

ANSWER TO QUESTION NO. 2

The driver could possibly file suit alleging an assault and battery by Officer Stokes. The police department would be vicariously liable for the tort of its employee, Officer Stokes. However, a police officer, as a governmental employee, is immune from tort liability unless his conduct rises to the level of gross negligence. The facts presented probably do not support a case of excessive force. As such, Officer Stokes and the police department will be immune from any liability for the injuries sustained by the driver.

Assault & Battery: In order to establish claims of assault or battery, a plaintiff must demonstrate that the defendant had the intent to cause a harmful or offensive contact with another person, or knowing, with substantial certainty, that such contact would result. *Boumelhem v BIC Corp*, 211 Mich App 175, 184 (1995). Here, Officer Stokes slammed the driver's face on the hood of the vehicle, sprayed him in the face with pepper spray, and put his handcuffs on too tight. As such, all three actions by Officer Stokes would constitute assault and battery.

Vicarious Liability: The vicarious liability of a municipality for the torts of its employees is based on the doctrine of respondeat superior. Such liability generally can be imposed only where the individual tortfeasor acted during the course of his or her employment and within the scope of his or her authority. *Meadows v City of Detroit*, 164 Mich App 418, 431 (1987), citing *Ross v Consumers Power Co (on rehearing)*, 420 Mich 567, 624 (1984). Accordingly, to the extent that Officer Stokes is liable for an assault and battery, his employer would be liable as well.

Governmental Immunity: However, under the governmental immunity act, a governmental employee is not liable in tort for personal injuries as long as the employee's "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." MCL 691.1407(2)(c). "Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). For example, an officer is grossly negligent if the force used is excessive. If Officer Stokes (the governmental employee) is immune, so then will be his employer.

Excessive Force: In subduing a suspect, a police officer may

use a substantial level of force that may even result in injury to the suspect if the use of that force was necessary. See *Sudul v Hamtramck*, 221 Mich App 485-486 (1997) citing *Burns v Malak*, 897 F Supp 985 (ED Mich 1995). To determine whether the amount of force used by a police officer was justified, the Court must determine whether the force was "objectively reasonable under the circumstances." *VanVorous v Burmeister*, 262 Mich App 467, 482 (2004) citing *Brewer v Perrin*, 132 Mich App 520, 528 (1984). "Police officers . . . must be given a wide degree of discretion in determining what type of action will best ensure the safety of the individuals involved . . . the general public . . . and the apprehension of wrongdoers." *Brown v Shavers*, 210 Mich App 272, 276 (1995) quoting *Ross v Consumers Power Co (on rehearing)*, 420 Mich 567, 659 (1984). As such, if the force is determined to be excessive, then the governmental employee is liable in tort for the plaintiff's injuries.

Conclusion: A claim against the officer and therefore the police department will likely fail. Absent a showing of gross negligence, Officer Stokes and the police department are governmentally immune from the driver's lawsuit for assault and battery. The officer's actions--slamming the driver's face into the hood of the vehicle while attempting to subdue and frisk him, spraying him with pepper spray, and handcuffing him tightly--must be measured by "what was objectively reasonable under the circumstances." The driver here did not immediately stop, had to be forced off the road, and resisted more than one time Officer Stokes' efforts. While the handcuffing too tightly may constitute excessive force, the claimed injuries are nonexistent or minimal (no medical treatment required) and, therefore, not sufficient to support a claim of excessive force. *Oliver v Smith*, 269 Mich App 560 (2006). Because the driver cannot make out a claim of excessive force, he cannot establish the gross negligence exception to governmental immunity and his claim must fail.