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**EDWARD WIERSZEWSKI'S SIXTH CIRCUIT
PRINCIPAL BRIEF
(OCTOBER 12, 2016)**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

ALAN THIBAUT,

Plaintiff-Appellee,

v.

EDWARD WIERSZEWSKI,
individually and in his official capacity
as a Public Safety Officer,

Defendant-Appellant.

Case No. 16-2021

Oral Argument Requested

STATEMENT OF ISSUE PRESENTED:

**DID THE DISTRICT COURT COMMIT CLEAR
AND REVERSIBLE LEGAL ERROR BY REFUSING
TO GRANT SUMMARY JUDGMENT OF PLAIN-
TIF'S FALSE ARREST CLAIMS ON THE BASIS OF
THE DOCTRINE OF QUALIFIED IMMUNITY?**

STATEMENT OF THE CASE

Introduction

Defendant-Appellant Edward Wierszewski seeks reversal of an Opinion and Order entered by the District Court denying him summary judgment on grounds of qualified immunity with respect to Plaintiff's claims of false arrest for driving while under the influence of intoxicants. Resolution of the legal issues raised on appeal require a review of the undisputed and indisputable facts established in the record as well as the District Court's analysis of the doctrine of qualified immunity as applied to the relevant and incontrovertible record.

Verified Background Facts

Edward Wierszewski is a public safety officer with the Grosse Pointe Farms ("GPF") Public Safety Dept. ("PSD") (Wierszewski Aff., RE #12-2, Pg ID 110; Wierszewski Dep., RE #12-3, Pg ID 151).

At approximately 2:00 AM on December 5, 2014, Officer Wierszewski was on patrol in squad car #33 when he noticed the erratic operation of semi tractor-trailer on Moross Rd. just south of Mack Ave (Wierszewski Aff., RE #12-2, Pg ID 110, 111, 113-114; Wierszewski Dep., RE #12-3, Pg ID 153-154; GPF PSD Case Report 140005021-001, RE #12-4, Pg ID 172). The erratic driving was also observed by GPF public safety officer Veronica Cashion who was patrolling the area in squad car #34 (Wierszewski Dep., RE #12-3, Pg ID 160; Cashion Aff., RE #12-6, Pg ID 218-219). Specifically, the officers observed the front of the truck inexplicably hit, go up and over, a median (Wierszewski Aff., RE #12-2, Pg ID 113; Wierszewski

Dep., RE #12-3, Pg ID 153-154; Case Report, RE #12-4, Pg ID 172; Cashion Aff., RE #12-6, Pg ID 219). *See also*: Complaint, RE #1, Pg ID 3 and Thibault Dep., RE #12-7, Pg ID 243, 249).

Wierszewski observed two equipment-related violations of the Michigan Motor Vehicle Code when approaching the truck (Wierszewski Aff., RE #12-2, Pg ID 113-114; Wierszewski Dep., RE #12-3, Pg ID 154; Case Report, RE #12-4, Pg ID 172). Wierszewski initiated a traffic stop and Cashion provided back-up (Complaint, RE #1, Pg ID 3; Wierszewski Aff., RE #12-2, Pg ID 113-114; Case Report, RE #12-4, Pg ID 172; Cashion Aff., RE #12-6, Pg ID 220).

The traffic stop was recorded by the dash camera of car #33 and Wierszewski's body microphone (Wierszewski Aff., RE #12-2, Pg ID 111). At the end of Wierszewski's shift, the data was downloaded onto a GPF server (*Id.*).¹

Wierszewski approached the truck from the driver's side, while Cashion approached from the passenger side (Wierszewski Dep., RE #12-3, Pg ID 160; Case Report, RE #12-4, Pg ID 172). Both noted that the driver's window was down, despite cold temperatures, and that the radio volume was unusually high (DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 114-115; Case Report, RE #12-4, Pg ID 172;

¹ A DVD of the recording was filed with the District Court (Wierszewski Aff., Ex 1, RE #12-2, Pg ID 127). The DVD has been authenticated as complete and accurate (Wierszewski Aff., RE #12-2, Pg ID 112-113; Cashion Aff., RE #12-6, Pg ID 220221; Dionne Aff., RE #12-9, Pg ID 270-271; Krizmanich Aff., RE #12-10, Pg ID 276-277). A transcript of the audio portion was also filed with the District Court (Transcript, RE #12-5, Pg ID 187-216).

Transcript, Pg ID 198-200; Cashion Aff., RE #12-6, Pg ID 219-220).

Upon initial contact with the driver, Plaintiff Alan Thibault, the two officers observed that Thibault appeared disorientated, was attempting to smoke an unlit cigarette, was speaking unusually slow, and, had a flush red face (Wierszewski Aff., RE #12-2, Pg ID 114-115; Wierszewski Dep., RE #12-3, Pg ID 154-155; Case Report, RE #12-4, Pg ID 172, 176; Cashion Aff., RE #12-6, Pg ID 222).

Thibault asked Wierszewski for the location of a nearby Wendy's and Wierszewski responded it was in an adjacent block (DVD, RE #12-2, Pg ID 127; Case Report, RE #12-4, Pg ID 173, 176; Transcript, RE #12-5, Pg ID 188). Thibault explained that he had hit the median after becoming confused about how to access the Wendy's from a rear alley (DVD, RE #12-2, Pg ID 127, media time 1:50:16-1:50:40; Wierszewski Dep., RE #12-3, Pg ID 153; Transcript, RE #12-5, Pg ID 189; Thibault Dep., RE #12-7, Pg ID 242). Allegedly, while in the process of making a left turn from Moross, Thibault thought he saw a "no truck" sign and, in his haste to turn back onto Moross, ran up, on, and over the middle median (Complaint, RE #1, Pg ID 3; Thibault Dep., RE #12-7, Pg ID 243-244, 255-256). Thibault did not mention the purported sign to Officer Wierszewski and, in fact, no such sign was posted in the area at that or any other time (DVD, RE #12-2, Pg ID 127, media time 1:50:16-1:50:40; Wierszewski Dep., RE #12-3, Pg ID 153, 154; Transcript, RE #12-5, Pg ID 187-215; Brennan Aff., RE #18-2, Pg ID 523-524).

When asked, Thibault denied having any medical issues or being on medication (DVD, RE #12-2, Pg ID

127; Case Report, RE #12-4, Pg ID 173, 176-177; Transcript, RE #12-5, Pg ID 188-189).

Wierszewski asked Thibault to step out of the truck (DVD, RE #12-2, Pg ID 127; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 189). Thibault complied and had the following exchange with Wierszewski:

OFFICER WIERSZEWSKI: Okay. Step out for a minute. Have you had anything to drink tonight?

MR. THIBAUT: No.

OFFICER WIERSZEWSKI: Okay. You realize that cigarette is not even lit, right?

MR. THIBAUT: No. It goes out a lot.

(DVD, RE #12-2, Pg ID 127; Transcript, Doc #12-5, Pg ID 189-190. *See also*: Wierszewski Aff., RE #12-2, Pg ID 114-115; Case Report, RE #12-4, Pg ID 173).

Upon exiting the truck, Thibault immediately began shaking (DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 115; Transcript, RE #12-5, Pg ID 190). When asked why, he explained that he was chilled despite the fact that he had just vacated a warm truck cab (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 190).

Wierszewski asked Thibault if he had been drinking or taking any drugs, to which Thibault responded in the negative (Complaint, RE #1, Pg ID 4; DVD, RE #12-2, Pg ID 127; Case Report, RE #12-4, Pg ID 173, 177; Transcript, RE #12-5, Pg ID 189-191). However, Wierszewski's observations of Thibault's behavior raised concerns regarding possible intoxication

or impairment (Wierszewski Aff., RE #12-2, Pg ID 115; Wierszewski Dep., RE #12-3, Pg ID 154-156; Case Report, RE #12-4, Pg ID 172-173, 176). Therefore, Wierszewski requested, and Thibault consented to, a pat down and field sobriety tests (Complaint, RE #1, Pg ID 4; DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 115; Wierszewski Dep., RE #12-3, Pg ID 156; Transcript, RE #12-5, Pg ID 189-191).

Wierszewski initially conducted seven field sobriety tests (“FST’s”) which were recorded by the dash cam of car #33 and observed by Cashion (Complaint, RE #1, Pg ID 5; DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 191-197; Wierszewski Aff., RE #12-2, Pg ID 115-122; Wierszewski Dep., RE #12-3, Pg ID 157-160; Cashion Aff., RE #12-6, Pg ID 222).

Four of the FST’s were selected by Wierszewski based on his general field training experience (Wierszewski Aff., RE #12-2, Pg ID 115-116; Wierszewski Dep., RE #12-3, Pg ID 157, 160). Wierszewski requested Thibault to pick a number between 19 and 20 and Thibault correctly answered 20 (DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 115; Wierszewski Dep., RE #12-3, Pg ID 157; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 191-192; Cashion Aff., Re #12-6, Pg ID 222).

Wierszewski requested Thibault to recite the alphabet from the letter D to the letter O (DVD, RE #12-2, Pg ID 127, media time 1:52:46-1:52:55; Wierszewski Aff., RE #12-2, Pg ID 116; Wierszewski Dep., RE #12-3, Pg ID 157, 160; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 192; Cashion Aff., Re #12-6, Pg ID 222). Thibault responded by stating, “D, A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V—stopping at O.” (DVD, RE #12-2, Pg ID

127; Wierszewski Aff., RE #12-2, Pg ID 116; Wierszewski Dep., RE #12-3, Pg ID 157; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 192; Cashion Aff., Re #12-6, Pg ID 222).

Wierszewski directed Thibault to touch of the tip of a thumb to the trip of each finger while counting, which Thibault successfully completed (DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 116; Wierszewski Dep., RE #12-3, Pg ID 157, 160; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 192; Cashion Aff., Re #12-6, Pg ID 222).

Wierszewski requested Thibault to silently count for thirty seconds and advise Wierszewski when he was finished (DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 116; Case Report, RE #12-4, Pg ID 176-177; Transcript, RE #12-5, Pg ID 196-197). Thibault completed this task after 19 seconds (DVD, RE #12-2, Pg ID 127, media time 1:57:20-1:57:39; Wierszewski Aff., RE #12-2, Pg ID 116; Wierszewski Dep., RE #12-3, Pg ID 157; Case Report, RE #12-4, Pg ID 176-177; Transcript, RE #12-5, Pg ID 197-198).

Officer Wierszewski also administered three standard field sobriety test (“SFST’s) developed by the National Highway Traffic Safety Administration (“NHTSA”): the Horizontal Gaze Nystagmus (“HGN”), the One-Leg Stand, and the Walk and Turn (DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 116; Wierszewski Dep., RE #12-3, Pg ID 158-160; Case Report, RE #12-4, Pg ID 173, 176-177; Transcript, RE #12-5, Pg ID 193-195; Cashion Aff., Re #12-6, Pg ID 222).²

² These standard tests were described by the Supreme Court in *Pa. v. Muniz*, 496, U.S. 582, 585, n. 1, 110 S.Ct. 2638, 110 L.Ed.2d

On 12/5/14, Wierszewski was trained and experienced in the administration of FST's and the recognition of illegal drug use (Wierszewski Aff., RE #12-2, Pg ID 110; Wierszewski Dep., RE #12-3, Pg ID 151-153, 158; Certificates issued to Edward Wierszewski, RE #12-8, Pg ID 258-267). Wierszewski has been certified to perform NHTSA FST's since 2003 (Wierszewski Dep., RE #12-3, Pg ID 152-153; Certificates, RE #12-8, Pg ID 258-267). He is also a certified drug recognition expert (Wierszewski Aff., RE #12-2, Pg ID 110; Wierszewski Dep., RE #12-3, Pg ID 153; Certificates, RE #12-8, Pg ID 258-267).

Via his training, Wierszewski learned that an individual's performance of SFST's provides reliable clues about whether the individual is impaired due to alcohol or drugs; specifically: 77% of intoxicated/impaired individuals will exhibit abnormal HGN; 68% of intoxicated/impaired individuals are unable to

528 (1990). as follows:

The 'horizontal gaze nystagmus' test measures the extent to which a person's eyes jerk as they follow an object moving from one side of the person's field of vision to the other. The test is premised on the understanding that, whereas everyone's eyes exhibit some jerking while turning to the side, when the subject is intoxicated 'the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct' (citation omitted). The "walk and turn" test requires the subject to walk heel-to-toe along a straight line for nine paces, pivot, and then walk back heel-to-toe along the line for another nine paces. The subject is required to count each pace aloud from one to nine. The 'one leg stand' test requires the subject to stand on one leg with the other leg extended in the air for 30 seconds, while counting aloud from one to thirty.

successfully complete the walk-and-turn; and, 62% of intoxicated/impaired individuals are unable to successfully complete the one leg stand ((Wierszewski Aff., RE #12-2, Pg ID 116-122; Wierszewski Dep., RE #12-3, Pg ID 158-160).

Before administering the NHTSA SFST's, Wierszewski inquired whether Thibault had any problems standing, sitting or walking to which Thibault responded in the negative (DVD, RE #12-2, Pg ID 127, media time 1:53:20-1:53:23; Wierszewski Aff., RE #12-2, Pg ID 116; Wierszewski Dep., RE #12-3, Pg ID 167; Case Report, RE #12-4, Pg ID 176; Transcript, RE #12-5, Pg ID 192).

First, Wierszewski administered the walk-and-turn test after providing verbal instructions and a physical demonstration (DVD, RE #12-2, p 127, media time 1:53:24-1:54:27; Transcript, RE #12-5, Pg ID 192-193). Thibault acknowledged understanding the instructions and voiced no questions, concerns or objections (DVD, RE #12-2, p 127, media time 1:54:34-1:54:35; Transcript, RE #12-5, Pg ID 194). Thibault exhibited at least four indicators/clues of intoxication: body rigidity; swaying and flailing his arms to maintain balance while being instructed; elevating and using his arms for balance while walking; and, stopping during the process (DVD, RE #12-2, Pg ID 127, media time 01:53:30-01:53:34, 1:54:37-1:55:03; Wierszewski Aff., RE #12-2, Pg ID 117-119; Wierszewski Dep., RE #12-3, Pg ID 159-161; Case Report, RE #12-4, Pg ID 173, 176-177; Cashion Aff., RE #12-6, Pg ID 222-223). Two clues during performance of the walk-and-turn test is reliable evidence of intoxication (Wierszewski Aff., RE #12-2, Pg ID 117-118).

The next test was the one-leg-stand for which Wierszewski provided verbal instructions and a physical

demonstration (DVD, RE #12-2, Pg ID 127, media time 1:55:04-1:55:30; Transcript, RE #12-5, Pg ID 194). Thibault confirmed that he understood the test and voiced no questions, concerns and objections (DVD, RE #12-2, Pg ID 127, media time 1:55:04-1:55:30; Transcript, RE #12-5, Pg ID 195). Wierszewski requested Thibault to perform the test where Wierszewski had conducted the demonstration, with Thibault acknowledging that Wierszewski had performed the test without difficulty (DVD, RE #12-2, Pg ID 127, 1:55:47-1:55:54; Transcript, RE #12-5, Pg ID 195). While performing the test, Thibault exhibited five indicators of intoxication: failure to count as instructed; failure to maintain 6" foot elevation; inability to keep arms at side and use of arms for balance; swaying while balancing; and, hopping (DVD, RE #12-2, Pg ID 127, media time 1:55:24-1:55:29, 1:55:59-1:56:33; Wierszewski Aff., RE #12-2, Pg ID 119-121; Wierszewski Dep., RE #12-3, Pg ID 160-161; Case Report, RE #12-4, Pg ID 173, 176-177; Transcript, RE #12-5, Pg ID 194-195; Cashion Aff., RE #12-6, Pg ID 223). Two clues during performance of the one-leg stand are indicative of intoxication (Wierszewski Aff., RE #12-2, Pg ID 119-120).

During the HGN test, Thibault's eyes did not pursue smoothly and he had nystagmus at maximum deviation in both eyes, for a total of four clues suggestive of intoxication (Wierszewski Aff., RE #12-2, Pg ID 121-122; Wierszewski Dep., RE #12-3, Pg ID 158-159; Case Report, RE #12-4, Pg ID 173, 176-177).

Wierszewski asked and received permission to search the truck (DVD, RE #12-2, Pg ID 127; Wierszewski Dep., RE #12-3, Pg ID 164; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 197). During the search conducted by Wierszewski and

Cashion, Thibault sat in the heated back seat of car #33 (Complaint, RE #1, Pg ID 5; DVD, RE #12-2, Pg ID 127; Wierszewski Dep., RE #12-3, Pg ID 161; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 198; Cashion Aff., RE #12-6, Pg ID 220). By this point, Officer Thomas Dionne arrived at the scene and remained with Thibault (Wierszewski Dep., RE #12-3, Pg ID 161; Dionne Aff., RE #12-9, Pg ID 270-271).

During the search, Cashion confirmed that: immediately prior to the stop, Thibault had been hanging out the open window of his cab and had his radio “blasting”; when stopped, Thibault attempted to smoke an unlit cigarette; Thibault’s face had remained flushed and red; and, Thibault’s performance of the SFST’s, especially the walk-and-turn, suggested intoxication (DVD, RE #12-2, Pg ID 127, media time 1:59:55-2:07:18; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 198-200; Cashion Aff., RE #12-6, Pg ID 222-223). The search did not uncover evidence of alcohol or drugs (Complaint, RE #1, Pg ID 5). Wierszewski expressed concern about the absence of physical evidence further substantiating that Thibault was unable to safely operate the truck on public streets (DVD, RE #12-2, Pg ID 127, media time 2:02:04-2:06:58; Wierszewski Dep., RE #12-3, Pg ID 164; Transcript, RE #12-5, Pg ID 198-200).

Wierszewski returned to Thibault and, upon inquiry, discovered that Thibault had been driving for a couple of hours (DVD, RE #12-2, Pg ID 127; Case Report, RE #12-4, Pg ID 173; Transcript, RE #12-5, Pg ID 200). Wierszewski advised Thibault that: he had failed the FST’s; the test results were consistent with consumption of an intoxicant; and Wierszewski had ruled out alcohol consumption (DVD, RE #12-2, Pg ID

127, media time 2:08:33-2:09:42; Transcript, RE #12-5, Pg ID 201-202). Wierszewski also recounted other factors, including attempts to extinguish an unlit cigarette which, combined with the test results, caused Wierszewski to suspect that Thibault was intoxicated (DVD, RE #12-2, Pg ID 127, media time 1:50:58-1:51:02; Transcript, RE #12-5, Pg ID 201-202). Thibault denied taking any drugs and offered no explanation for the observed indicators of intoxication (DVD, RE #12-2, Pg ID 127, media time 2:09:42-2:08:48; Case Report, RE #12-4, Pg ID 176-177; Transcript, RE #12-5, Pg ID 201). By this point, Sgt. Krizmanich had arrived at the scene and Wierszewski advised her as to the status of the investigation (Wierszewski Dep., RE #12-3, Pg ID 161; Krizmanich Aff., RE #12-10, Pg ID 276).

After conferring with Krizmanich, Dionne, and Cashion, all of whom agreed that Thibault appeared intoxicated, Wierszewski decided to reexamine Thibault's eyes for signs of stimulant use and administer a second walk-and-turn test (DVD, RE #12-2, Pg ID 127, media time 2:11:50-2:12:28; Transcript, RE #12-5, Pg ID 202-206). Prior to the walk-and-turn test, Dionne asked Thibault to roll up his sleeves and inquired when Thibault had last used drugs (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 205). Thibault admitting to previously using marijuana, but denied any current drug use or abuse (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 205-206).

Wierszewski again verbally explained and physically demonstrated the walk-and-turn test and Thibault again confirmed he understood without voicing any questions, concerns, or objections (DVD, RE #12-2, Pg

ID 127, media time 2:14:1702:15:06; Transcript, RE #12-5, Pg ID 206-207).

Thibault was unable to successfully perform the second walk-and-turn test, as clearly depicted on the dash cam video and as observed by all four GPF public safety officers; specifically, Thibault substantially swayed from side to side lifted his legs off the ground, and considerably flailed his arms (DVD, RE #12-2, Pg ID 127, media time 2:14:15-2:15:17; Wierszewski Aff., RE #12-2, Pg ID 119; Wierszewski Dep., RE #12-3, Pg ID 161; Case Report, RE #12-4, Pg ID 173, 176-177; Transcript, RE #12-5, Pg ID 206-207; Cashion Aff., RE #12-6, Pg ID 222-223; Dionne Aff., RE #12-9, Pg ID 271-272; Krizmanich Aff., RE #12-10, Pg ID 277-278).

In Wierszewski's professional judgment, Thibault was possibly under the influence of an intoxicant and, if so, should not be allowed to continue to operate the truck on the public streets (Wierszewski Aff., RE #12-2, Pg ID 122-123; Case Report, RE #12-4, Pg ID 177). This judgment was based upon Thibault's poor performance of the FST's combined with the following observations:

- Thibault had driven erratically during the early morning hours;
- the truck radio was unusually loud;
- Thibault's face was flushed and red;
- Thibault was disoriented and restless;
- Thibault had attempted to smoke and extinguish an unlit cigarette;
- Thibault's speech was unusually slow; and,

- the window of Thibault's cab had been down despite the cold temperatures;

(Wierszewski Aff., RE #12-2, Pg ID 122-123; Wierszewski Dep., RE #12-3, Pg ID 154-156; Case Report, RE #12-4, Pg ID 173, 176-177).

Officers Cashion and Dionne and Sgt. Krizmanich independently determined that probable cause existed for operation of a vehicle while impaired by an intoxicant (Cashion Aff., RE #12-6, Pg ID 222-223; Dionne Aff., RE #12-9, Pg ID 271-272; Krizmanich Aff., RE #12-10, Pg ID 277-278).

Wierszewski arrested Thibault for operating a motor vehicle while impaired by an intoxicating substance ("OWI") in violation of MCL 257.625 (Complaint, ¶ 18; DVD, RE #12-2, Pg ID 127; Wierszewski Aff., RE #12-2, Pg ID 122-123; Wierszewski Dep., RE #12-3, Pg ID 153; Case Report, RE #12-4, Pg ID 173; Transcript, RE 12-5, Pg ID p 207). Dionne transported Thibault to the GPF police station while Wierszewski and Krizmanich secured the tractor-trailer (DVD, RE #12-2, Pg ID 127; Case Report, RE #12-4, Pg ID 173; Transcript, RE 12-5, Pg ID p 207-215; Dionne Aff., RE #12-9, Pg ID 272).

At the station, Dionne administered a preliminary breathalyzer test, to which Thibault consented and which was negative for alcohol use (Complaint, ¶ 21; Wierszewski Dep. RE #12-3, Pg ID 162; Case Report, RE #12-4, Pg ID 175-180). Wierszewski separately completed a drug influence evaluation upon Thibault as witnessed by Cashion (Complaint, ¶ 22; Wierszewski Aff., RE #12-2, Pg ID 122-123; Case Report, RE #12-4, Pg ID 175-180). During this evaluation, Wierszewski took Thibault's pulse and blood pressure and the results

of both measurements were in the high end of the normal ranges, yet further indications of possible drug use (Complaint, 1123-24; Wierszewski Dep. RE #12-3, Pg ID 167-168; Case Report, RE #12-4, Pg ID 175-180). Wierszewski again administered the NHSTA SFST's, as witnessed by Cashion, during which Thibault continued to exhibit clues of impairment (Wierszewski Aff., RE #12-2, Pg ID 122-123; Case Report, RE #12-4, Pg ID 175-180; Cashion Aff., RE #12-6, Pg ID 223). Wierszewski, Cashion, and Krizmanich all detected a white powder-like substance in Thibault's left nostril (Wierszewski Aff., RE #12-2, Pg ID 122-123; Wierszewski Dep. RE #12-3, Pg ID 164-165; Case Report, RE #12-4, Pg ID 175-180; Krizmanich Aff., RE #12-10, Pg ID 278).

Officer Wierszewski read Thibault his Miranda rights and questioned him further regarding drug use, which Thibault denied (Complaint, 25-26; Case Report, RE #12-4, Pg ID 173, 175-180). Wierszewski remained concerned that Thibault was possibly under the influence of a central nervous system stimulant or depressant (Wierszewski Aff., RE #12-2, Pg ID 123-124; Case Report, RE #12-4, Pg ID 175-180).

All activities occurring within the GPF station booking room involving Thibault were captured visually and audibly by a recorder mounted in the room (Wierszewski Aff., RE #12-2, Pg ID 112; Cashion Aff., RE #12-6, Pg ID 221; Dionne Aff, RE #12-9, Pg ID 272; Krizmanich Aff., RE #12-10, Pg ID 278)³.

3 A copy of the DVD recording from the booking room was filed with the District Court (DVD RE #12-2, Pg ID 130). This DVD has also been authenticated as complete and accurate (Wierszewski Aff, RE #12-2, Pg ID 113-114; Cashion Aff., RE #12-6, Pg ID 221; Dionne Aff., RE #12-9, Pg ID 272; Krizmanich Aff.,

Wierszewski transported Thibault to Cottage Hospital for a consented-to blood test with the samples sent to the Michigan State Police by hospital staff (Complaint, ¶¶ 27-29; Wierszewski Aff., Pg ID 12-2, Pg ID 123; Wierszewski Dep., RE 12-3, Pg ID 165; Arrest Report, RE #12-4, Pg ID 177-180, 184).

At the conclusion of the drug evaluations, Thibault was issued a citation for OWI and released after posting a \$500.00 bond (Arrest Report, RE #12-4, Pg ID 173, 181; Court Record RE #12-13, Pg ID 288-289, 292, 301). After his release, Thibault underwent drug and alcohol screening tests at his employer's drug screening facility, the results of which were negative for alcohol, marijuana, cocaine, amphetamines, opiates, and PCP (Complaint, ¶ 30; Court Record RE #12-13, Pg ID 320-321).

On December 19, 2014, the Michigan State Police Laboratory reported that the blood drawn on Thibault at Cottage Hospital on 12/5/14 was negative for alcohol (Lab Report, RE #12-11, Pg ID 281-282; Wierszewski Dep., RE 12-3, Pg ID 165).

On January 28, 2015, a Stipulation and Order was entered in the GPF Municipal Court, dismissing the OWI charges against Thibault without prejudice, the prosecutor reserving the right to file a new complaint in the event the results of the Michigan State Police Laboratory blood screen was positive for drug use (Court File, RE #12-13, Pg ID 290, 293-295). On January 30, 2015, GPF refunded the \$500.00 bond posted for Thibault (Court File, RE #12-13, Pg ID 298).

On April 22, 2015, the Michigan State Police Laboratory reported that the blood drawn on Thibault at Cottage Hospital on 12/5/14 was negative for certain limited class of drugs, including, amphetamines, barbiturates, benzodiazepines, cannabinoids, cocaine metabolites, meprobamates, methadone, opiates, tramadol and zolpidem (Lab Report, RE #12-12, Pg ID 284-285; Wierszewski Dep., RE #12-3, Pg ID165-167). No further charges have been levied against Thibault with respect to his detention and arrest on 12/5/14.

Proceedings in the District Court

On or about April 14, 2015, Plaintiff Thibault instituted the instant action responding, “No. He asked me. You know your cigarette is not lit. I said, I know that.” (Thibault Dep., RE #12-7, Pg ID 253). Plaintiff’s counsel did not examine his client under oath regarding any of Officer Wierszewski’s observations regarding Thibault’s behavior with the unlit cigarette (Doc #12-7, Pg ID 225-256).

Pursuant to Court order, fact discovery closed on October 30, 2015 (Doc #8, Pg ID 51) and expert discovery closed on February 29, 2016 (Doc #10, Pg ID 64).

One March 23, 2016, the Defendant filed a Motion for Summary Judgment supported by documentary evidence including the GPF DPS Case Report (RE #12-4, Pg ID 169-185); DVD’s containing the dash cam and booking room recordings (RE #12-2, Pg ID 126, 130); a transcription of the dash cam recording (RE #12-5, Pg ID 186-216); the GPF DPS Case Report (RE #12-4, Pg ID 170-185); Wierszewski’s deposition transcript (RE #12-3, Pg ID 148-186); the sworn affidavits of Wierszewski (RE #12-2, Pg ID 109-124), Cashion (RE

#12-6, Pg ID 218-223), Dionne (RE #12-9, Pg ID 269-273), and Krizmanich (RE #12-10, Pg ID 275-279); Wierszewski's DRE training certificates (RE #12-8, PG ID 258-267) Michigan State Police Laboratory Reports (RE #12-11, Pg ID 281-282, RE #12-12, Pg ID 284-286); the Municipal Court file (RE #12-13, Pg ID 288-335); and, Thibault's deposition (RE #12-7, Pg ID 224-256). Attached to the Defendant's Reply Brief was the Affidavit of GPF Public Services Director Terrance Brennan and expert Bugbee's deposition transcript (RE #18-2, Pg ID 522-525, 539-561).

The Defendant's request for summary relief was premised on arguments that:

- Plaintiff's false arrest claims failed on the merits because, as a matter of law, the Defendant officer had probable cause to arrest Plaintiff;
- Plaintiff's malicious prosecution claims failed on the merits because, as a matter of law, the Defendant officer had probable cause to arrest Plaintiff, and, as a matter of undisputed fact, the officer did not participate in Plaintiff's prosecution in a blameworthy way and Plaintiff did not suffer from a deprivation of liberty apart from the initial arrest; and,
- as a matter of law, the Defendant was entitled to qualified immunity.

(RE #12, Pg ID 69-105)

In the Defendant's Brief in Support of Summary Judgment, Thibault's attempt to extinguish an unlit cigarette was explicitly referenced as a factor justifying

Wierszewski's probable cause determination (RE #12, Pg ID 81, 99).

Plaintiff submitted a Response Brief to which no documentation was attached (RE #15, Pg ID 466-482). With respect to his false arrest claims, Plaintiff argued that Wierszewski lacked probable cause because Plaintiff passed the FST's and the other factors relied upon by the officer do not constitute evidence of actual criminal activity (RE #15, Pg ID 476-478). Plaintiff did not cite any evidence verifying that he did not attempt to smoke or extinguish an unlit cigarette. With respect to his malicious prosecution arguments, Plaintiff again asserted the absence of probable cause (RE #15, Pg ID 478-481).

At the hearing on Defendant's Motion for Summary Judgment, the parties' argument focused primarily upon the false arrest claims, the District Court indicating that the malicious prosecution claims failed in absence of evidence that Defendant participated in Plaintiff's prosecution and Plaintiff suffered no deprivation of liberty apart from the initial arrest (Motion Transcript, RE #32, Pg ID 821, 834-836).

With respect to the false arrest claims, Plaintiff's counsel insisted that proofs in the record establish that:

- there is no corroboration for Officer Wierszewski's observed indicators of intoxication; and,
- Wierszewski lied, ignored, or failed to investigate for, exculpatory evidence, fabricated evidence after-the-fact, and, specifically, manipulated the FST/SFST tests and results in order to "railroad" an innocent Thibault.

(Motion Transcript, RE #32, Pg ID 821, 836-850, 859, 863).

However, Plaintiff's counsel admitted on the record that:

- Thibault drove erratically on 12/5/14 (RE #32, Pg ID 837);
- the windows of Thibault's truck were down while he was driving (*Id*);
- Thibault never attempted to explain why he had an unlit cigarette in his mouth (RE #32, Pg ID 859-860);
- Wierszewski was not told that Thibault had a speech impediment that would account for his slow speech (Motion Transcript, RE #32, Pg ID 842); and,
- Thibault denied having any medical conditions that would impact his ability to perform FST's/SFST's (Motion Transcript, RE #32, Pg ID 842-843).

At the hearing, Plaintiff's counsel asserted, for the first time, that Thibault did not attempt to extinguish an unlit cigarette (Motion Transcript, RE #32, Pg ID 839). Plaintiff's counsel requested, and received, permission from the Court to submit a proposed affidavit as a supplemental exhibit in opposition to summary judgment (Motion Transcript, RE #32, Pg ID 851-852, 868-869).

The District Court placed a few rather remarkable comments on the record before taking the dispositive motion under advisement (Motion Transcript, RE #32, Pg ID 867). For example, the Court stated that the

dash cam video clearly depicts a “substantial” loss of balance during both walk-and-turn tests (Motion Transcript, RE #32, Pg ID 844). However, the Court also indicated that it found the NHTSA and other SFST’s “troubling” as they appeared designed to trap innocent motorists (Motion Transcript, RE #32, Pg ID 825-826, 846). Indeed, the District Court Judge confessed to attempting to perform the FST’s in chambers and was frustrated by an inability to perform them (Motion Transcript, RE #32, Pg ID 826, 844). Yet the Court also noted that:

- in addition to the results of the FST’s/SFST’s there were other undisputed facts such as Thibault’s erratic driving, flushed face, use of an unlit cigarette, which would raise reasonable concerns that Thibault was impaired;
- Officer Wierszewski was faced with a difficult situation; and,
- it might well have been irresponsible to allow Thibault to continue to drive.

(Motion Transcript, RE #32, Pg ID 844-846).

On June 9, Plaintiff submitted his post-hearing motion and proposed affidavit (RE #24, Pg ID 688-698). The motion was granted over defense objections (Response Brief, RE #25, Pg ID 700-733; Order, RE #26, Pg ID 734-740; Thibault Aff., RE #27, Pg ID 741).

On June 24, 2016, the District Court issued an Opinion and Order granting summary judgment on Plaintiff’s malicious prosecution claims but denying summary judgment on the false arrest claims (Opinion and Order, RE #28, Pg ID 743-777). On page two, the Court concluded, in part, that “if a jury resolved

[certain hotly disputed facts] in Thibault's favor, it could find that Wierszewski's mistaken conclusion that he had probable cause to arrest Thibault was not a reasonable one." (RE #28, Pg ID 744). On June 24, 2016 the District Court also issued an Amended Opinion and Order (RE #29, Pg ID 778-812) which modified the original sentence on page two by removing the word "mistaken" (RE #29, Pg ID 778-812, Pg ID 778-779).

On July 13, 2016, Edward Wierszewski filed a Notice of Appeal seeking review and reversal of the denial of summary judgment with respect to Plaintiff's false arrest claims (RE #30, Pg ID 813-814).

SUMMARY OF ARGUMENTS

The District Court committed clear and reversible legal error by refusing to grant summary judgment in favor of the Defendant police officer on the basis of the doctrine of qualified immunity with respect to Plaintiff's false arrest claims because there is incontrovertible proof, in the form of a complete and accurate dash cam recording and other undisputed or indisputable evidence, that Wierszewski had probable cause to arrest Plaintiff Thibault for driving under the influence of intoxicants.

Alternatively, even assuming that the questions of fact exist as to objective reasonableness of the Defendant's probable cause determination, the qualified immunity doctrine requires summary dismissal of the false arrest claims because, under the rules of law clearly established on the date of Thibault's arrest, Wierszewski could have reasonably believed that Thibault's arrest was both lawful and necessary to protect the general public and Thibault from the enormous dangers associated with driving while intox-

icated, regardless of whether this belief was ultimately proven erroneous.

STANDARDS OF APPELLATE REVIEW

The Sixth Circuit conducts a *de novo* review of district court determinations on motions for summary judgment. *Pollard v. City of Columbus*, 780 F.3d 395, 402 (6th Cir. 2015).

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). *See also: Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). *See also: Celotex*, 477 U.S. at 327.

The moving party is obliged to inform the court of the legal basis for summary relief and to cite portions of the record which demonstrate the absence of a genuine dispute over material facts. Fed. R. Civ. Pro 56 (c)(1)(A)-(B); *Celotex Corp.*, 477 U.S. at 323; *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002). The burden then shifts to the responding party to identify specific portions of affidavits, depositions, or other quality evidence which would permit a reasonable jury to reach a verdict in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505;

91 L.Ed.2d 202 (1996); *Matsushita Elec. Indus.*, 475 U.S. at 586.

A court resolving a request for summary judgment is required to view the factual evidence and all reasonable inferences in a light most favorable to the opposing party. *Tolan v Cotton*,—U.S.—,134 S.Ct. 1861, 1863, 188 L.Ed.2d 895 (2014); *Plumhoff*, 134 S.Ct. at 2017. However, a reviewing court is not obligated to accept wholesale or grant deference to an opposing party's version of the facts if that version is so blatantly contradicted by the record that no reasonable jury could believe it. *Scott*, 550 U.S. at 378-381; *Shreve v. Franklin Cnty, Ohio*, 743 F.3d 126, 132-33 (6th Cir. 2014); *Marvin v. City of Taylor*, 509 F.3d 234, 239-244 (6th Cir. 2007); *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000).

Neither conclusory allegations, speculation, unsubstantiated assertions, nor a mere scintilla of evidence in support of the non-movant's position, may defeat summary judgment. *Liberty Lobby*, 477 U.S. at 252; *Matsushita Elec. Indus.*, 475 U.S. at 586.

In *Scott, supra*, the Supreme Court addressed the role of video and audio evidence at the summary-judgment stage of civil rights actions, holding that:

- where there is a complete and accurate video /audio recording of the entire incident giving rise to claims, the district court should view the facts in the light depicted by the recording;
- witness accounts seeking to contradict such video recordings do not create triable factual issues for juries; and,

- once the court has determined the relevant set of facts and inferences supported by the record, the reasonableness of a defendant's actions is a question of law for the courts.

The Sixth Circuit recognizes that complete and authenticated video/audio recordings may be dispositive of alleged factual disputes in civil rights cases; that is, the court must view the facts in the light depicted by the recording and may only draw inferences in favor of the non-movant to the extent supported by the recordings. *Rudlaff v. Gillispie*, 791 F.3d 638, 639 (6th Cir. 2015); *Kinlin v Kline*, 749 F.3d 573, 576-579 (6th Cir. 2014); *Shreve, supra*; *Dunn v. Matatall*, 549 F.3d 348, 350 (6th Cir. 2008); *Marvin, supra*; *Pennington v. Terry*, 644 Fed. Appx. 533, 538-541, 2016 U.S. App. LEXIS 5619, 2016 Fed. App. 0164N (6th Cir. 3/23/16) (Addendum III, Ex B); *Jolley v Harvell*, 254 Fed. Appx. 483, 2007 U.S. App. LEXIS 26625 (6th Cir. 11/31/07) (Addendum III, Ex C)⁴.

Notably, this Court has recognized that the video and/or audio quality of a recording “need not be flawless” to be dispositive; rather, the sound and images need only be “clear enough to discern what happened and, more importantly, what did not happen.” *Pennington*, 644 Fed. Appx. at 540-541 (concluding that the court “must view the facts in the light depicted

⁴ See also: *Bernard v. Det. Pub. Sch. Dist.*, 2015 U.S. Dist. LEXIS 59018, *25 (ED, Mich., 5/16/15); *Lee v. Hill*, 2013 U.S. Dist. LEXIS 131158, *13-15 (E.D. Mich., 3/3/11); *Evans v. Mallory*, 2011 U.S. Dist. LEXIS 34471, *4-5, 10-18 (ED, Mich., 3/3/11); *Kelly v. Sines*, 2015 U.S. Dist. LEXIS 121377, *2 (SD, Ohio, 9/11/15); *Carter v. Porter*, 2011 U.S. Dist. LEXIS 20911, *20-36 (ED, Ken. 3/1/11); *Shackelford v. Guterth*, 2005 U.S. Dist. LEXIS 27954, *10-12 (WD, Ken, 11/01/05).

by the videotape rather than in the light most favorable to the plaintiff and, at best, the video provides a scintilla of evidence in support of the 4th Amendment claims).

ARGUMENT:

THE DISTRICT COURT COMMITTED CLEAR AND REVERSIBLE LEGAL ERROR BY REFUSING TO GRANT SUMMARY JUDGMENT OF PLAINTIFF'S FALSE ARREST CLAIMS ON THE BASIS OF THE DOCTRINE OF QUALIFIED IMMUNITY

A. Introduction

42 U.S.C. § 1983 confers a private federal right of action against any person who, acting under color of state law, deprives an individual of any right, privilege or immunity secured by the Constitution or federal laws. *Collins v. City of Harker Highs.*, 503 U.S. 115, 119, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299, 306; 106 S.Ct. 2537; 91 L.Ed.2d 249 (1996).

Qualified immunity shields a governmental employee from the burdens of litigation and personal civil liability under § 1983 for money damages arising out of the performance of discretionary functions as long as the employee acted under the objectively reasonable, even if mistaken, belief that his/her actions were lawful. *Mullenix v. Luna*,—U.S.—; 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015); *Pearson v. Callahan*, 555 U.S. 223, 231-232, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); *Anderson v. Creighton*, 483 U.S. 635, 639; 107 S.Ct. 3034; 97 L.Ed.2d 523 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 526-527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (“The entitlement is an immunity from suit

rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”); *Austin v. Redford Twp. Police Dept.*, 690 F.3d 480, 495 (6th Cir. 2012). This insulation from both litigation expenses and § 1983 liability is broadly applied, protecting all but the plainly incompetent or those who knowingly violate a clearly established statutory or constitutional right. *Mullenix, supra*; *Reichle v. Howards*, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012); *Harlow*, 457 U.S. at 815-816; *Malley, supra*.

Resolving a defense of qualified immunity presents a two-prong inquiry; specifically: whether the defendant’s conduct violated a federal right and whether this right was clearly established at the time of the injury. *Tolan v. Cotton*, U.S.____, 134 S.Ct. 1861, 1865-186, 188 L.Ed.2d 895 (2014); *Pearson*, 555 U.S. at 232; *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Reviewing courts are allowed to decide the order in which to address the two point inquiry. *Tolan*, 134 S.Ct. at 1866; *Pearson*, 555 U.S. at 236. The burden of proof rests squarely upon the § 1983 plaintiff to defeat the immunity defense. *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 680-681 (6th Cir. 2013); *Reilly v. Vadlamudi*, 680 F.3d 617, 623 (6th Cir. 2012).

A constitutional right is “clearly established” when case law in existence at the time rendered the constitutional or statutory violation “beyond debate”. *Mullenix, supra*; *Reichle, supra*; *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011); *Malley v. Briggs*, 475 U.S. 335, 341, 343; 89 L.Ed.2d 271; 106 S.Ct. 1092 (1986); *Martin v. City of Broadview Heights*, 712 F.3d 951, 960-961 (6th Cir.

2013). When applying this test, the Sixth Circuit looks to Supreme Court decisions, decisions of the Sixth Circuit and its district courts, as well as other federal court decisions. *Martin*, 712 F.3d at 961; *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004).

In the context of alleged 4th Amend. violations, the Supreme Court insists that reviewing courts determine whether a right is “clearly established” based on the exact conduct at issue—and not as a broad general issue. *Tolan, supra* (courts must avoid defining the 4th Amend. right “in a manner which imports disputed factual propositions.”); *Pearson*, 555 U.S. at 236-237; *Saucier*, 533 U.S. at 302.

In order to establish that an arrest violates the 4th Amend., it is incumbent upon the plaintiff to prove that the arresting officer lacked probable cause. *Voyticky v. Vill. of Timberlake, Ohio*, 412 F.3d 669, 677 (6th Cir. 2005). However, the demonstrated lack of probable cause or a question of fact as to the existence of probable cause is not the test for qualified immunity. Rather, and in recognition that even police officers are human and, therefore, will inevitably make mistakes, the Supreme Court has mandated that police officers may not be held personally liable in cases where they reasonably, albeit incorrectly, conclude that probable cause is present. *Brousseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004); *Saucier*, 533 U.S. at 205; *Malley*, 475 U.S. at 341 (immunity should be recognized if reasonable officers could disagree on the issue of the existence of probable cause); *Anderson*, 483 U.S. at 641. *See also: Goodwin v. City of Painesville*, 781 F.3d 314, 333 (6th Cir. 2014); *Kennedy*, 635 F.3d at 214, (“Thus, even if

a factual dispute exists about the objective reasonableness of the officer's actions, a court should grant the officer qualified immunity if, viewing the facts favorably to the plaintiff, an officer reasonably could have believed that the arrest was lawful.”); *Greene v. Barber*, 310 F.3d 889, 893 (6th Cir, 2002); *Ireland v. Tunis*, 113 F.3d 1435, 1449 (6th Cir. 1997), *cert. den.*, 522 U.S. 118 S.Ct. 560, 139 L.Ed.2d 401 (1997) (“ ‘Probable cause determinations, even if wrong, are not actionable as long as such determinations pass the test of reasonableness.’ ”, *quoting Jeffers v. Heavin*, 10 F.3d 380, 381 (6th Cir. 1993)).

The reasonableness of an officer's probable cause determination for the purposes of qualified immunity presents a question of law for the courts. *Hunter v. Bryant*, 502 U.S. 224, 227-228, 112 S. Ct. 534, 116 L.Ed.2d 589 (1991); *Goodwin, supra*; *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009); *Jeffers, supra*. And, when determining the reasonableness of an officer's “arguable probable cause, the reviewing court is obliged to balance the nature and quality of the intrusion upon the claimant against the importance of the governmental interest prompting the intrusion. *Tolan, supra*; *Graham v. O'Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

In short, a defendant police officer is entitled to qualified immunity from claims for civil damages resting upon allegations of false or wrongful arrest if the officer reasonably—even if erroneously—believed at the time that the arrest was lawful in light of existing law and the information then possessed by the officer. *See, i.e., Pearson*, 555 U.S. at 232; *Malley*, 475 U.S. at 341; *Kennedy*, 635 F. 3d at 214; *Russo v. Cincinnati*, 953 F.2d 1036, 1049 (6th Cir. 1992).

A. Controlling Law Mandates That Plaintiff's Claims of Unlawful Arrest be Subject to Summary Judgment Because the Incontrovertible Record Demonstrates the Defendant Police Officer had Probable Cause to Arrest Plaintiff for Driving While Under the Influence of Intoxicants

1. Elements of § 1983 Claims for False Arrest

The 4th Amend., as incorporated by the 14th Amend., protects individuals from warrantless arrests by municipal police officers in the absence of probable cause. U.S. Const. Amend. IV; *Robertson v. Lucas*, 753 F.3d 606, 618 (6th Cir. 2014). The probable cause requirement was intended to prevent officers from making “hasty, unsubstantiated arrests with impunity” and from turning “a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone.” *Ahlers v. Schebil*, 188 F.3d 365, 371-372 (6th Cir. 1999).

State law defines offenses for which a person may be arrested and federal law defines whether probable cause existed for an arrest for the purposes of § 1983 liability. *Kennedy v. City of Villa Hills*, 635 F.3d 210, 215 (6th Cir. 2011). The existence of probable cause presents a jury question unless there is only one reasonable determination possible. *Kinlin*, 749 F.3d at 578; *Wilson v. Morgan*, 477 F.3d 326, 334 (6th Cir. 2007). Again, the claimant, alone, bears the burden of proving the absence of probable cause. *Voyticky, supra*.

Whether probable cause exists depends on the totality of the particular circumstances in existence at the time of the arrest. *Illinois v. Gates*, 462 U.S. 213,

232, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *Kinlin*, 749 F.3d at 577-578; *Stricker v. Twp. of Cambridge*, 710 F.3d 350, 362-363 (6th Cir. 2013); *Green v. Throckmorton*, 681 F.3d 853, 885 (6th Cir. 2012). A police officer has probable cause when there is reasonably reliable information suggesting that an individual has committed or is about to commit a crime. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003); *Texas v. Brown*, 460 U.S. 730, 732, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983); *Beck, supra*; *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003).

Probable cause requires only the fair probability of criminal activity at the time of the arrest and not ironclad evidence of guilt. *Brown, supra*; *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Kinlin*, 749 F.3d at 578; *Crockett v. Cumberland Coll.*, 316 F.3d 571, 580 (6th Cir. 2003); *Criss v. City of Kent*, 867 F.2d 259, 262 (6th Cir. 1988).

Reviewing courts are required to assess probable cause determinations under an objective standard from the viewpoint of a reasonable officer at the particular scene based exclusively upon the actual information known at the time of the arrest. *Green*, 681 F.3d at 865; *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005); *Crockett*, 316 F.3d at 580; *Klein v. Long*, 275 F.3d 544, 550 (6th Cir. 2001). Courts are prohibited from testing challenged conduct from the standpoint of legal scholars, from the court's own experience, or from the court's perspective with the benefit of hindsight. *Gates*, 462 U.S. at 232; *U.S. v. Cortez*, 419 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *Radvansky, supra*; *Klein, supra*. *See also*:

U.S. v. Montoya De Hernandez, 473 U.S. 531, 542, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (“ . . . we have cautioned that courts should not indulge in ‘unrealistic second-guessing,’ (citation omitted) and we have noted that ‘creative [judges] engaged in post hoc evaluations of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished.’ *Id.*, at 686-687.)

The existence of probable cause does not necessarily depend upon the knowledge and experience of the arresting officer, alone; rather, other officers may offer corroborating evidence. *Brown*, 460 U.S. 730, 742-743; *Cassidy v. U.S.*, 49 F.2d 504, 504-505 (D.C. Cir. 1931); *U.S. v. Cotton*, 253 F. Supp. 2d 983, 987 (S.C. Ohio, 2002); *Briggs v. Holsapple*, 2009 U.S. Dist. LEXIS 1295, *13-16 (D.Ct. Ore., 2/11/09) (two officers at scene of traffic stop concurred that probable cause existed for OWI arrest); *Corcoran v. Higgins*, 2010 U.S. Dist. LEXIS 47284, *3-5, 10-12 (S.D.N.Y., 5/13/10) (two officers witnessed plaintiff’s failure to pass three out of four SFST’s); *U.S. v. Gorder*, 726 F. Supp. 2d 1307, 1315-1316 (D. Utah, 2010) (second officer at arrest scene corroborated that initial traffic violation and failure to properly perform SFST’s were reliable indicators of intoxication); *U.S. v Jones*, 500 Fed. Appx. 216, 218, 2012 U.S. App. LEXIS 26070 (4th Cir. 12/18/12) (Addendum III, Ex D); *U.S. v. Kemp*, 214 Fed. Appx. 127, 2007 U.S. App. LEXIS 659 (3rd Cir. 1/11/07) (Addendum III, Ex E).

Notably, the law does not impose an onerous burden upon officers who are contemplating a warrantless arrest. While officers gathering information relevant to a probable cause determination are required to consider both inculpatory and exculpatory evidence, the officers

are not required to vigorously investigate every claim of innocence. *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007), *cert. den.*, 555 U.S. 811, 129 S.Ct. 35, 172 L.Ed.2d 19 (2008); *Gardenshire v. Schubert*, 205 F.3d 303, 318 (2000). As a matter of law, unusual, bizarre, and even innocent behavior can form grounds for probable cause. *Gates*, 462 U.S. at 243, n. 13; *Green*, 681 F.3d at 865, *U.S. v. Wright*, 16 F.3d 1429, 1438 (6th Cir. 1994); *U.S. v. Respress*, 9 F.3d 483, 488 (6th Cir. 1993).

As a matter of law, once officers have probable cause, they need not investigate further. *Kinlin*, 749 F.3d at 580-581; *Klein*, 275 F.3d at 551-552; *Ahlers*, 188 F.3d at 371; *Criss*, 867 F.2d at 263.

A subsequent dismissal of charges or finding of innocence does not render actionable an officer's prior determination of probable cause. *Baker v. McCollan*, 443 U.S. 137, 145-146, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979) ("The Constitution does not guarantee that only the guilty will be arrested."); *Mich. v. DeFillippo*, 443 U.S. 31, 36, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); *Kinlin*, 749 F.3d at 578; *Criss*, *supra*.

Finally, the subjective motive of the arresting officer is legally irrelevant to the existence of probable cause. *Graham*, 490 U.S. at 397 (officers' purported improper motives cannot transform objectively reasonable actions in to 4th Amend. violations); *Cass v. City of Dayton*, 770 F.3d 368, 377 (6th Cir. 2014); *Kinlin*, 749 F.3d at 579-580.

The long held consensus across the federal circuits, as well as the rule in Michigan, is that the unsatisfactory performance of FST's/SFST's constitutes reliable evidence upon which officers may premise probable

cause determinations—especially where the test results are accompanied by other indicators of intoxication. *Bradley v. Reno*, 2015 U.S. App. LEXIS 21100, *1-8 (6th Cir. 12/3/15) (Addendum III, Ex F) (results of FST's/SFST's combined with unsafe operation of vehicle at 10:25 PM); *Jolley, supra* (failed FST's/SFST's combined with unusual driving tactics and behavior); *Wynn v. Morgan*, 861 F.Supp.622, 632-633 (E.D. Tenn., 1994) (failed FST's/SFST's combined with erratic driving and unusual behavior); *Budgett v. Sanborn*, 2015 U.S. Dist. LEXIS 102437, *2-5, 11-14 (D.Ct. Ore., 5/14/15) (failed FST's/SFST's combined with failure to dim bright lights and to follow basic instructions); *Ketchum v. Khan*, 2014 U.S. Dist. LEXIS 97975, *4, 21 (ED. Mich., 2/24/14), adopted by 2014 U.S. Dist. LEXIS 97472 (ED. Mich., 7/18/14) (failed FST's/SFST's combined with unsafe driving at 3:00 AM, watery bloodshot eyes, slurred speech and unsteadiness); *Cameron v. Riverview*, 2011 U.S. Dist. LEXIS 89118, *6-7 (ED. Mich., 8/11/11)(failed FST's/SFST's combined with erratic driving at 1:30 AM and other signs of intoxication); *Mott v. Davis*, 2011 U.S. Dist. LEXIS 115316, *3-5, 24-28 (ED. Tenn., 10/5/11) (failed FST's combined watery bloodshot eyes and slurred speech); *Freeland v. Simmons*, 2012 U.S. Dist. LEXIS 9804, *8, 16 (D.SC, 1/27/12) (failed FST's combined with early morning hour and watery bloodshot eyes); *Rutherford v. Cannon*, 2010 U.S. Dist. LEXIS 102016, *5-7, 14-19 (D.SC, 9/2/10) (failed FST's combined with erratic driving and open vehicle windows on a cold night); *Shackleford, supra*, at *2-3, 10-12 (failed FST's/SFST's combined with erratic driving and dilated pupils); *Briggs, supra*, (failed FST's/SFST's combined with speeding); *Wilson v. City of Coeur D'Alene*, 2010 U.S. Dist. LEXIS 123258, *3-4, 11-15 (D.Ct. Idaho, 11/19/10)

(failed FST's/SFST's combined with illegal turn at 10:30 PM, flushed face, and glassy eyes); *Corcoran, supra*, (failed FST's combined with glassy eyes, slurred speech and lack of coordination); *People v. Cloutier*, 2016 Mich. App. LEXIS 1704, *1-2, 9-12 (No. 326255, 9/15/16) (failed FST's/SFST's combined with reckless driving at 2:00 AM, blood shot eyes and slurred speech). *See also: People v. Berger*, 217 Mich. App. 213, 214-218, 551 N.W.2d 421 (1996) (FST/SFST results provide reliable data to officers tasked with determining probable cause for driving while intoxicated); *Gorder, supra; U.S. v. Hernandez-Gomez*, 2008 U.S. Dist. LEXIS 26810, *2-7,14-25 (D. Nev. 3/25/08) (“the results of properly conducted standard field sobriety tests may be considered to determine whether probable cause exists to charge a driver with driving while intoxicated.”).

The analysis and results in several of the more factually similar cases merit discussion.

In *Gorder*, the Court determined that there was probable cause for a challenged DUI arrest because both the arresting officer and another officer on the scene had observed the arrestee start the one-leg stand test early, make numerous mistakes during the one-leg stand test, and almost fall over during the walk and turn test. *Id.*, 726 F. Supp. 2d at 1315-1316.

The *Briggs* Court determined that it was objectively reasonable for an officer to believe he possessed probable cause to arrest the plaintiff for driving while under the influence based on the facts that plaintiff: had been stopped for speeding; had watery bloodshot eyes; and, had failed the walk-and-turn test. *Id.*, 2009 U.S. Dist. LEXIS 11295 at *2-16. The Court stressed that its conclusion was not undermined by the facts that plaintiff passed a HGN test, arguably passed a

one-leg stand test, and that breath and urine tests were negative, reasoning that such exculpatory evidence did not “conclusively” negate the other reliable evidence of intoxication. *Id.* at *15-16. The Court also rejected plaintiff’s arguments that the results of the SFST’s were not reliable since he was forced to perform them on an inclined service with loose gravel, noting that plaintiff had failed to complain about these conditions when the tests were administered. *Id.* at *13-14.

In *Burgett*, the plaintiff had been stopped for failing to dim high beam headlights, failed to follow simple instructions, failed to properly perform the walk and turn and badly failed the one leg stand. SFST’s. *Id.*, 2015 U.S. Dist. LEXIS 102437 at *3-4. A dash cam video captured plaintiff’s poor test performances, particularly on the one-leg test. *Id.* at *4. Prior to the testing, plaintiff denied having any medical issues that would impact the test results. *Id.* at *12-13. The results of a blood alcohol test indicated an amount below the level where impairment is presumed under state law *Id.* at *12-13. The local district attorney elected not to prosecute the DUI charges *Id.* at *5.

The *Burgett* Court held that the inculpatory factors relied upon by the arresting officer’s satisfied the objectively reasonable test for probable cause. *Id.* at *11. The Court rejected arguments that plaintiff’s poor test performance was due to physical infirmities or difficult terrain, noting that, at the time the tests were performed, plaintiff had failed to lodge any complaints or offer any explanations to the arresting officer and reasoning that “[r]egardless of why plaintiff failed the FST’s, his failure supported probable cause to arrest

him.” *Id.* at *12-13. The Court also reasoned that neither the low blood alcohol measurement nor the lack of prosecution nullified the other reliable indicators of impairment. *Id.* at *13-14.

Wilson involved an arrest for DUI prompted by the plaintiff’s unsatisfactory performance of the walk-and-turn, one-leg-stand, and HGN tests, combined with arresting officer’s observations that plaintiff had made an illegal turn, was flushed, had red and glassy eyes. *Id.*, 2010 U.S. Dist. LEXIS 123258, *2-3. A breath test was negative for alcohol as was an independent urine tox-screen and, as a result, the charges were dismissed. *Id.*, at *3-4. The *Wilson* Court readily rejected attacks upon the “sufficiency” of the evidence relied upon by the officer when making his probable cause determination:

Officer Winstead’s observations of Mr. Wilson at the time of the initial stop may appear to be scant evidence of probable cause when considered singularly and/or in hindsight with the benefit of the test results. However, when viewing the observations in the totality of the circumstances at the time of the arrest, probable cause existed for the DUI arrest. It was late in the evening, approximately 10:30 p.m., Mr. Wilson was observed leaving The Corner Bar, made an illegal turn, was flush and his eyes were red and glassy, Mr. Wilson admitted to consuming some alcohol, and he failed the FST. These facts are sufficient evidence upon which Officer Winstead could base his probable cause finding and arrest Mr. Wilson for a DUI. Courts in Idaho have found probable cause exists to arrest for a

DUI where the individual admitted to drinking four beers but was unable to say where he had been drinking or where he was going, his eyes were bloodshot and glossy, his speech was ‘thick,’ and he failed the Horizontal Gaze Nystagmus (HGN). (citation omitted)

Undoubtedly the circumstances here could have been stronger to support a finding of probable cause. That, however, is not what is required. The probable cause determination asks that we answer the question of ‘if ‘at the moment the arrest was made . . . the facts and circumstances within [the officer’s] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing’ that the suspect had violated a criminal law.’ (citation omitted) Upon the facts and circumstances known to Officer Winstead at the time of the arrest, there was sufficient probable cause to arrest Mr. Wilson.

Id., emphasis supplied.

2. As a Matter of Incontrovertible Fact, Probable Cause Existed for Thibault’s Arrest for Driving While Intoxicated

It is unlawful in Michigan to operate a motor vehicle on the public roads while under the influence of alcohol or other intoxicating substance. MCL § 257.625(1)⁵. MCL § 257.625(25) broadly defines “intoxicating substance” as:

⁵ “(1) A person, whether licensed or not, shall not operate a

(25) As used in this section:

- (a) “Intoxicating substance” means any substance, preparation, or a combination of substances and preparations other than alcohol or a controlled substance, that is either of the following:
 - (i) Recognized as a drug in any of the following publications or their supplements:
 - (A) The official United States pharmacopoeia.
 - (B) The official homeopathic pharmacopoeia of the United States.
 - (C) The official national formulary.
 - (ii) A substance, other than food, taken into a person’s body, including, but not limited to, vapors or fumes, that is used in a

The Michigan Legislature enacted MCL § 257.625 in order to address the “enormity of dangers”—including the risks posed to innocent members of the general public—posed by intoxicated drivers. *People v. Rogers*, 438 Mich. 602, 621, 475 N.W. 2d 717 (1991). *See also: People v. O’Neal*, 198 Mich. App. 118, 122, 497 N.W.2d 535 (1993); *Holland v. Dreyer*, 184 Mich. App. 237,

vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, “operating while intoxicated” means any of the following:

- (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.” manner or for a purpose for which it was not intended, and that may result in a condition of intoxication.

238, 457 N.W.2d 56 (1990); *People v. Aughton*, 1996 Mich. App. LEXIS 1124, *4 (No. 185297, 719199). This Court has independently acknowledged that “it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy.”’ *Marvin*, 509 F.3d at 245.

In this case, Officer Wierszewski justified his determination that there was probable cause for suspecting that Thibault violated MCL § 257.625 upon the following:

- Wierszewski’s extensive prior training, experience, and certification as an expert in the administration of FST’s, including the standard tests adopted and advocated by the NHTSA;
- Thibault’s inability to successfully perform six out of eight FST’s/SFST’s;
- other reliable indicators of intoxication presented by the time of day, Thibault’s erratic driving, Thibault driving with windows open and with the radio turned up extremely loud during the cold early morning hours, Thibault’s slow speech, read and flushed face, Thibault was disoriented and restless, and, Thibault’s attempts to smoke and extinguish an unlit cigarette.

Relying exclusively upon this Court’s decision in *Green, supra*, the District Court denied summary judgment on Plaintiff’s false arrest claims, reasoning that it was “hotly disputed” whether Wierszewski’s proximate cause determination was objectively reasonable.

For the purposes of this appeal, the Defendant concedes that, when viewed in a light most favorable to Plaintiff, the evidence in the record, specifically, the deposition testimony of Thibault and Bugbee, creates reasonable questions of fact with respect to whether:

- at the time of the initial traffic stop, the radio in Thibault's truck was playing unusually loud; and,
- the HGN SFST had been properly administered and, therefore, whether the test results served as a reliable indicator of intoxication.

However, the Defendant-Appellant maintains that the District Court committed clear and reversible error by failing to assess the remainder of the probable cause factors in the light of the incontrovertible portions of the record.

First, the District Court committed reversible error by failing to recognize that certain facts were undisputed. Specifically, and notably unlike the plaintiff in Green, Thibault's counsel admitted, on the record (RE #32, Pg ID 837, 842-843, 859-860), that:

- Thibault drove erratically on 12/5/14;
- the windows of Thibault's truck were down while he was driving;
- Thibault never attempted to explain why he had an unlit cigarette in his mouth;
- Wierszewski was not told that Thibault had a speech impediment that would account for his slow speech; and,
- Thibault denied having any medical conditions that would impact his ability to perform tests.

As a matter of law, these undisputed facts, certainly when considered cumulatively, sufficiently justified Wierszewski's conclusion that there was a fair probability that Thibault was intoxicated. *Bradley, supra; Jolley, supra; Wynn, supra; Ketchum, supra; Cameron, supra; Freeland, supra; Shackleford, supra; Wilson, supra; Cloutier, supra; Briggs, supra; Burgett, supra.*

Second, the District Court committed reversible error by failing to recognize that, markedly unlike the Green case, the probable cause determination in this case was not premised upon Wierszewski's observations, alone.

Officer Cashion, who was at the scene of the detention and arrest, confirmed that probable cause existed based upon her independent observations that:

- Thibault had been driving erratically in the early morning hours;
- Thibault had been driving with and hanging out of open windows with the truck radio exceedingly loud;
- Thibault's face was flushed and red;
- Thibault was behaving strangely by attempting to smoke and extinguish an unlit cigarette, listening to exceedingly loud music, and keeping the windows of his cab open on a cold night; and,
- the results of Thibault's performance of 6 of the 8 FST's/SFST's were indicative of intoxication.

(Cashion Aff., RE #12-6, Pg ID 218-223; DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 188-215)

Officer Dionne and Sgt. Krizmanich, who were advised as the intoxication indicators already observed by Wierszewski and Cashion and who witnessed the second walk-and-turn test, also independently determined probable cause existed for Thibault's arrest (RE #12-9, Pg ID 269-273; RE #12-10, Pg ID 275-279; DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 202-206).

As a matter of law, the concurring judgment of the other officers on the scene renders Wierszewski's probable cause determination objectively reasonable. *Brown, supra; Cassidy, supra; Cotton, supra; Briggs, supra; Corcoran, supra; Gorder, supra; Jones, supra; Kemp, supra.*

Third, the District Court committed reversible error by failing to view many of the allegedly disputed facts in the light of the incontrovertible evidence provided by the dash camera recording of Thibault's detention, testing, and arrest. At the outset, it must be acknowledged that the recording has been authenticated as complete and accurate (Wierszewski Aff., RE #12-2, Pg ID 112-113; Cashion Aff., RE #12-6, Pg ID 220-221; Dionne Aff., RE #12-9, Pg ID 270-271; Krizmanich Aff., RE #12-10, Pg ID 276-277), and, there is no evidence to the contrary. More to the point, the recording substantiates the objectively reasonable nature of several of the factors relied upon by Wierszewski to establish probable cause.

In particular, the recording confirms the later documented observations of Wierszewski and Cashion that, at the time he was detained Thibault's face was flushed and red and he was attempting to smoke an unlit cigarette (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 198-200).

The recording also verifies that Thibault attempted to extinguish the unlit cigarette when he exited the truck cab. Specifically, the recording plainly reveals that, as Thibault was exiting the cab, Wierszewski inquired whether Thibault “realize[d] that the cigarette was not even lit.” (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 189-190). Thibault’s response: “No. It goes out a lot.” (*Id.*). The only reasonable interpretation of this clear and discernible response: Thibault did not realize that the cigarette was unlit, an omission he justified on the basis that the cigarette often extinguished itself. The District Court reasoned that this audio evidence was not dispositive because it was not accompanied by video evidence which might have documented that Thibault did not physically extinguish the cigarette (RE #32, Pg ID 789). As a matter of law, such speculation is insufficient to defeat the complete, accurate and incontrovertible audio evidence. *Liberty Lobby, supra; Matsushita Elec. Indus., supra; Pennington.*

Separately, but equally as a matter of law, Thibault’s 11th hour affidavit stating that he never attempted to extinguish an unlit cigarette must be rejected as genuine evidence as it is blatantly contradicted by the audio recording and, not incidentally, his attorney’s admissions on the record that Thibault never advised Wierszewski why he had an unlit cigarette in his mouth. *Scott, supra; Rudlaff, supra; Kinlin, supra; Shreve, supra; Marvin, supra; Dunn, supra; Jolley, supra.*

The audio portion of the recording likewise establishes that Thibault began shivering as soon as he exited the truck cab (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 190). And, while it is true

the recording also reveals Thibault's attempts to downplay his shaking by claiming he was chilled, as a matter of law, Wierszewski was not obliged to accept this claim of innocent behavior as true. *Logsdon, supra; Gardenhire, supra*. Additionally, even if true, as a matter of law, such innocent behavior—and highly unusual behavior since it is undisputed that Thibault had been driving with the truck windows open—is an acceptable basis for a probable cause determination. *Kinlin, supra; Klein, supra; Ahlers, supra; Criss, supra*. Moreover, as a matter of law, the mere presence of exculpatory evidence does not nullify the reliable and countervailing evidence tending to establish probable cause. *Briggs, supra; Burgett, supra*.

Additionally, the audio recording absolutely proves that Thibault did not correctly perform the alphabet recitation test (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 192). Specifically, this portion of the audio blatantly contradicts the District Court's conclusion that the testimony of expert Bugbee created a question of fact regarding whether Thibault "passed" the alphabet test. Therefore, as a matter of law, the District Court erroneously relied upon the opinion evidence to deny summary judgment. *Scott, supra; Rudlaff, supra; Kinlin, supra; Shreve, supra; Marvin, supra; Dunn, supra; Jolley, supra*. Point in fact: expert Bugbee actually testified that Thibault improperly performed the test because he was confused by Wierszewski's instructions (RE #18-4, Pg ID 555-556). Still, as a matter of law, the opinion testimony fails to create a genuine issue of material fact since the audio recording does not evidence that, at the time of the test, Thibault voiced any objections or requests for clarification (*See* DVD, RE #12-2, Pg ID 127, Trans-

cript, RE #12-5, Pg ID 192 and *Gates, supra; Beck, supra; Kinlin, supra; Stricker, supra; Green, supra; Briggs, supra; Budgett, supra.*

Moreover, the dash cam recording blatantly contradicts the District Court's conclusion that a question of fact exists as to whether Thibault passed the one-leg-stand test. The District Court's nitpicking regarding the quality or scope of the video portion notwithstanding, the recording allows easy discernment of the facts that Thibault: failed to count as instructed; failed to maintain a 6" leg elevation; failed to keep his arms at his side and used them for balance; and, repeatedly swayed and hopped on his planted foot. As matter of law, this evidence is now incontrovertible. *Scott, supra; Rudlaff, supra; Kinlin, supra; Shreve, supra; Marvin, supra; Pennington, supra; Jolley, supra; Dunn, supra.*

Similarly, as a matter of law, the District Court improperly relied upon expert Bugbee's testimony as creating an issue of fact with respect to whether Wierszewski properly administered the one-leg test. For, Bugbee admitted under oath that there was no evidence that Wierszewski improperly administered the one-leg test (RE #18-4, Pg ID 554). And, while Bugbee may have criticized Wierszewski's characterization of Thibault's performance of the properly administered test, such criticisms must be rejected as legally irrelevant to the extent that they are blatantly contradicted by the real time recording. *Scott, supra; Rudlaff, supra; Kinlin, supra; Shreve, supra; Marvin, supra.*

Finally, the dash cam recording serves as incontrovertible evidence that Thibault failed to successfully perform two separate walk-and-turn tests. The recording undeniably demonstrates that Thibault

engaged in substantial swaying and flailing of arms and legs in an effort to maintain his balance—a fact the District Court itself readily recognized (DVD, RE #12-2, Pg ID 127; RE #32, Pg ID 844, 846). And, the District Court's reliance upon Bugbee's testimony as evidence to the contrary is legally indefensible since Bugbee admitted under oath that the tests were properly administered and that, under the particular circumstances, reasonable officers could view Thibault's performances as indicative of intoxication. *See*: RE #18-4, Pg ID 552-553 and *Scott, supra; Rudlaff, supra; Kinlin, supra; Shreve, supra; Marvin, supra; Jolley, supra; Dunn, supra; Pringle, supra; Brown, supra; Beck, supra; Crockett, supra; Green, supra; Radvansky, supra; Klein, supra*.

Without doubt, and notwithstanding the District Court's blithe assumptions to the contrary, Thibault's deposition testimony does not create a question of fact with respect to the reliability of the results from the walk-and-turn tests.

Thibault testified that, immediately before performing the first walk-and-turn test, he revealed that he had balancing issues (RE #12-7, Pg ID 247, 253). Yet, no such statement can be heard in the audio recording before the performance of either the first or second walk-and-turn tests. Indeed, the recording which, again, has been authenticated as accurate and unedited, distinctly reveals that, immediately before the first walk-and-turn test, Thibault expressly denied having any physical problems that would interfere with his performance of any test (DVD, RE #12-2, Pg ID 127, media time 1:53:20-1:53:23; Transcript, RE #12-5, Pg ID 192).

In any event, even if Thibault's blatantly contradicted testimony is accepted as true, as a matter of law, Wierszewski was not required to accept such evidence as dispositive with respect to his probable cause determinations. *Logsdon, supra; Gardenshire, supra.*

The bottom line is that the dash cam recording and other undisputed or indisputable evidence in the record provides incontrovertible proof that, under the particular circumstances and with the information he possessed at the time, it was objectively reasonable for Officer Wierszewski to believe that there was a fair probability that Thibault was operating his semi-truck while under the influence of intoxicants. That Wierszewski's professional judgment in this regard was objectively reasonable finds further support in the independent conclusions of the three other officers at the scene.

Critically, and despite Plaintiff's unsubstantiated and, frankly, outrageous accusations to the contrary, there is no evidence that Wierszewski was motivated by a desire to railroad an innocent Thibault and made a hasty decision to arrest without any evidence of possible intoxication. Indeed, Wierszewski's alleged nefarious motivations are legally irrelevant to the assessment of the objective reasonableness of the probable cause determination. *Graham, supra, Cass, supra; Kinlin, supra.*

At any rate, the dash cam recording and other undisputed documentary evidence conclusively demonstrates that Wierszewski engaged in a lengthy and painstaking investigation during which he acknowledged and documented both inculpatory and exculpatory evidence (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 189-207). As a matter of law,

the mere fact that there was acknowledged exculpatory evidence did not preclude entry of summary judgment. *Brown, supra; Baker, supra; Logsdon, supra; Gardenhire, supra; Kinlin, supra; Crockett, supra; Criss, supra; Briggs, supra; Budgett, supra.*

Similarly, the District Court erred as a matter of law by allowing determination of summary judgment on the false arrest claims to be impacted, to any extent, by the results of blood tests performed after the arrest or by the dismissal of the charges against Thibault. *Brown, supra; Baker, supra; DeFillippo, supra; Gates, supra; Beck, supra; Kinlin, supra; Stricker, supra; Chriss, supra; Radvansky, supra; Crockett, supra; Klein, supra.*

In sum, Wierszewski correctly concluded that the inculpatory evidence, which included FST/SFST performances and other factors indicative of intoxication, was both reliable and sufficient to tip the scales in favor of protecting the general public from the fair probability that Thibault was legally unfit to drive. As a matter of law, this evidence is enough to justify Thibault's probable cause determination and, as such, enough to warrant entry of summary judgment on Plaintiff's false arrest claims.

In conclusion, the District Court committed clear and reversible error by failing, as required under controlling case law, to properly assess the impact of the undisputed and incontrovertible evidence in the record upon the tenability of Plaintiff's false arrest claims. On this basis, alone, the Court may reverse the Amended Opinion and Order dated June 24, 2016 and remand for entry of a final judgment in favor of this Defendant.

B. As a Matter of Law, It Was Reasonable for the Defendant Officer to Believe That He Had Probable Cause to Arrest Plaintiff for Driving While Under the Influence of Intoxicants

Even assuming that the District Court properly denied summary judgment on the basis that genuine and material factual disputes exist regarding the objective reasonableness of Wierszewski's probable cause determination, the Defendant is entitled to summary judgment because, under the law clearly established on the date of Thibault's arrest, Wierszewski could have reasonably believed that Thibault's arrest was both lawful and necessary to protect the general public and Thibault from the enormous dangers associated with driving while intoxicated, regardless of whether this belief was ultimately determined to be erroneous.

Federal and Michigan case law in existence at the time of the 2014 arrest fully supported Wierszewski's determination that Thibault's inability to successfully complete FST's/SFST's provided probable cause for an arrest under MCL § 257.625—especially when this factor is combined with the other reliable indicators of intoxication presented by Thibault in this case, to wit, erratic driving, general confusion or disorientation, a red and flushed face, driving with windows open despite cold weather, and other unusual, even if innocent behaviors. *Jolley, supra; Wynn, supra; Ketchum, supra; Cameron, supra; Mott, supra; Freeland, supra; Gorder, supra; Rutherford, supra; Shackelford, supra; Briggs, supra; Hernandez Gomez, supra; Wilson, supra; Corcoran, supra; Berger, supra.*

Notably, the *Corcoran* and *Briggs* Courts held that, as a matter of law, the reasonableness of the arresting

officers' beliefs is conclusively demonstrated where, as here, other officers witnessed detainees' performances of FST's/SFST's and independently arrived at or concurred with the arresting officer's judgments. These decisions are absolutely consistent with well-settled case law holding that, generally, where other officers are on the scene or serve as witnesses, the existence of probable cause does not necessarily rest solely upon the knowledge and experience of the arresting officer. *Brown, supra; Cassidy, supra; Cotton, supra; Gorder, supra; Jones, supra; Kemp, supra.*

Equally notably, several of the relevant cases concluded that, as a matter of law, "arguable probable cause" determinations are not undermined or negated where, as here, there is evidence of subsequent and negative blood or other scientific test results. *Corcoran, supra; Wilson, supra; Briggs, supra; Budgett, supra; Wynn, supra; Freeland, supra.* These decisions are totally compatible with cases which, generally, stand for the propositions that: whether probable cause exists depends upon the exact circumstances surrounding the arrest; and, a subsequent dismissal of charges or an exoneration on the merits do not render actionable officers' probable cause determinations. *Gates, supra; Beck, supra; Kinlin, supra; Stricker, supra; Chriss, supra; Radvansky, supra; Crockett, supra; Klein, supra; Baker, supra; DeFillippo, supra.*

More to the point, the decisions are compatible with well-established judicial recognition that the very purpose of qualified immunity is to shield police officers from the burdens of litigation and potential personal liability arising out of situations where officers reasonably, albeit mistakenly, conclude that probable cause is present. *Mullenix, supra; Pearson,*

supra; *Creighton, supra*; *Mitchell, supra*; *Reichle, supra*; *Harlow, supra*; *Malley, supra*.

Finally, the record is devoid of any evidence that Officer Wierszewski was plainly incompetent or intentionally violated Thibault's 4th Amend. rights. Instead, and indeed, the dash cam recording conclusively establishes that Wierszewski was unfailingly polite, considerate and professional during his interactions with Thibault (DVD, RE #12-2, Pg ID 127; Transcript, RE #12-5, Pg ID 188-207). The recording also undeniably demonstrates that Wierszewski sincerely and appropriately wrestled with the need to properly balance the absence of physical evidence and the presence of other exculpatory evidence, on one side, against the factors his specialized training and experience taught him were indicative of intoxication and his duty to protect the general public and Thibault from the dangers associated with operating a vehicle while intoxicated, on the other side. *See*: DVD RE #12-2, Pg ID 127;

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendant-Appellant Edward Wierszewski requests this Honorable Court to reverse the portion of the District Court's Amended Opinion and Order dated June 24, 2016, denying summary judgment of Plaintiff's false arrest claims, and, remand this matter for entry of a final judgment in favor of the Defendant pursuant to F. R. Civ. Pro. 56.

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/s/ Michelle A. Thomas

P35135

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**MARTY BUGBEE'S DEPOSITION TRANSCRIPT
(FEBRUARY 23, 2016)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALAN THIBAUT,

Plaintiff,

v.

EDWARD WIERSZEWSKI,
individually and in his official capacity
as a Public Safety Officer,

Defendant.

Case No. 2:15-cv-11358

MARTY BUGBEE,

After having been first duly sworn to tell the truth,
the whole truth and nothing but the truth, was
examined and testified as follows:

EXAMINATION

BY MR. DEGROOD:

- Q. Good morning. Would you state your full legal name for the record?
- A. My name is Marty George Bugbee. Spelling: M-a-r-t-y. G-e-o-r-g-e. B-u-g-b-e-e.

Q. Mr. Bugbee, my name is George DeGroot. I represent the defendants in this lawsuit that was commenced against them on behalf of Mr. Alan Thibault.

MR. DEGROOD: The deposition is being taken pursuant to notice and pursuant to the Michigan, the actual Federal Rules of Evidence and the Federal Rules of Civil Procedure.

Q. Could you please give me your residential address.

A. 1380 Larkmoor Boulevard. L-a-r-k-m-o-o-r. Boulevard. Berkley, Michigan 48073.

(Deposition Exhibit No. 1
marked for identification.)

Q. Mr. Bugbee, I'm going to hand to you what has been marked as Deposition Exhibit No. 1. For the record could you please identify what this is.

A. This is my curriculum vitae.

Q. Would you agree it's two pages long?

A. Yes.

Q. There's nothing in your C.V. that has any type of fee schedule with respect to any of the efforts that you might provide to individuals who hire you for your services. True?

A. Yes, sir. That is true.

Q. Yesterday on February 22nd, 2016, you forwarded to my office a request that indicated that I would need to have a check in the amount of \$700 for a minimum of a four hour appearance fee for your deposition today. Correct?

A. Correct.

- Q. Have I so far given you the 700 check?
- A. Yes, you have, sir.
- Q. Your hourly fee is identified as \$175 per hour. My question to you is: Is that the fee, \$175 per hour, that you charge for review as well as for testifying in court?
- A. Yes.
- Q. Should it be necessary for you to proceed to court, do you also do a four hour minimum or do you go by straight hourly rate?
- A. It would be by straight hourly rate.
- Q. It appears to me in my review of Exhibit 1 that for the majority of your adult life you were employed by the State of Michigan as a Michigan State Police Trooper?
- A. That is correct.
- Q. That began in April of 1989?
- A. Yes, sir.
- Q. And you retired from the Michigan State Police in April of 2011?
- A. That's correct.
- Q. What was your rank at the time of your retirement from the Michigan State Police?
- A. I was a Detective First Lieutenant.
- Q. At what location or post were you working when you last worked for the State Police?
- A. I was the Commander of the Information Sharing Environment Section and that was located at the

HIDTA: H-I-D-T-A, HIDTA Office in downtown Detroit.

Q. Is that in the New Center area?

A. Yes, sir. That's near Grand Circus Park, right near the Tiger Stadium, Comerica Park.

Q. Now it indicates—strike that.

Have you ever been certified as a standard sobriety field test expert: Yes or no?

A. Yes.

Q. When were you so certified as an instructor for standard field sobriety testing?

A. You say expert or instructor?

Q. As an instructor.

A. I was a Field Training Officer with the Michigan State Police, as well as with other the police department prior to Michigan State Police. And in that capacity I instructed other officers and troopers on field sobriety testing and the arrest process for alcohol enforcement.

Q. The prior law enforcement agency that you worked with before joining the State Police was what agency?

A. I was a police officer with Chesterfield Township Police Department. I graduated from the Macomb Police Academy in 1985. I worked there on a part time for several months. Then I went to the Plymouth Township Police Department, where I worked from '85 to '89. There I served as a Field Training Officer.

- Q. Now as I understand a Field Training Officer's role, as it existed when you were at both the Plymouth Township and Michigan State Police, that was pretty much hands on experience with respect to-I'll use the term rookie or a new hire in the agency. Correct?
- A. That's correct.
- Q. So they would in essence ride along with you if you were doing road patrol and looking for possible individuals who were violating traffic laws?
- A. Yes.
- Q. And you would perhaps point out to them a situation and perhaps quiz them, etcetera, to make sure that they fully understood the law and were capable of applying same to given circumstances?
- A. No. It's a little more complex than that.
- Q. Well, did you ever sit down with your Field Training Officers with respect to teaching any field sobriety testing with any course textbook or anything of that nature? Yes or no.
- A. Yes.
- Q. What textbook would you have used?
- A. It would have been the Field Training Manual.
- Q. For the State Police?
- A. No. For the Plymouth Township Police Department and then also the Michigan State Police.
- Q. Now I see a fair amount of materials in front of you and did you bring materials in response to the notice to produce that was attached?

A. Yes, I did.

Q. What did you bring with you; what materials?

A. Well, I brought a disk that I burned for you that contains the National Highway Transportation Safety Administration manuals for three different levels of alcohol enforcement. One being the DUI or DWI Detection Manual for Standard Field Sobriety Testing. The other manual being the Advanced Alcohol Enforcement Manual and the third manual that is on here is the Drug Recognition Expert Manual.

Q. All right.

A. Also other resources. Just some correspondences and some—

Q. Let me just stick with the first one here.

MR. DEGROOD: We'll mark this as Exhibit 2, please.

(Deposition Exhibit No. 2 marked for identification.)

Q. Mr. Bugbee, with respect to Exhibit No. 2, do you have an index somewhere as to what is on here or were you testifying from memory?

A. Testifying from memory.

Q. With respect to the first manual that you identified, what was that again?

A. That was the DWI Detection Manual. That's just my memory of what the title was. It's not specific.

Q. What edition was that?

A. Don't know.

Q. What was the second manual?

A. That was the—I would like to look at my—

Q. Go ahead. You can pull out your notes, whatever.

MR. RADNER: If you like, I can turn my laptop on and we can all look together at it. That's why I brought my laptop.

MR. DEGROOD: That's okay. I can't read electrons.

A. The second manual is the Advanced Roadside Impaired Driving Enforcement Manual.

Q. What edition was that?

A. R5 slash 13 edition.

Q. What was the third manual on that?

A. The third manual is the training manual. It's a NHTSA manual, NHTSA being: National Highway Transportation Safety Administration Manual, training manual for DRE.

Q. What edition was that?

A. Don't know off the top of my head.

Q. Were any of these manuals the manuals that you procured from Michigan State Police Sergeant Perry Curtis within the past two or three weeks?

A. Perry Curtis. I didn't speak to a Perry Curtis.

Q. Did you procure any of those manuals from the Michigan State Police within the last two or three weeks?

A. I procured the Standard Field Sobriety Test Manual, the first one.

Q. When did you procure that?

A. It would have been within the last two weeks.

Q. From where did you procure it?

- A. Directly from Detective or—excuse me. From First Lieutenant James Flegal.
- Q. James and his last name?
- A. James Flegal: F-l-e-g-a-l. He's the Section Commander for Traffic Services Division.
- Q. Before procuring that manual from Sergeant Flegal when is the last time that you had reviewed that manual from today going backwards?
- A. I don't recall.
- Q. Would it have been when you were still employed as a Michigan State Police Officer?
- A. Possibly.
- Q. What about the other two manuals, the NHTSA manual, when did you last review that?
- A. I don't recall when that was either.
- Q. More likely than not when you were still engaged as an officer with the Michigan State Police? A. Possibly.
- Q. What about with the DWI Detection Manual, same question. When did you last utilize that?
- A. I don't recall that either.
- Q. Probably when you were still working at the State Police?
- A. Possibly.
- Q. Would I be correct that at no time since retiring from the Michigan State Police in April of 2011, were you involved in any type of traffic stops of citizens on the roadway suspected of either erratic driving or operating under the influence?

- A. That's correct.
- Q. So with respect to the date of December 5th, 2014, you were not actively engaged in any type of traffic stops for any law enforcement agencies. Correct?
- A. That's correct.
- Q. Would I also be correct that in December of 2014, you were no longer engaged in field training exercises as a field training officer?
- A. That's correct.
- Q. Would your activities as a field training officer have ceased when you retired in April of 2011, from the Michigan State Police?
- A. That's correct.
- Q. Would I be correct that at no time have you ever participated in a lecture as part of instruction in field sobriety tests?
- A. Participated in as in?
- Q. As a lecturer to a group of individuals who were undergoing training?
- A. No. I have not done that.
- Q. Now you indicated that you also had the DRE Manual?
- A. Correct.
- Q. When did you first receive a copy of a DRE Manual?
- A. I don't recall when I first looked at one.
- Q. Was it in connection with your review of this case?

- A. That was the last time I looked at it. I don't recall prior to that when I looked at one.
- Q. Is it possible that the first time that you saw a DRE Manual was as a result of your participation in this lawsuit?
- A. No. I believe I have reviewed one in the past.
- Q. Am I correct that you are not a-when you use the term DRE, what are you referring to?
- A. Drug Recognition Expert.
- Q. Have you ever taught the DRE curriculum?
- A. No, I have not.
- Q. Have you ever been certified to teach the DRE curriculum?
- A. No, I have not.
- Q. Have you ever participated as a student in the DRE curriculum?
- A. No, I have not.
- Q. So you have never been trained and do not hold yourself out as a drug recognition expert. Correct?
- A. Correct.
- Q. Now as a result of your involvement in this lawsuit-and by the way, when were you first contacted to consider becoming engaged in this matter?
- A. It would have been I think three weeks ago.
- Q. Since being retained approximately three weeks ago in this matter, have you kept a log of the amount of time that you have spent in your endeavors?

A. No, I haven't.

Q. When you were first contacted, by whom were you first contacted approximately three weeks ago?

A. I was contacted by Solomon Radner.

Q. Had you ever provided any review services for purposes of rendering any type of opinions for Mr. Radner in any cases prior to your involvement in this one?

A. No, I have not.

Q. How about with respect to Mr. Radner's law firm, 1-800-Law-Firm, have you ever been retained by the firm to participate in providing review and/or opinions with respect to any type of police work besides this case?

A. No, I have not.

Q. Do you in some fashion advertise your availability to provide opinions concerning police activities?

A. No.

Q. Do you have any idea how Mr. Radner discovered your availability?

A. I believe it was through word of mouth.

Q. Word of mouth regarding who?

A. I don't know who he spoke to but he contacted me and said he had talked to somebody who said to talk to me.

MR. RADNER: I forgot that guy's name too or I would tell you.

MR. DEGROOD: That guy's name you mean?

MR. RADNER: Yes.

MR. DEGROOD: It was a gal actually and you forgot that conveniently.

MR. RADNER: It was a girl you said?

Q. Would I be correct that nowhere in Exhibit 1 do you indicate that you hold yourself out as an expert in standard field sobriety testing?

A. That's correct.

Q. As you use the term standard field sobriety testing, what does that mean to you?

A. Well, that means you're trained in the capability to detect driving behaviors that could indicate intoxication. Trained in collecting observations of drivers from direct contact. Conducting standardized testing to determine probable cause to make arrests for driving under the influence of alcohol or drugs.

Q. With respect to the three manuals that you have reproduced on Exhibit No. 2, can you tell me with respect to any of those manuals which if any sections of those manuals were reviewed by you in formulating any opinions you might be rendering here today?

A. I reviewed each manual and every page over the weekend.

Q. Do you have any recollection how long that took to review every page of those three manuals?

A. Most of the weekend. I didn't log the time.

Q. How are you being paid for your services by Mr. Radner; by the hour?

A. Flat fee.

Q. A flat fee?

A. Yes.

Q. What is that flat fee?

A. I provided a deposit slip indicating that in my discovery to you. It's \$2,000.

Q. All right. So no matter if it takes one hour or 60 hours it's a flat fee of \$2,000 for Mr. Radner. Correct?

A. Correct.

Q. Would that be the basis upon which you have failed to complete a log as to the time that you have invested in this matter?

A. Tracking time didn't matter. No.

Q. So you're not keeping track of time at all. It doesn't matter?

A. No.

Q. How do you ever determine whether or not you have made money, broke even or lost money with respect to the time and efforts put into your review process?

A. I don't.

Q. Have you testified in open court with respect to opinions of constitutional violations by police officers?

A. No.

Q. Have you testified in open court as an expert witness?

A. As a police officer, yes.

Q. When you were still employed by Michigan State Police?

A. Right. Right.

Q. Since retiring from the Michigan State Police, have you testified in open court as an individual rendering opinions critical of police officers?

A. No, I have not.

Q. Have you at any time testified in open court as an individual offering opinions substantiating the activities of police officers who are being sued for alleged wrongdoings?

A. No, I have not.

Q. So just so I'm clear. At no time since your retirement from Michigan State Police have you testified in any court in the State of Michigan, state court or federal court?

A. Correct.

Q. Have you testified in any other states?

A. No.

MR. RADNER: Just so we're clear. I'm just going to make a little objection here that you kind of went back from or you switched from asking him only if he has been qualified as an expert and asked questions for his opinions.

Then you kind of wrapped that up with a question of: You have never testified in any state or federal court. I think that when he was answering, he was answering as to the being qualified as an expert for his opinions.

MR. DEGROOD: Pardon me? What's your objection?

MR. RADNER: I stated it already.

MR. DEGROOD: Sounded like a treatise to me but that's okay.

Q. What is the next item that you have brought with you?

A. Well, it was a description of the drug or the training sequence for-it was just a reference that I looked at while I was reviewing things.

Q. May I see that?

A. It's for the training courses that are offered by Michigan State Police in regard to alcohol enforcement, the different stages of training. It was just a reference that I had reviewed pursuant to your discovery order. I produced that as well because I had read it through the weekend.

Q. Let's mark that Exhibit No. 3. Before you mark Exhibit No. 3.

To your independent knowledge and recollection at the time of your retirement from the Michigan State Police, was there a drug recognition expert program available to officers in Michigan?

A. I don't recall. I don't.

MR. RADNER: What was Exhibit 3?

Q. You don't recall or you don't know?

A. I don't know if there was or not. I don't recall if I knew that at the time.

Q. Okay.

MR. DEGROOD: We'll now mark this as Exhibit 3.

(Deposition Exhibit No. 3 marked for identification.)

Q. What is the next item that you brought with you?

A. The next item is what I had mentioned earlier. This is the deposit slip from the fee that I received from Mr. Radner in regard to this case. I received it on 1-26, 2016. I produced that in response to your court order.

Q. All right. Let's mark that as our next Exhibit.

(Deposition Exhibit No. 4 marked for identification.)

Q. When Mr. Radner first contacted you did he meet with you or was it a telephone contact?

A. Telephone contact.

Q. What did you discuss with him during your initial contact and when in proximity to the date of 1-26-16 of Exhibit 4 did that conversation first take place?

A. I think it was a day or two prior to that 1-26.

Q. Do you remember how long the initial phone call lasted?

A. No, I don't.

Q. Did you take notes of any of the information that was imparted to you by Mr. Radner?

A. No, I didn't.

Q. Do you recall what it was that you discussed with Mr. Radner at that time?

A. He said he had heard that I could help him out on a case and wanted to know if I was interested.

Q. All right.

A. Gave me a brief description.

Q. What was the brief description of the case that he gave you?

A. It was an arrest that was made in Grosse Pointe Farms. As a result of the investigation the officer did there was no evidence in regard to chemical tests that supported the arrest and wanted to know if I could review the case for him.

Q. Did you review the case?

A. Yes, I did.

Q. What materials from the case did you review?

A. He provided me with the Complaint Report from Grosse Pointe Farms Police. Chemical tests. The chemical test rights form. Two videos; one of the arrest process and one of the booking process.

Q. Anything else he provided you with?

A. That's what I was given.

Q. Anything else since that initial provision of these materials that you have been provided?

A. No.

Q. Just so I'm clear. You have not read the testimony given by Mr. Thibault at his deposition?

A. No.

Q. That was taken in this very room when we didn't have the lights that we have available today?

A. No, I did not.

Q. Likewise, I'm assuming you didn't review Officer Wierszewski's deposition testimony?

A. No, I did not.

Q. Do you think that either the deposition testimony of Mr. Thibault or Mr. Wierszewski would be of importance to you to review prior to formulating opinions?

A. No.

Q. Did you review Mr. Thibault's Answers to Interrogatories?

A. No.

Q. Did you review Defendant Wierszewski's Answers to Interrogatories?

A. No.

Q. Did you review the City of Grosse Pointe Farms' Answers to Request for Production of Documents?

A. No.

Q. Did you review any documents produced by Mr. Thibault?

A. No.

Q. I'm assuming but you tell me. Are you going to render opinions today—

MR. DEGROOD: Off the record. (Brief recess.)

MR. DEGROOD: Back on the record. (Record repeated by reporter.)

Q. Are you prepared to render any opinions today critical of the City of Grosse Pointe Farms?

A. Yes.

Q. Are you prepared to render any opinions today critical of Officer Wierszewski?

- A. I'll render my observations and they can be interpreted as critical or not.
- Q. Excuse me?
- A. I'll render my observations and my opinion and they can be interpreted as critical or not.
- Q. Well, how do you interpret them? I would like to know if you're criticizing Officer Wierszewski?
- A. No. I think that's a harsh word. I think I will render my observations as to what I see.
- Q. Well, let me ask you this. Do you believe that Officer Wierszewski at any time with his interaction with Mr. Thibault on December 5th, 2014, violated any standard of practice that a reasonable and prudent officer in like or similar circumstances with like and similar training of Officer Wierszewski?
- A. Yes.
- Q. What's the next item that you brought with you?
- A. This is something I referred to, as the temperature that day was a factor in what I reviewed. I researched the National Weather Service.
- Q. For what city?
- A. Temperature for that day. For Detroit.
- Q. Do you know if those temps are taken at Metro Airport?
- A. This is likely taken at DTX. That's Detroit City Airport.
- Q. How far was that from the stop?

- A. This is Detroit City. I'm a pilot so I'm familiar with this.
- Q. I understand. I read your C.V. But this case doesn't involve any flying, does it?
- A. I have a familiarity where City Airport is. I'm just qualifying my capability.
- Q. How far was the City Airport from the stop?
- A. 6 miles. 7 miles.
- Q. 7 miles?
- A. Yeah.
- Q. What was the temperature at City Airport at around two in the morning?
- A. It doesn't say. It says a minimum temperature and a maximum temperature and an average temperature.
- Q. Of what significance was the temperatures with respect to your formulation of opinions?
- A. Mr. Thibault said he was chilly.
- Q. Pardon me?
- A. Mr. Thibault said he was chilly. He didn't have a coat on. One of the observations for—one of the pre-arrest observations that Officer Wierszewski made was that he kept rubbing his hands and moving his feet up and down.
- Q. Did you observe the videotape that recorded the activities of the traffic stop at the scene where Mr. Thibault rolled his sleeves up as he was walking back to the police cruiser at the direction of Officer Wierszewski?

A. Yes.

Q. Do you think that may have had any role to play in his being chilly?

A. Potentially.

Q. Do you agree that if indeed the evidence in this case indicates that Mr. Thibault was in the cab of a semi-tractor with the heater on at the time of exiting from the cab of that tractor, that more likely than not he was not impacted by the chilliness, if you will?

A. I don't know.

Q. So that's a gray area with respect to formulating your opinion. Correct?

A. I don't know how he felt, no.

Q. You would agree that when it comes to standard field sobriety testing, while the individuals learning said techniques are taught same under ideal conditions, that when officers actually enter the field, there are times that less than ideal conditions exist with respect to administering those field sobriety tests. Correct?

A. Correct. And those conditions need to be taken into consideration as to the interpretation of their weight.

Q. Do you have any evidence one way or the other that Officer Wierszewski did not take the temperature at the time of the traffic stop into consideration with respect to his performing and observing the response to the field sobriety testing given to Mr. Thibault?

A. No.

Q. Do you have any plans today or from today forward to review Officer Wierszewski's deposition testimony?

A. I have not been asked to or directed by Counsel to do so and I don't have plans.

Q. Same question with respect to Mr. Thibault.

A. I don't plan on that either.

MR. DEGROOD: I'm going to reserve the right to again examine Mr. Bugbee should there come a point in time that he does review those materials for purposes of formulating or adding to any of his opinions.

I don't think we marked the temperature. Let's do that next as No. 5.

(Deposition Exhibit No. 5 marked for identification.)

Q. What's the next item that you brought with you today?

A. Those are my written notes that I took from my most recent review of the second NHTSA manual that I had mentioned that are in discovery. Those were prepared over the weekend.

Q. May I see those, please.

MR. DEGROOD: Let's do those.

(Deposition Exhibit No. 6 marked for identification.)

Q. With respect to your notes of Exhibit No. 6, you have indicated on the first page: Notes pertaining to a phase one. On the second page, notes related to a phase two, which continue on to page three. And on page four a phase three, which is four, five, six, seven. And then a validation of SFST at

page eight and then standardized WAT on page nine in one leg stand. It's my understanding that when NHTSA explains the standardized field sobriety test that it breaks it into a three phase study, the first being the initial observations of vehicle operation. Correct?

A. Correct.

Q. And you're not critical of Officer Wierszewski for stopping Mr. Thibault as a result of the erratic behavior—those my terms—of observing this semi tractor-trailer being driven over a median island separating the two directions of travel on Moross Avenue, are you?

A. No.

MR. RADNER: I want to just object that that question had a-it was a very lengthy I think at times vague question. To answer that with simply a yes or no I don't think is fair and appropriate.

Q. Let me ask you this question as well. You don't believe that Mr. Thibault's constitutional rights were violated as a result of this traffic stop by Officer Wierszewski, do you?

MR. RADNER: I'm going to object to that as well that I don't believe he's qualified to answer that question.

MR. DEGROOD: I think for many years enforcing the laws, including the Constitution of the State of Michigan, as well as the Constitution of the United States, he may be capable of answering that question. If at a subsequent point in time you wish to file a motion to strike his opinion concerning that, that is obviously your prerogative.

- Q. Do you remember the question, Mr. Bugbee?
- A. Yes. I don't know.
- Q. You don't know?
- A. I don't know.
- Q. Why don't you know?
- A. As Counsel had stated, I'm not qualified to make that.
- Q. Would I be correct that you're not qualified to render any opinions whatsoever concerning the constitutionality of any of the activities that were performed by Officer Wierszewski with respect to his interaction with Mr. Alan Thibault on December 5th, 2014?
- A. I don't know how to answer that question either.
- Q. What do you mean you don't know how to answer it?
- A. It would be premature for me to make any kind of a determination as to the constitutionality of his actions because I'm simply not trained to do that.
- Q. So is there some type of training you believe could fall upon your lap, if you will, such that you could render such an opinion?
- A. Probably law school.
- Q. But short of that you're not comfortable in answering questions concerning constitutional violations in this lawsuit. Correct?
- A. Correct.
- Q. Now were there any phase one observations in your opinion made by Officer Wierszewski?

A. Yes.

Q. Did he fail in any manner whatsoever, in your opinion, to complete under the circumstances that were existing at the time of his observation and traffic stop with respect to the observations of vehicle operation?

A. Can I refer to the copy of my notes? I have my original.

Q. You have your originals in there?

A. Yes.

MR. RADNER: These notes have not yet been marked, right?

MR. DEGROOD: Yes. They're No. 6.

MR. RADNER: I thought he was referring to the big stack of notes.

A. I'm going to have to refer to the big stack of notes.

MR. DEGROOD: Let's mark the big stack of notes. We'll mark that as Exhibit No. 7.

(Deposition Exhibit No. 7
marked for identification.)

Q. I'm going to hand you what has been marked as No. 7. What is that?

A. This is my notes as to my observations of the videotape, videotapes that were provided to me in regard to the traffic stop and arrest process, as well as the booking process.

Q. Okay.

A. Prior to Mr. Thibault being taken out of the police department to get a blood test.

Q. With respect to Exhibit No. 6 that we previously marked, in my review of those notes and given your prior testimony, am I correct that the information contained in the nine pages of Exhibit 6 are statements that you retrieved from the NHTSA manual?

A. Correct.

Q. I notice that you did not write down any pages with respect to where the quotations from the NHTSA manual came from?

A. No.

Q. Any reason why not?

A. I thought those were going to be used to just refresh my memory as I testified here. I didn't believe they were going to be used for reference for anybody else.

Q. Did you actually procure the NHTSA standard manual in printed form or only in electronic format?

A. Electronic format.

Q. On your version of the electronic format, did you highlight any information contained within that manual?

A. No. I made notes of the pertinent.

Q. So if we were to look at the master manual we won't find any underscores, any highlighted, none of that?

A. No.

- Q. Because you took what you felt was important from the manual and reproduced that in writing, which we have marked as Exhibit 6?
- A. Correct.
- Q. Now let me see. I'm going to have Exhibit 7. You have the original?
- A. I have the original.
- Q. Now I'm going to go back. You may use your notes, obviously. My question to you is: Are you in any fashion whatsoever going to render any opinion that Officer Wierszewski failed to exercise a phase one observation with respect to his stop of Mr. Thibault on 12-5-14?
- A. No. But I don't think that he observed much driving. He saw it jumped the curb and the vehicle was stationary when he rolled up on it.
- Q. He had opportunity to drive down and adjacent to the vehicle and then to come up behind it. Correct?
- A. Correct.
- Q. You didn't review his deposition testimony to learn if indeed there were any other observations that he made that may not have been captured on that video. Correct?
- A. Correct.
- Q. So is that a criticism, the fact that he only saw the vehicle move for the period that it did move and strike the island separating the lanes of travel?
- A. It's merely an observation.

Q. Again, if you were an officer investigating the circumstances, you take the facts as they come your way. Correct?

A. I myself would have wanted to see more driving prior to making that determination.

Q. Well, are you aware of the fact that Mr. Thibault has testified in this matter that as soon as he saw the police officers he stopped his vehicle, believing that he would be pulled over?

A. No.

Q. If that were the case then how in God's green earth could any officer, including Officer Wierszewski, have seen more driving?

Are you suggesting he should have gone to the driver of this semi tractor-trailer, after observing it jump the curb, if you will, and ask him to drive a quarter mile so I can watch your activity behind the wheel?

MR. RADNER: I'm going to object. It's a compound question. It's calls for speculation.

You can answer, if you can.

Q. Go ahead.

A. I would like you to simplify the question because I got lost. I wanted to answer the first part of it and I got lost.

Q. Are you suggesting that to comply with phase one observations that Officer Wierszewski should have directed this driver, Mr. Thibault, to continue driving the vehicle such that he, Officer Wierszewski, could have additional observational infor-

mation regarding Mr. Thibault's operation of the truck?

A. No.

Q. Do you know how many officers observed Mr. Thibault's operation of the semi tractor-trailer on 12-5-14?

A. From the video it appeared to be Officer Wierzewski and Officer Cashion in two separate patrol cars.

Q. So that would be two?

A. Yes.

Q. Now any other statements you would like to make with respect to a phase one observation, in addition to you would have liked to have seen more driving under these circumstances?

A. Yes.

Q. What would that be?

A. I believe in the officer's report he indicated that the truck was stationary at the intersection with its four way flashers flashing. However, when I reviewed the video it was clear that from the system that they have that, the four way or—excuse me—the patrol car lights were activated at 1:48 and 21 seconds a.m., which initiates the traffic stop. The semi four ways didn't become active for another seven seconds, which tells me that the driver of the vehicle was responding to the signal from the officer to pull over or he was being stopped.

Q. All right.

- A. That tells me a lot about his capability to negotiate what is going on around him and to change his task from driving the vehicle to now complying with the officer's request for him to pull over basically.
- Q. In your review of the video of the stop did you at any point in time see the semi tractor-trailer moving?
- A. I saw it stationary at the corner of Moross and Mack with the left turn signal. Looked like he was waiting for the light to turn. So he was operating the vehicle in the left lane of traffic.
- Q. My question was: Did you at any time see movement of the tractor-trailer on the video: Yes or no?
- A. No, I did not.
- Q. Any other criticisms of Officer Wierszewski with respect to his phase one observations?
- A. He had said there was a—when Officer Wierszewski approached the driver or talked to him at some point, he said that his trailer clearance lights were out. But it appeared that from the video that the clearance lights were operative.
- Q. Were you able to see—well, strike that.
First off, as a Michigan State Police Officer, did you ever receive any specialized training in commercial vehicle inspections?
- A. Yes.
- Q. Were you ever involved in the Motor Carrier Division of the Michigan State Police?

- A. No. But we were trained to motor carrier standards in the Basic Academy.
- Q. You would agree that the video that you saw did not provide any observational abilities of any of the clearance lights on the front of that trailer. Correct?
- A. Correct.
- Q. So you don't know, not having read Officer Wierszewski's deposition, which of the clearance lights that he was referring to. Correct?
- A. Correct.
- Q. So the fact that you saw operational clearing lights on the rear of this trailer does not rule out the fact that lights on the front of the trailer were inoperable. Correct?
- A. Correct. I was basing it on my observation.
- Q. So you wouldn't be critical of Officer Wierszewski with respect to his observation of a clearance lamp not working, if indeed it were his testimony it was on the front of the trailer. Correct?
- A. Correct.
- Q. What about the license plate lamp, was that operable or couldn't you tell?
- A. Couldn't tell.
- Q. Anything else that you are critical of Officer Wierszewski with respect to what he had to work with for a phase one observation of this scenario as per the NHTSA standard field sobriety testing training?

A. I'm not critical of his stop but I don't think it provided indications of intoxicated driving.

Q. What did it provide?

A. It provided indication of a civil infraction, perhaps improper lane use. That was it.

Q. Well, do you have any basis upon which to conclude that at any time before Officer Wierszewski moved on to a phase two or phase three observation, had formulated any opinion with respect to Mr. Thibault operating under the influence of alcohol or drugs?

A. I don't know how he formed his opinion.

Q. It would be important to know what of a phase one, phase two and/or phase three observation an officer utilizes in determining to arrest someone for OWI. Correct?

A. Could you rephrase that.

MR. DEGROOD: Could you read that back to him, please.

(Record repeated.)

Q. That would be important?

MR. RADNER: I'm just going to object. Important for what.

Q. Important if possible, correct?

A. If possible.

Q. What do you mean by that?

A. It's kind of a vague question.

Q. Anything else that you're critical of with respect to the phase one portion of this stop?

A. No.

Q. What is the phase two portion of the NHTSA training for standard field sobriety testing?

A. Contact with the driver.

Q. Did Officer Wierszewski have any involvement in personal contact with Mr. Thibault?

A. Yes.

Q. Are you at any point in time offering any opinions that Officer Wierszewski failed to complete a phase two portion of his examination of Mr. Thibault?

A. I think he completed the examination.

Q. Did he complete the phase two examination in keeping with the standards expected of him as a reasonable and prudent public safety officer under the circumstances as they existed on December 5th, 2014?

A. Yes.

Q. What is the phase three portion of the NHTSA training?

A. It's the standard field sobriety tests.

Q. How many standard field sobriety tests are there that are recognized within the battery of available standard field sobriety tests?

A. There are three scientifically validated tests.

Q. Those are?

A. The horizontal gaze nystagmus. The walk and turn and the one leg stand.

Q. Would I be correct that as a field training officer, when you were so engaged and employed with the Michigan State Police, that you would have instructed those officers training in the field with you to additional field sobriety testing over and above those three. Yes or no?

A. Yes.

Q. What additional field sobriety testing, over and above the three that you have described, would you instruct your fellow officers that were within your charge as an FTO?

A. There are other non validated tests which can be used.

Q. Which ones would you have trained individuals in? And by the way, when you say: Validated versus non validated, what do you mean by that?

A. Well, through NHTSA standards there are only three scientifically validated tests which would be used to make the arrest decision. Those are the three aforementioned tests that I said.

Q. When you say "validated" how are they validated, if you know?

A. They were scientifically validated through studies in the eighties.

Q. Were you involved in any of those studies?

A. No.

Q. Have you reviewed the results of any of those studies?

A. No.

- Q. Your familiarity with the alleged validation is basically through the statements that NHTSA makes in its manuals. Correct?
- A. Through my training and the alcohol enforcement, the standard field sobriety testing courses I have taken such that those were all covered. There were segments that talked about the scientific studies that were done.
- Q. Did you at any point in time in your career as a Michigan State Police Officer, ever arrest a subject that you believed was operating under the influence but at or near the time of arrest had a negative PBT that you subsequently had blood samples drawn that ultimately came back negative for alcohol and negative for drugs even though you had arrested the individual for OWI?
- A. Not that I recall.
- Q. But you haven't gone back and looked at all of your stops, have you?
- A. No.
- Q. You would agree that indeed an officer may have probable cause to arrest someone for OWI who has blown negative or zero results on a PBT. Correct?
- A. Correct.
- Q. You likewise understand that an officer may have probable cause to arrest someone for OWI in advance of the results of blood tests for alcohol becoming available for that officer. Correct?
- A. Yes.

- Q. In fact, when you were pulling people over as a Michigan State Police Officer or Trooper, were there times that you needed to have blood drawn?
- A. Yes.
- Q. It's my understanding when that occurred the blood sample was not immediately analyzed and more likely than not was not analyzed even within 48 to 72 hours of the arrest. Correct?
- A. Correct.
- Q. Your blood samples, I'm assuming, like the sample drawn on Mr. Thibault would go to the Michigan State Police Crime Lab. Correct?
- A. Yes.
- Q. Likewise, would you agree that an officer could make an arrest of somebody for OWI with probable cause, even though a blood sample for drugs that had been removed had not yet had the findings returned?
- A. Correct.
- Q. Did you review any of the laboratory reports generated in this case with respect to blood samples removed from Mr. Thibault?
- A. Yes.
- Q. Which ones?
- A. They were provided to me as part of the Complaint Report that I talked about from the—
- Q. Could I see what you're referring to as the Complaint Report?

- A. This is listed as Grosse Pointe Farms Public Safety Complaint Report No. 140005021. Happened 12-5 of 2014, by Officer Wierszewski.
- Q. Did you make a copy of that to give to me as a result of the notice to produce?
- A. I believe that's on the disc that I gave you.
- Q. You just put together that report in its entirety from your original that I might quickly review.
- A. Pardon me?
- Q. May I see what you're calling the compendium of the report. You just put it together.
- MR. DEGROOD: Solomon, he can do it.
- MR. RADNER: I'm just looking at what he's doing.
- MR. DEGROOD: Slipping the Joker in the deck, are you?
- MR. RADNER: The record should be very clear that I have not touched the documents. I'm merely looking over his shoulder.
- A. Would you like me to state for the record what is in here?
- Q. If you could just hand it to me when you have got it all put together. I'll even let you borrow a paperclip if you would like.
- A. Okay. I'm handing to you what was given to me by Counsel and stated to be the Police Report.
- Q. Thank you.
- A. Containing the aforementioned or afore requested—if that's a word—chemical test results.

MR. DEGROOD: Let's mark this as an Exhibit and count the pages, please.

(Deposition Exhibit No. 8
marked for identification.)

Q. I'm going to show you what we have marked as Exhibit 8 to your deposition. There are 17 pages. Specifically I want to go through the laboratory results.

A. Yes.

Q. First off, when was this report authored to the best of your knowledge?

A. Well, it says a report date and time 12-5 of '14 at 2:19 p.m. That doesn't tell me when it was authored though.

Q. All right.

A. Excuse me. Stop.

Q. Go ahead.

A. Created on-now this date here on the bottom of page two of four states it was created on 12-19, 2014 at 2:09 p.m.

Q. Do you know if that's just the time that the copy that we have marked was made at the time as opposed to the actual creation of same?

A. I don't know.

Q. We do know from your review of Exhibit No. 8, that the blood samples were drawn on 12-5, 2014. Correct?

A. Yes. Well, that would not be on this sheet. It would be on another sheet.

- Q. It clearly would be on—
- A. That would be on this one. This is the one the officer would have to fill out and that says 12-5 of '14.
- Q. The date of collection, right?
- A. Right.
- Q. Now there are two pages in here.
- A. Yes.
- Q. That are Specimen Result Certificate. Attention: Kacey Hothem.
- A. Uh-huh.
- Q. You believe these are part of the actual Grosse Pointe Farms Police Report?
- A. No. These were provided to me as well as the report by Counsel.
- Q. These were what? What are these the labs from?
- A. Those look like a private test that was sought by Mr. Thibault.
- Q. You didn't read his deposition though, correct?
- A. No, I didn't.
- Q. Now did you ever receive the laboratory report from the Michigan State Police relative to an alcohol study performed by the Department of State Police Forensic Science?
- A. That's not in this information, no.
- Q. The lab report that clearly is a copy of the State of Michigan, Department of State Police is related

to a blood sample that relates to whether or not drugs were included. Correct?

A. Well, I don't know what they tested for but they say what the results are.

Q. And they show that they didn't find the drugs that are specifically identified in the document. Correct?

A. It says item number one not detected and it shows a whole list of drugs that were not detected.

Q. Correct. Now you're not a toxicologist, correct?

A. No, I am not.

Q. I'm assuming you have already told me you didn't have any training as a drug recognition expert. Correct?

A. Correct.

Q. Would I also be correct that you have received no training with respect to what particular designer drugs may have been utilized by the public in December of 2014. Is that fair enough?

A. That's not a yes or a no question. I received extensive training in basic and advanced narcotics with the Michigan State Police as to the existence and effects of many types of drugs.

Q. In that training you're aware of the fact that some of these—I'll use the term designer drugs—metabolize out of an individual's system even before a blood sample can be retrieved, correct?

A. I don't know.

Q. That's beyond your expertise?

- A. I would have to review my past training materials and such to prepare for that question. I don't know which ones would, to render a definitive answer.
- Q. I'm just asking, not specifically but in a general sense, you are aware of the fact that some drugs can metabolize out of someone's system before a blood sample is even retrieved?
- A. No. I'm not aware of that.
- Q. Are you aware of the fact that some drugs can metabolize out of a blood sample that is merely sitting in a vial waiting to be tested?
- A. No.
- Q. That's beyond your training?
- A. No. It may have been—it was certainly within my training I'm willing to say but as far as if I remember that part of it, no. I don't remember that.
- Q. So as you sit here today you're not rendering any opinions on that topic?
- A. Correct.
- Q. Now let's go back to our face three, which is what, pre-arrest training and screening?
- A. Correct.
- Q. Now with respect to the phase three pre-arrest screening of the NHTSA training, are you in any way critical of Officer Wierszewski's performance of any pre-arrest screening?
- A. I don't believe they provided probable cause to make the arrest.

Q. So it is your opinion that in your judgment what you saw with respect to these three scientifically discussed and verified standardized field sobriety tests, in your opinion it didn't provide probable cause, correct?

MR. RADNER: I'm just going to object to that question that there was a lot more in the video than just those three scientific tests. But if you understood the question and you can answer it with a yes or a no, please feel free.

A. Can you ask the question again, please.

Q. Sure. First off, what field sobriety tests in your opinion were performed if any that provided probable cause of operation OWI by Mr. Thibault on the day in question?

A. In my observation it's my opinion none of the tests—which include the three standardized tests as well as all the additional tests that he gave him—rose to the level of probable cause to make an arrest.

Q. You weren't there that evening, correct?

A. No. This is based on an observation of the video. Yes.

Q. Did you see all of the testing that was performed upon Mr. Thibault at the station that may not have been captured on any video? Yes or no?

A. No.

Q. Is there any aspect of the three standardized tests that you believe were not appropriately administered by Mr. Wierszewski?

A. Yes.

Q. Let's start with the walk and turn. Was that properly administered?

A. It was properly administered.

Q. It was?

A. Yes.

Q. On how many occasions?

A. Two that I saw.

Q. Where were they, the ones that you saw, where were they occurring?

A. There were two that were administered on the road.

Q. At the stop?

A. Yes.

Q. Do you believe either of those—let's talk about the first one. The first one that was administered was witnessed, to your knowledge, by how many officers of Grosse Pointe Farms?

A. Two.

Q. Which two?

A. Based on just what was going on in the video I think it was Officer Wierszewski and Officer Cashion. She was continually referred to as Veronica. So I presume that's her.

Q. By the way, you did review the drug evaluation form that was completed by Officer Wierszewski, correct?

A. Yes.

- Q. Am I correct that at no time during your professional activities did you ever complete those types of tests and fill out that type of a form?
- A. We filled out those types of a form.
- Q. Those exact forms?
- A. Not that exact form. That type of form that documented our observations in the standard field sobriety testing.
- Q. Did you ever take blood pressure of subjects? Yes or no.
- A. No.
- Q. Did you ever take temperatures of subjects? Yes or no?
- A. No.
- Q. Did you ever complete any eye examinations in addition to the vertical or horizontal gaze nystagmus test: Yes or no?
- A. Yes.
- Q. Which ones did you complete besides that?
- A. Pupil size.
- Q. What other tests are recorded on the DRE form completed by Officer Wierszewski—and, please, you may refer to it—that you would not have completed in your analysis of a subject that you were evaluating for possible arrests of OWI?
- A. We never did pulse and time.
- Q. All right?
- A. We never did convergence. Never did the internal clock test. The forms that we filled out didn't have

a section for nasal area, however, had that observation been made it would have been put in a report. Rebound dilation was a part of the horizontal gaze nystagmus training examination. Reaction to light was not.

Forms I used didn't have a diagram to mark their arms. This one has a right arm and a left arm. It didn't have it. We didn't take their blood pressure. We didn't do their temperature. If things like muscle tone were pronounced enough to notice, we would have documented that in a narrative. That's the only examinations that are on this form, that were not examined in the past that I recall.

Q. Okay. Were you trained to observe and make conclusions with respect to whether or not a subject was under the effects of a central nervous system stimulant?

A. Yes. The training I went through covered that.

Q. What stimulants would you look for and what were the—strike that.

What were the CNS symptoms that would lead you to believe that a subject was under the influence of a stimulant?

A. Well first, presence of drugs or drug paraphernalia during the phase two. In general, if they were to pass the three validated tests, that being the horizontal gaze nystagmus, the walk and turn and the one leg stand. If their pupils were an uneven size and they also had vertical gaze nystagmus that may indicate some drug use.

Q. Stimulant versus a depressant?

A. What about it?

Q. Well, I'm asking you what you look for to determine if someone is potentially under the influence of a CNS stimulant versus a CNS depressant, if you know?

A. Within the scope of my background and training, having not gone through the drug recognition, we would have recognized a potential presence of some drugs and moved on from there.

Q. All right. The vertical gaze nystagmus is not one of the scientifically verified tests?

A. No, it's not.

Q. Now did you record in your notes the time on the tape that you believe depict Mr. Thibault's efforts at completing the first walk and turn?

A. Yes.

Q. On what page of your notes is this?

A. Page four.

Q. Page four?

A. Yes.

Q. That would be what we have marked as Exhibit 7, correct?

A. Yes.

Q. The four is circled in the upper right hand corner. Correct?

A. Yes.

Q. What was the time on the tape that you have indicated the first walk and turn was attempted by the plaintiff?

A. 1:53 and 25 seconds a.m. That was when the instructions were began.

Q. I think you told me that the administration of that test by Officer Wierszewski was proper, correct?

A. Yes.

Q. Did you see any indication on your review of Mr. Thibault's first walk and turn that indicated he was unsteady and using his arms for balance?

A. Yes.

Q. Is that an indication of possible influence by alcohol or drugs with respect to the walk and turn?

A. Yes.

Q. Did you see any evidence, physical evidence, during the first Thibault walk and turn that we're talking about that suggested to you that Mr. Thibault was under the influence of alcohol or drugs?

A. No.

Q. None?

A. None. Not in my opinion.

Q. You would agree that other individuals could clearly differ with your opinion, correct?

MR. RADNER: Objection. Speculation.

Q. Go ahead.

A. Others could.

Q. Have you shown this video footage that we're discussing to any other actively employed officers,

either Michigan State Police or other certified law enforcement officers, and requested their opinion as to whether it is demonstrative or not of someone impaired?

A. No.

Q. What did you see during this first walk and turn that lead you to believe and conclude no probable cause existed to suspect impaired individual?

A. Well, during the instruction phase Mr. Thibault was very steady. He maintained the position that the officer asked him to while he was giving instructions. Okay. As he performed the test, though he did use his arm to balance, it didn't appear as though he stepped off the line.

He did the proper amount of steps, which indicated that he had understood the questions, recalled them correctly and executed it properly. He did a good turn without losing control there and walked back. So in all, the only thing I saw him do which may raise some suspicion was he raised his arms above six inches to maintain his balance.

Q. Did he maintain an upright position of his upper trunk as he completed the walk and turn we are discussing?

A. At one point it seems as though he lost his balance but did not step off the line.

Q. Were you able to see his feet in the video that was provided to you: Yes or no?

A. No.

Q. All right. So when he appeared to lose his balance you cannot objectively state that he did or did not come off the line. True?

A. It appeared as though he stayed on the line to me.

Q. You cannot objectively state—because you were not present—that he did or did not come off the line. Correct?

A. Correct.

MR. RADNER: Asked and answered.

Q. You would agree that Officer Wierszewski and Officer Cashion would be in a better vantage point being at the scene to determine if indeed at any time during the first walk and turn Mr. Thibault came off the line. True?

A. True.

Q. Any other comments that you have with respect to his first walk and turn?

A. Yes.

Q. What would that be?

A. I would have evaluated that as a pass or a good test. I would not have felt that was a fail based on my observations.

Q. All right. Anything else that you wish to comment on that first walk and turn?

A. No.

Q. Now—do you need a break?

A. Bathroom.

MR. DEGROOD: Let's go off the record. We'll take a break.

(Brief recess.)

- Q. How many one leg stands did you observe on the videos that you watched?
- A. I observed one.
- Q. In your notes do you have the notation as to the time on the tape it occurred?
- A. Yes. 1:55 and 06 seconds a.m.
- Q. It's on page four as well?
- A. Four, yes.
- Q. Did you believe that you saw anything during the performance of that test that lead you to believe it was administered inappropriately?
- A. No.
- Q. Did you find anything during that test that lead you to believe possibly probable cause existed that this individual was impaired?
- A. No.
- Q. What during this test lead you to believe that this individual was not impaired?
- A. Well, during the two phases of the test, the instruction phase and the performance phase. During the instruction phase Mr. Thibault was instructed to stand in a certain position. Take that position until instructed to perform the test. He did so as instructed. I think he had to move to do it from his back to the camera to side to the camera and he was—he followed instructions well.

There was no confusion. When he was standing in that position listening to the instructions he maintained the position. No swaying. No difficulty. He paid attention to the instructions. When told to do the test—let me correct that.

There was one thing that Officer Wierszewski did do. He stopped observing Mr. Thibault for a moment. He returned to the patrol car. Then came back. So his observation stopped for a moment. At 1:55 and 53 seconds he instructed him to move to a different position.

He resumed another position which was—could be more favorable to the camera. He followed the instructions well. There was no swaying and looked like he had good balance as he listened to the instructions.

Q. Okay.

A. At 1:56 and 59 seconds, Officer Wierszewski instructed Mr. Thibault to start the test. Instructed him to lift his foot higher than six inches at one point it appeared. He left him in that position for what was a 35 count. That was Mr. Thibault counting, which according to the tape was actually 24 seconds. At 1:56 and 35 seconds he instructed Mr. Thibault to put his foot down.

My observations was that the test was done properly. He had slight raising of the arms for balance. Proper count. And the tempo was good. There was no slurred speech as he was speaking and counting out. He had no loss of balance. He was able to complete the test without putting his foot to the ground.

- Q. Anything else with respect to the one leg stand?
- A. Like I said, at one point it appears as though he instructed him to lift his leg higher than six inches. He kept telling him: Higher, higher, higher, which put Mr. Thibault in a difficult position to maintain his balance.
- Q. Would you agree that when he was instructed, Mr. Thibault that is, to raise his foot higher, the camera did not allow the viewer of the video to actually see how high the foot was?
- A. Correct. But the position of the knee and the lower leg appeared though it was higher than the six inches.
- Q. Do you know how tall he was?
- A. No.
- Q. Would you agree that Officer Wierszewski and Officer Cashion would be in a better vantage point to determine if indeed he was requested to lift his knee only six inches and upon failing to do so, was instructed to attempt to return to six inches?
- A. They would be in a better vantage point to observe that.
- Q. In addition to the three standardized field sobriety tests that you have identified, what additional sobriety, field sobriety tests were administered?
- A. There were many.
- MR. RADNER: Are we still on the one leg stand or are we moving on?

MR. DEGROOD: We're talking about what other tests were administered over and above the three standardized field sobriety tests.

A. It appears as though there were four additional tests given. Some of them were given more than once.

Q. Which were they?

A. The alphabet was given twice. Or actually he started the instructions for the alphabet. Officer Wierszewski started the instructions for the alphabet and then he had him take the numbers test and then he returned to the alphabet again and had him do the alphabet. So it wasn't performed twice but it was broken because it was mixed in with the numbers test.

Q. Did he successfully complete the numbers test?

A. He successfully completed the numbers test.

Q. That test is the test where he was asked to pick a number between 19 and 21?

A. Well, my observations of that were he followed the instructions well. There was no confusion as to what was being asked. There was no slurred speech. He gave a proper answer.

Q. Did he successfully complete the alphabet test?

A. It appears as though he was confused about the—what was being asked of him. But it was broken down into two sections between the—at 1:52 and 21 seconds, Officer Wierszewski asked him if he knows his alphabet from A to Z. He responded yes.

- Q. Where was he standing when that question was asked of him?
- A. He was standing in front of the patrol car right in front of the camera. At that point he was asked to turn and face the truck.
- Q. Do you recall if he was asked if he knew the alphabet when he was standing outside the cab to the semi-truck?
- A. That's what I'm talking about right now. He was—
- Q. So he was not directly in front of the hood, if you will, of Officer Wierszewski's car when he was asked if he knew the alphabet. Correct?
- A. He was through—at this particular test this time, he was asked at 1:52 and 21. He was standing in front of the patrol car with his face to the patrol car. After he was asked if he knew the alphabet he was asked to turn and face the truck. I notice he made the turn, 180-degree turn, steady. Followed instructions well. No swaying. No staggering. So that's what I observed.
- Q. All right. Do you remember what he was subsequently instructed with respect to the alphabet test?
- A. Yes. At 1:52 and 42 seconds, after having successfully completed the numbers test, Officer Wierszewski then returned to the alphabet test and told him to recite the alphabet, starting with D and ending with O.
- Q. Did he start with D or start with A?

A. He mumbled A through C to get him to D. He recited D. Went all the way to V and then returned to O.

Q. So that would be interpreted by some individuals as a failed test. True?

A. No, because there's other observations that need to be taken into account.

Q. What other observations?

A. Although he did the test improperly, he did it with clear speech. He wasn't confused. Although he did it wrong, he wasn't necessarily confused. The letters were said in sequence or the letters were said in sequence. He maintained a steady position of balance throughout the test.

I interpreted as though he was confused of what he was asked because it was never said, quote, without saying any other letters. He just said: Go from D to O. He didn't say: Don't say any other letters.

Q. All right. Any other tests that are field sobriety tests other than the three standardized field sobriety tests, of which we have already spoken about two?

A. Finger count. He did the finger count at 1:52 and 59 seconds.

Q. Anything else?

A. He, at 1:56 and 38 seconds, he did a modified Romberg.

MR. RADNER: Can you spell that please?

THE WITNESS: R-o-m-b-u-r-g, I believe.

- Q. What is the modified Romberg?
- A. Well, that was instructed to be: Close his eyes. Hold his head back. And I don't believe that was instructed properly based on the NHTSA guidance. But he was instructed to hold his head back. Close his eyes and let him know when 30 seconds were over.
- Q. What was improper with respect to that instruction?
- A. It doesn't instruct that the driver or suspect is to count in their head. It just says: Let me know when you think 30 seconds is over at the end of the test.
- Q. Isn't that implied, if you are going to let me know when 30 seconds are over that you're counting in your head?
- A. But that's not part of the test to ask how they counted. That seemed to be important to Officer Wierszewski, the manner in which he counted. That's not even instructed in the NHTSA manual. So it just wasn't in compliance with the way they instructed.
- Q. With the way that you instructed, correct?
- A. The way it said in the manual.
- Q. Well, the manual covered non-verifiable field sobriety testing and if so what manual was that?
- A. That was the aforementioned manual that I had spoken of, being the Advanced Road Side impaired Driving Enforcement Manual.
- Q. Now that you had the hard copy there what was the edition of that again?

A. That was the R5 slash 13 edition.

Q. Okay.

A. As stated earlier.

Q. Any other field sobriety tests that were performed that we haven't talked about, knowing full well that there is a second walk and turn and we have not yet talked about the HGN?

A. No.

Q. Was the HGN test performed?

A. Yes.

Q. Do your notes reflect at what time on the tape that you were provided you saw the HGN test performed?

A. 1:58 and five seconds a.m.

Q. Was it administered properly?

A. I don't believe so.

Q. In addition to the belief that it was not properly administered, any other criticisms of the manner in which that test was conducted?

A. No.

Q. With respect to the administration of that test, what is it that you believe was improperly completed or completed?

A. Well, it appeared as though it was mixed with another test that is called the lack of convergence test. So there was—

Q. What page are you reading from Exhibit 7?

A. Five.

- Q. Page five. Thank you. Continue, please.
- A. It appeared that the HGN test, the horizontal gaze nystagmus, was conducted in conjunction with the lack of convergence test, which are two different tests. They were both mixed into one test, which I believe complicates the horizontal gaze nystagmus in that the NHTSA guidance warns of fatiguing the eyes prior to getting or prior to getting a good test. Eye fatigue is a factor and a negative HGN test for the NHTSA guidance.
- Q. Was there a negative HGN test?
- A. I don't believe there was.
- Q. What do you believe—again, let me just see that I'm clear. The video that you were provided with when the HGN test, and in your opinion the comingled convergence test occurred, you could not see the face or eyes of the subject. True?
- A. True.
- Q. Mr. Thibault's back was facing the camera. Correct?
- A. Correct.
- Q. So neither you nor I or someone who only has benefit of looking at this tape, we cannot objectively state what the actual response Mr. Thibault had to that test or in your opinion tests pleural. True?
- A. True.
- Q. Were the results of the HGN test recorded anywhere in the records completed by Officer Wierszewski?
- A. They were captured on the videotape.

Q. Are they identified anywhere in his written report?

A. No.

Q. So there's nothing mentioned in the DRE report about that?

A. He says he failed the HGN test but I don't know which one it was. He gave it to him three times.

Q. So that test was provided in your opinion to the subject on three occasions. Correct?

A. Correct.

Q. Were any of those occasions when the subject was at the station after being removed from the stop?

A. Yes.

Q. Do you know how much time elapsed between those tests?

A. Yes.

Q. How much time elapsed—well, strike that. How many HGN's did you see administered at the scene of the stop?

A. One.

Q. How many did you see administered at the station?

A. At least one. But I don't know what happened when they went off camera. Mr. Thibault was taken off camera for a few tests I believe. The audio sounded like they were doing sobriety tests off camera.

Q. Did you see the performance of any HGN tests captured on the video reflecting the activities at the station?

A. Could you repeat that?

Q. Sure. Did you see, when you reviewed the station videotapes—

A. Oh.

Q. —the administration of any HGN tests and if so, at what time on the video footage did you see such tests administered?

A. At 12—excuse me. At 2:50 and 28 seconds the HGN was given, again, in the booking room. it's the second time it's given.

Q. Was it given by Officer Wierszewski?

A. Yes.

Q. How much time elapsed between the one at the traffic stop and this one in the booking; over an hour?

A. The one at the traffic stop was at 1:58. The one in the booking room was at 2:50. Less than an hour.

Q. So about 50 minutes between the two?

A. Roughly. 52 minutes.

Q. You're not suggesting that the HGN performed at the traffic stop fatigued Mr. Thibault's eyes with respect to the second HGN performed 50 minutes later, are you?

A. No. I'm basing my conclusion merely on the officer's statement.

Q. What is it of the officer's statement that you are basing your conclusion on?

A. At 2:10 and 48 seconds another officer pulls up. Potentially a senior officer or supervisor because Mr. Officer Wierszewski felt the need to report to

him and he said, quote: He hit the curb. He can't do some—he can't do sobriety tests. He doesn't have HGN. That's what I base the results on, his statement: He doesn't have HGN to his counterpart.

Q. What does that mean to you?

A. That means that he didn't test positive for horizontal gaze nystagmus.

Q. So in your opinion that statement would validate that there was no jerking eye movement during the performance of that test in the horizontal plane. Correct?

A. I just take it on its face that it was a negative test because the officer said so.

Q. All right. Now anything else about the HGN? I think you indicated you thought that it was improperly provided. Have we covered all of your criticisms of the administration of that test by Officer Wierszewski that you believe were inappropriate?

A. Those are my observations, however, I did observe that during the test Mr.—

Q. What page are you reading from your notes; upper right corner.

A. Yes. I know where the page number is. I'm just reading.

Q. Okay.

A. I'm looking at page number five.

Q. Okay. What on that page were you about to tell me about during the test?

A. That is all.

Q. That was it?

A. That's all.

Q. Any criticisms?

A. I have no other observations.

Q. I'm looking at the bottom of five and it says: 33. I'm assuming that is Officer Wierszewski. Turns on light and instructs defendant to watch light. Tests done improperly. 33. Doing large circles. Three eye crosses. Four circles. 11 horizontal deviations. Extended max D beyond three seconds.

Is any of that critical of the administration of the test?

A. That's consistent with my observation that mixing the lack of convergence with the HGN could fatigue the eyes. It was never my practice to do that many movements. Typically I would do it in three or four quick movements.

Q. I'm just trying to figure out what that refers to when obviously that refers to your very first criticism of the mixing of the two tests. Correct?

A. That is documentation of the mixing of the two tests.

Q. Are you critical of any of the three standardized field sobriety tests that we have already talked about that we haven't already discussed?

A. Am I critical?

Q. Any other criticisms I guess is what I'm asking you other than what we have already discussed?

A. I don't have criticisms other than I don't believe they rose to the level of probable cause for an arrest in and of themselves.

Q. With respect to the performance of Officer Wierszewski, as it relates to his arrest, am I correct that your opinion is that he had no probable cause to arrest him for OWI?

A. Correct.

Q. Any other opinions that you are going to render against Officer Wierszewski in this case?

MR. RADNER: I'm going to object to the form of that question.

You can answer it if you understood it.

A. I have no criticisms toward Officer Wierszewski, other than he seemed to have ignored the evidence that he was developing to make his arrest decision.

Q. Can you answer my question?

A. No.

Q. Okay.

A. No, I don't have any.

Q. Okay.

A. Yes, I can answer your question. The answer is no.

Q. That's fair enough.

What is it that you reviewed if anything to render an opinion as it relates to the City of Grosse Pointe Farms?

MR. RADNER: I'm going to object that it calls for a legal conclusion but if you can answer that question.

A. I don't know what you're asking.

Q. Early on in the deposition, Mr. Bugbee, I asked if you were going to render opinions critical of Officer Wierszewski and the City of Grosse Pointe Farms. And my recollection is that you indicated an affirmative response to both of those questions.

In so much as you have just indicated to me that you have no other opinions related to Officer Wierszewski, other than you believe he did not have probable cause to arrest Mr. Thibault, I'm now moving to the City of Grosse Pointe Farms to ascertain what opinions if any you will be asserting before the jury if allowed to do so in this matter?

A. I clearly misunderstood the scope of that question. No, I don't have any criticisms against the City of Grosse Pointe Farms. I would like to correct that prior statement. No, I do not have criticisms.

Q. You know what, I'm going to let you do that. Any other materials that you were kind enough to bring that we haven't already marked?

A. I have got my training certificates.

Q. Let's mark those. Are those copies that you made for me?

A. These are copies of my training certificates.

Q. Okay.

(Deposition Exhibit No. 9 marked for identification.)

Q. Are you prepared to render any opinions in this matter against Officer Wierszewski related in any fashion whatsoever to the dismissal of the misdemeanor charges brought against him in January of 2015?

MR. RADNER: I'm going to object to that because I'm not sure I understand that question.

A. I don't understand.

MR. DEGROOD: Would you read it back again?

(Record repeated.)

A. Was Wierszewski charged.

Q. No. Perhaps I misspoke. Are you in any position to render any opinions against Officer Wierszewski with respect to the dismissal of the misdemeanor charges brought against Mr. Thibault which were dismissed in January of 2015?

A. No.

Q. Am I correct that you have no knowledge one way or the other with respect to what role if any Officer Wierszewski had in the dismissal of the misdemeanor charges?

A. You're correct.

MR. DEGROOD: Let's go off the record.

(Brief recess.)

Q. Mr. Bugbee, are you at this point in time rendering any opinion related to Officer Wierszewski concerning the claims of malicious prosecution being made against him?

A. No.

Q. I think you have already indicated that you have no opinions related to the City of Grosse Pointe Farms, correct?

A. Correct.

MR. RADNER: Subject to my objection to that question.

Q. Have you at any point in time been provided with a copy of the actual complaint filed in United States District Court against my clients?

A. Yes.

Q. Would you agree with the statement: That every arrest of a citizen by a law enforcement officer requires a judgment call be made on behalf of the arresting law enforcement officer?

A. Yes.

MR. RADNER: What do we want a copy of here?

(Brief recess.)

Q. Would you agree that at the time of this particular stop by Officer Wierszewski that he was acting in furtherance of a legitimate government function?

A. Yes.

Q. As a retired Michigan State Police officer, you would agree that there were no violations of Mr. Thibault's rights related to the actual stop of him that evening?

A. I would agree.

Q. It was not a violation of Mr. Thibault's rights on 12-5-14 to ask for his CDL or commercial driver's license, logbook, medical card or annual inspection forms when he was stopped?

A. Correct.

Q. It was not a violation of any of Mr. Thibault's rights on 12-5-14 when Officer Wierszewski asked him if he was suffering from any medical issues?

A. Correct.

Q. Would you also agree that it was not a violation of Mr. Thibault's rights when Officer Wierszewski asked him at what time he had started driving that evening?

A. Correct.

Q. Would you also agree that it was not a violation of Mr. Thibault's rights when Officer Wierszewski asked him to explain what had happened with respect to his vehicle coming into contact with the island median?

A. Correct.

Q. Would you agree that it was not a violation of Mr. Thibault's rights for Officer Wierszewski to ask him if he had had anything to drink that evening?

A. Correct.

Q. Would you also agree that it was not a violation of Mr. Thibault's rights for Officer Wierszewski to ask Mr. Thibault to participate in the standard field sobriety test and field sobriety test that evening?

A. Correct.

Q. Would you agree that it was not a violation of Mr. Thibault's rights for Officer Wierszewski to frisk him the evening he was stopped on 12-5—

A. Correct.

Q. —'14.

A. Correct.

Q. And would you agree that Mr. Thibault voluntarily consented to allow the officers to search his semi tractor the evening of 12-5—

MR. RADNER: I'm going to object to that.

Q. —'14.

MR. RADNER: You can answer it if you can.

A. I don't recall if a full and willing waiver of that. I think he—

Q. Do you recall the question being asked of Mr. Thibault?

A. I think it went something to the effect of: You don't mind if I look in your car, do you?

And Mr. Thibault said no. So I don't know if that's a—

Q. It was not inappropriate for Officer Wierszewski to ask Mr. Thibault, prior to the administration of any standard field sobriety test or field sobriety test, whether he, Mr. Thibault, had any problems or difficulties with standing, sitting or walking?

A. No.

Q. Did you see any evidence in any of the materials that were provided to you or procured by you that demonstrate Mr. Thibault ever telling Officer Wierszewski or any other officers who came into contact with him on December 5th, 2014, that he, Mr. Thibault, had a speech impediment?

A. No. He did say he is slow though at one point. I don't know what that means.

Q. He also indicated in response to questions that he did not have any physical problems and was not under a doctor's care, correct?

A. Yes. He at one point said he was receiving doctor's care from V.A. That was never pursued.

Q. Where was that? You can refer to your notes.

(Brief recess.)

MR. DEGROOD: Back on the record.

Q. In case Mr. Bugbee has a response to the last question.

MR. RADNER: Please identify which page number of Exhibit 7 you are looking at.

A. I will do that. When he was being given the blood pressure test—let's see. I'm sorry. I can't find exactly where it said but when he was given the blood pressure test he said something to the effect of: I have this done once a month. But right now I can't find it in here.

Q. All right. In your experience is there any margin of error related to the standard field sobriety tests?

A. If there is I wouldn't know what it is.

Q. Would you know if it, that margin of error, is any different for a, quote, war combat veteran, unquote?

A. I wouldn't know that.

Q. Have you ever heard that at any time in your experience?

A. I have never heard that.

Q. Because I'm winding down, I'm going to ask one more time. Any other opinions that you will be rendering that are critical—and by critical I mean demonstrative of a deviation from the standards expected of a reasonable and prudent public safety officer as they existed on December 5th, 2014, under the circumstances of this case related to Officer Wierszewski that we have not already covered?

A. Well, from my observations I believe that the amount of tests given and the repetitive tests was very excessive. I tested for navy pilot and I took the physical and I didn't go through this much to do that.

So I think it was rather excessive and I think that Officer Wierszewski ignored the evidence that he collected all along the way to make his decision. It just appeared to be a results based investigation.

Q. You didn't perform any physical exams on any Air Force pilot, did you?

A. I was an Air Force OSI agent.

Q. Pardon me?

A. I was an Air Force OSI agent. We weren't allowed to do that.

Q. What are you referring to when you just said: I gave the test to a pilot?

A. No. I said I took the test for Navy pilot.

Q. All right.

A. And I went through quite extensive flight physicals and stuff. I was flabbergasted by how much he was putting this person through to try to get a positive result.

Q. You mean to tell me, to get a seat in one of the United States Navy's aircraft you go through less than two to three hours testing overall?

A. I don't recall officially what was contained in the test and what-how long the duration was.

Q. How old were you?

A. I was 19.

Q. Were you a member of the United States Navy?

A. I was a Midshipman at University of Michigan.

Q. So you were on the ROTC program?

A. I was in the Naval ROTC program.

Q. Upon graduation did you serve in the Navy?

A. No. Upon graduation I—actually I entered—prior to graduation I entered the Air National Guard. I went from there to the Air Force Reserves where I was a Air Force Offices Special Investigations, Special Agent and reserve status.

Q. Do you receive a pension from the Reserves?

A. No.

Q. Are you still a reservist?

A. No.

Q. When is the last time you participated as an Air Force reservist?

A. I retired from the Air Force Reserve in 2010, 20 years. And I will begin to receive a pension at the age of 59.

MR. DEGROOD: Thank you. I have nothing further.

MR. RADNER: Two questions.

EXAMINATION

BY MR. RADNER:

Q. Can you please turn to page 14 of Exhibit 7. And please tell me if that refreshes your recollection as to where in Exhibit 7 and where in the video there is discussion of treatment at a VA.

A. Okay. Yes.

MR. DEGROOD: What page are we on?

A. That's on page No. 14. At 2:47 and 05 seconds Officer Wierszewski asked him: Do you have any physical defects?

Mr. Thibault responds, quote: A little slow.

There's no pursuit of that by Officer Wierszewski.

He goes on to the next question: Are you under the care of a doctor or dentist is what Wierszewski asked next.

Thibault answers: VA.

Still no pursuit of what for or anything.

Q. One last question. If you can turn to page No. 11. This is just for reference. There was something that you said to me about: Inner air 92 bravo infantry. Something about that that you thought peaked your interest.

Can you explain that, please.

- A. During conversation with 92 bravo, there was at 2:12:55, an unknown officer asked: What's your MOS. Mr. Wierszewski or—excuse me—Mr. Thibault says. quote: 92 bravo, which I believe is a combat position.

When he is engaged in conversation, again later in the booking room, he tells another—or I think it was Veronica. I think that's Officer Cashion—that he was in infantry in the military. She engaged him in cordial conversation.

This was at 3:53 and 30 seconds Veronica takes his fingerprints. He is very cooperative. Follows instructions. He is coordinated. Steady stance. No assistance needed standing. Veronica engages Mr. Thibault in conversation about his job and the military.

I believe at that point is when he tells her he was in the infantry. This is—what I have got written down here is a summary of the situation and not direct quotes because the conversation went on for a bit. He talks about his trucking job. He talks about the military. Says he's in infantry. All the time very cordial and polite.

- Q. Is there any significance to that with how you would administer these field sobriety tests?
- A. Oh, I would pursue whether or not they have been subject to any kind of a concussion from loud explosions or gun fire. I would be concerned about their inner ear and the condition of it. Balance tests are all about the inner ear's capability to balance the body.

MR. RADNER: Nothing further.

MR. DEGROOD: Thank you, sir.

(Deposition concluded at 1:10 p.m.)

[. . .]

**EDWARD WIERSZEWSKI'S
DEPOSITION TRANSCRIPT
(DECEMBER 3, 2015)**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALAN THIBAUT,

Plaintiff,

v.

EDWARD WIERSZEWSKI,
Individually and in His Official Capacity
as a Public Safety Officer,

Defendant.

Case No. 15-CV-11358

EDWARD WIERSZEWSKI

Having first been duly sworn, was examined and
testified on his oath as follows

CROSS-EXAMINATION

BY MR. RADNER

- Q. Good morning, sir. Please state and spell your name for the record.
- A. Officer Edward Wierszewski. Spelling of the last name is W-I-E-R-S-Z-E-W-S-K-I.

MR. RADNER: The record should reflect this is the deposition being taken of Officer Wierszewski taken pursuant to notice and will be used for all purposes permitted by these Court Rules.

Q. (By Mr. Radner) Sir, where are you employed?

A. I am employed with the City of Grosse Pointe Farms Public Safety Department.

Q. How long have you been employed there?

A. Just shy of 14 years now.

Q. Fourteen years ago when you got hired, what was your job?

A. I was a public safety officer.

Q. How long were you a public safety officer, or are you still a public safety officer?

A. I still am a public safety officer for the City of Grosse Pointe Farms.

Q. Have you received any training prior to becoming a police officer?

A. Yes, I have.

Q. What training did you receive, please?

A. I have completed the Macomb Police Academy.

Q. Is that it?

A. I also have a criminal justice degree, associate's degree through Macomb Community College.

Q. Is that specific to law enforcement or is that just the general?

A. It's an associate's degree through Criminal Justice.

- Q. Is that a degree that police officers get specifically, or is it something that anybody can go in and get?
- A. It's more tailored towards police officers.
- Q. What year did you graduate from the Macomb Police Academy, please?
- A. 2001.
- Q. What year did you receive the criminal associate's degree from—which college was that?
- A. Macomb Community College. I believe it also was 2001, spring of 2001.
- Q. After becoming a police officer in 2001—I'm sorry. You became a police officer in 2001 as well, correct?
- A. That is correct.
- Q. After becoming a police officer in 2001, did you receive any other training after that, either through your department or through anybody else?
- A. Yes, I have.
- Q. What other training did you receive, please?
- A. I have numerous training.
- Q. Let's hear them all.
- A. Commercial vehicle enforcement. I have drug recognition evaluation expert. I'm a field training officer.
- Q. Drug recognition?
- A. Yes, expert.
- Q. What was the third one you said?

- A. Field training officer, bike patrol officer, numerous classes with drugs, dealing in different drug classifications as well as different kinds of drugs.
- Q. That was over a period of time, or they were all at the same time?
- A. No. That was over a period of time.
- Q. Anything else?
- A. I am an accident investigator with, I believe, nine classes, maybe just shy of nine different classes.
- Q. That was also over the years?
- A. That was also over the years.
- Q. Anything else?
- A. I'm a standardized field sobriety testing instructor.
- Q. Standardized—
- A. Field sobriety testing instructor.
- Q. Anything else?
- A. Yes. I have multiple classes dealing with specialty vehicles, as well as stolen vehicle techniques. I also have training through drug diversion investigations.
- Q. What is drug diversion investigations, please?
- A. Prescription drugs and ways people actually go around and illegally—basically get prescription drugs.
- Q. Got you.
- A. And also using them.
- Q. I have a sister that's a practitioner, so I'm familiar.

Let's move on. Anything else?

A. Numerous CPR classes, hazardous material. I'm also a certified firefighter one and two. There are more. I just cannot recall right now throughout the years.

Q. Let's go to a couple here that you said. You said you're a commercial vehicle enforcement. What year did you receive that training?

A. I believe the last training on that was around 2010. I can't recall the exact date. I have a couple different ones, some prior to that. There is different levels of that.

Q. Who gave you that training?

A. It would be Macomb College was one of them for Police Academy Advanced Training. And, off the top of my head, I do not remember the certification, the name of it. I think it's Advanced Police Training through Trooper Steve Blankenship.

Q. Is there a record somewhere, either in your department or somewhere else, that would keep records of all the training that you have completed?

A. Yes, there would be.

Q. Is that MCOLES or is that something else?

A. MCOLES would have all those, although some classes are not certified through MCOLES, so some of that would be held through the department. They should have all the records.

Q. Commercial vehicle was MCOLES?

MR. DEGROOD: If you know. Don't guess.

THE WITNESS: I'm not sure.

Q. (By Mr. Radner) How about drug training expert?

A. Yes.

Q. Field training officer?

A. Yes. I cannot confirm on that one.

Q. Bike patrol officer?

A. Bike patrol is through MCOLES.

Q. Numerous drug classes about the different kinds of drugs that you have taken over the years, all MCOLES?

A. I do not recall all of them.

Q. Standardized field sobriety testing instructor. To become a standardized field sobriety testing instructor, did you have to take any classes?

A. Prior to that, you have to be certified in standardized field sobriety testing.

Q. When did you receive that certification?

A. I do not recall. It was in the beginning of my career.

Q. Did you ever have to take any continuing education classes?

A. I take continuing education classes every year and certifications for the standardized field sobriety testing updates.

Q. Are these tests MCOLES or not?

A. I do not recall.

Q. So some are MCOLES and some are through your station?

A. No, none of the testing is through the station.

- Q. But they have a record of these, correct?
- A. My department would have a record of all my training.
- Q. What is commercial vehicle enforcement, the first one you mentioned? What does that entail? What is that training about? What do you learn about?
- A. That would have to deal with tractor trailers, tractors and trailers.
- Q. Meaning what?
- A. Anything over gross vehicle weight of 10,001 pounds, combined or gross vehicle weight.
- Q. So this focuses on trucks that are too heavy?
- A. Not too heavy. It's just trucks in general over 10,000 pounds, commercial vehicles.
- Q. What does it focus on, though, if not the weight? What is it that the training includes; what are you trained to observe?
- A. There's Federal Motor Carrier rules, that's one of the classes. The other class was the inspections.
- Q. What kind of inspections?
- A. How to do an inspection on a commercial vehicle.
- Q. What do you inspect for?
- A. Any kind of problems with the actual vehicle tractor itself or the trailer. Any equipment violations.
- Q. Okay. Let's move on to the next one. Drug recognition expert. What is a drug recognition expert?
- A. What that is, is somebody certified in the seven categories of drugs under the impairment, while

somebody is under the impairment of one of those seven categories.

Q. So it trains you to identify the seven categories?

A. Correct.

Q. What are the seven categories, if you know?

A. It would be central nervous system depressants, central nervous system stimulants, inhalants, dissociative anesthetics, cannabis.

I have to start again. Central nervous system depressants, central nervous system stimulants. Then you have inhalants, dissociative anesthetics, cannabis, hallucinogens, and—

Q. Can't recall the seventh one?

A. I can. I can go back to my notes for the last one. I have it right here.

Q. Okay.

A. Narcotic analgesic.

Q. So you're trained in these seven categories of drugs, correct?

A. Correct.

Q. Does your training include how to identify if somebody is on one of these seven drugs?

A. It does.

Q. So you can look at a person, and how long would you have to either engage with them, observe them or otherwise be in contact with them to determine whether or not they are on drugs?

A. It is a testing process that I would go through.

Q. So take me through it. Let's say, let's talk about Mr. Thibault. You are here because Mr. Thibault is suing you, correct?

A. That is correct.

Q. He is suing you for an arrest that took place on December 5, 2014, at about 2:19 a.m.?

A. Correct.

Q. You arrested him because—why did you arrest him?

A. He was under the influence of an intoxicating substance. His erratic behavior driving first led me to the observation of him.

Q. Erratic driving, you said?

A. Yes.

Q. How long had you been observing this erratic driving?

A. As I was on Mack, I observed him bounce off the median on a straight roadway.

Q. Did you ask him why he bounced off the median?

A. I had asked him what had happened at that time once the stop—once I had made the stop.

Q. Do you remember what he said?

A. I believe he said he was going to turn left. He didn't realize—he realized it was not Mack Avenue and he didn't want to go into oncoming traffic.

Q. Is there indeed a no left turn sign there?

A. There is not a sign there.

Q. No sign at all—

A. There is no sign.

Q. —there prohibiting the turn he was trying to make?

A. There is no sign.

Q. Is there any sign at all on that intersection that he possibly could have been confusing it?

A. I do not believe so.

Q. He bounced off the median. That was the erratic driving, that he bounced off the median?

A. Correct, on a straight roadway.

Q. On a straight roadway, but he was trying to turn left, right? At least that's what he told you?

A. That's what he had stated.

Q. But you thought that—did you believe him?

A. He was past where the area to make a left was.

Q. So his tire—what exactly hit the curb, if you recall?

A. It would be the driver's side front tire.

Q. Driver's side front tire. So he is driving down a straight roadway, hits a curb and then pulls off. You have been driving for a long time, right?

A. Okay.

Q. How long have you been driving for?

A. Since I was 16.

Q. Ever hit any curbs?

A. Not that I can recall.

Q. You can't recall ever hitting a curb while you were driving?

A. Not that I can recall.

Q. That's incredible.

MR. DEGROOD: Well, it might be incredible if you bounce off them regularly, then maybe you're not as good a driver as you ought to be. I've never bounced off a curb and I've probably been driving more than both of you combined.

MR. RADNER: So I might be sitting in front of the two most greatest drivers of all times.

MR. DEGROOD: I would hope so. I wouldn't want any injury to befall you as the result of either of our operations of a motor vehicle in this or any other state.

Q. (By Mr. Radner) Have you ever been sitting in a car with anybody else that hit a curb?

A. Not that I can recall.

Q. Were you ever sitting in a car with either a parent or family member either as a child—

A. I have been in a car with my parents, yes.

Q. You have never been in a vehicle with anybody who hit a curb?

A. Not that I can recall.

Q. Is it your opinion that if somebody hits a curb, they are most likely under the influence of something?

A. That is not my opinion.

- Q. Okay. What are the possible things that could cause erratic driving, as you called it?
- A. Not paying attention to the roadway.
- Q. Okay. Texting?
- A. It could be that. It could be numerous things that could have taken place at that time.
- Q. So you pull him over because of this erratic driving, as you called it. What happens next? What do you do next?
- A. There was also equipment violations that were also in place on that, not just bouncing or hitting the curb.
- Q. What were the equipment violations?
- A. He had a clearance light that was out and no license lamp.
- Q. No license lamp?
- A. Correct.
- Q. What was the other one?
- A. A clearance lamp was out.
- Q. Where is a clearance lamp?
- A. A clearance lamp is actually on the trailer. It would be on the corners in the front of the trailer. Should be a yellow to each side. And on the back would be the red.
- Q. How about a license lamp, where is that?
- A. License lamp would actually be on the back. Most of the time on tractor trailers, on a trailer itself, they put them on the doors of the actual trailer.

- Q. So when you pulled him over, did you pull him over because of these, or did you only notice these after you pulled him over?
- A. No. I actually noticed all these before the stop, before I activated my lights.
- Q. Where were you when you—
- MR. DEGROOD: May I ask you to keep your voice up.
- Q. (By Mr. Radner) Describe for me where were you driving when you observed this truck.
- A. I was westbound on Mack turning to southbound Moross.
- Q. Where was the truck?
- A. The truck was northbound on Moross.
- Q. You observed the truck. So what part of the truck were you able to see best, the front, the right side, the left side, the back?
- A. The front of the vehicle.
- Q. Front of the vehicle. After you saw the truck hit the median, that's what brought your attention to this particular truck?
- A. That is correct.
- Q. Then when you looked over at the truck, you saw there was also no license lamp and no clearance lamp?
- A. That's incorrect. I first—after I noticed the curb, I noticed the clearance lamp. And then once I got behind the vehicle I noticed the license lamp.
- Q. Got you. So you pull him over and told him why you pulled him over?

- A. I believe I asked him for his license and registration, insurance—I'm sorry. His CDL, log book and medical card. And then, to the best of my knowledge, I remember asking what happened back with the curb.
- Q. That's when he explained to you that he thought there was this sign that said no turning?
- A. That is not correct. He never mentioned anything about a sign.
- Q. He never said anything about a sign?
- A. No.
- Q. When you were first talking to him, did you think he was under the influence of a substance of some sort?
- A. When I first spoke to him, I noticed a slow speech, as well as the window was down and he had an unlit cigarette he was attempting to smoke.
- Q. Why is it you think he was attempting to smoke it?
- A. Well, when it wasn't lit and he puts it up to his mouth and he tries to take a puff off of it, I would say that would be trying to smoke that.
- Q. Just for, I guess, for an illustration, I just had my pen in my mouth. Do you think I was trying to smoke it?
- A. I don't think I have ever seen someone try to smoke a pen.
- Q. Okay. Did you ever see anybody put a cigarette in their mouth and not light it?
- A. Yes.

Q. And they are not trying to smoke it, right?

A. They are not puffing on it.

Q. So you're saying he was puffing on the cigarette?

A. He took a puff on it.

Q. He took a puff out of it?

A. Yes.

Q. How many puffs did he take out of it?

A. I don't recall.

Q. Did he leave it in his mouth after he took a puff, or did he take it back out?

A. I do not recall.

Q. Was he only getting two fingers, the way you often see people holding cigarettes, or possibly between his thumb and index finger, as you sometimes picture people smoking a joint or some other way?

A. I do not recall which way he was holding it.

Q. You don't recall any of that, but you recall that he was trying to smoke the cigarette because you saw him actually take a puff?

A. That is correct.

Q. Is it possible that he just put the cigarette in his mouth and that he was breathing?

MR. DEGROOD: Object to form. Go ahead and answer.

THE WITNESS: I do not believe so.

Q. (By Mr. Radner) Why is it that you don't believe so?

- A. Because he actually inhaled with it in his mouth as a person would do when smoking a cigarette, not taking a breath in.
- Q. Okay. So at what point was it that you first thought maybe this guy is under a substance? Is it because of the slow, slurred speech and the unlit cigarette that he was trying to smoke, or was there a third thing that had happened?
- A. There was a combination of his driving, my training and also the cigarette, window was down in the middle of December and his speech.
- Q. Did you ask him why his window was down?
- A. Do not remember if I did or not. I do not recall.
- Q. If that's one of the things that you observed that makes you believe he might be on drugs, wouldn't that be something you might want to ask him about?
- A. I don't see what the window down, how that could just relate right to drugs.
- Q. Didn't you just say that's one of the things that you relied upon in your belief that he might be on drugs?
- A. No. What I did state was between my experience and all his driving, his speech and the fact he was trying to smoke a cigarette that was unlit, all of this was a combination.
- Q. Did you ask him about why he was trying to smoke an unlit cigarette?
- A. I did tell him that he was—I did inform him that his cigarette was not lit.

Q. What did he say?

A. I do not recall what his response was.

Q. Just so I understand it, there were five things that made you believe he might be on drugs, his speech, your experience, the fact that he was smoking an unlit cigarette, the fact that he had the window down and his erratic driving. Am I missing any?

MR. DEGROOD: Object to the form of the question inasmuch as you have not identified any period of time with respect to your question concerning what it was that allowed him to suspect utilization of some type of drug intoxicant, et cetera.

You can answer over that objection.

Q. (By Mr. Radner) Let me withdraw that question and rephrase it in a way that hopefully makes more sense.

We were talking over the last few minutes about when it was that you first believed he might be on drugs, right?

A. Okay.

Q. That's what I'm talking about. When you first had that thought this guy might be on drugs.

As I understand your testimony, that's when—that belief was based on the five things I just read back to you.

A. As well as also the sobriety tests and also given the time of the evening. As I stated, it's a combination of everything that occurred at that time.

Q. Well, wait a second. The sobriety test wasn't until after you thought he was on something, right?

A. Correct.

Q. Let's not go there just yet. Then there was the second thing, you said the timing of the evening.

A. The timing of the evening.

Q. It was strange for him to be out at this time driving a truck?

A. It's not strange, but through my experience, that's when most of intoxicated or impaired drivers are out on the road.

Q. Do you believe that being out on the road driving gives you probable cause to believe somebody on the road at that time, that they are probably high on some sort of substance?

A. No, I do not.

Q. Just making sure. So as far as this initial thought that this guy might be on drugs, there was the slurred speech. You relied on your experience. There was the unlit cigarette. There was the window that was down and erratic driving. Right?

A. Slow speech, not slurred.

Q. Whatever his speech was. Of these five things, four of them were attributed to him. Obviously, your experience had nothing to do with anything he did, right? What I'm asking—rephrase that question.

From what you were observing, it was those four things, the speech, the cigarette, the window and erratic driving, right?

- A. Driving—his face was also flushed red.
- Q. When was his face flushed red, when you first approached him?
- A. That is correct.
- Q. Do you remember how cold it was that night?
- A. No, I do not.
- Q. Do you remember if it was cold or warm?
- A. It was December. I would say it was cold, very cold.
- Q. Does your face ever get red when it's cold outside?
- A. It possibly does.
- Q. Have you ever noticed anybody else's face get red when it's cold outside?
- A. Yes.
- Q. So that would possibly explain the flushed red face, right?
- A. It could.
- Q. Now, have you subsequently learned, or have you heard, there is a claim that Mr. Thibault suffers from a slight speech impediment?
- A. I had not. I do not have a knowledge of that.
- Q. You have never heard that before today?
- A. No.
- Q. Did you read the complaint that you were served with?
- A. I have to look back.
- Q. At any time did you ever?

- A. Yes, I had gone over it.
- Q. But you don't remember seeing anything in there about speech impediment. I'm not asking you to read the complaint. I'm just asking if you recall.
- A. I do not recall about any speech impediment.
- Q. Do you think that would possibly explain why he was speaking slowly?
- A. It could be.
- Q. Different people speak in different ways?
- A. That is correct.
- Q. Some people speak fast, right?
- A. That is correct.
- Q. Some people speak slow?
- A. Correct.
- Q. Some people speak loud?
- A. Correct.
- Q. Some people speak very, very quietly?
- A. That's correct.
- Q. So you are saying that this was slow speech. Have you ever heard him speak before you spoke to him on that particular evening?
- A. No, I have not.
- Q. Then how do you know this was slow speech and not normal speech for him?
- A. This was an observation that I made.
- Q. I understand that it's an observation that you made. What I'm asking you is, do you think I'm

right now speaking slow, fast or something else?
What adjective would you say my speech is right now?

MR. DEGROOD: I would just object to the form of your question inasmuch as I perceive your speech to be harassment of my client and you are badgering this witness.

MR. RADNER: Thank you.

MR. DEGROOD: You may respond to Mr. Radner when he would like you to characterize what you believe his speech was like, as he just asked you that question.

THE WITNESS: I believe your speech to be not fast or slow.

Q. (By Mr. Radner) Okay. You have never really heard me speak before, except for that one time at my office?

A. That is correct.

Q. Now, Mr. Thibault, in your opinion, was speaking slower than what?

A. At the time I was speaking to him, his response and how he was talking was slow, slower than most anyone else that you would talk to on the road.

Q. In your training and experience, that would lead you to believe he might be on some sort of substance?

A. That could be a clue or observation.

Q. And then there was the unlit cigarette?

A. That is correct.

- Q. You mentioned something to him about the unlit cigarette, right?
- A. That is correct.
- Q. You asked him about his erratic driving?
- A. I asked him about the curb he had hit, yes.
- Q. You didn't ask him why he had his window down?
- A. I do not recall.
- Q. So all those things lead you to administer some field sobriety tests, correct?
- A. That is correct.
- Q. You do this field sobriety test—first of all, which field sobriety test did you administer?
- A. I believe I first asked Mr. Thibault about his education and to pick a number between 21 and 19.
- Q. What did he say?
- A. He correctly stated the number 20.
- Q. Where did you get this idea that this is a field sobriety test, by asking somebody to pick a number between 21 and 19?
- A. These are tests that I use before I do a Standardized Field Sobriety Test.
- Q. I asked you where you got this test from. Did you Google it? Did you find it?
- A. That's how I was trained in that field.
- Q. In where?
- A. In field training.

- Q. Are there certain field sobriety tests that are considered approved, or is there any body, governing body or any sort of body out there that approves specific field sobriety tests that you're aware of?
- A. Yes. It would be the Standardized Field Sobriety Test or SFST for short.
- Q. Who is it that writes these SFSTs, if you know?
- A. I do not recall. The best of my knowledge, I believe it was Highway Safety Planning possibly, which was National Highway Safety Planning, NHTSA had part of that sobriety testing.
- Q. So there are certain approved sobriety tests, correct?
- A. That's correct.
- Q. Picking a number between 21 and 19 is one of them?
- A. That is not correct.
- Q. Where did this test come from?
- A. That came, as I stated, from field training.
- Q. So from the field sobriety test training that you took?
- A. No. From the field training that I had here.
- Q. So that's something that this department made up, as far as you know?
- A. My field training officer originally—before I was standardized field sobriety testing, that was one of the tests that I had used.
- Q. That's not one of the NHTSA approved tests?
- A. That is correct.

Q. Did you administer any NHTSA approved tests?

A. Yes, I did.

Q. The first one you did was pick a number. What was the second one you did?

A. Second one was recite the alphabet starting with the letter D, David, and stopping with the letter O, ocean.

Q. Is this NHTSA approved?

A. That is not.

Q. Also not NHTSA approved. Where did you get this one from?

A. That is also one through training when I was first employed with the City of Grosse Pointe Farms.

Q. How did he do on that one?

A. I have to recall from my notes.

Q. Sure.

A. He started at the letter A, continued past the letter O, stopping at the letter U, and then he stated after that, he stated O.

COURT REPORTER: O, as in—

THE WITNESS: Just O, as in the letter O.

Q. (By Mr. Radner) Well, you don't know if he was saying O, as in the letter O or Oh, as in O-h, I just messed up, right?

A. That's correct.

Q. You're just assuming he said the letter O?

A. After he stated Z, he stated O.

- Q. Right. After he said Z, he said O. But you don't know if he was saying the letter O, as if he believes the letter O came after Z a second time, or if he was saying Oh, as in Oh, whoops, I messed up.
- A. That's correct.
- Q. But you just told the court reporter it was the letter O, right?
- A. As he stated it, he went from O all the way down to— as I stated, stopping at the letter U and then stated O. He kept everything in line, so after he stated S-T-U-O, so I—
- Q. Was there a third test that you administered?
- A. There was a third test, the finger dexterity.
- Q. What is the finger dexterity?
- A. Touching the tip of the thumb to the tip of each finger on the right hand, conducting it three times, counting up 1-2-3-4 and 4-3-2-1.
- Q. How did he do on that one?
- A. He completed that test.
- Q. No problems?
- A. No problems.
- Q. Is that a NHTSA certified test?
- A. That is not.
- Q. Also not. Where did you get that one from?
- A. That is also from when I was field training with the department.
- Q. So the first test he passed. The second test he messed up. The third test he passed?

A. Correct.

Q. Let's move on to the fourth one. Can I ask you, why did you do a fourth one? Let me go back.

Why did you do a second one after he passed the first one?

A. People can pass one test.

Q. Oh, okay. You gave him a second one and he failed that?

A. Correct.

Q. Why didn't you arrest him right then?

A. That's not enough.

Q. Okay. So people can fail a test if they are sober?

A. What is that?

Q. People can fail a test even if they are sober, right?

A. Most people do not fail a test if they are sober.

Q. That's not what I asked you.

A. It may be possible.

Q. That's why probably your training says don't arrest people if they pass one and fail one, right?

A. My training through standardized field sobriety testing is a collection of clues that if you don't pass all these or you have some impairment, it will show up on the Standardized Field Sobriety Test.

Q. Let's move on to the next one. Did you give him a fourth test?

A. I did.

Q. What was the fourth test?

A. It was a horizontal gaze nystagmus.

Q. What is that?

A. That is checking for an involuntary jerking in the eyes.

Q. Describe this one to me. I'm not a doctor.

A. Basically the concept is the eye should move smoothly across, almost as a marble would across a glass table, when following a stimulus.

Q. And how do you do this test?

A. With a stimulus. Stimulus is approximately 12 inches away from the head, elevated slightly above the eye level. And Mr. Thibault, in this case, would follow the stimulus.

Q. What stimulus did you use?

A. Stream light, blue stimulus.

Q. Blue stream light?

A. Yes.

Q. What kind of training did you get for this test—is this test—let me ask you this. Is this test more difficult to have expertise than the first three you mentioned?

A. This is a Standardized Field Sobriety Test that is through NHTSA approved.

Q. This is a NHTSA approved test?

A. Yes, one of the three.

Q. Does NHTSA have requirements for police officers of NHTSA training that they need to do before

they can be considered competent to administer this test?

A. Yes. It's a three-day class, and there's also a practical at the end that you have to pass to know you are proficient.

Q. You took that three-day class?

A. I have taken a class as well as a recertification.

Q. At the time that you administered to Mr. Thibault, were you certified or not?

A. Yes.

Q. Are you still certified?

A. I am certified still.

Q. What do you do during these three days of training?

A. You actually learn how to perform the Standardized Field Sobriety Test.

Q. Do they teach you about eyes and about reflex and about what your eyes should be doing and things of that nature?

A. They base it with the horizontal gaze nystagmus.

Q. The three-day class is only for the horizontal gaze test or all?

A. No. When you asked me if it was just eyes, they base it just with the horizontal gaze nystagmus and vertical gaze nystagmus.

Q. That three-day class?

A. There are other parts of it, as well, the other two which you didn't want to get into.

- Q. We'll get to that. What I want to know simply is how much training did you receive in this horizontal gaze test, was it three days of training or just the two-hour slot of the three-day training course?
- A. There was some book. And then throughout the three days you go over it, and you have your practicals, and they speak over it.
- Q. Got you. Who teaches the class, professor or officer? Who teaches them?
- A. It would be an instructor, standardized field sobriety testing instructor.
- Q. Would the instructor have people stand up and do this test on each other throughout the class?
- A. That is correct.
- Q. Do you recall how many people did that during the class?
- A. I do not recall.
- Q. Do you recall if anybody failed during the test—
- A. I do not recall.
- Q. —during the class.
- Let's go back to the next one. Did he pass this test?
- A. On this test he showed—I have to go back to my notes here.
- Q. Please do.
- A. He showed clues, four clues. He had lack of smooth pursuit in both eyes and distinct nystagmus at maximum deviation of both eyes.

Q. Lack of smooth pursuit?

A. Correct.

Q. What was the next one?

A. And distinct and sustained nystagmus at maximum deviation.

Q. Distinct and sustained—

A. Nystagmus.

Q. Can you spell that, please?

A. N-y-s-t-a-g-m-u-s. At maximum deviation.

Q. At maximum deviation. Was there a third one, or was there a third thing? You said there were four.

A. There was four. There was two clues—for each test, there is a clue for the eyes. So there was your two for the right eye and two in the left right there. So lack of smooth pursuit and a distinct in both eyes.

Q. Oh, in both eyes?

A. Yes.

Q. What is lack of smooth pursuit?

A. Again, what that is, when the eyes do not roll smoothly. The eyes should follow stimulus across, follow the stimulus just like—easiest way to put it is a marble across a glass table.

Q. That's how they should roll across?

A. They should roll, track evenly then.

Q. His eyes weren't doing that?

A. That's correct. They weren't.

- Q. Could that be when you're holding—doing the test, and holding this blue stream light in front of him, is it possible—let me ask you this: Not you, if somebody is administering this test and has a jerking motion with his hand or doesn't smoothly move the stimulus in front of the testing subject's eyes, then that person's eyes will also not roll across, correct?
- A. That could be possible.
- Q. Okay. But you didn't do that in this case?
- A. I did not.
- Q. You administered the test perfectly?
- A. I administered the test as I have been trained.
- Q. Did you administer the test perfectly or not?
- MR. DEGROOD: Let me just object to the form and foundation of your question. Go ahead and answer.
- Q. (By Mr. Radner) Was there something wrong with the way you administered the test or did you administer it correctly?
- A. I administered the test correctly.
- Q. What is distinct and sustained nystagmus of maximum—
- A. That is when you take the pupil all the way out to the maximum deviation of the eye, and there is an actual jerking in the actual pupil you can actually watch.
- Q. You were able to see jerking in the pupil?

- A. You can actually see the actual pupil, the eye, the iris and everything right there jerk back and forth. That's what the nystagmus is.
- Q. When you received your training, did your training tell you or instructor tell you that if somebody has lack of smooth pursuit and distinct and sustained nystagmus, maximum deviation, that there's a likelihood that person might be on drugs or alcohol?
- A. There is a 77 percent—there is a San Diego study that shows 77 percent of the time when somebody has HGN, that they are intoxicated or impaired by a controlled substance.
- Q. Did anybody else do these tests or just you?
- A. I did the tests.
- Q. Other officers came on scene, right?
- A. There were other officers on scene, that is correct.
- Q. You didn't ask them to do the test, as well?
- A. I did not.
- Q. Maybe they would do the same testing and get a different result?
- A. There would be no reason for them to get a different result.
- Q. Okay. But you didn't ask anybody to do it, right?
- A. I did not ask anybody to do it.
- Q. You were confident that your results that you found were correct?
- A. Yes, that's correct.
- Q. Was there a fifth test that you did?

- A. It was a walk and turn.
- Q. What is a walk and turn?
- A. Walk and turn is a series of instructions where Mr. Thibault would walk nine steps heel to toe, turn in a prescribed manner and walk back nine steps heel to toe.
- Q. Was he able to complete this one?
- A. He had showed clues through this walk and turn that he was not able to stand as instructed. He used his arms for balance, and he was swaying while he was standing.
- Q. So he failed this test?
- A. He showed clues of impairment.
- Q. Did he pass the test or fail the test—
- A. The test—
- Q. Let me finish the question.
- A. Okay.
- Q. Did he pass the test or fail the test or you're not able to say?
- A. I cannot answer that question.
- Q. It was not conclusive?
- A. There is no pass or fail. They are clues.
- Q. What clues did he show?
- A. He was unable to stand as instructed during the instruction phase, swaying while he was standing there. He used his arms for balance. His steps were rigid. His arms were elevated, and he also stopped the test while he was performing it.

- Q. Have you ever tried to do a heel to toe walk when it's a very cold night beside the road and being interrogated by a police officer?
- A. Not while being interrogated by a police officer. I performed this test and explained it to—I performed this test and explained it to Mr. Thibault.
- Q. Do you have any idea if people sometimes feel anxiety when being accused of a crime by a police officer, any idea at all?
- A. I can't say.
- Q. No idea?
- A. I can't say.
- Q. Okay. You have never been accused of a crime, right?
- A. No, I have not.
- Q. So he was unable to complete this particular test, or you said he showed signs of clues because he was unable to complete certain steps?
- A. Correct. I believe there were four clues he showed.
- Q. Was this a NHTSA certified test?
- A. This is a certified test by NHTSA.
- Q. Based on your training, what likelihood do you think that there was of him being on some sort of substance based on the results of that walk and turn test?
- A. The San Jose model states, I believe, it's 68 percent on this one. There is a kind of level of intoxication or impairment.

Q. Let's go back to the beginning, because I didn't know that you had these percentages.

The pick a number test, what are the percentages on that one?

A. Not NHTSA approved and no test done on that.

Q. No percent there. How about number two, recite the ABCs from D to O?

A. Not a Standardized Field Sobriety Test that is through NHTSA.

Q. And finger dexterity test, same thing?

A. Same thing, correct.

Q. Horizontal gaze test, you said that was 77.

A. Yes.

Q. Did you do a sixth test?

A. I did do another test.

Q. What is that?

A. One leg test.

Q. Was that NHTSA certified?

A. That is.

Q. What is the one leg stand?

A. That is where you stand on one leg, elevated six inches off the ground and count out loud, arms down to your side.

Q. How did it go on this one?

A. He showed clues of impairment.

Q. What clues did he show of impairment?

A. He was unable to keep his foot elevated as instructed, following instructions, and he used his arms for balance, and he was swaying from side to side.

Q. What are the percentages in this case of somebody being on some sort of substance based on your training?

A. I believe it was through the San Jose, 62 percent, I believe.

Q. So did you arrest him at that point after he showed signs and you had all these percentages in your favor? Did you arrest him then or not yet?

A. Not yet. At that point, not yet.

Q. Why not?

A. I believe I had him walk and turn one more time.

Q. So then you had him do a seventh test, which was the walk and turn again?

A. Correct.

Q. Why did you have him do the walk and turn again?

A. There were other officers there at the time.

Q. When did the other officers get there, between which test?

MR. DEGROOD: I'm going to object to the form of the question as it inherently assumes that other officers all arrived at the same time as opposed to it was some of those officers being there throughout the entire time frame of the initiation of the stop.

You may answer.

Q. (By Mr. Radner) Let me withdraw that question and ask another one.

When is it that the first officer arrived who wasn't with you?

A. That would be at the same time of the stop.

Q. Before you even approached Mr. Thibault?

A. We approached at the same time.

Q. Which officer was that?

A. That was Officer Cashion.

Q. How do spell Cashion?

A. C-A-S-H-I-O-N.

Q. So does he drive with you or drive separately?

A. He is a she, and she has her own vehicle.

Q. She has her own vehicle. She arrived before you approached Mr. Thibault. As you said, the two of you approached together, correct?

A. We both had made the stop at the same time. She was right behind me.

Q. Who else showed up?

A. Officer Dionne had showed up.

Q. How do you spell Dionne?

A. D-I-O-N-N-E.

Q. When did Officer Dionne show up?

A. I don't recall the exact time, but I do note that he was there when Mr. Thibault was sitting in the back of the vehicle and a search of the vehicle was done.

Q. Was that before or after these seven field sobriety tests were completed, or administered, I should say?

A. I believe it was after the tests were performed.

Q. Who else arrived?

A. That would be Sergeant Krizmanich.

Q. Holly Krizmanich, right?

A. That's correct, Sergeant Krizmanich.

Q. When did she get there?

A. I do not recall the exact time.

Q. Do you remember if it was before or after the field sobriety test?

MR. DEGROOD: Object to the form of the question as you are, again, inherently assuming that all of the field sobriety tests discussed by this witness thus far were the only field sobriety tests as opposed to any additional field sobriety tests, be they other tests or repeat tests were performed in the presence of any of the other officers.

You may answer.

Q. (By Mr. Radner) I thought the question was fairly simple, so I'm going to allow you to answer that question.

Did Sergeant Krizmanich get there before, after or during these tests being administered?

A. She, I believe, was there during the last walk and turn. She was not there, I believe, for the actual field sobriety first ones.

Q. Any other officers show up?

A. No. That was all the officers on scene.

- Q. So a moment ago I asked you why did you do a walk and turn again, and you said because other officers had shown up.
- A. Correct.
- Q. The only officer who showed up after the sixth test, but before the seventh test was complete, was Sergeant Krizmanich; is that correct?
- A. No. It would be Officer Dionne, as well.
- Q. Officer Dionne was there after you already put Mr. Thibault in the car, right?
- A. He did not see the first set of sobriety tests I had done.
- Q. After you put Mr. Thibault in the car, you took him out and did the seventh test, the walk and turn.
- A. The walk and turn, correct.
- Q. So Officer Dionne watched the entire seventh test, and Sergeant Krizmanich watched a part of it, correct?
- A. I believe Sergeant Krizmanich watched all of it, as well as Officer Dionne.
- Q. I thought you said that Krizmanich got there during the walk and turn?
- A. She was there after the first set, after I had first done the HGN, which is the horizontal gaze nystagmus, the one leg stand, the walk and turn. She had showed up right after that. That is when I did that second walk and turn while she was there.
- Q. Just because I want to be clear about this, did Sergeant Krizmanich get there in the middle of

the second walk and turn or before the second walk and turn?

A. Before.

Q. Are you sure about that?

A. I'm sure of that.

Q. So Dionne and Krizmanich both watched the second walk and turn?

A. That is correct, as well as Officer Cashion.

Q. How did he do?

A. Second walk and turn, I have to go back to my notes. Rigid movements, unsteady walking and had to use his arms for balance. Again, he showed clues of intoxication or impairment.

Q. Same as the first time, meaning the same results as the first walk and turn?

A. He showed clues of impairment, being that he was rigid, unsteady and had used his arms for balance.

Q. Were those the same signs of impairment that he had showed the first time you administered the test?

A. On the second one, I do not believe he stopped the test. On the first one, he did stop it.

Q. Do you know why he stopped the test; did he tell you why or did you ask him why?

A. No. He was instructed not to stop once he had began.

Q. Did you ask him why he stopped?

A. No, I did not.

Q. Did he tell you why he stopped?

A. No, he did not.

Q. Did he tell you that he is just not so good with his balance?

A. Not at that point.

Q. Did he tell you at some later point?

A. I believe he did at the—in the station at the very end of the testing.

Q. Okay. Now at some point, you did a PBT as well, correct?

A. I did not do that. Officer Dionne did.

Q. Why is it that—did you ask Officer Dionne to do the PBT or did Officer Dionne offer?

A. I believe I asked him to while I was preparing for the evaluation.

Q. Do you know what the results were?

A. I believe it was 0.000.

Q. Were you surprised by that?

A. No, I was not.

Q. Let's skip ahead and come back to this. Do you know whether he was actually on a substance that night according to the test administered by the Michigan State Police lab or results of the Michigan State Police lab?

A. The only paper I had seen that came back at the time was the alcohol, and it did show that there was no alcohol content.

Q. You still have not seen any of the results of any drug tests?

A. As far as after I was served with the paperwork for the lawsuit, I believe it was approximately a few months after, I was made aware that MSP did a drug test.

Q. You know that this case, the crime that you charged Mr. Thibault with was dismissed by stipulation between myself and Calvin C. Brown, prosecutor for the City of Grosse Pointe Farms, correct?

MR. DEGROOD: Object to form and foundation. At what point in time?

Q. (By Mr. Radner) At any point in time, are you aware that that was the disposition of this criminal case?

A. I was made aware of that after the lawsuit by the lawyer.

Q. You didn't know this case was dismissed before the lawsuit?

A. I did not know that.

Q. The prosecutor never called you and asked you for your opinion on this matter?

A. I had no interaction. I had never spoke to the prosecutor.

Q. Is that common or uncommon for the prosecutor of your particular city to dismiss cases that you are charging without talking to you about it?

MR. DEGROOD: Object to the form and foundation and calls for speculation.

If you can possibly answer that, go ahead.

Q. (By Mr. Radner) I will rephrase the question so that it doesn't call for any speculation at all.

How many people have you charged with crimes since you became an officer in 2001?

A. I could not answer that.

Q. Do you know how many of them have been dismissed?

A. I could not answer that.

Q. Do you know if the majority of them have been dismissed?

A. I could not answer that.

Q. After somebody has been charged, is it common for the prosecutor to talk to you about the case before dismissing it?

MR. DEGROOD: Objection to the form, foundation and calling for speculation. Go ahead.

THE WITNESS: They do not talk to us about something on the case.

Q. (By Mr. Radner) About what case?

A. On cases. The prosecutors do not always talk to us.

Q. I didn't ask always. I asked if that is common.

A. It's common that I do not have any interaction with the prosecutor.

Q. So until you were served with this lawsuit, you did not know this case was dismissed by stipulation?

- A. That is correct, until my lawyer informed me.
- Q. The stipulation was signed by the prosecutor on January 27, 2015. You didn't know that?
- A. I did not. I did not have any talk, any interaction with the actual prosecutor.
- Q. So Mr. Thibault blew all zeros; is that correct?
- A. That is correct.
- Q. Then you took him back to the station and did some more tests?
- MR. DEGROOD: Let me just object to the form of the question inasmuch as it assumes that the PBT you just referred to was performed some place other than at the station.
- You may answer.
- Q. (By Mr. Radner) Where was the PBT performed?
- A. It was performed in our processing room.
- Q. So you didn't do a PBT on site?
- A. That is correct.
- Q. Is that common for you to not do—not administer a PBT on site?
- A. Sometimes I do, sometimes I don't. In this case, I did not have the knowledge that it would have been alcohol.
- Q. What did you think it was?
- A. I believe the impairment to be something other than alcohol, and as it turned out, was an alcohol rule-out.
- Q. It was a what?

- A. Alcohol rule-out. It was not alcohol by the time my testings were done.
- Q. Now, I see that you have a copy of the report that you wrote in front of you, correct?
- A. That is correct.
- Q. This has already been marked as Deposition Exhibit Thibault No. 1 referring to October 21, 2015. Can you please turn to the front page of that.
- A. Okay. When you say front page, are you speaking—
- Q. Case report. Now CR number, what is that?
- A. That would be case number.
- Q. Report date and time, I think we all know what that means. Location, Moross Road and Mack Road. That's the general location of where this took place, correct?
- A. That is correct.
- Q. Call sources, telephone. What does that mean?
- A. That, I do not know. That is through dispatch.
- Q. Did you write this report?
- A. I did write this report. This first page is done actually through dispatch. It is initiated by dispatch.
- Q. So you didn't write the front page?
- A. I did not write the front page. Only thing on the page would be the verified offenses, what I verify it as.
- Q. Dispatched offenses 8041 OUIL, liquor?

A. That is correct.

Q. What is 8041?

A. I believe it is the code that the system uses for alcohol intoxication.

Q. Is there a different code for operating under the influence of drugs, or is it the same code?

A. It would be the same code on this one that we used, operating while under the influence of liquor, OWIL.

Q. So there's not like a separate code, like 8042 or operating under the influence of drugs?

A. There possibly could be, but we rule everything as operating while intoxicated.

Q. What does that mean, you rule everything?

A. For our citations and for our offenses it's operating while intoxicated.

Q. Operating under the influence?

A. Operating while under the influence of alcohol. OWI is actually considered operating while intoxicated. This is a computer system that automatically puts these in like this. I don't think that our department can change how the wording is on them.

Q. Okay. Let's turn to the second page. You see over here it says at the very top, 90 D, driving under the influence B. What does that mean?

A. I do not know. That is a computer program that's in the computer from the manufacturer, Clemens.

Q. Did you write this page or did somebody else?

A. This would be my page.

Q. You actually wrote this page?

A. I filled in the drop down boxes and the charge.

Q. Where it says offense file, class 54002-operating under the influence of liquor or drugs, you put that in. Did you type that in or click, you click that option?

A. That gets transposed from, I believe, the first page when it comes in. So the verified offense would actually come across onto this one here, and you just forward it to that page.

Q. Then again, towards the bottom towards, towards the second-third—third-third of the page, it says arrest information, offense 8041, operating under the influence of alcohol or liquor, OWI?

A. Correct.

Q. In your report—when you got back to the station, somebody did administer a PBT, correct?

A. That is correct.

Q. Datamaster, that was done, correct?

MR. DEGROOD: What was that again?

MR. RADNER: Datamaster.

THE WITNESS: I do not know. There was no datamaster that was actually performed.

Q. (By Mr. Radner) Are you sure about that?

A. To my best knowledge, there was no datamaster. It was a PBT.

Q. Okay. You didn't include anywhere in your report that he blew zeros on the PBT, correct?

A. Yes, it is on the report in a couple different places.

If you go to page two of four that we were on, under arrest information, it says OWI/BAC, which is bodily alcohol content, it says, yes, 0.000 percent. There is another, if you go to attachment file one, which is the Grosse Pointe Farms Drug Influence Evaluation, you also see about two lines down, breath results, 0.000, test instrument PBT.

Q. That's not on Exhibit 1 from Thibault, so I'm going to—

MR. DEGROOD: Let me see Exhibit 1. You may not have offered the entire police report. You're the one that offered that, not me. And you obviously have not offered Exhibit 1, anything other than the first page, the second page, we talked about, and two-page narrative of this report, and not the entire report.

MR. RADNER: I wasn't trying to be tricky. I was just trying to state for the record—

MR. DEGROOD: Why don't you put that together and we'll go off the record for a moment—

MR. RADNER: No reason to. I'm not going to take that much time.

MR. DEGROOD: We'll, I'm not—

(Discussion off the record.)

Q. (By Mr. Radner) Let's go back to the scene for a minute. When you were administering these tests, and I'm specifically talking about, let's say, the first six in the presence of Officer Cashion, were you discussing the results of these tests with Officer Cashion at all?

MR. DEGROOD: At the time when the tests were being performed or at any time?

Q. (By Mr. Radner) You would do the test and then would you say, hey, what do you think of that test or looks likes he's got this problem, or did you keep your opinions to yourself?

A. I may have made some mention at one point about what I observed.

Q. To Officer Cashion?

A. Yes.

Q. Did Officer Cashion agree with you or disagree or not have an opinion?

A. I do not recall.

Q. How about when you did the last test in the presence of Officer Dionne and Krizmanich, did you discuss the results of either of them?

A. I believe I did, and I believe it was with Officer Dionne and Sergeant Krizmanich.

Q. Did they agree that this person had to be arrested?

A. I do not recall them saying it that way. I recall them also observing that there was some impairment in the test.

Q. Did they agree with your decision to arrest, or did they not have an opinion?

A. I do not recall.

Q. You do not recall. Okay. Do you recall having the following exchange with any particular officers there; you said, I'm not happy. Somebody said, why. You said, I want something. There better be

something in here. Do you recall ever having that exchange with any other officers there?

A. That was not the actual conversation.

Q. Is that a yes or no or do you need to explain?

MR. DEGROOD: His question is, did you have that. And if that's not accurate, the answer is no. That simple.

THE WITNESS: No.

Q. (By Mr. Radner) You said that was not the exchange, right?

A. That's correct.

Q. Did you prepare for this deposition by reviewing any documents today?

A. I reviewed the report, my face sheet, as well as the request to produce. And I have in the past, had watched the video.

Q. You did watch the video?

A. Yes.

Q. You don't recall hearing that particular exchange, I'm not happy. Why. I want something. There better be something in here.

A. That was not the exchange.

Q. Okay. What was the exchange?

A. The exchange, I believe, was, I'm not happy. Officer Cashion said, why. I said, I want something. There has got to be something in here I'm missing, to almost that.

Q. Because you had convinced yourself, or you were convinced in some way Mr. Thibault was on a

substance and you felt that it was your job to arrest him, correct?

A. No, not correct.

Q. What is it? Why is it you say you're not happy, you wanted something that was not there?

A. Through my experience and training, most of the time people do carry narcotics, drugs, open intoxicants with them.

Q. Most of the time people carry that stuff?

A. Most of the time on my stops, I have always found something like that when somebody is under the influence.

Q. So you are saying you wanted to find something because that would probably strengthen your, not only your ability to arrest him, but charge him with another crime, right?

A. No, that's not true.

Q. What is true?

A. What's true, as I stated, most of the time people that are impaired, they have that impairing substance with them.

Q. Why were you not happy? You should be thrilled there were no illegal substances in this car—or in this truck, right?

MR. DEGROOD: Form and foundation. Go ahead and answer.

Q. (By Mr. Radner) Shouldn't you have been happy that there were no illegal substances in this truck?

- A. I can't answer that no, I wouldn't be happy, as I would feel I may have missed something.
- Q. You were not happy with the job you did because you thought you missed something?
- A. I thought I could have probably missed something.
- Q. That explains why you were not happy, okay.
- Then you asked him over and over again if he was on drugs and what drugs he was on and so on and so forth, correct?
- A. I do not recall asking him over and over.
- Q. At the station, you thought you saw something in his nose?
- A. Yes, I did see something in his nose.
- Q. What did you see in his nose?
- A. I saw white substance, a white powder substance in his left nostril.
- Q. Did you have any idea what the white powder substance was?
- A. I do not know.
- Q. Did you have it field tested?
- A. I was not aware of how you would field test something in somebody's nose.
- Q. Is there any way to—I don't know if you have any training for this or not, but maybe have him blow his nose and have him give that to the lab and say, hey, is there any powder cocaine in there?
- A. To my knowledge, not sure if they could test for that.

Q. Did you try to capture any of the powder with tweezers or anything else?

A. No, I did not.

Q. Why not?

A. I have never taken a pair of tweezers and put them in somebody's nose.

Q. Why not?

A. Not a practice I would try to do.

Q. Did you ask him to possibly try to get this white powder out?

A. No, I did not.

Q. Did you ask any other officers if they saw this white powder?

A. I believe I did.

Q. Which officer did you ask?

A. I believe it was Officer Cashion, and I believe Sergeant Krizmanich had seen it.

Q. They both claim to have seen this white powder, as well?

A. They did see it.

Q. They confirmed to you that they saw this white powder, as well?

A. Correct.

Q. Did you ask him what this white powder was?

A. I did ask Mr. Thibault what the powder was.

Q. What did he say?

- A. I believe his response was there is no powder, or there is nothing white in my nose.
- Q. To date, have you seen the results from the Department of State Police Forensic Division—alleges—let me ask you this: Somebody did a blood draw of Mr. Thibault, right?
- A. That is correct.
- Q. After that blood draw, that blood was to be sent somewhere, right?
- A. Correct.
- Q. Do you know where this blood was sent?
- A. Blood work is sent to Michigan State Police.
- Q. To date, have you seen the results of that lab?
- A. I was made aware of the results.
- Q. What are the results?
- A. I believe MS—Michigan State Police said with that sample that they had no conclusive results come back on that.
- Q. No conclusive results?
- A. There was nothing came back.
- Q. So that was conclusive; it was conclusive that there was nothing in the system, right?
- MR. DEGROOD: Object to the form of the question. It assumes that all the tests that were provided by Michigan State Police were such that they could be all inclusive.
- You can answer the question. I don't know if there was a question. It may have just been a state-

ment. Before you respond, I would like the question read back.

MR. RADNER: I can just withdraw and ask another one.

MR. DEGROOD: That's fine. Great.

Q. (By Mr. Radner) I'm going to ask you this question. You did look at the lab reports, right?

A. That is correct.

Q. You looked at the supplemental lab report, as well?

A. I would have to see what you mean by the supplemental lab report.

Q. I'm going to hand you two two-page documents. One of them is titled Laboratory Report and one of them is titled Laboratory Report Supplement Report.

A. Yes, I have seen that.

Q. When is it that you first saw these reports?

MR. DEGROOD: Let's be specific, first off. So we are clear on the record, the Laboratory Report specifically indicates Record Number 1 in the upper right corner with the reception date of December 17, 2014, and a completion date of December 19, 2014.

I would like you to respond to his compound question, asked you, this document, that being the one with the completion date of December 19, 2014.

THE WITNESS: I do not know the exact date. I would guess it was in December that I was made aware

that there was no alcohol that came back in Mr. Thibault's blood test that we sent out.

Q. (By Mr. Radner) Then there was a supplemental report, right?

A. That is correct, the Record Number 2.

MR. RADNER: I'm going to enter both of these as exhibits.

MR. DEGROOD: That's fine.

MR. RADNER: Just so that we are clear, let's have them marked right now.

(Whereupon Deposition Nos. 1 & 2 were marked for identification)

Q. (By Mr. Radner) We were just talking about Number 1, and that's the one that said there was no alcohol, correct?

A. That is correct.

Q. Now, I'm going to hand you Exhibit Number 2 and ask you, what do these results mean to you, if anything?

A. The results from Number 2, Exhibit Number 2 just states from Michigan State Police that what they tested for, this list here—

MR. DEGROOD: He wants to know when did you see this for the first time.

THE WITNESS: This was—I do not remember the exact date. It was after I had found out about the lawsuit. It was probably—if I had to guess—

MR. DEGROOD: No, you don't have to guess.

THE WITNESS: I can't tell you when. It was later after my lawyer informed me of it.

Q. (By Mr. Radner) You don't know if it was before or after being served with the lawsuit?

A. It was after.

Q. It was after, okay.

A. Yes.

Q. What does this test—what do the results of that test mean to you, if anything?

A. It means what they tested for on this list, nothing was detected.

Q. Of what they tested for?

A. That is correct.

Q. Explain to me what that means. Are there more substances you wish they would have tested for?

A. Michigan State Police cannot test for every drug or every substance, and there is also parameters that they can only go—if it's so far down, they can only test for. So on this test, it shows right here under not detected, it tells all the, I guess, would be 13 different drugs that they tested for.

Q. Just those 13, though, right?

A. That's what it looks like.

Q. All the other drugs he could have possibly been on, but they don't test for it, right?

A. They would have tested for that.

Q. Do you have any idea why they wouldn't test for additional drugs?

A. Because in the FST 93 blood draw, I had put on that what to test for

Q. What specifically did you ask to test for?

A. That was central nervous system depressants and stimulants.

Q. You asked them to test for these because with all the training you received, those are the ones you believed he was on?

A. Correct.

Q. He wasn't, right?

MR. DEGROOD: Pardon me?

Q. (By Mr. Radner) He was not, right, on any of those substances you thought he was on?

MR. DEGROOD: Object to the form of the question. Whether he was on them or not on them is totally irrelevant. If you're asking him what did the blood sample at the time it was tested for reveal, I think that's a proper question. I think they are two different things. What he may have been on and what the sample tested for are two different things. I object to the form of the question.

Q. (By Mr. Radner) I'll ask it this way. The test results that you asked Michigan State Police to perform, based on the drugs you believed Mr. Thibault was on, came back negative, correct?

A. For what they had tested for.

Q. For what you asked them to test for, correct?

A. That is incorrect.

- Q. You asked them to test for things they did not test for?
- A. They can only test for certain drugs. They cannot test for every stimulant that is produced. They cannot test for every depressant that is produced.
- Q. What drugs did you want them to test for that they did not test for?
- A. Drug category of stimulants and depressants.
- Q. Would that include marijuana?
- A. That would not include marijuana.
- Q. Would that include cocaine?
- A. That would include cocaine, as cocaine is a stimulant.
- Q. Would that include amphetamines?
- A. That would include amphetamines.
- Q. Would that include opiates?
- A. It would—I cannot answer for what Michigan State Police does in their tests on that one.
- Q. I'm asking what you wanted them to test for.
- A. As I had marked on my evaluation, depressants, central nervous system and stimulants.
- Q. They were not able to test for—what drugs were they not able to test for, did they not test for?
- A. I cannot give you a list of the drugs that they cannot test for.
- Q. Did they test for cocaine?
- A. According to this, they did metabolites of cocaine.

Q. Did they test for amphetamines?

A. According to this list, they did test for amphetamines.

Q. Did they test for opiates?

A. According this list, they did test for opiates.

Q. Did they test for PCP?

A. On here, it does not show. Does not show any benzo—

Q. Did they test for marijuana, if you know?

A. Does not show. They did test for cannabinoids.

Q. All of those tests were negative, correct?

A. According to this on here, yes. What they show here on these, when I said 12 or 13.

Q. Do you still believe Mr. Thibault was on some sort of substance that was illegal when you arrested him?

A. Yes, I do.

MR. RADNER: I have no further questions.

REDIRECT EXAMINATION

BY MR. DEGROOD:

Q. I just have one. I'm going to hand you a copy of the complaint in this matter. And it is a complaint that shows it was issued with summons on April 14, 2015, and has a two-page summons followed by a complaint that is 14 pages in length. I'm going to hand you the complaint, pages 1 through 14, and we can off the record for a minute. I want you to review every paragraph in that complaint,

and then I'm going to ask you the following question.

Is there any statement within any of the allegations in the complaint filed in this case that assert Mr. Thibault had a speech impediment? I want you to read every line of this. We are going to go off the record. Before you answer the question, give me a high sign. I will ask our court reporter to go back on the record.

(Whereupon there was a brief recess.)

Q. (By Mr. DeGrood) Officer, have you had a chance to read the complaint in its entirety?

A. Yes, I have.

Q. Did you ever discover any allegations asserting that Mr. Thibault had any speech impediment?

A. No, I did not observe any.

Q. Did you see anything within the complaint that asserted he had any physical defect whatsoever?

A. No, I did not.

Q. I would like you to turn to your Drug Influence Evaluation, page one.

A. Okay.

Q. Approximately five lines down, there is a question and I quote; "Do you have any physical defects?" Did you ask that question to Mr. Thibault during your examination of him on the 5th of December, 2014?

A. Yes, I did.

Q. What was his answer to the question, "Do you have any physical defects?"

A. I have on here, stated no.

Q. Did he at any time ever explain to you that he had any type of speech impediment?

A. He did not.

MR. DEGROOD: Thank you. I have no further questions.

RE CROSS-EXAMINATION

BY MR. RADNER:

Q. Didn't you do other tests other than the seven that we talked about?

A. That is correct. I went back to the drug evaluation and there was more.

Q. Didn't you take his blood pressure?

A. I did take his blood pressure.

Q. You also took his pulse?

A. That is correct.

Q. Why did you do both of these things?

A. That is how we handle a drug evaluation.

Q. Why?

A. That is how we were trained.

Q. Could those things be indicative of drug use?

A. It could be a sign.

Q. They were both normal?

A. They were not normal.

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- Q. They were not normal?
- A. They were not normal.
- Q. Which part of it was not normal?
- A. As you see on here, the pulse was at the higher end at 86 and 88, and the 90 was at the high end. Pulse should be between 60 and 90.
- Q. What number was it?
- A. 60 and 90 beats per minute.
- Q. What number was it?
- A. He was at 86 and 88 and 90. So he was at the higher end on the pulse.
- Q. These numbers are not between 60 and 90.
- A. They are, but they are at the higher end.
- Q. They are normal, but at the higher end of normal?
- A. They are at the higher end of normal.
- Q. You, again, have no idea whether or not people being arrested are going to feel any sort of anxiety that would possibly make their pulse get higher, right?
- A. That's why the tests are done three different times.
- Q. All while being arrested or in custody, right?
- A. While they are back at the station.
- Q. How about the blood pressure, was that normal?
- A. Blood pressure was high.
- Q. Was high at 138 over 92?
- A. That is correct.

Q. What part of that is high?

A. Systolic, 138 is at the higher end. It should be between 120 and 140. Diastolic is actually high. It should be between 70 and 90, and he was at 92.

Q. Which of the two would be indicative of drug use, systolic or diastolic?

A. When you put a combination of everything together.

Q. So what I'm asking you is this particular blood pressure, did you advise him to go see a doctor about his blood pressure?

A. No, I did not.

MR. RADNER: Thank you.

MR. DEGROOD: We are finished.

(The deposition was concluded at 11:35 a.m.)

ALAN THIBAUT'S DEPOSITION TRANSCRIPT
(OCTOBER 21, 2015)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALAN THIBAUT,

Plaintiff,

v.

EDWARD WIERSZEWSKI,
Individually and in His Official Capacity
as a Public Safety Officer,

Defendant.

Case No. 2:15-cv-11358

ALAN THIBAUT

After having been first duly sworn to tell the truth,
the whole truth and nothing but the truth, was
examined and testified as follows:

EXAMINATION

BY MR. DEGROOD:

Q. Good morning. Would you state your full legal
name for the record?

A. Alan Joseph Thibault, Junior.

Q. It's Thibault.

A. It's pronounced Thibault.

Q. Like the quarterback that never really got to play?

A. And the hockey player and the goalie.

Q. If I mispronounce it I apologize.

A. That's fine. Everyone does.

Q. Mr. Thibault, my name is George DeGrood. I'm sure your attorney has probably given you a little primer as to me and to what is going to happen here today, in so much as we have other matters together and we pretty much have a fairly decent data base upon which to draw upon with respect to each of our characters, if you will.

I represent the defendant in this lawsuit, Officer Wierszewski. I'm sure your attorney has also prepared you and given you kind of the landscape of a deposition, so to speak. I'm not here to trick you. If you don't understand any of the questions that I ask you just let me know. I'll try to find out where the confusion lies and to clear it up.

A. Yes.

Q. If you don't know an answer to a question don't feel compelled to make something up to fill in the blanks because it won't do you any good. It won't do me any good. Just tell me you don't know.

If you need to have a question repeated I will be glad to repeat it if I can. If it's so convoluted, I may ask the court reporter to read it back because sometimes I forget where I'm at in the middle of the sentence. It's easier for me to have them repeat that.

I'm going to ask that you do what you have demonstrated thus far. That's when you respond to any of the questions, that you do so in a loud clear fashion. I would ask that you pause a moment if your attorney objects to a question, which he has the right to do if he chooses to do so. Let him get his objection out on the floor, so to speak, so the court reporter doesn't have to take stereo or quad. She can just do one on one. Fair enough?

A. Right.

Q. Anything that you don't understand thus far?

A. No.

Q. Can you give me your current residential address?

A. 1008 Bentley, Monroe, Michigan. 48162.

Q. That's off of North Custer?

A. Yes. Right there by Telegraph.

Q. Right. Okay. Date of birth?

A. June 19th, '81.

Q. Married, single, divorced?

A. Single with, you know, in a relationship.

Q. Any children?

A. No.

Q. Any other address besides the home in Monroe on Bentley?

A. No.

Q. Because I noticed in going through a job application for Sygma you had an address in Sault Ste. Marie?

A. Yes. My grandmother lives there.

Q. That's not a home that you own?

A. No.

Q. Did you spend any time on a regular basis up at that address?

A. I haven't been up there in almost three or four years.

Q. All right?

A. My dad lives on the Canadian side. That's why we live in the Soo.

Q. Did you ever work for your father?

A. For a while.

Q. What kind of work was that?

A. Construction.

Q. All right. What if anything did you look at to prepare yourself for today's deposition?

A. I read. I went over what was printed up to you guys and had a quick memory of what happened. It happened almost a year ago so I had to—

Q. Now you're looking at what appears to be a copy of what we would call the complaint?

A. Yes.

Q. Is that what you looked at to help refresh your memory?

A. Yes.

Q. I'm assuming that the various statements of law that might appear in that complaint didn't refresh your memory but more likely than not I'm assu-

ming you focused upon the recitation of the facts that are in the complaint, correct?

A. Yes.

Q. The recitation of the facts in the complaint, where did those facts come from?

A. I'm assuming from what was happening at the time.

Q. Did you provide that explanation of what is in the factual basis of your complaint to your attorney to use in the complaint?

A. This is what I gave him, the information. He wrote this off of what I told him at the time.

Q. Anything else that you looked at?

A. I looked at both of these really. I looked at what was charged and what the cop charged me of. Then I looked at—

Q. Just read the title. It's in bold print right below.

A. The response and defense first request of the document.

Q. That's where you have given me a copy of the laboratory report from a facility down in Monroe?

A. Yes.

Q. What was the name of that facility in Monroe?

A. It was a medical review office.

Q. Where was that located, if you remember?

A. 11 10th Street.

MR. RADNER: Just for the record he's not recalling this from his memory. He's reading this from the paper that was attached.

Q. Is that over at the Mercy Memorial Hospital area?

A. Yeah. It's right across the street from that hospital. That's where we go get our physicals and everything for work.

Q. So you get your work physical there?

A. Yes, my D.O.T. physical.

Q. When was the last time you had a D.O.T. physical?

A. I'm due in February.

Q. Of '16?

A. Yes.

Q. The last one that you had was done?

A. Two years ago from February.

Q. That was at the same facility as this?

A. No. That one was at the one in Romulus.

Q. I was going to say I have seen some indication that a doctor in Romulus performed that.

A. Yes.

Q. But now we have got a physician in Monroe that will do it this year?

A. Yes.

Q. Do you know that individual's name?

A. Negative. He just started doing it. We just got the approval not even six, seven months ago.

Q. Have you ever failed a D.O.T. exam at any time?

A. Negative.

Q. Have you ever been arrested for operating any motor vehicle under the influence of intoxicating liquor or alcohol or substance exclusive of the ticket that you got on this case?

A. It will be ten years in February.

MR. RADNER: I'm just going to object to the relevance of that.

Q. Sure. Where was that at?

A. That was in Westland.

Q. Westland. What kind of ticket was it?

A. It was—

MR. RADNER: Same objection. Go ahead.

A. It was an impaired.

Q. Did you plead guilty to that?

A. At the time, yes.

Q. How old were you, roughly; 23, 24?

A. I would have been, yeah, 24. Then I turned 25. Yeah, 24.

Q. At the time of January 5th, 2014, you were living at the Bentley address?

A. Yes.

Q. Was anyone else residing at that location?

A. My girlfriend.

Q. At that time frame?

A. Yes, my girlfriend and her kid.

Q. What's her name?

A. Ashley Rohr. It's Ashley: L-e-y. And then Rohr: R-o-h-r.

Q. Does she still live with you at that address?

A. Yes. Her boy is turning six tomorrow.

Q. In school; first grade?

A. His birthday was too old. So he's in kindergarten still. He's going to be an old graduate.

Q. Now would you agree with the general statement that investigating the careless operation of a motor vehicle would be a legitimate governmental function for a police officer to exercise if he was doing so in the jurisdiction of which he acted as an officer?

MR. RADNER: I'm going to object to that question. It calls for a legal conclusion. But if there's any way you can answer that please feel free.

A. Can you repeat it?

Q. Sure. Would you agree with the general statement that investigating the careless operation of a motor vehicle on the roadway is a legitimate governmental function for an officer, a police officer, to carry out in his duties?

MR. RADNER: Same objection.

A. No objection.

Q. So you're agreeing with that?

A. Right.

Q. I'm going to ask you to keep your voice up a little louder. I jokingly said the court reporter is deaf. I

am profoundly deaf. So I can only read lips for so long. So keep your voice up.

Are you employed today?

A. Yes.

Q. Are you employed by more than one employer today?

A. No.

Q. Who is your employer today?

A. Sygma Mutual. They're owned by Sysco.

Q. When you—I'm assuming you still drive a truck for them?

A. Yes.

Q. Do you basically deliver food stuffs?

A. I deliver to Wendys, Tim Hortons and Krispy Kreme and I do back hauls for Sysco.

Q. Now it's my understanding you arrived within the last 12 hours in the Detroit area from St. Louis?

A. Yes.

Q. Were you working, driving professionally in St. Louis or were you there on personal?

A. I was driving. I did a drop off. Did my ten hours. Did my ten hours sleep. Then drove home.

Q. Now when did you first working for Sygma?

A. It would be February 22nd of last year.

No. It was two years ago. I apologize. Two years ago. It will be two years this February.

Q. So February 22nd of 2013?

A. Right.

Q. Correct. It appears that at some point in time you may have been working for the United States Army?

A. I do work for the United States Army.

Q. Still?

A. Yes.

Q. Are you a civilian employee with the Army?

A. I'm a National Guard.

Q. From where do you report for your National Guard duties?

A. Bay City.

Q. For the record that is in Michigan?

A. Yes.

Q. How long have you been a Guardsman?

A. 14 years in August.

Q. When you started with the Guard you didn't transfer into the Guard from the Army or anything?

A. I did. I was active duty for three years at Fort Campbell.

Q. So when did you first join the Army?

A. In 2002, August 27th. I went in the whole 9/11 thing.

Q. So were you deployed overseas?

A. Yes.

- Q. Where did you do your active duty overseas?
- A. I did in January, '03 went to Iraq during that whole kick off. Got back March, '04. Then went to Korea in August, '04. Then got back August, '05. Then joined the National Guard August, '05.
- Q. What's your current rank in the Guard?
- A. E7. That's Sergeant First Class.
- Q. Is there a particular activity that you perform for the Guard?
- A. My enlist is a cook. So but I'm in charge of headquarters platoon.
- Q. Got to keep it up. You're in charge of?
- A. I'm in charge of headquarters platoon. They have about 15 cooks, two medics, supply, commo. It's a mixture.
- Q. When was the last time you were deployed anywhere?
- A. I got back September 11th, 2013.
- Q. That was from where?
- A. That was over Kunduz, Afghanistan, from the Bay City unit. We left—boots on ground January, 2012.
- Q. Have you been deployed since returning home on September 11th, 2013?
- A. Let me reword that. September, 2012. It would be—it was three years since I been back.
- Q. Have you been deployed since then anywhere?
- A. Negative.

Q. Were you precluded from being deployed anywhere as a result of this incident on January—on December 5th, 2014?

A. No. I was—I could not do certain training though. We had training down out of state. I wasn't allowed to leave the state to do their training.

Q. Let's explore that for a minute.

When were you scheduled to leave the state?

A. I was scheduled in the month of January. They went down to Alabama. I was with the medical unit at the time, 1171st out of Ypsilanti. And we were on a mission to where if anything happened with the fire department, got really bad bomb or chemical spill that we have to be the first to assist. It's our turn.

And our training brought us to Alabama and the one in Alpena. And they split us up. I couldn't go to the Alabama one. So I had to go to the Alpena one. The day after everything was dropped.

Q. The day after everything was dropped, that being the day that the lawsuit was dismissed?

A. Yes.

Q. That being like the 28th of January, 2015?

A. Yes.

MR. RADNER: So did you say the lawsuit was dismissed?

MR. DEGROOD: Yes. The suit, the criminal charges.

MR. RADNER: The criminal charges.

Q. All right.

- A. That was, yes, and I went the first week of February.
- Q. All right. So you did complete your training?
- A. I just did the one in Alpena instead of the one where I was supposed to go.
- Q. Nonetheless, you received the training?
- A. I did. They changed some orders around.
- Q. So when did you last drive for Sygma with respect to this December 5th, 2014 incident?
- A. I was working every day.
- Q. Up until this point in time?
- A. I was working nights. Then I would have all day off. Then work nights.
- Q. When did you go back to driving for Sygma after the 5th of December, 2014?
- A. It was almost 61 days after. It was the first week in February. I want to say February 4th or 5th. I can't remember.
- Q. Now when you went to—would I be safe in characterizing the training in Alpena as fire school training?
- A. Yes. Chemical. Yes.
- Q. Hazmat, chemical, fires, things of that nature?
- A. Yes. I'm certified in all.
- Q. So how long was that training in Alpena, Michigan?
- A. Well, that was just where we got together with the chemical unit, the police department and the

fire department. And we did our fair share. Like the medicals, we had—there was 150 people that came through our line. We just treated them as medical. But the actual schooling part, we went to Battle Creek. That was two years prior to that.

Q. So you received all the training. This sounds almost like a—

A. An exercise.

Q. A field exercise practice, if you will?

A. Yes.

Q. While the group from Ypsilanti I think it was you told me went to Alabama, you couldn't go to Alabama but you were able to take part in the same or similar training exercise in Alpena?

A. Right.

Q. Was that a weekend exercise?

A. It was a five day exercise; Monday through Friday.

Q. So I'm assuming when you were participating in Alpena in this exercise you weren't driving for Sygma?

A. Right.

Q. And I'm assuming—and you correct me if I'm wrong—Sygma was understanding that if you were to be deployed or needed to go to an exercise or to training class—they would accommodate you for those things?

A. Oh, yes. They're very supportive of the National Guard.

Q. So let me see if I have got this straight.

On January 28th of 2015, the criminal charges were dismissed against you. True?

A. Yes.

Q. And then you went to Alpena immediately after that?

A. No. I went to Alpena the first week of February. I worked for a couple days before I went to Alpena.

Q. Just trying to figure that out. First week of February of 2015, you go up to Alpena. And you're up there for, what did you tell me; four days, five days?

A. Five days.

Q. Now I'm assuming when you're in Alpena for those five days, Sygma does not pay you. True enough?

A. No, unless I take vacation time. I didn't take that.

Q. So would I be correct that—did you actually drive on January 28th for Sygma or was it the 29th? What day do you remember first going back once this criminal lawsuit was dismissed?

A. I would have to say it was like when he got the call and say I can work. I would have to say it was the next day.

Q. Who was your supervisor at that time at Sygma?

A. I have three. Bob, Curt and I want to say Mike. Mike Carter.

Q. Mike Carter?

A. Yes. And then there's another one. I can't remember his name. He's the head supervisor. But

he talked directly to Simon. I didn't talk to him mostly.

MR. RADNER: My name is Solomon by the way. I think he accidentally said Simon.

THE WITNESS: I'm sorry.

Q. Do you know who Kacey Hothem is? H-o-t-h-e-m?

A. Casey?

Q. Yes.

A. Doesn't sound familiar.

Q. How about a Nancy McLaughlin. Who is she?

A. She's our HR.

Q. HR for Sygma?

A. Yes.

Q. Where is her office located?

A. In the main building.

Q. Where is that at?

A. In Monroe. Monroe, Michigan.

Q. What street? I'm familiar with Monroe, I went to Monroe High. So if you tell me where I will know exactly where it's at.

A. 660 Ternes.

Q. About how many employees do they have at—hat's the terminal as well?

A. No. Terminal is across the street on 600 Detroit.

Q. I think that used to be the old football field for the high school across there before they moved out.

A. I wouldn't know.

Q. Way before your time.

So how many folks working at the office in Monroe, roughly?

A. I have no idea.

Q. None?

A. I can't answer that.

Q. How many Joseph Mathias; does that ring a bell?

A. Yes.

Q. Who is Joe?

A. He's the head guy.

Q. The main man in Monroe?

A. He's the guy that talked to Solomon.

Q. Okay. You were able to go right back to work as soon as you got the green light from the court?

A. Right. They couldn't even let me work as a warehouse guy or anything.

Q. Now on the 5th of December, do you remember what time it was that you were released from the police station in Grosse Pointe Farms?

A. Roughly 8:30.

Q. In the morning?

A. I do believe so.

Q. Did someone come and pick you up?

A. I had one of my solders come pick me up.

Q. Who was that?

A. It was Sergeant Wright, I do believe. His first name is Anthony.

Q. Did he post bond for you as well?

A. Yes.

Q. He gave you the \$500?

A. Yes.

Q. Where does he live at?

A. He lives right here in Southfield.

Q. In Southfield, Michigan. Do you know on what street?

A. No idea.

Q. How was it you selected him to come and get you out?

A. He's the closest and the only one I knew would be up in the morning. And we been friends for ten years.

Q. I'm assuming you were allowed to make a phone call to get him and have him come over?

A. Oh, they let me have my cell phone in there. They were quite nice about that.

Q. So you were able to make whatever phone calls you wanted?

A. Yes.

Q. Did they serve you anything to eat while you were over there—

A. No.

Q. —in the police station?

A. No.

Q. Did you have anything on your person that you ate?

A. No.

Q. Now let's walk through your educational background a little bit.

A. Uh-huh.

Q. Where did you attend high school?

A. Three different high schools. Sault Ste. Marie, Battle Creek and New Albany, Indiana.

Q. New?

A. Albany. Right across the street from Louisville.

Q. Parent moved around?

A. My aunt and uncle are preachers of the Salvation Army.

Q. That's who you were living?

A. Yes.

Q. What are their names?

A. Bill and Betsie Cox or Elizabeth Cox.

Q. C-o-x?

A. Yes, C-o-x. Yes.

Q. Are they still living today?

A. Yes.

Q. Where do they reside?

A. They got moved to Duluth.

Q. To Duluth?

A. Yes.

Q. So when you actually got your high school degree, if you will, your diploma came from New Albany?

A. Yes.

Q. What year?

A. 2001.

Q. When you graduated from high school did you continue your education in some other capacity?

A. Yes. College and Rochester Christian College, in Rochester Hills.

Q. That's Rochester Hills, Michigan?

A. Yes. And 911 happened.

Q. Hold on a minute.

A. Sorry.

Q. I'm not as quick as you are.

So did you go straight from high school to college?

A. Yes.

Q. So when did you start up at the Rochester Christian College; would that be the fall of 2001?

A. Yes.

Q. Did you have a dormitory or some place that you stayed in?

A. I had a dorm.

Q. Did you ever complete any college degrees?

A. Negative.

Q. Did you receive any certificates from any college?

A. Negative.

Q. Did you even complete a full semester at college in Rochester Hills?

A. Two semesters.

Q. Two semesters?

A. Yes. My uncle wanted me to finish out the year before I went in the Army. So I went that August.

Q. So you started when in August, September of 2001, correct?

A. (Nods.)

Q. When did you leave college?

A. I finished, I left that year June, 2002.

Q. All right.

A. Then I started preparing to go to the Army in August, 2002.

Q. So what did you do between June and August of 2002?

A. I went back up to Sault Ste. Marie. Hung out with my dad. Hung out with my mom.

Q. I may have asked you this already and I apologize. What's your father's name?

A. Same name but he's a senior.

Q. He's Canadian?

A. Yes.

Q. He lives?

A. Sault Ste. Marie, Ontario.

Q. On the Canadian side?

A. Yes.

Q. What's your mother's name?

A. Ruth Ann.

Q. Last name?

A. I want to say—it's French. I may beat it up right now. It's Bellaried. Don't ask me how to spell it.

Q. Would she live in the Soo as well?

A. Soo, Ontario. She was the American. My dad is the Canadian. That's how I got my citizenship, is through her.

Q. So are you a Canadian citizen?

A. I was born in Canada but I don't have none of that OP at or any of that stuff. I don't have residence over there.

Q. So you consider yourself a U.S. citizen?

A. Hundred percent.

Q. That's by birth?

A. Canadian by birth.

Q. Then when did you become a U.S. citizen?

A. Moved over here in 2000, I mean '92. 1992. Got my citizenship when I turned 18. In '90, I want to say '98 or '99. I can't remember.

Q. Have you ever been admitted for any type of rehab treatment for alcohol abuse?

A. Negative.

Q. Have you ever been a member in a rehab program for any type of drug abuse?

A. Negative.

Q. So you signed up and were accepted into the United States Army?

A. Yes.

Q. In 2002, correct?

A. Uh-huh.

Q. You where did you do your basic at?

A. Fort Sill, Oklahoma.

Q. What did they initially in the United States Army decide that you would do?

A. They gave me like four choices.

Q. Which were?

A. Infantry. Cook. Maintenance. And I can't remember the fourth one.

Q. Which did you choose?

A. I chose cook.

Q. Have you ever utilized your skill and training as a cook in any endeavor working as a cook outside of the Army?

A. Oh, yes.

Q. Such as a restaurant or things of that nature?

A. Oh, yes. When I got out in '02. I mean '05. When I got out in '05, I went to culinary school over there on Schoolcraft. Did not finish my degree. I worked in two different restaurants. And then I went up north back to Sault Ste. Marie in '07.

Q. You started culinary school at Schoolcraft College in 2005?

A. Uh-huh.

Q. That's a yes?

A. Yes.

Q. How long did you stay a student in that program?

A. It was, I was here for a year and a half

Q. Was that a two year program?

A. It is but the waiting list was like three years to get in. So I did a bunch of culinary substitutes like chocolate class and stuff like that. I did some serve safe classes. Nutrient classes. I did food history classes. Never got directly in. Then when I finally got accepted that's when I went up north.

Q. So when it came time to actually do the culinary labs, if you will, getting into the kitchen, that's when you decided to drop out of the program?

A. Yes.

Q. What was the reason for dropping out, given the fact that you had taken all of the book classes, so to speak, in hopes of being accepted into the labs to complete that degree?

A. Well, my grandfather passed away on Halloween, 2005, when I got home. And my grandma had a rough year and a half. So then I went up there. My cousin, who I was living with, moved to St. Joe's. So I found it easier to head up there. That was six months after my DUI. So gave me a chance to save some money. My impaired. Sorry about that.

Q. Now what two restaurants did you work at down here?

A. Northville. Northville and Deadwood. And Beaver Creek.

Q. Where is Beaver Creek?

A. Westland.

Q. Okay.

A. It's off of Ford Road.

Q. Any other college training besides going to Rochester Christian College, Schoolcraft College?

A. Yes, Bay Mills College up in the UP. I did that for two years too. That was part time though.

Q. What were you studying up there?

A. Business.

Q. When was that?

A. That was—that was that '06, '07 area.

Q. How close are you to getting a business degree?

A. By now not close at all. It's been more than five years. I have to redo everything.

Q. Are you currently contemplating returning to college?

A. No. I used up my G.I. bill. What I do have is going to go towards my girlfriend.

Q. What is she studying?

A. She's got—she's in that rush program where she gets four and a half years, comes out with a Master's in Nursing or something like that.

Q. Does she practice as a nurse today?

- A. No, she's full-time school. We're reliable off my income.
- Q. Where is she going to school?
- A. In Toledo somewhere. And then right now she's got a couple side classes at Monroe Community College.
- Q. When is the last time, from today going backyard, that you worked in the National Guard?
- A. I work every month.
- Q. Are you going for like a weekend a month?
- A. Yes.
- Q. How does that go? Is that here in Southfield you come or do you go up to Bay City?
- A. I go up to Bay City. Then we drive to Grayling. It's not necessarily a weekend. We're an infantry unit. So it's more like Thursday, Friday, Saturday, Sunday type deal.
- Q. How do they pay you? Is it like a salary or by the hour or how do they—
- A. By rank.
- Q. By rank?
- A. I get paid per MUTA. And it's nothing worth living off of. I never did the math but on a two day, four day MUTA, Saturday and Sunday, I think it's 325.
- Q. \$325?
- A. Take home, roughly. Yes.
- Q. In this lawsuit are you contending that because of the ticket and the court proceedings following

the issuance of the ticket you lost any time from working for the National Guard?

A. Not the National Guard.

Q. So there's no lost wages or income from the Guard in this lawsuit?

A. Not from the Guard. I don't rely on the Guard though.

Q. Pardon me?

A. I don't rely on the Guard money though. I may pay one bill, maybe two.

Q. Do you get any health care through them?

A. Not the National Guard, no.

Q. I'm assuming you're claiming some wage loss as a result of not driving for Sygma, right?

A. Roger.

Q. Are you claiming wage loss from any other source as a damage in this lawsuit besides the loss from Sygma?

A. I have no other job besides National Guard.

Q. At any time prior to December 5th, 2014, were you ever put on any type of probationary status by Sygma?

A. Negative.

Q. Prior to December 4th, 2014, were you ever written up for any violations of company policy by Sygma?

A. Negative.

Q. Was there an incident one time where you came out of the lot but the trailer fell off the tractor and became disconnected from the tractor?

MR. RADNER: Objection, relevance. You can answer.

A. At the time it was unhooked and fell right to the grass but it was no, nothing where I got in trouble for. It was one of those mishaps that just happen to anybody.

Q. So you didn't get a write up for that?

A. No.

Q. Have you ever been written up for anything?

A. No.

Q. Never been written up or counseled by Sygma for failing to wear a seat belt, for instance?

A. No.

Q. For smoking or eating in the truck?

A. No. The camera comes on when you hit a bump every now and then but that's about it.

Q. So you have never—have you ever received any warnings for doing something Sygma didn't want you to do while you were driving?

A. My first couple weeks I have seen a few warnings. But that was in training. We train the first—we ride with another driver, so.

Q. Let's go back in time to the 3rd of December, 2014. Do you know what day of the week that was?

A. That was—it was a Thursday. Thursday night. It was a Thursday.

Q. So December 3rd was a Thursday. December 4th would be?

A. It would be, that was the Friday morning.

Q. How about December 5th?

A. I had drill that weekend. That was a Saturday.

Q. Now it's my understanding in reviewing the record and I notice there is a police report in front of you. Is that something you reviewed as well?

A. Earlier today, yes.

Q. May I see that, please?

MR. DEGROOD: Let's mark that as Exhibit 1.

(Brief recess.)

(Deposition Exhibit No. 1 marked for identification.)

Q. Now when you first hired in at Sygma I'm assuming you had driven for some other companies prior to that?

A. Yes. I had driven for Dairy Fresh and I also teach truck driving for a living at the time.

Q. Where was that through; what school did you teach at?

A. ITS. International Trucking School.

Q. Do you still teach there?

A. No.

Q. Why did you drop that activity?

A. It was \$15 an hour and I wasn't having much students. Didn't pay the bills.

Q. Did you ever get terminated from any company that you were driving a truck for?

A. Dairy Fresh.

MR. RADNER: Objection, relevance.

Q. Dairy Fresh. What was the reason for the termination?

MR. RADNER: Same objection.

A. Objection.

Q. Go ahead.

A. Objection.

Q. He objects.

MR. RADNER: I object and then I say: Go ahead and answer the question. So you go ahead and answer.

A. At the time it was one day prior to my 90 days to be part of the union. They didn't think I could join their union.

Q. It didn't have anything with operating a vehicle on the grass or anything like that?

A. That was two months prior to that and they waited.

Q. Two months prior to the day of joining the union. What happened?

A. Yes, they went on—I didn't go on the grass. I went on the web part. And then my tracks made it look like I went on the grass.

Q. Where was this at; at their terminal?

A. No, at a client's place.

Q. At a client. Which client?

MR. RADNER: Same objection for this whole line of questioning. Go ahead.

Q. So did the client call and complain that—

A. Yes.

Q. —hey, Sygma. You got a guy out here that looks like he's planting corn in our grass with his tires. Is that kind of how it went down?

A. Well, it was wet and there was already mud and tire tracks on that comer. Then I got lucky enough to graze that area and keep on going. So when he took pictures it probably looked like fresh. Then, of course, I wasn't part of the union. So they said, well, two months down the road we're not paying for seed. They didn't want to so they let me go.

Q. Anybody else ever let you go?

A. I got fired from another job back when I was in high school.

Q. What was that all about?

A. That was a grocery store at Glen's up in the UP.

Q. Good old Glen's?

A. Yes.

Q. Now on the 3rd did you work for Sygma, of December?

A. That morning? Yes.

Q. That would be—did you have a normal schedule that you would work?

A. No, I don't have a normal schedule.

Q. When would the dispatcher call you and just say: Hey, I need you today or I don't need you?

A. I call him.

Q. So I'm assuming that this happened—strike that.

Do you remember what time of day on the 5th—

MR. DEGROOD: Off the record.

(Discussion held off the record.)

MR. DEGROOD: Let's go back on the record.

Q. Do you recall what time of day or night you were stopped by the officer that you're suing in this lawsuit?

A. I was going to my third stop. So it was roughly around, I want to say around 1:30, two o'clock in the morning.

Q. If there is a time in Exhibit No. 1 that indicates when you were stopped, do you have any reason to disagree with the time that is reported by the officer?

A. 2:19 sounds right.

Q. Now that's the report time. You don't necessarily know if that was the actual time that you were stopped, correct?

A. No.

Q. Are we at least in agreement that you were stopped sometime after midnight of December 4th, 2014?

A. Yes. It was after midnight.

Q. So you were clearly in the 24 hour cycle, if you will, of December 5th?

A. Yes.

- Q. 2014. All right. Now what, you said you were into your third stop. Do you remember where your first two stops were?
- A. It was north a little ways. It was all in that area. I want to say Warren.
- Q. Do you remember your client?
- A. They're all Wendys.
- Q. All Wendys?
- A. I want to say it was Warren area.
- Q. How about the second stop.
- A. It was either Warren also or above 696. Somewhere in that area.
- Q. Now on the night that you were stopped are you telling me your whole load consisted of food stuffs for Wendy Restaurants?
- A. Yes. How the circle goes, I would have went north to Warren, come back. Head back into Warren and then end up downtown Detroit at the hospital.
- Q. Which hospital?
- A. The one off Groesbeck Road, right off 375. The corner of 375 and 75, like right there.
- Q. Do you deliver food there too?
- A. Yes. They have a Wendys in there.
- Q. So it's a Wendys in the hospital?
- A. Yes.
- Q. Then you would head back to Monroe?
- A. Yep.

Q. So how long did this route normally take?

A. It take me about ten hours.

Q. Ten hours.

Technically how many hours straight were you allowed to drive?

A. You're allowed to drive?

Q. Yes.

A. 11. Work 14.

Q. 11?

A. Hours of drive time.

Q. Yes.

A. And 14 hours of on duty time.

Q. When you say "on duty time" what does that mean?

A. From the day you log on you only have 14 hours from that moment you log on.

Q. Okay.

A. That's duty time minus your 11 hours drive time.

Q. So you have got to complete your 11 hours in that 14 hour window so to speak?

A. With a route that small you don't drive not even three, four hours because you're stopping every 15, 20 minutes delivering a load for an hour. Then going to the next drive.

Q. How do you keep track of the time that you're actually—does the equipment, the tractor has a clock if you will that knows when it stops?

A. Yes. It's called a Zada.

Q. Spell that for the court reporter.

A. I have no idea how to spell it.

Q. Say it again, loud.

A. Zada. It's an abbreviation for something.

Q. I'm assuming the truck had a GPS system on it as well?

A. Yes, it did.

Q. Had you been to the Wendys and as I read Exhibit No. 1, it indicates it's a Wendys store located near the intersection of Mack and Moross.

Had you been there to deliver food stuffs before the night of 12-5-14?

A. It was but it was such a long time. And I can't remember and I think I did it with somebody at the time. So I couldn't remember how to get there. I couldn't remember what loop they did or where they came from, what exit they got off the highway.

Q. So did you plug that address into the GPS and follow the instructions that were given?

A. Yes. I followed my GPS.

Q. Do you remember who your boss of the day was the day that you were stopped?

A. It was Jeff.

Q. Jeff who?

A. I can't remember his last name.

Q. Is he a dispatcher, if you will, or what do they call him?

A. He's supervisor.

Q. Supervisor?

A. Night supervisor.

Q. All right. Does he still work for Sygma?

A. No. He had a very—he's released on medical.

Q. He's on a medical leave?

A. He's released from the job too. He got a replacement already.

Q. Somebody replaced him?

A. Yes.

Q. Now I think you mentioned that you had to take a physical for Sygma when you hired in?

A. Yes.

Q. Was that separate and distinct from the D.O.T. physical that you may have had when you were driving for either the truck driving or Dairy Fresh?

A. Very. He had me bend down. Lift up. Put my arm this way. Put my arm that way. Lift boxes off shelves.

Q. So there was a separate physical, if you will?

A. Yes.

Q. An employment physical?

A. Yes.

Q. Versus a D.O.T. physical?

A. Correct.

Q. Let's go back in time. I think you told me you had your last D.O.T. physical was at a doctor or a clinic in Romulus?

A. Right.

Q. Do you remember that doctor's name?

A. Negative.

Q. Do you remember the doctor's sex; male, female?

A. Male. I don't think I had a female one yet.

Q. What type of exam do they do for your D.O.T. physical?

A. Urine.

Q. You get a urine screen.

A. Squat. Walk like a duck type of thing.

Q. Duck walk.

A. Cough.

Q. Pardon me?

A. The cough.

Q. Cough?

A. Turn and cough.

Q. They check to see if you have a hernia.

A. Yeah.

Q. That's what you mean by: Hang on. Turn your head and cough and everybody hates it?

A. Right.

Q. You get a little fondle going there, don't we?

A. Yep.

- Q. So you got to cough. Then what?
- A. It was eyes. Vision. Hearing. And then I do believe that's it.
- Q. Okay.
- A. If there's more I can't remember.
- Q. How long does it usually take; less than a half an hour?
- A. Not even that.
- Q. Not even that. 15 minutes maybe?
- A. You wait longer in the doctor than what it takes.
- Q. Typical doctor's office, huh.
- So do you remember where you had your employment physical for Sygma?
- A. Taylor. Somewhere in Taylor.
- Q. All right.
- A. I think I got off the highway. Got on Ecorse Road. It was right there on off Road.
- Q. More than a 15 minute exam?
- A. It was an hour. That was a full hour.
- Q. What did they do for the employment exam?
- A. That was bend over. Pick up boxes. Run on the treadmill for 20 minutes. Not 20 minutes at a time but it was roughly 20 minutes total. Five here. Five there. Check my heart. All that good stuff.
- Q. Any lab tests? Did they do a urine test and stuff too?

A. No. No lab there.

Q. Did you have to take an employment lab test anywhere? Just go somewhere and do a urine sample or anything?

A. Minus D.O.T. urine sample, no. They do do random drug tests. I did two of them already with the company, randomly.

Q. They just call you in and say: Drop?

A. You get off from route. You get a piece of paper in your mailbox. You look at it. You go down the road to Monroe.

Q. To the same place that you went to have this done?

A. Yes. Well, no. Not to get the physical done. Where they have the new physical.

Q. I'm talking about—my bad. Okay. When you got—

A. Yes, that's the same place.

Q. Just so we're clear. With respect to the documentation produced in response to our first request for production of documents, and the lab that has the results of urine drug testing, that's the same place that they say: Guess what, Alan. Today is your lucky day. Head on over there. If you're not there in ten minutes we're going to wonder why you're not there in ten minutes, kind of a thing?

A. Right.

Q. You have had two of those?

A. Yes.

Q. Since February of '13?

A. Since I joined. Yes.

Q. When is the last time they pulled the surprise on you?

A. I haven't had one since that.

Q. All right.

A. I've had many in the National Guard though.

Q. How about, do you remember going on February 28th of '15, and having a urine sample taken in the course of your employment with Sygma?

A. February 28th?

Q. Yes.

A. When I got back?

Q. Yes.

A. No, I never did.

Q. Never. Okay.

A. When I started work I didn't have a drug test with Sygma.

Q. So how often does the Guard give you a urine test?

A. Almost every three months.

Q. Every three months?

A. They do it randomly too.

Q. Do you smoke cigarettes?

A. I do.

Q. When did you start smoking, age-wise?

A. When I was 18.

Q. Continuously until the current time?

A. Off and on. I'm trying to quit.

Q. You're 34 now?

A. Yes, 34. I'll go six months on. Six months off.

Q. Are you six months on currently?

A. Yes.

Q. Or six months off?

A. I'm on right now.

Q. So when you're on, how many a day do you smoke?

A. Well, six months prior to the incident I was at half a pack. Now I'm down to like anywhere between five and ten, depending on the work day. And at the time I have a cigarette in my mouth and it breaks me from smoking even more. I just keep it in my mouth.

Q. Let me ask you this. At the time of December 5th, 2014, were you smoking?

A. It was not lit.

Q. Just in general. Let's assume you're up with the buddies at the bar watching a game. And let's assume this is before bars outlawed smoking. Were you smoking in December of 2014?

A. I was trying to quit. Yes, I was smoking.

Q. You were smoking but you had the best intentions to quit, correct?

A. Yes.

- Q. In spite of those best intentions of December, 2014, we still haven't been able to kick the habit. Right?
- A. I kicked it for a minute there; three months.
- Q. That's not really kicking it, is it once you go back. It's kind of like an alcoholic saying he's sober because for a week he didn't have a drink because he was locked up and had the DTs. That doesn't really mean he's not an alcoholic anymore. Agreed?
- A. Right.
- Q. So how much do you smoke per day, now?
- A. Roughly between five and ten.
- Q. When you were smoking, yet trying to quit in December of 2014, how much were you smoking; still that five to ten, a reduced number from that?
- A. It was less than five a day.
- Q. Less than five a day. Were you using the patch or any Nicorette gum or any nicotine substitute back in December of 2014?
- A. I had this horrible thing but it's made more for dippers. It's a chew thing that sat right here. But other than that.
- Q. What was that called?
- A. I can't remember what it was called.
- Q. You were using that back in December?
- A. Yes. At the time.
- Q. Where did you purchase that at?
- A. The VA gave it to me.

- Q. Did you need a prescription for that thing, whatever it was?
- A. No, you didn't need a prescription.
- Q. So when you go to the VA, which facility do you go to?
- A. The one in Ann Arbor. I wasn't using that at that time.
- Q. At the moment you were pulled over you didn't have one in your mouth, true?
- A. No. No.
- Q. Had you used one on the 3rd of December?
- A. No.
- Q. How about the 4th of December?
- A. No. No.
- Q. How come you weren't using that? You would sneak a smoke instead?
- A. Yes. Take a couple puffs of cigarette. Just keep it in my mouth. That's all I would do.
- Q. So I want to go back. When you would work and make your deliveries for Sygma would you always service the Wendys, the Krispy Kremes and the Tim Hortons?
- A. At the time there was Smashburger on this too. But we don't do Smashburger no more.
- Q. You didn't have any Smashburger deliveries on the 5th of December, 2014, did you?
- A. Negative.

- Q. So what time do you normally have to show up to complete the route, if you will?
- A. Well, like we were talking earlier. I call in every day at 1:15. He gives me a choice of what route to do.
- Q. All right. So let me go back.
I'm assuming, since you were driving on December 5th, on December 4th at around 1:15, you made a phone call to someone at Sygma?
- A. Right.
- Q. Who was the person you spoke with at Sygma?
- A. That was Bob. I can't remember his last name. He's the supervisor.
- Q. Does Bob still work there?
- A. Yes.
- Q. Supervisor Bob down in Monroe, correct?
- A. Yes.
- Q. So you called Bob. What did Bob tell you?
- A. He told me what was available.
- Q. What was available?
- A. I can't remember now. But I know the Detroit, Grosse Pointe route was available and I chose that. Had the most weight on it and the most money made.
- Q. Most weight. Most money. Most weight meaning there was more poundage of product to be delivered, if you will?
- A. Yes, compared to the other options I had.

- Q. Now why—does that have something to do with you earning a bigger scale, if you will?
- A. Yes. I get paid by the pound, not by the route. Yes, I get paid by the pound and the route, not by the hour.
- Q. Explain how that works for me. We can use that night as an example. Do you remember what the weight was?
- A. No idea. It was up there in the 33s.
- Q. Do you remember what the legal limit for that trailer that you were using that night?
- A. 40,000.
- Q. 40,000 pounds. You think this was what, around 30,000 pound?
- A. 33, 34-ish.
- Q. Let's just assume—I'm going to take your testimony as 33 or 34,000 pounds. But what do they pay a pound? I'm assuming—
- A. I think it's 23 cents a pound.
- Q. Does somehow the mileage figure in on it too?
- A. No, mileage on a single man route like that.
- Q. So you would have been paid 23 cents times even go big—34,000 pounds. That's what you would have been paid that night?
- A. Yes.
- Q. No other moneys figured in?
- A. Nope.

Q. What about health care, do they give you any health care there at Sygma?

A. I have to pay for that.

Q. That's not included. Do you have a group plan that you participate in?

A. Yes. I pay \$31 a week for it.

Q. Because you were not allowed to work from December 5th, until after the case was dismissed on January 28th, are you claiming that you lost any health care services?

A. I was paying for it.

Q. Right. But you still had the coverage, so to speak?

A. I almost lost it. I almost lost it but you're right.

Q. You didn't?

A. I didn't lose it. I had coverage.

Q. Now in addition to whatever—what kind of coverage is that; is that a Blue Cross policy?

A. HAP.

Q. HAP?

A. Yes.

Q. Got you. In addition to that HAP coverage, I'm assuming you are entitled to use the VA services, correct?

A. Only for services relative to my injuries overseas, which there wasn't injury overseas. Like the regular physical.

Q. If you had the flu or something you couldn't go.

A. Yeah.

Q. True?

A. No. If I had the flu they won't cover it.

Q. Now you told me about a tour in Iraq. You told me about a tour in Afghanistan. Any other—and Korea I think you told me. How long were you in Korea?

A. I was in Korea from August of '04 to August of '05.

Q. Does cat taste as bad as they say it does?

A. No. Dog though is nice though.

Q. I'll bet. They say the Irish Setters are the very best.

A. I never knew I was eating that until he told me.

Q. Oh, yuk.

A. It was good at the time.

Q. Did you suffer any injuries in any of the campaigns that you participated in overseas?

A. No.

Q. None whatsoever?

A. We have—I have—I get my back checked and my heart checked every year. The VA says if there's any issues they can proclaim it back but other than that.

Q. Do you have a back issue of some kind at all?

A. Not at this moment, no.

Q. Periodically? I have a herniated disc and it might be 20 years and no problem. I get up tomorrow and pick up a pen off the floor and I can't straighten it up. Is that what you have?

- A. That's what the VA doctor said. He said you have no issues but—.
- Q. When is the last time you had a problem with your back?
- A. I had no problem with it. They were just saying they will claim your back and claim this. It was one of those things that might come up 20, 30 years down the road.
- Q. Did you play any sports when you were in high school?
- A. Cross country and track.
- Q. No hockey?
- A. Nope. My dad left us and I got out of hockey when he left.
- Q. God forbid, but do you suffer from post-traumatic stress disorder?
- A. No.
- Q. Have you ever been diagnosed as suffering from post-traumatic stress disorder?
- A. I took a small test during the two months I was off there.
- Q. Which two months; between December?
- A. December and first week of February.
- Q. Yes.
- A. I took a test and saw a couple physicals thinking there was something wrong but, no.
- Q. That was through the VA?
- A. That was VA and local. I paid for it too.

- Q. So the VA in Ann Arbor—I'm assuming if we're looking for PTSD—we're doing some type of psychological or psychiatric study to check your emotions and things of that nature?
- A. They didn't do that. They just gave me a form to fill out. I had a 500 word questionnaire to answer. Looked at it and he said: Yes, you got no issues. I was like all right. That one locally—
- Q. Who is the local one? Where was that at?
- A. The one right off Dixie Highway.
- Q. Dixie Highway and where? It's a long highway.
- A. Monroe. I can't remember what street it cornered on. Exhibit 11. Whatever Exhibit 11 is. I went there and she asked me questions and all that stuff.
- Q. Was that a psychologist or a psychiatrist?
- A. Psychiatrist.
- Q. Do you remember her name?
- A. Negative.
- Q. Do you have an appointment go and back her at all?
- A. I can go back there and get the appointment but I can't remember. I can see her any time I want to.
- Q. That's what they say: Come back if you think you need us?
- A. Yes.
- Q. You don't have a standing appointment, such like every Thursday at three you go in and get charged

60 minutes for 40 minutes of couch time? You don't have anything like that?

A. \$150 they wanted to charge for an hour. It's ridiculous.

Q. But you met with her.

A. Yeah.

Q. She examined you. Talked with you?

A. She said nothing.

Q. And reassured you that you don't seem to fit someone with PTSD; true enough?

A. Uh-huh.

Q. That's a yes?

A. Yes.

Q. Ever have to undergo any type of anger management classes?

A. Negative. No.

Q. When you had your impaired, did they make you go to any type of alcohol awareness program?

MR. RADNER: Objection to relevance.

A. I went for a weekend.

Q. One weekend.

I want to be clear. I'm assuming you didn't work. Did you get paid for 12-5-14?

A. 12-5.

Q. That's December 5th of 2014, the night this—you got pulled over. You had made at least two stops

and delivered. Did you get paid for that poundage, if you will?

A. Yes. I got paid for the two stops I had. Then they had to pay someone else and a helper to do that route because what I do usually takes two other people to do in most cases.

Q. What is that that you do that it takes two wimpy guys to do?

A. They say I do it pretty quick.

Q. You pull in. Park. Do you turn the tractor off when you unload?

A. Yes.

Q. Turn it off. Then you unload whatever it is that is for this particular location?

A. Yes.

Q. Put the ramp back in. Start up. Go to the next site, correct?

A. Yes.

Q. So I'm assuming your ability to work with Sygma ended as of the 6th of December, 2014?

A. No. It ended that morning when I went.

Q. You got paid for part of that day but part of the day you didn't get paid. I just want to make sure I've got the time frame involved. You were not able to work from the 5th, partially, up till February 1st of 2015?

A. Right.

Q. How do you come up with 61 days, if indeed it's really not 61 days? It's substantially less than that.

- A. Well, there's 31 days in December and 31 days in January.
- Q. 30. Yes, but you didn't have the full 31 in December. You worked the first part of December, correct? Then you were able to go back to work on the 28th of January. You told me you started driving on the 1st of February.
- A. It was almost exactly two months, if I'm right. So it would have been the 1st or 2nd, yes.
- Q. What precluded you from driving on January 29th, 30th, 31st?
- A. I do believe, if I remember correctly, it was either a weekend and all the job were filled.
- Q. So there are times when you will call in and the supervisor would tell you from time to time there are no jobs available?
- A. You are given a choice.
- Q. What do you mean: You are given a choice because I don't work for them?
- A. There's about usually—right now I call in. There's about 10, there's about 12 or 15 people on the extra board. So there's five people that aren't going to be able to work. So you're given a choice of either: Pass, on call or use one of your sick or vacation days and be on call. Pays you \$45 just to be on call.
- Q. There's ten routes?
- A. Not every day there's ten routes.
- Q. What's the range? What's the least amount of routes that they might have available?

A. Five.

Q. What's the most routes that they would have?

A. I have seen up to 12.

Q. Up to 12 and that's per day.

A. Yeah.

Q. Or is that per shift?

A. It goes by day. Route numbers one through.

Q. 12?

A. Six. Six days a week. We don't work on Saturdays.

Q. So let's assume—and I think you said there's how many? You said there's some on call and there's some regulars or what do they call you?

A. They're on call or a pass.

Q. A pass. That's where you got to use your vacation?

A. No, you don't have to use your vacation if you don't want to.

Q. You can just decide to go fishing or something, if you want?

A. Yes.

Q. What's the third status; you're on call, pass or?

A. Use one of your sick days or vacation time.

Q. Or you take a route?

A. Or you take a route, yes.

Q. Now how many drivers are there competing for a route back in December of 2014?

- A. I was at the bottom. I was—no, I was close to the bottom. I was third from the bottom. So I have always—I didn't have a choice to pass or to skip or anything like that.
- Q. When you say third from bottom, you had to take a route?
- A. If a route came down to me, yes, I would—I had to take it.
- Q. How often on a seven day time frame, a week if you will, would routes come down to you on an average?
- A. At that time?
- Q. Yes, back in December of 2014.
- A. Almost every day a route came to me.
- Q. You wouldn't drive seven days a week though would you?
- A. No. We don't work on Saturdays.
- Q. So you get Saturdays off. I'm assuming it goes by the hours it takes you. Once you achieve your maximum hours per—
- A. Week.
- Q. You're done, right, regardless of whether or not they have got a route for you or not?
- A. They're pretty lenient on that. Like if you know, you have a route and they ask you, hey, how long will this take you? And I say ten hours. And you only have nine hours to do it, I would ask for a helper or they would say: I can't do it. I will take a different route. Or it gets passed.

- Q. Now once you left Grosse Pointe Farms Police station, when they let you go. You bonded out. You're familiar with that term, correct?
- A. Yes.
- Q. Once you bonded out and they let you go back, where did you go from there?
- A. I went straight to work. I went straight there to do a drug test.
- Q. You went straight to Sygma's office?
- A. Yes.
- Q. Who did you talk with?
- A. I talked right to Joe Mathias.
- Q. Now prior to arriving at Sygma's office in Monroe, did you talk to anybody on the telephone at Sygma?
- A. No. I didn't talk to Jeff or anybody. No one was there at that time. No one got there until around seven.
- Q. Let me ask you this. You were kind enough to tell me that the officers gave you free access to your cell phone?
- A. Right.
- Q. Did you call anybody at Sygma?
- A. I tried.
- Q. While you were there at Grosse Pointe Farms?
- A. I tried and no one picked up.
- Q. So you dialed their number and no one answered, correct?

A. Correct.

Q. Do you still have the same cell phone today that you had back in 2014?

A. Negative. This is an update.

Q. Let me ask you this. That was dumb on my part. Same carrier. Same phone number?

A. Yes.

Q. But new equipment. True?

A. Right.

Q. Who was your carrier in December of 2014?

A. AT&T.

Q. That's who it is today?

A. Roger.

Q. So you did you drive—strike that.

When your soldier picked you up he took you straight to Sygma?

A. Uh-huh.

Q. Correct? Got to answer out loud.

A. Yes, he did.

Q. I'm assuming your car was there?

A. At Sygma, yes.

Q. But you weren't allowed to drive it at that point, correct?

A. I was allowed to drive my vehicle.

Q. So you go into the office. You talk to Joe, true?

A. Uh-huh.

Q. Did Joe already know that you had had some trouble a few hours earlier because somebody had to go and pick up the rig and things of that nature?

A. Yes, he knew about it. He was going to come pick me up until I called my Joe, my soldier, to come get me.

Q. So when you first talked to Joe—what was his last name again?

A. Mathias.

Q. When you talked to Mr. Mathias, what did you tell him?

A. When I saw him I told him the situation, why I got pulled over. He says, well, cover ourselves, go take a drug test. You have to take a drug test. You hit a deer, you have to go take a drug test. So that's what I did. I went and took a drug test.

He gave me information. Mike Carter is our accident guy and our safety. And he's the one that gave me the info. Go get the drug test. Go do this. Go do that. He's the one that asked me if I had a lawyer or not.

Q. If you had a what?

A. If I had a lawyer or not and all that stuff.

Q. Have you at any time looked at any of the video footage that captures you on the evening of the 5th? I say evening; early morning hours of December 5th, 2014?

A. Negative.

Q. You have never seen what was captured by the in-car cameras by the police officers?

A. Negative.

Q. You have never heard any of the audio that may have been recorded on that evening?

A. Negative.

Q. You have not seen any of the video or heard any audio that may have been captured that evening showing you when you were at the police station?

A. Roger. I never seen none of it.

Q. All right. Do you recognize the gentleman that is sitting next to my right?

A. Negative. No, I don't. I'm sorry.

Q. So you don't know if this individual sitting next to me was involved in any manner whatsoever with your stop on the 5th of December, 2014?

A. I can't remember. There was a lot of other faces there.

Q. Do you remember how many officers were at the scene that evening?

A. Not offhand. If I remember correctly I counted about three or four vehicles at the time.

Q. Now when you left the client, immediately before coming to this Wendys at Moross and Mack, do you remember what time it was that you left?

A. Negative.

Q. Were you having any difficulty finding the Wendys at Moross and Mack?

A. I was.

Q. Did you ultimately find it?

A. No.

Q. Did you drive by it? Did you—anything like that?

A. I never found it. To this day I never did that route.

Q. Now if you told someone on the evening, for instance one of the officers, that you had made deliveries to the Wendys on Moross and Mack, would you disagree with that?

A. If I told someone that I—yes, I have in the part. But it was a while and I can't remember where I was going. We came out a different way or different direction.

Q. Do you know if you drove—and if you don't know, that's fair enough to tell me. I told you that at the beginning of the deposition. Do you know if you drove up and down Mack Avenue on more than one occasion before you were stopped on Moross?

A. Is Mack the corner that I was pulled over on?

Q. You were at the intersection of Moross and Mack.

A. Yes, I drove up.

Q. The traffic light was at the intersection of Moross and Mack and your truck, you stopped the vehicle on Moross.

A. I didn't go down the other one then. I did not go down that street at all.

Q. None at all?

A. I pulled over on Moross. I did not go down Mack at all.

Q. Before getting stopped, did you go down Mack?

A. No. That's what I was looking for.

- Q. How did you end up on Moross in the direction that your tractor was facing? Where were you coming from when you stopped?
- A. Well, I ended up heading—when I passed, I realized I passed Mack. Went down and GPS had me taking all these roads that I couldn't go down the truck with. So then I ended up going way down south or way past the line and doing a turn around and coming back. My GPS had me taking a back road and it ended up probably behind Wendys. When I was going to make that turn I saw the no truck sign.
- Q. Where was the no truck sign?
- A. Before the median. It was the main road Mack. Then it was like an alley type kind of thing.
- Q. Could you sketch this for me if I asked you to?
- A. Negative. I cannot offhand.
- Q. You don't have any ability whatsoever?
- A. No, not offhand. You wouldn't be able to tell what it was.
- Q. Now wait a minute here.
- A. I couldn't.
- Q. You went through basic training. Don't tell me you're not familiar with maps, how to sketch them, how to read them.
- A. It was the block before.
- Q. The block before Mack?
- A. Yes.
- Q. You were going to turn in there?

A. Yes.

Q. Did you have—tell me where you were coming from before. How did you get so you could turn in there?

A. I was coming going towards Mack.

Q. Right.

A. Because it showed I had to make a left.

Q. All right. Make a left to get to the Wendys?

A. Yes. It had me not going to Mack but going to the block before it.

Q. Like an alley?

A. Yes. And I was going to cut that. I came to a stop and I saw it. I was going to make my turn. I saw the sign.

Q. Did you actually come to a full stop at the alley before making the turn?

A. Yes. Yes.

Q. Now this tractor that you were driving that night, do you remember what kind it was?

A. It was an 18 wheeler.

Q. Brand name?

A. A Volvo.

Q. Was that an automatic or stick transmission?

A. Automatic.

Q. So you pull up to this alley, correct?

A. Uh-huh.

Q. That's a yes?

A. Roger. Yes.

Q. I'm assuming—do you know how many lanes on Moross there were at that point?

A. It was the center left lane.

Q. That's where you stopped?

A. That's where I stopped.

Q. So there would have been another lane to your right, if you will?

A. And to my left, yes.

Q. You come to a complete stop. What do you do?

A. I went and turned and looked and I saw the truck sign. And—

Q. Are you sure you saw a no truck sign?

A. Yes. I saw a no truck sign.

Q. Have you ever been back there since this night?

A. Negative.

Q. So you believe you saw a no truck sign. Then what did you do?

A. Then I started proceeding forward.

Q. So you started from a dead stop?

A. Right. I proceeded forward. Then I saw the median right away. Right—

Q. Right in front of you?

A. Right in front of me.

Q. So as you see the median right in front of you I'm assuming you're sitting in the driver's seat of the tractor?

- A. Right.
- Q. This median looks like it's dead straight, right in front of you?
- A. Yes. And I steer my way out of it.
- Q. When you say you steer your way out of it, which way did you go?
- A. I steered towards the right.
- Q. Then what happened?
- A. As I steered towards the right I got myself in the right lane. My back trailer was catching up to me and hit the curb.
- Q. The trailer that you were pulling that evening, how many axles did it have?
- A. It had two axles; 48 footer.
- Q. Which of the tires on which axle do you believe hit the curb?
- A. The back driver's side.
- Q. So it would have been—just so I'm clear. I'm going to have you tell me. At the rear of that trailer, on the driver's side of that trailer, as it was configured on the night of December 5th, 2014, how many tires were on the driver's side of the rear of that trailer?
- A. Four.
- Q. Doubles?
- A. It had two sets of doubles, right.
- Q. So which of those tires, to your knowledge, hit the curb?

- A. I do believe all of them did.
- Q. All of them. How did you know that is this something you felt?
- A. It was one of these things. You feel a bump.
- Q. It's kind of a big bump I'm assuming. If all four tires go up in the air you're going to feel that sitting by the seat of your pants in the cab. Right?
- A. Yes and no.
- Q. Did you that night?
- A. I felt a little bump. It's not a big bump. When it's all eight in the rear you feel it. When it's just the four on the one side, you feel just a little—because it's 50 feet behind you.
- Q. Did you look in the mirror, the rear view mirror when it happened?
- A. Yes. That's how I noticed it happened.
- Q. Did you actually see the tires going over in the mirror?
- A. Yes.
- Q. I'm assuming—it sounds like you're dang near lost looking for this Wendy's. Is that a fair enough statement?
- A. Yes.
- Q. I'm assuming—do you remember how you were dressed that night?
- A. I do believe in uniform. I had jeans and a shirt on. I had a long sleeve shirt.
- Q. Any particular uniform they make you wear?

- A. Yes. It's blue. It says Sygma and my name on the left.
- Q. Now when you came up and stopped at this alley, had you had your driver's side window down at that point to look out and maybe see a little more clear as you were looking for this Wendys?
- A. Yes. My window was down.
- Q. When did you put your window down, if you remember?
- A. It was probably when I made the stop to make the first initial left turn.
- Q. Now were you—did this Volvo tractor have a radio in it or some type of musical entertainment?
- A. Yes.
- Q. Were you using that at the time you were stopped by the officers?
- A. Yes.
- Q. Are you allowed to listen to the radio?
- A. Yes.
- Q. I think there's a company rule that says if you are going to use the radio before you start your route, you are supposed to preprogram the channels. Am I right?
- A. Yes.
- Q. Was this an AM/FM radio, a satellite radio? What was in there in '14?
- A. I do believe am/fm.
- Q. What were you listening to?

- A. I was listening to the local 99.5 country station.
- Q. Do you remember how loud that was set when you were listening to it at the time of your stop?
- A. Not that loud but the engine was going too. You hear the engine.
- Q. So if the engine is on you have to turn the radio up loud enough to overcome the engine noise?
- A. Right.
- Q. So you called in around 1:15 and you talked to Bob on—this would have been the afternoon of 12-4, correct?
- A. Yes.
- Q. And what did Bob tell you?
- A. He told he what was available.
- Q. You selected this route?
- A. Roger.
- Q. Had you—let me ask you this. You have told me that sometimes—not too often in your case—there might not be a route available. Who would we contact today at Sygma to identify what routes would have been available for you or some other driver for like December 6, 2014. Up through February 1st, 2015? Who would we want to talk to?
- A. I wouldn't know. I don't know where they file, keep their files. I don't know who in charge of the files. There so many people that go in and out of there.

- Q. Clearly the main guy at the front office, if he were to get a subpoena, he would probably say: What is this about?
- A. He would find—
- Q. He would probably find the right person?
- A. He would know. But me, I do not know.
- Q. So to the best of your knowledge you believe you drove on the 3rd of December, '14. And on the 4th.
- A. It was that day.
- Q. So what time on the 4th would you have finished your route, that being the route that you completed before taking on this route that ended up in your arrest?
- A. It was that morning. Probably around seven in the morning.
- Q. So what did you do at around seven. I'm assuming it's 7 a.m. on December 4th, correct?
- A. (Nods.)
- Q. What did you do?
- A. I went home. Had breakfast. Take a nap. Woke up at 1:15. Called in. Fall back to sleep.
- Q. So you go home. You eat breakfast. Do you remember what you had to eat that day?
- A. No idea.
- Q. Do you normally eat breakfast every day?
- A. Normally I get a bite to eat. In the morning after routes I'm starving.

- Q. You normally make something yourself because you can probably make an omelet better than most places because of your training or do you stop somewhere and grab something?
- A. I normally eat whatever the kids have left over.
- Q. So then you go to bed?
- A. Uh-huh.
- Q. Normally get up at what time?
- A. At that time I got up at 7:30 I do believe.
- Q. You have got to make a phone call?
- A. I got up at 1:15. Then went back to sleep.
- Q. Then you got your instructions?
- A. Uh-huh.
- Q. That's a yes?
- A. Roger.
- Q. Do you remember what time he told you you had to come into the yard, so to speak, to start that route?
- A. We come in an hour prior. I can't remember what time he said but I came in an hour prior like normal.
- Q. When you come in an hour prior, what do you do during that hour before you pull out of the yard?
- A. It's called pre trip. We do a pre trip paperwork. Check engine inspection.
- Q. Do you know any loading of the trailer?
- A. We check the load. We don't do the loading.

- Q. You check the load. You want to make sure it's secure?
- A. Roger.
- Q. You want to make sure that you have got the appropriate produce it says you're going to deliver?
- A. Yes and no on that. Because I really can't go through the whole trailer because it's so tight.
- Q. It's packed in tight.
- A. But I do check the stickers and make sure the sticker matches my invoice, my bill number and my route number.
- Q. Did you have any type of an electronic device?
- A. Negative.
- Q. You see these guns sometimes that do the bar codes. You guys weren't using those?
- A. We don't use those.
- Q. So then you get up about, I think you said 7:30 at night?
- A. Right.
- Q. Do you eat dinner before you go into work?
- A. Yes, I do. I eat dinner with the family.
- Q. What did you have for dinner the night—I guess we're going to talk 7:30 p.m. on 12-4, 2014?
- A. I can't remember.
- Q. No recall?
- A. We eat pork chops a lot. Maybe it was pork chop night.

- Q. But you normally have a full sized dinner knowing you're going to go into work and not get off until early morning?
- A. Yes. Yes.
- Q. I want you to think back. You get in about an hour before you have to leave the yard. Do you remember eating anything at Sygma before pulling out of the yard?
- A. No, I don't eat at Sygma. I go to the Pilot, grab my coffee and my Subway sandwich I usually eat later.
- Q. So you get a coffee and a Subway sandwich at Sygma?
- A. At Pilot.
- Q. Which Pilot?
- A. Right next—down the road from Sygma on the corner of Detroit and Dixie.
- Q. Did you do that that night?
- A. I do it every night.
- Q. So no doubt in your mind it's like clock work?
- A. Yes. I got a coffee and I got a Subway sandwich. Filled my thermos and I hit the road.
- Q. Any particular Subway that you normally would eat?
- A. It's usually between the three. It's the tuna or the steak one if I'm feeling rich or the cold cut.
- Q. So on the 4th of December, 2014, there's no doubt in your mind that you have a thermos full of coffee and a submarine sandwich of some type?

A. Right.

Q. Did you eat your submarine sandwich before you were stopped by officers on the early morning hours of the 5th of December, 2014?

A. No, that would have been in my cooler.

Q. Was your cooler in the cab?

A. Roger.

Q. Had you had any coffee?

A. Yes, I had. I had probably about two cups of coffee. Two, three cups.

Q. Two to three cups of coffee?

A. Roger.

Q. What time do you normally eat the submarine sandwich?

A. I usually eat it—it's so hard telling.

Each route is different when I take a lunch break. So later in the evening. Later in the night. It's usually after a stop. I have ten stops normally. So it's usually after eight or nine stops.

Q. Did you have anybody in the cab with you that night?

A. No, I didn't.

Q. Were you allowed to take other people in the cab?

A. No one is allowed in the cab if you're not a Sygma driver—if you're not a Sygma employee.

Q. Ever get written up for having somebody in the cab?

A. No.

Q. I think you told me—were there times that you would have had another Sygma employee in the cab with you?

A. Yes. They're called helpers.

Q. I'm assuming you're in charge of the tractor when you're driving it. Correct?

A. Yes. They're just to help with the load if it's too much.

Q. I'm assuming that you knew that the people that were helpers riding with you, you would make sure they had their seat belts on?

A. Yes.

Q. Ever remember getting told or getting written up about a helper riding in the truck without a seat belt?

A. No.

Q. Now you told me you have reviewed what's been marked as Exhibit 1. May I see that. For the record that is a four page document. Agreed?

A. Roger.

Q. Now have you looked at any other records from Grosse Pointe Farms other than these four pages?

A. No. This document.

Q. That's not from the Farms. That's obviously from the hospital.

MR. RADNER: He's referring to the other, the Michigan State Police lab results. I showed him that in the office. I don't have it here with me.

MR. DEGROOD: That's fine.

Q. But you haven't looked at anything else?

A. Roger.

Q. Now did you read all four pages of Exhibit No. 1?

A. I glanced through it today. But I did read it. I did read it when I got this emailed to me a couple weeks after the incident.

Q. Is there anything you disagree with that is reported in Exhibit No. 1?

A. There's a few things but—.

Q. Why don't you tell me what those few things are. Take as long as you need to tell me.

A. Bare with me for a moment.

Q. You're on page what of what?

A. I'm on three of four.

Q. All right.

A. The window. He says right here:

Writer effected a traffic stop and approached the driver's area.

Q. How far down are we?

A. I am—10th line.

Q. It says:

Upon a approach writer notes window was down and the stereo was very loud.

A. Yes.

Q. What do you disagree with there?

A. At the time his opinion of the stereo being loud. Then when I shut the truck off.

Q. Did you turn the truck and the radio off at the direction of the officer?

A. What do you mean?

Q. Sir, could you please turn your rig off and get your paperwork ready.

Okay. Off goes.

As opposed to: Oh, crap. Here's come a pig. I'm going to turn the doggone truck off.

A. No, I was looking for my paperwork and he approached and he asked me and at the time I was—

Q. He asked you to turn it off and you turned it off?

A. Yes.

Q. We're on the same page.

A. I didn't do it before and I wasn't meaning anything disrespectful.

Q. That's fine. At any time do you have any memory—well, strike this.

The officer that first approached your vehicle approached you on the driver's side?

A. Roger.

Q. Was that a man or a woman?

A. It was a man.

Q. Was that the individual that had you perform various tasks, tests in front of the police car that you can remember?

A. Yes. He was the one giving me a sobriety test and everything.

Q. I'm assuming you had undergone sobriety tests previously?

A. Minus the impaired. That's the last time I did one.

Q. Did you have any doctor or did you know yourself, prior to December 5th, 2014 that you had any type of balance problems?

A. I did. I did.

Q. You did or did not?

A. No, I knew I don't have a balance within me at all.

Q. So you had trouble with balance?

A. I do with PT tests. I do with PT in the military.

Q. What is PT?

A. Physical training.

Q. Do you have a problem with your ears, if you will? Sometimes people have an inner ear problem and as such you can't balance.

A. Not that I know of.

Q. But it is your opinion that you have trouble with balance?

A. Yes. I asked—I told him that before. In the middle of it he says minus the walk.

Q. Who did you tell?

A. I told the person that told me to step out of the vehicle, that would initiate it.

I mentioned: Hey, I do have a balance issue.

He said, later on, he said: Minus the walking the line you failed everything, so.

- Q. So when do you tell this officer that you have a balance problem, are you still in the truck?
- A. No. When he asked me to walk the line the first time.
- Q. Where were you standing when he asked you to walk the line the first time?
- A. In front of the vehicle behind the trailer.
- Q. So I'm assuming at some point this officer asked you to get out of the truck?
- A. Yes, he did.
- Q. Do you remember what you were asked to do when you were first asked to get out of the truck?
- A. No, I can't remember. But he immediately asked me why I was shaking.
- Q. Were you shaking?
- A. I was.
- Q. What did you tell him the reason for your shaking was?
- A. It was cold out. It was really extremely cold outside.
- Q. Why did you have your window down if it was extremely cold outside?
- A. The heat different between here and where the window was down, it wasn't that bad. I was directly in the heat underneath the steering wheel.

- Q. When you got out of the truck, knowing that it was extremely cold outside, did you take your coat?
- A. I got out of the truck quick because he asked me to. No, I didn't.
- Q. Did you take your coat?
- A. No.
- Q. Did you have an overcoat you could have put on?
- A. I had a sweater in the truck, yes.
- Q. Did you at any time on that evening ask to put your sweater on?
- A. I did not ask, no, because I didn't think it was going to take that long.
- Q. So you didn't ask for the sweater after you were taken out of the patrol vehicle, correct?
- A. Negative. Right.
- Q. Were you ever given your sweater that evening?
- A. I can't remember.
- Q. So you get out of the truck. You remember the officer asking why are you shaking. And you told him because it's chilly?
- A. Yes.
- Q. Anything else you remember the officer asking you before you got out of the truck?
- A. Not at this time, no.
- Q. Before getting to the car to do the straight line walking, in addition to being asked why you were

shaking, anything else you remember the officer asking you?

A. Not at this moment. He didn't ask me on what was I doing or where I was going. I tried to ask him where the Wendys was. I wanted to explain to him my situation. But I didn't get a chance to. He asked me to step out of the vehicle right away.

Q. So you have no recollection of ever being told that the Wendys closest to where your vehicle was stopped was about a block away. You don't remember anybody telling you that, do you?

A. I asked him. He pointed a certain direction. It's that way. Then I had quiet ever since.

Q. My question to you is, sir. Do you remember actually hearing any officer explain to you verbally: Yeah, the Wendys is about a block down?

A. Negative.

Q. All you know is you asked about a Wendys and someone what, pointed?

A. Right.

Q. And when you asked about the Wendys and the officer pointed, that was when you were in front of the police car?

A. No. That was when I was still in the vehicle.

Q. Did you explain to the officer that you were looking for a Wendys on Mack?

A. Yes.

Q. And in response he pointed?

A. Right.

- Q. Did you at any time tell the officers that you were late starting or getting to work that night?
- A. According to my time I wasn't late but according to dispatch time I was.
- Q. When did you learn you were late, before leaving the yard that night?
- A. Yes. They already—my employer set the times back because of certain other circumstances that I can't remember.
- Q. What do you mean by that?
- A. Like the trailer probably wasn't ready until a certain time.
- Q. So you show up an hour before you're supposed to leave?
- A. Right.
- Q. At some point during then they tell you you were late for whatever the reason is?
- A. No. The hour I was supposed to leave for what I was told the dispatch was at, was still late, according to my appointment times that are normally met on that route.
- Q. Do you remember telling the officer that you were late for work that night?
- A. I can't remember, no.
- Q. So you couldn't dispute that one way or the other; true enough?
- A. Right.
- Q. Do you remember if you told the officer what time you started driving that night?

A. I do believe I said nine, nine or ten o'clock.

Q. I want you to look at page four of four of Exhibit 1. In the second line the end of that sentence it says:

And started driving at approximately 22:30.

Being a National Guardsman and an ex Army infantryman, what time is 22:30?

A. At about 10:30. That sounds about right.

Q. Does that sound about something you probably would have told him that evening?

A. Right.

Q. So you're not disputing that?

A. No.

Q. If it then says at the fourth line an Officer Cashion. Do you know who Officer Cashion is?

A. Negative.

Q. Do you know if all of the officers that responded to this traffic stop were male or female?

A. There was a few females.

Q. So there was a mixture?

A. Roger.

Q. It says:

Officer Cashion observed the vehicle, your vehicle, on Mack pass the Wendys moments prior to the stop.

Do you disagreeing with that or don't you know one way or the other?

A. I don't understand. I don't know one way or the other.

Q. Fair enough.

So anything else that you can remember as you sit here today that you said to the officer before being asked to walk back towards the patrol vehicle, that you haven't already told me?

A. Nothing I can think of.

Q. Anything more that you can remember the officer telling you before asking you to walk back to the patrol vehicle'?

A. Not that I can think offhand, no.

Q. If the conversation between you and the officer was recorded, you have already told me you have not listened to the audio recordings. True?

A. Right.

Q. Do you have any reason to believe that any of the video or audio that was recorded that evening is inaccurate?

A. Not if it's recorded. No, I have nothing.

Q. The officer that asked you to step out of the vehicle and escorted you back to the patrol vehicle and had you perform various sobriety tests, was he at least polite that evening?

A. He was a little bit aggressive.

Q. What do you mean by: A little bit aggressive?

A. Not like disrespectful aggressive. I meant more like an NCO would be to his soldiers. Answer this quick. Answer that quick. Let's do this. Like—

- Q. But not in a disrespectful fashion but more like in a business like fashion?
- A. A little bit of fine line there. It wasn't—he wasn't threatening or anything. It was just more like—
- Q. Was he rude?
- A. No. He—it didn't seem like he was rude or anything. He was just pushy with his questions.
- Q. What did he do that led you to believe he was slightly aggressive?
- A. I guess he was pushy with his questions and was quite demanding—which I understand why he was demanding. But on the same token there was no politeness there at all when it comes to: Hey. This, this, this.
- Q. Give me the: Hey, this. This. This. What do you mean by that?
- A. I guess there was no common courtesy between each other. Between like the minute he met me there was no common courtesy towards who he was pulling over. I felt like I was—act as not just a person but as somebody he was going to arrest no matter what. That kind of thing.
- Q. When did you first see police officers that evening?
- A. In the past?
- Q. That night. When did you first see police cars or officers?
- A. It would be—I didn't see nothing at all that night at that time until I saw them.
- Q. When did you first see them?

A. Not until I came to the light and saw them on the corner. And in the back of my mind thought they saw me. So I came to a stop. That's the first time I saw them.

Q. You came to a stop because the way you were operating the tractor/trailer?

A. Yes.

Q. From an observer's point of view could be determined to be careless?

MR. RADNER: Objection. Speculative.

Q. True?

A. Roger.

Q. It's because you ran over the median and saw police officers, you assumed they might investigate the behavior of operating the vehicle?

A. Roger.

Q. You didn't think that was unusual or out of line, did you?

A. No. But I was hoping for a chance to explain myself. But there was no chance of explanation at all.

Q. So you didn't get a chance to tell them that your rear wheel ran over because you were trying to turn into the street?

A. I told them that later. Not at that time.

Q. So you did get a chance to explain at some point that evening?

A. Right.

Q. What had actually happened, correct?

- A. Yes. It seemed like it was—the minute he stopped me, it seemed like it was: Hey, go do this. Do this. Do this. It was 100 percent of just straight running from the beginning. I didn't have a chance to explain myself.
- Q. Okay. So you go through some sobriety tests?
- A. Right.
- Q. And then what, did they actually put you in a vehicle that evening?
- A. They did.
- Q. How long were you in the vehicle?
- A. I can't recollect how long at the time.
- Q. I notice that you're not wearing a wrist watch at the present time?
- A. No.
- Q. Do you normally wear a watch?
- A. No, I don't.
- Q. What do you normally utilize to keep track of time?
- A. There's a clock on the Zada and there's a clock on my phone.
- Q. Did you have a phone on your person when they put you in the vehicle, in the squad car?
- A. No.
- Q. Where was your phone?
- A. It wasn't given to me until later.
- Q. Where was it though?

A. In the cab.

Q. You normally set it down someplace in the cab?

A. Roger.

Q. Standard habit and custom?

A. Yes. It sits above on the dash.

Q. Now at some point in time they padded you down I understand?

A. Roger. Probably did. Can't remember.

Q. You're not complaining that they did anything inappropriate during the pat down, are you?

A. They didn't touch me nothing weird, no.

Q. No. Did they explain to you: Look it. Do you have anything that might hurt me and I want to check that you don't have something that might hurt me or to hurt yourself?

A. They did explain that, yes.

Q. I'm assuming you agreed to let him do that?

A. Roger.

Q. This was the male, not one of the female officers, was it?

A. I do believe it was a male and I agreed.

Q. Did you consent to them looking in the cab?

A. Yes, I did.

Q. At some point in time I believe you may have been placed in handcuffs?

A. I was.

Q. Then put back in the car?

- A. I was placed in handcuffs before I was in the car the first time.
- Q. You were cuffed the first time before you went in the car?
- A. Roger.
- Q. So every time you were in a vehicle that night you were in handcuffs?
- A. Roger.
- Q. Did you get transported back to the station so to speak?
- A. I did.
- Q. Was it transported in the same car that you were put in initially or a different vehicle?
- A. Same vehicle.
- Q. Was it the same person that drove you back to the station that had conducted the sobriety test and asked you to get out?
- A. Negative. I do believe it was a different guy.
- Q. But you think it was the same car?
- A. It was his vehicle, the car I was put into.
- Q. Did you have any conversations with the officer that drove you back to the police station?
- A. I had a few words.
- Q. What did you say to him?
- A. I asked him if I was being charged. He said: If you have no drugs in your system you wouldn't have no worries or something along those lines.
- Q. All right.

A. Then he mentioned: We will go back and do a urinalysis test. If you have no drugs in your system, there's no issue. Then he mentioned: Now is the time to tell me. I was like: I don't have nothing in my system.

Q. This was the officer that was driving you back to the station?

A. Yes. He is: Now is the time to tell me. I was telling him: I have nothing in my system.

All right. Then he asked me about two or three times. We're going to find it. Now is the time to tell me.

And I said: I have nothing in my system.

And then he said: Well, you have nothing to worry. We get back, we'll do a test. If you pass, you pass. No charges dropped. We'll let you go.

I'm still assuming at that time I can finish my route. When I get back to the police station it just seems it was told something different every time. At first it was: I'll do a urine test. We'll find the issue right there. Second was: We'll do a blood test. I didn't argue.

Q. Did they do a urine test at the station?

A. No. I was holding myself. Then I asked a female. I said: When are we going to do it?

She said: You're not going to do it. You're going to do a blood test.

So then I said: Can I use the bathroom. She let me use the bathroom. She was polite.

- Q. Did you do any kind of actual testing that you can remember at the police station to determine if you had alcohol or drugs in your system?
- A. We did the sobriety test a couple times more.
- Q. That being asked to do certain physical walks or behavior?
- A. Right.
- Q. Anything else you remember doing?
- A. Did something in the office like what is called a nighttime check where he—where my eyes would adapt differently in the dark. So we did that. I walked the hallway for two or three times, if I remember correctly.
- Q. Did more than one officer observe you doing the sobriety?
- A. Right. If I do remember there was like two females there at that time.
- Q. All right. Do you remember if there were more than one officer observing you do the sobriety test when you were out on the road?
- A. Outside?
- Q. So to speak?
- A. Yes. There was more than one or two.
- Q. So we have got several people that have witnessed what your physical abilities were with respect to completing the sobriety tests?
- A. Right.
- Q. Both in the field, if you will, and in the station?
- A. Right.

Q. So no urine test. Did you have to do a blood test?

A. I did.

Q. Where was that performed?

A. That was performed at the hospital. I was told I was coming back. Of course, my knowledge on blood tests is very little. He told me it might come back this evening. When I got the blood test, they told me it would be back in two to three months. That's when I was kind of frustrated.

Q. Did you say anything or act out in your frustration?

A. No, I didn't act out in my frustration. I asked the question. Then small questions: Well, how is that going to help me in a couple weeks. Then he gave me an answer.

Q. What was the answer?

A. It doesn't matter what the blood test says. We'll go off my report.

Q. Who was that, that said that to you?

A. The officer that charged me.

Q. Do you remember who that was?

A. The main person. I do believe so.

Q. Any other conversations—you remember having your rights read to you?

A. I do not remember that. But my lawyer says—

Q. Don't tell me anything your lawyer said.

A. He saw it on—

Q. It's just like talking to the Pope, okay.

Your lips to his ears and not mine. Okay.

A. Roger.

Q. So my question to you is: Do you have any personal recollection, as you sit here across from me today, of having what is commonly called the Miranda Rights read to you?

A. No. But I do remember signing something later. I thought it was for the blood test.

Q. All right. If you were recorded receiving your Miranda Rights, would you dispute that?

A. No. I wouldn't dispute that.

Q. Okay. Let's go back to this. I think in answers to interrogatories it was indicated that you're claiming you lost about \$15,300 in terms of wages. Do you remember that?

A. Roger.

Q. How did you reach that figure? How did you come about that amount?

A. My take home is roughly \$1,300 a week. Then I lost—and my bonus is 15 percent of what I make.

Q. How often do you get a bonus?

A. Every quarter.

Q. So how do they run their quarter system?

A. First of January.

Q. January through?

A. March. Then April 1st. Then April, May, June. Then July 1st. July, August, September. Then we have October 1st. And then so on. October, November, December.

MR. RADNER: I'm sorry to do this but we have to go off the record again.

MR. DEGROOD: Okay.

(Brief recess.)

Q. Now I'm assuming when you're back at the yard doing your pre route equipment inspection—

A. Yes.

Q. —that you're checking for things like your airline is properly connected, all the lights on the trailer are properly working because your route is all in the dark?

A. Right.

Q. So did you have like a checklist that you would have to go through and fill out and identify that equipment that wasn't working on the tractor or the trailer before leaving on your route?

A. We have a piece of paper shape of the logbook. It sits in front of the dash. It's one per truck. You sign off for the day. Then it has everything on their from engines. Then it has brakes. It has bodies. It has trailers and all that stuff. And then if we have, see no issues at the bottom we write out check, sign it. Date it. It goes in with our paperwork.

Q. Did you have any issues with any of the equipment when you left sometime either late night 12-4-14 or early morning 12-5-15?

A. I did not see no issues at the time from when I checked.

Q. Pardon me?

- A. I did not see no issues at the time from when I checked.
- Q. If you had various bulbs burned out on the trailer, was it company policy that they would be replaced before you left the yard?
- A. Yes.
- Q. Same thing with respect to license plate illumination. If it wasn't working, it had to be fixed before you left?
- A. Right. Right.
- Q. So if the officer that pulled you over noted there were deficiencies in the equipment, is it your testimony that those deficiencies somehow must have occurred after you left the yard?
- A. Yes.
- Q. Do you recall where your next stop would have been after dropping off your delivery at the Wendys at Moross and Mack?
- A. No, I don't recall. I know I would have headed back to 94.
- Q. Do you ever remember telling any of the officers at the scene that you had to be to a Costco no later than 3 a.m.?
- A. Not a Costco.
- Q. If you said that, then your memory today, would that have been in error or you just don't remember?
- A. I wouldn't remember. I don't believe going to a Costco. I don't remember that.

Q. So when you came back from the hospital I'm assuming you were put back in the holding cell?

A. Roger.

Q. What time were you bonded out and what time did you leave, if you will?

A. I don't remember. Around 8:30.

Q. A.M.?

A. I do believe so.

Q. About what time did it take you to get back to Sygma in Monroe?

A. Took me about an hour and a half.

Q. Hour and a half. That would have been with your soldier driving you?

A. Uh-huh.

Q. That's a yes?

A. Roger.

Q. You agree that regardless of, well—strike that.

Assuming that you were accurate and the rear tires ran over the curb, you agree that would be a sufficient reason for a patrol officer to maybe pull you over and see what is going on at that time of the morning. True?

MR. RADNER: Objection. Calls for a legal conclusion. You can answer.

Q. In fact, that's what you thought was going to happen and it's plead in your complaint at paragraph No. 10, that the reason you stopped was you saw the cops and you figured you were going to get pulled over.

- A. Roger. And I wanted to explain myself
- Q. Are you currently scheduled to go out on any training exercises or deployment with the National Guard?
- A. They're all rumors.
- Q. So how about the weekends, do you still go once a month?
- A. Roger.
- Q. Is that always the end of the month, the middle? How is that set up?
- A. It's the first weekend of every month. We have the 7th. Then next month will be the first weekend. I can't remember what it is.
- Q. Okay.
- A. But November 7th is my next drill.
- Q. Any plans on leaving the National Guard any time soon?
- A. No. I got four more years. I'm pretty descent high ranking. I got the 13, 14 years in. So I might go the whole term.
- Q. Did you at any time ever explain to any D.O.T. examining physicians that you have a balance problem?
- A. It wasn't big of a problem.
- Q. So the answer is no?
- A. No.
- Q. No. You never have told any D.O.T. physicians that you have a balance problem. Correct?

- A. Right.
- Q. Have you ever told any of the physicians that were completing or participating in your employment examination with Sygma that you had any balance problems?
- A. When they did the physical they seen that there was no issue.
- Q. You didn't volunteer: Hey, by the way. If you were to ask me to stand on one leg and raise my right hand for two minutes I might not be able to do it because I have balance problem?
- A. I might not do it for two minutes, no.
- Q. You never told any of those doctors about a balance problem?
- A. Not at that time.
- Q. At any time have you ever told any of the physicians examining you for physicals, with either the United States Army or the National Guard, that you have a balance problem?
- A. Not standing on my foot for two or three minutes at a time. So, no, I did not tell them.
- Q. Well, as far as they know you're perfectly fit?
- A. Yep.
- Q. And perfectly balanced and wouldn't have any problem doing whatever your responsibilities were. Correct?
- A. Right.
- Q. Is the night of December 5th, 2014, when the officers pulled you over, the very first time in your

life you ever told anyone that you had what you consider to be a balance problem?

A. No. Like when I was doing exercises in the Army I was like: Hey, guys. I'm not going to be able to stand that long on there. They were quite understanding about it.

Q. Give me a specific instance where you told another member in the service that you couldn't perform a portion of the physical activities asked of you as a result of your balance problem.

A. Well, when we do the—say we'll walk the, walk the balance beam. I had one foot on there. I would say: Hey, guys, this might be tough for me. I might not be able to do that.

Oh, yeah. It's understandable. We try. We all fall. We all have a laugh.

Q. How many times after you were pulled over on the 5th of December, 2014, did you make a statement to officers that you had a balance problem?

A. I said it just the one time I do believe. I asked him and he mentioned it a couple times.

Q. That was when you were in the field, before getting back to the station?

A. Yes. He mentioned it a couple times. Oh, I know you had this but I know you mentioned this. But you still failed all these, these, these and these.

Q. All right.

A. So.

Q. Do you have any memory problems?

A. Negative.

- Q. When are you scheduled to undergo your next physical examination performed by anybody; National Guard?
- A. Be February.
- Q. Of?
- A. 2016.
- Q. Is that a yearly for the Guard?
- A. That's for the D.O.T.
- Q. I'm assuming if the doctor doesn't ask you at the D.O.T. exam about a balance issue, you're probably not going to volunteer anything that might jeopardize passing that exam; am I correct?
- A. Roger. Roger. My job is pretty active. It's mostly running and up down a ramp.
- Q. Have you ever made any claim for Workers' Compensation?
- A. No.
- Q. Have you ever collected any type of Social Security Disability?
- A. No.
- Q. Have you ever had any civil lawsuits—and by that I mean something not involving a charge of a crime. Have you ever filed any civil suits besides the one that brings us here today?
- A. No.
- Q. I'm assuming if you were mouthing an unlit cigarette on December 5th, 2014, I think you gestured when you were finished you just what, kind of put it behind your ear?

A. Yes. Right.

Q. You wouldn't—because it's not lit, you wouldn't have to take any visible efforts to try to put it out, would you?

A. No. He asked me: You know your cigarette is not lit.

I said: Yes, I know that.

Q. Do you recall at any time asking any of the officers what it was you were going to be charged with?

A. I did a couple times.

Q. Where was that at?

A. I did it in the vehicle.

Q. That being when you were being transported back to the station?

A. No. The first time when he asked me to go sit in the vehicle to warm up.

Q. All right.

A. And then I asked. Then I asked also the second time before we rolled away. Then I remember asking at the station.

Q. When you were on route back to Monroe, and Sigma, following leaving the police station in Grosse Pointe Farms, did you stop to grab something to eat or drink, given the fact that you missed your sub earlier in the morning?

A. Yes. I stopped. I grabbed a drink. Smoked a cigarette. And then I got in the car and I went.

- Q. So this was in route back to Monroe that you stopped somewhere to get a drink?
- A. Yes. I went to that gas station on the corner.
- Q. The corner?
- A. Of where I was pulled over.
- Q. I think there's a BP Station there?
- A. I do believe so.
- Q. So the station in your mind—if you were sitting in the tractor in the driver's seat, looking out the front window, that station was to the left or right of the rig?
- A. Right.
- Q. Did you get something to eat there too as well?
- A. I grabbed a candy bar and then cigarettes. I didn't have money on me at the time.
- Q. Now it's alleged in your complaint—strike that. Has the fact that you have undergone this incident at the Grosse Pointe Farms, in any way damaged your ability to work with Sygma since the dismissal order came about? By that I mean, they're not discriminating against you just because you got arrested and it was subsequently dismissed, are they?
- A. There's an awkward reputation I have there now. But it's kind of—they say it's joking—it's a joking reputation, I guess.
- Q. Who says that?
- A. I mean it's everything that you go through when you have peers. They joke on that side of you.

- Q. Give me a for instance who? You understand they're joking I guess?
- A. It's one of those things that's changed and, of course, the atmosphere has kind of changed a little bit but nothing I can't work.
- Q. It's not anything you would be seeking damages for I'm assuming?
- A. No.
- Q. I'm assuming guys are guys. Somebody says: Yeah, let the drunk take that load. Somebody else they may say: Let the guy with the little weiner take that load. Just bantering back and forth kind of stuff?
- A. Or they ask you if you took your line before you went to work today so you can get it done quicker.
- Q. You probably have some reply that you give them?
- A. Yeah. It is what it is.
- Q. But nobody has basically to your observation has come out and said or you haven't seen any evidence of the company keeping you from working, if you will?
- A. No.
- Q. Because of that?
- A. No. Joe is very supportive. He called Solomon. He called. Make sure. He called every week. Make sure everything was doing good. He wanted me back so bad.
- Q. Any physical injuries as a result of being stopped and taken to the station and ultimately released?

A. Not at the time, no.

Q. Had you ever had any?

A. No.

Q. It's not like: Yeah, I can't stand up. My butt hurt from their stupid bench that didn't have any cushions. I couldn't walk or I have sciatica. None of that has couple to light?

A. No. Their cells is better than what I slept in overseas.

Q. Have you suffered any mortification as a result of this incident?

MR. RADNER: Objection. Calls for a legal and/or medical conclusion. You can go ahead and answer the question.

Q. Go ahead.

A. Negative.

Q. I'm assuming your family members don't look at you in any disrespectful manner just because this incident happened?

A. Like I said, like people at work, people everywhere. You don't know if they're really joking or not. But, no, not really. Nothing to—.

Q. Nothing to get upset about?

A. Right.

Q. Does it cause you anxiety?

A. No.

Q. Suffer from depression as a result of this?

A. My heart beats when I see a cop now. That's about it.

Q. Mine does too. But for a lot of weird reasons.

But you don't have any, you don't have like nightmares of getting pulled over or anything like that?

A. No.

Q. You haven't had to go—when you went to see these—I'll call them mental health people that checked you out for post-traumatic stress—you didn't tell them anything like: Hey, this incident up in Grosse Pointe Farms. I'm like a nervous Nellie. I can't even hold a cup of coffee or anything like that?

A. No. No.

Q. Would I also be correct that even though you may disagree with the officer's findings and conclusions, you didn't at any time have any impression that he was like out to get you that night, correct?

A. Honestly half and half.

Q. Half and half.

Did you ever—did you meet this individual prior to that night?

A. No.

Q. Why do you think half and half he was, quote, out to get you?

A. Because some issues were not understanding. And some issues were, I guess, understanding in my point of view. Like I didn't understand why he had to do the nighttime check or the nose check 20

times if he didn't find it the first time. Or all the cops are upbooting this guy; saying he's the best of the best. Only he does this, this, this. And frankly, in my eyes is like why he doing it forever then. If he's so good at it, why can't he tell from the first time.

Q. Did anyone look at your nose in the field, to speak?

A. In the field?

Q. At the scene of the stop as opposed to back at the station?

A. Yes. I did the one time. I did there where count to 30 in my mind.

Q. No. I'm asking did anybody look in your nostrils to see if there was any substance, when you were out at the truck?

A. During the first sobriety test outside? Yes, I to believe he did at that time.

Q. Are you sure?

A. Because I did the count to 30 and looked up. I thought at that time he was doing it. I can't remember.

Q. Do you know if he had you look up as part of the balance equation that they try to have you do if you're sober?

A. Yes. That's probably one of the two.

Q. Did they, to your knowledge, take a light and shine it up your nose when you were in front of the car or anything like that?

A. They did take a light to my eyes.

Q. To your eyes?

A. Yeah.

Q. As far as you know, you don't know one way or the other if they were looking up your nostrils. True enough?

A. Yeah.

Q. Okay. Now it's alleged in your complaint that Sygma had a policy that any driver that gets pulled over with a DUI or anything like that gets fired.

A. Yes. That's true.

Q. Who made the exception for you to that?

A. Because the drug test that I took for them.

Q. Who made the decision?

A. Joe Mathias, the head guy.

Q. Do you know if he put anything in writing that said: Look it, you know—

A. He emailed somebody.

Q. All right.

A. I know he emailed because every week he was letting me know: I'm going to have to let you go next week. I'm going to have to let you go next week. I'm going to email this guy. I'm going to email this guy.

So every week he was constantly emailing somebody, getting another week for me; getting another week for me; getting another week for me.

Q. I'm assuming when you were pulled over you didn't make any statement like: Hey, you guys

know I'm a veteran or: Hey, I'm in the Guard or anything like that?

A. I didn't even make a statement or even mention I was a soldier or veteran until I tried to have an honest conversation later on.

Q. Was that at the station?

A. Yeah. That's when I mentioned it the first time because I remember correctly they were saying one of the guys had, was prior Navy or one of the guys had a son that was service. I mentioned, hey, I'm in the service and all this stuff. So I was trying to break the ice with honest conversation.

Q. The no truck sign that you told me about, do you remember what color it was?

A. It was white.

Q. What did it actually say?

A. It said: No trucks allowed with the picture of the little B truck with a cross sign through it.

Q. A little picture of what?

A. It's a little B truck. It looked like a straight cab. It looks like a straight cab truck.

Q. It had like—

A. An X through it. Cross through it.

Q. An X or just one bar?

A. Had the one bar.

Q. Like you see no smoking and stuff like that?

A. Correct.

Q. Did you ever go back and take a picture of that sign or anything like that?

A. No. No, I didn't.

Q. I apologize if I asked you this before but have you ever been back to that location where this was?

A. No. I just went there, that gas station. I haven't been there since. I haven't even took that route.

Q. So you don't do that route anymore?

A. No. They're still going to see Sygma vehicles drive through there.

Q. Do you have any idea of whether or not Sygma delivers to Costco?

A. I don't believe I ever mentioned Costco. If it was a misunderstanding between the words of Costco and Sysco. I don't ever mention Costco.

Q. Do you know today whether or not—

A. We don't deliver to Costco.

Q. Do you occasionally drive tractor/trailers that say Sysco as opposed to Sygma?

A. No, I don't pull their vehicles at all. I don't pull their trailers or their tractors. We pull their product and we deliver it to them but I do not pull their equipment.

MR. DEGROOD: I don't think I have any other questions for you.

MR. RADNER: No questions.

(Deposition concluded.)

[. . .]