. These are all federal constitutional violations that serve as the basis for pleading a case under 42 USC § 1983.

Moreover, specifically recognized exceptions to immunity exist under state law as well. Actions and conduct that are grossly negligent and cause personal injury, or intentional torts like malicious prosecution, false imprisonment, and detention or detainer are all potential wrongs for which the individual may be held liable.

It is critical to understand that prosecutors, county sheriffs, local police chiefs, and governmental employees can be liable for a violation of constitutional rights under 42 USC § 1983 and state law. The COVID-19 pandemic has created a perfect storm whereby those who are trying to assert their constitutional rights are being singled out and punished for it. As further explained, lower level employees and the governmental entities that employ them also have to be careful not to violate someone's constitutional rights or cause personal injury by conduct that fits the definition of "gross negligence", because state law does allow an exception to immunity in these cases.

The county commissions, prosecutors, county sheriffs and local police chiefs must determine whether it is more reasonable to ensure people can exercise their constitutional rights while protecting their health and safety by taking other precautionary measures (short of suppressing their constitutional rights), or face liabilities in the millions of dollars for potential lawsuits that appear to be on the horizon because, as discussed above, the constitutional violation is built right into the executive orders being sought. The orders, if followed, severely restrict

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fundamental constitutional rights. Enforcement is bound to give rise to expensive litigation and potentially enormous civil liabilities.

Please do not hesitate to contact me to discuss any of the contents of this memorandum in detail, or if you have any follow up questions or concerns you would like me to address. Thank you for allowing me to assist you with this important matter.