

**STATE OF MICHIGAN
IN THE SUPREME COURT
On Appeal from the Michigan Court of Appeals
(Judges Gleicher, Boonstra and Tukul)**

SAMUEL JEROME,

Plaintiff-Appellant,

Case No. 15-148401-CZ
Hon. Denise Langford Morris
COA No. 335328
MSC No.:

v

LIEUTENANT MICHAEL CRUM, in his
Individual and Representative Capacity,
And the CITY OF BERKLEY, a
Municipal entity,

Defendants-Appellees.

PLAINTIFF'S APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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Order Appealed and Relief Sought

Plaintiff appealed as of right from the trial court's order that granted summary disposition as to all defendants on all counts. The trial court issued its order granting summary disposition on September 29, 2016. Because the trial court's grant of summary disposition leaves no remaining claims in this case, it is a final order for the purposes of appeal, pursuant to MCR 7.202(6)(a)(i). After Plaintiff filed his claim of appeal, the Court of Appeals ultimately affirmed the grant of summary disposition in a 2-1 opinion, with Judge Gleicher concurring in part and dissenting in part. *Jerome v Crum*, unpublished opinion of the Court of Appeals, issued December 27, 2018 (Docket No. 335328)

Plaintiff now seeks leave to appeal the decision of the Court of Appeals pursuant to MCR 7.302. As Plaintiff's Application will set forth, that review is proper for several reasons identified by MCR 7.302(B). Specifically, pursuant to MCR 7.302(B)(2), this issue in this case is of significant public interest and involves claims levied against a state actor. Under MCR 7.302(B)(3), the issue in this matter is of major significance to the state's jurisprudence. Finally, under MCR 7.302(B)(5), the decision of the Court of Appeals is both clearly erroneous *and* conflicts with both decisions of the Court of Appeals and decisions of this Court.

Specifically, in granting summary disposition in all regards, the majority in the Court of Appeals concluded that Plaintiff's cause of action was entirely barred by the doctrine of collateral estoppel. The majority relied upon an opinion from the 6th Circuit Court of Appeals in a related but distinct federal action arising from these same events. That federal claim, however, did not include any cause of action premised on a theory of gross negligence. The 6th Circuit never addressed the concept of negligence in its opinion affirming summary judgment, nor did the 6th Circuit address the concept of proximate cause. The majority from the Michigan Court of Appeals

acknowledged those facts, but nonetheless held that Plaintiff's state law claim for gross negligence was precluded by the 6th Circuit's opinion.

The majority's holding expands the concept of collateral estoppel beyond the scope established by this Court in binding opinions, such as *People v Trakhtenberg*, 493 Mich 38, 48; 826 NW2d 136 (2012). It also amounts to a disregard of the analysis of proximate causation set forth by this Court in *Ray v Swager*, 501 Mich 52 (2017). To allow the opinion to stand would be to encourage judicial shortcuts and corner cutting that preclude citizens from having the merits of their claims considered.

QUESTIONS PRESENTED

- I. DID THE LOWER COURTS ERR IN DETERMINING THAT DEFENDANT WAS ENTITLED TO SUMMARY DISPOSITION REGARDING PLAINTIFF'S GROSS NEGLIGENCE CLAIM AS A RESULT OF THE DOCTRINE OF COLLATERAL ESTOPPEL?

Lower Court Answered: NO

Defendants-Appellees Answered: NO

Plaintiff-Appellant Answered: YES

STATEMENT OF FACTS

On May 7, 2013 at approximately 10:00 AM, AK was brought to the Berkley Police Station by her maternal grandmother Judith Stiltner with a report of being sexually abused by her stepfather Samuel Jerome on two occasions. According to what AK reported to the Berkley Police, Samuel had touched her inappropriately on two occasions, the first being while her mother was hospitalized around Christmas time in 2012. The second incident of alleged inappropriate touching occurred shortly before AK presented to the Berkley Police Department on May 7, 2013. See **Exhibit A** at bates pp 4-6.

Berkley via its police department investigated this crime, which included Lieutenant Crum ordering an interview of AK at Care House pursuant to Forensic Interviewing Protocol. Although Lieutenant Crum had interviewed AK at the police station with regard to the alleged sexual abuse on May 7, 2013, he admits that he is not qualified, nor has he had any training in conducting forensic interviews of juveniles. See **Exhibit A**, bates pp 6-7; **Exhibit B**, 8/7/14 Trial Transcript at pp. 33-35 – testimony of Defendant Crum.

On May 16, 2013 AK was taken to the Care House facility for a forensic interview by her mother. The Care House forensic interview was conducted by Tricia Schuster. During the interview AK advised that Samuel did not touch her vagina, either above or below her clothing. She recalled him accidentally touching her breast. She further told the interviewer that although Samuel's hand rubbed her hip bones near her pubic line, she asked him to stop and Samuel stopped rubbing her. AK essentially recanted the allegations of sexual wrong doing by Plaintiff Jerome during the expert forensic interview. See **Exhibit A** at bates p 7.

On June 5, 2013, during a phone contact with Oakland Child Protective Services, Defendant Crum indicated that because AK had recanted her allegations against Plaintiff during

the forensic interview, his case would be closed. Oakland CPS found there was insufficient evidence to proceed against Mr. Jerome. See **Exhibit A** at bates pp 35-36, **Exhibit B** 8/7/14 trial testimony of Defendant Crum at p. 55.

Despite the fact that AK recanted her previous statements and the case should have been closed at that time, Crum improperly and impermissibly attempted to go back and “re-interview” AK for a third time. Defendant Crum admitted during Samuel’s criminal trial that is not customary to go back and re-interview an alleged juvenile victim following an interview conducted pursuant to the Forensic Interviewing Protocol. Defendant Crum further has testified that he is not supposed to interview a minor without parental consent (he did not have AK’s parents consent to interview or contact her again following the Care House interview), that a witness who changes her story is not credible, and, finally, what a minor says during a forensic interview at Care House “overrides” what the witness says to police. **Exhibit A**, bates pp 7-8; **Exhibit B**, 8/7/14 trial testimony of Defendant Crum at pp. 50, 52-54, 66, 99-100, 121, 142.

Despite having no parental consent to interview AK, and despite indicating to CPS that he was closing his file, Detective Crum convinced AK’s maternal grandmother, Judy Stiltner that the investigation was still open and to allow Detective Crum to re-interview AK on July 11, 2013. See **Exhibit A** at bates pp 7-9. Ms. Stiltner had been the target of several applications for protective orders by AK’s mother Stacey, in which Stacey was identified as the next friend of AK. See Exhibit A at bates pp 62-68. Further, Stacey’s counselor from Reflections Counseling Center, advised that Ms. Stiltner was “abusive” and “controlling” towards his daughter and her children, and that he advised that Stacey and her children “cut all ties” with Ms. Stiltner. See **Exhibit A**, bates p 61.

Nevertheless, Detective Crum accepted Ms. Stiltner's representations continued in his pursuit of Plaintiff. Detective Crum, though, did not take AK back to care house for a forensic interview, or have her submit a written statement, but rather wrote his own summary of the interview indicating that AK re-iterated her earlier allegations of sexual assault against Plaintiff Jerome. **Exhibit A**, bates pp 7-9.

Following the third interview with AK on July 11, 2013, Detective Crum submitted the case to the Oakland County Prosecutor. The prosecutor responded with a request for additional information before issuing a warrant. See **Exhibit C**. Detective Crum then interviewed AK for a FOURTH time, again without her parents' consent, on August 21, 2013. According to Defendant Crum's response to the prosecutor's request for further information, the statement given by AK in her August 21 interview was "identical" to her initial statement given to Detective Crum in May. See **Exhibit A**, bates pp 10-12.

There was no written statement to verify the conclusions of Defendant Crum which were provided to the prosecutor. Thus, the only information the prosecutor had to base the decision to issue a warrant for the arrest of Plaintiff was the information provided by Defendant Crum. Samuel was arrested on September 18, 2013 for the crime of Criminal Sexual Conduct (CSC) in the first degree and was held on a \$500,000.00 bond, despite the fact that Crum knew that the alleged victim had completely recanted her prior statement.

A preliminary examination was held in the 45 A Judicial District Court for the County of Oakland in the matter of the State of Michigan v Samuel James Jerome on October 9, 2013. At the preliminary exam, Samuel was bound over on charges of Criminal Sexual Conduct in the first degree and his \$500,000.00 bond was continued. Samuel remained in the Oakland County Jail from September 18, 2013 until his criminal trial began on August 4, 2014.

On August 7, 2014, Lieutenant Michael Crum was called to testify at Samuel's criminal trial. On August 7, 2014 while on the witness stand and under oath, Crum denied videotaping any interviews of AK in connection with the criminal case against Samuel. Further on August 7, 2014 Crum admitted while under oath and on the witness stand that pursuant to the policies and procedures of the Berkley Police Department officers are not allowed to interview juveniles by themselves and, "videotaping is not an option." **Exhibit B**, at pp. 21-23.

On the last day of Samuel's criminal trial on August 8, 2014 Crum, for the first time, appeared and produced a disc containing a copy of three videotaped interviews he had improperly and impermissibly conducted of witnesses AK, her sister SK and her maternal grandmother Judith Stiltner. Trial was adjourned by the Honorable Judge Rudy J. Nichols for the parties to review the previously undisclosed videotaped interviews. Despite many requests by Samuel's criminal defense attorney, Marsha Kosmatka, during the course of discovery, these videotaped were never disclosed and their actual existence was denied. After reviewing the undisclosed videotaped interviews of the witnesses, Judge Nichols adjourned the trial and reduced Samuel's bond from \$500,000.00 to \$1,000.00 in order for him to get out of jail. See **Exhibit G**, trial proceedings transcript of 8/8/14 pp. 6-45.

Defendants falsely arrested and imprisoned Samuel who was held in the Oakland County Jail from the date of his arrest on September 18, 2013 through August 8, 2014 when the trial was adjourned, and his bond was reduced. On October 6, 2014 when the parties returned for the continuation of Samuel's trial, the Oakland County Prosecutor's office moved the court for an Order of Nolle Prosequi for the reason that after further investigation, the People could not sustain their burden of proving the case beyond a reasonable doubt at trial and therefore the best interest

of justice would be served by dismissing the case with prejudice and entering an Order of Nolle Prosequi. **Exhibit A** at pp. 43-45; **Exhibit F**, Petition and Order for Nolle Prosequi.

Despite having the exculpatory evidence including the Case House interview and the three undisclosed and improperly videotaped witness interviews, neither Crum nor Berkley produced the interviews and affirmatively denied their existence while under oath. Moreover, Defendant Crum falsely and intentionally mischaracterized the statements by AK during her interview with Defendant Crum on August 21, 2013 by describing her statement as “exactly” the same as she had made in her initial statement of May 7, 2013. In fact, there were a number of significant discrepancies made by AK during her August statement of which the prosecutor was never informed in making the decision to issue an arrest warrant for Plaintiff. **See Exhibit D**, Deposition Testimony of Defendant Crum at pp. 130-155; **Exhibit E**, video interview of AK Krahe on August 21, 2013.

Procedural History

As a result of the events described above, Plaintiff filed a cause of action in the United States District Court for the Eastern District of Michigan, which presented a mix of claims under state and federal law. Subsequently, the federal district court dismissed Plaintiff’s state law claims without prejudice, choosing not to take jurisdiction over the non-federal questions. Thereafter, Plaintiff filed this action in Oakland Circuit Court. Plaintiff therefore had one case active in federal court based on violations of his federal civil rights, and one case active in state court for state actions arising out of those same events.

In the state case, Defendants ultimately moved for summary disposition pursuant to MCR 2.116(C)(10), in which they argued that there was probable cause to arrest Plaintiff and in which they argued that the Defendant officer was entitled to governmental immunity. Plaintiff filed a

response addressing those arguments and explaining why Defendant's failure to honestly apprise the Court of the relevant facts prior to trial precluded a reliable finding of probable cause and therefore rendered any arrest or imprisonment unlawful.

Following discovery in the federal action, and while the motion for summary disposition was pending in state court, the Defendants moved for summary judgment. After briefing and a hearing on the motion, the District Court granted the motion. The Court determined that there was probable cause to arrest Plaintiff and that the individual officer was entitled to qualified immunity under federal law relative to Plaintiff's federal claims of false arrest, false imprisonment and malicious prosecution. The Court also found that summary judgment was proper relative to Plaintiff's claim of a violation of due process for failing to disclose exculpatory evidence. Finally, because the Court found that there were no underlying constitutional violations, summary judgment was granted as to Plaintiff's claim of municipal liability. The motion for summary judgment was thus granted in full. Plaintiff then filed an appeal in the United States Court of Appeals for the Sixth Circuit.

After the grant of summary judgment in federal district court, and while the federal appeal was still pending, Defendants filed a reply to Plaintiff's summary disposition response brief in state court in which Defendants argued that Plaintiff was now collaterally estopped from bringing his state law claims. Under Defendants' theory, the state court was bound by the federal court's findings, and those findings were dispositive of the issues in the state action. Pursuant to the Court rules, as this Court is aware, Plaintiff was not permitted to file a response to that reply brief.

The parties proceeded to a hearing on the summary disposition motion in state court, in which they reiterated the arguments from their briefs. When Plaintiff's counsel addressed the Court, he stated to the Court that Defendants had introduced the idea of collateral estoppel in a

reply brief that Plaintiff was not permitted to respond to and stated that if the Court was persuaded by the collateral estoppel argument, he would like an opportunity to fully brief the subject. The Court did not issue its ruling at the close of the hearing. Instead, the Court later issued a one-page opinion and order in which it granted the summary disposition motion on the basis of collateral estoppel, relying on the findings of the federal district court.

Following the grant of summary disposition in Oakland Circuit Court, Plaintiff filed an appeal as of right in the Michigan Court of Appeals. Plaintiff argued that the trial court erred in granting summary disposition on the basis of collateral estoppel where 1.) that argument was not raised until Defendants' reply brief in support of the summary disposition motion and 2.) Plaintiff's federal claims and not even been disposed of because an appeal was pending in the United States Court of Appeals for the 6th Circuit. Plaintiff then argued that even if the trial court did not procedurally err, summary disposition was still improper because Defendants' argument was substantively deficient. Plaintiff argued that his complaint in Oakland Circuit Court included a claim of gross negligence, for which there was no counterpart in the claim in the Eastern District of Michigan. Therefore, because the Eastern District of Michigan (and, ultimately the 6th Circuit), never made any findings relative to whether Crum was grossly negligent, collateral estoppel could not apply to that claim.

While Plaintiff's appeal was pending the Michigan Court of Appeals, the parties proceeded to oral argument in the 6th Circuit. The 6th Circuit affirmed the grant of summary judgment on all of Plaintiff's federal claims. See *Jerome v Crum*, 695 Fed Appx 935 (2017) (**Exhibit H**). The Court generally found that Defendant Crum was entitled to qualified immunity because there was probable cause to arrest Plaintiff. Because the concepts were irrelevant to any of Plaintiff's federal claims, the Court's opinion never discussed the concepts of gross negligence or proximate cause.

After the opinion was issued by the 6th Circuit, the parties proceeded to oral argument in the Michigan Court of Appeals. Following oral argument, the Court of Appeals affirmed the grant of summary disposition in a 2-1 opinion (**Exhibit I**). The majority found that the trial court was permitted to consider the applicability of collateral estoppel despite its late injection into the proceedings. The majority then found that collateral estoppel did apply to each count in Plaintiff's Complaint in state court. Regarding the claim of gross negligence, the majority curiously stated that "While we agree that the determination of probable cause in the federal action does not equate to a finding regarding gross negligence, the claim is still barred under principles of collateral estoppel." The majority proceeded to explain that the 6th Circuit's opinion precluded Plaintiff from re-litigating the issue of causation. According to the majority, the 6th Circuit found that Crum's failure to disclose the recording of the August interview, as well as Crum's misrepresentation of what occurred in the interview, did not alter the fact that probable cause was established during the preliminary examination. The majority from the Court of Appeals thus concluded that even if Plaintiff could establish that Defendant was grossly negligent, Plaintiff could not satisfy the causation element of his claim because he was bound by the federal findings regarding cause.

Judge Gleicher concurred in part and dissented in part. She explained that collateral estoppel could not apply to Plaintiff's claim for gross negligence, as there was no federal counterpart for that claim or any federal claim that overlapped with the elements of a gross negligence claim. Citing to *People v Trakhtenberg*, 493 Mich 38, 48; 826 NW2d 136 (2012), Judge Gleicher opined that collateral estoppel could not apply because a question of fact essential to the judgment was *not* actually litigated and determined by a valid and final judgment. Specifically, Judge Gleicher stated

According to the majority, the Sixth Circuit determined that Crum's withholding of the videotaped interview did not proximately cause Jerome any

injury or damage, eliminating his ability to prove the necessary elements of gross negligence. Three fatal errors contaminate this conclusion. First, the Sixth Circuit never made such a finding. The majority has flatly mischaracterized that court's opinion. Second, the Sixth Circuit never addressed whether proximate cause existed for Jerome's gross negligence claim based on Crum's withholding of the interview videotape; none of the legal aspects of this state law cause of action were "actually litigated" or determined in its opinion. Third, the snippets the majority cherry-picks from the Sixth Circuit opinion do not stand for the proposition for which the majority cites them.

As a result of those disagreements with the majority's logic, Judge Gleicher would have reversed the grant of summary disposition relative to Plaintiff's claim of gross negligence and would have remanded for further proceedings.

Now, Plaintiff seeks leave to appeal in the Michigan Supreme Court. For the reasons set forth below, as well as the reasons set forth throughout Judge Gleicher's dissenting opinion, the doctrine of collateral estoppel is inapplicable to Plaintiff's state law claims of gross negligence and both the trial court and the majority in the Court of Appeals erred in holding otherwise.

STANDARD OF REVIEW

Defendant asserted that summary disposition was proper pursuant to MCR 2.116(C)(10). When a motion is brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Furthermore, all inferences must be drawn in favor of the non-moving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). Only where the Court is satisfied that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law is summary disposition proper. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which

reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In the context of MCR 2.116(C)(10), the Michigan Court of Appeals has stated that it “is liberal in finding a genuine issue of material fact,” *Benton v Dart Properties, Inc*, 270 Mich App 437; 715 NW2d 335 (2006), and it is well-established that factual determinations are reserved for juries, as opposed to Courts. *Smith v Anonymous Joint Enterprise*, 487 Mich 102, 130; 793 NW2d 593 (2010).

Defendant also asserted that summary disposition was proper pursuant to MCR 2.116(C)(8). “A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery.” *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 424 (2008). As the Michigan Supreme Court has explained, “[i]n reviewing the outcome of a motion under MCR 2.116(C)(8), we consider the pleadings alone. We accept the factual allegations in the complaint as true and construe them in a light most favorable to the nonmoving party.” *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008).

Finally, Defendant asserted that summary disposition was proper pursuant to MCR 2.116(C)(7). MCR 2.116(C)(7) provides that a motion for summary disposition may be raised on the ground that a claim is barred because of immunity granted by law. To survive a motion brought pursuant to MCR 2.116(C)(7) that is premised on a theory of governmental immunity, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). Neither party is required to file supportive material, though any documentation that is provided to the court must be admissible evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). “All well-pleaded

allegations are accepted as true and construed in favor of the nonmoving party.” *Smith*, 223 Mich App at 616. A plaintiff can overcome such a motion by alleging facts that support application of an exception to governmental immunity. *Burise v City of Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009).

ANALYSIS

I. THE MAJORITY UNQUESTIONABLY COMMITTED A LEGAL ERROR WHEN IT FOUND THAT THE DOCTRINE OF COLLATERAL ESTOPPEL APPLIED TO PLAINTIFF'S CLAIM OF GROSS NEGLIGENCE

In affirming the trial court’s grant of summary disposition, the trial court found that collateral estoppel barred Plaintiff's state law claims, including the claim for gross negligence, because Plaintiff was bound by the findings in the federal action in which summary judgment was granted and affirmed. As Judge Gleicher stated in her partial dissent, “[a] party relying on the doctrine of ‘collateral estoppel must show that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel.’” *Jerome v Crum*, unpublished opinion of the Court of Appeals, issued December 27, 2018 (Docket No. 335328), quoting *People v Trakhtenberg*, 493 Mich 38, 48; 826 NW2d 136 (2012) (cleaned up). Thus, in order to determine whether collateral estoppel applies, the Court must necessarily compare the claims currently being litigated (a state law claim for gross negligence) with the claims in which there has been a final judgment entered (various federal constitutional claims) in order to determine whether a fact essential to the claim currently being litigated was necessarily decided in the claim in which there was a final judgment.

Plaintiff's complaint in the federal district court included the following counts: 1.) false arrest and imprisonment; 2.) malicious prosecution; 3.) due process violation and 4.) municipal liability.

Because there is no such claim under 42 USC 1983, Plaintiff did not bring a federal claim premised on a theory of negligence or gross negligence. In Plaintiff's action in state court, however, Plaintiff asserted a gross negligence claim. In order to demonstrate the differences in those claims, Plaintiff will provide this Court with the elements of each.

“A false arrest claim under federal law requires a plaintiff to prove that the arresting officer lacked probable cause to arrest the plaintiff.” *Voyticky v Village of Timberlake, Ohio*, 412 F3d 669, 677 (6th Cir 2005). When determining if probable cause exists, an officer “cannot look only at the evidence of guilt while ignoring all exculpatory evidence.” *Gardenhire v Schubert*, 205 F3d 303, 318 (6th Cir 2000). As the Sixth Circuit has explained, “[p]olice officers cannot, in good faith, rely on a judicial determination of probable cause [to absolve them of liability] when that determination was premised on an officer's own material misrepresentations to the court.” *Gregory v City of Louisville*, 444 F3d 725, 758 (6th Cir 2006). Rather, if the material misrepresentations *or* omissions were made intentionally and deliberately *or* with reckless disregard for the truth, liability will be had. *Sykes v Anderson*, 625 F3d 294 (6th Cir 2010) “If the affidavit contains false statements or material omissions, we set aside the statements and include the information omitted in order to determine whether the affidavit is still sufficient to establish probable cause.” *Id.*

“The Sixth Circuit recognize[s] a separate constitutionally cognizable claim of malicious prosecution under the Fourth Amendment, which encompasses wrongful investigation, prosecution, conviction, and incarceration.” *Sykes v Anderson*, 625 F3d 294 (6th Cir 2010) (internal citation and quotation omitted). A claim of malicious prosecution is separate and distinct from a claim of false arrest and imprisonment. While a claim of false arrest requires a court to determine whether there was probable cause to arrest the plaintiff, a claim of malicious prosecution requires the court to determine “whether probable cause existed to initiate the criminal proceeding

against the Plaintiffs.” *Id.* at 310-311. In other words, the existence of distinct causes of action for false arrest and malicious prosecution recognizes that even if there was probable cause in support of an arrest, developments during the prosecution of the case can eliminate the probable cause that initially existed.

Plaintiff's claim for a due process violation in his federal complaint was premised on the argument that Defendant violated his right to due process when he withheld exculpatory evidence. To maintain such an action, a Plaintiff must prove that 1.) the evidence at issue was favorable to him because it was impeaching or exculpatory; 2.) the evidence was willfully or inadvertently suppressed by the state and; 3.) prejudice ensued. *Strickler v Greene*, 527 US 263, 281-281 (1999).

Finally, Plaintiff brought a federal claim alleging municipal liability. A municipality is not vicariously liable for its employees' violations of a citizen's constitutional rights. The Supreme Court in *Monell v Department of Social Services*, 436 US 658, 690 (1978), held that municipalities and other local governments may be held liable under 42 U.S.C. § 1983 for executing a government policy or custom, that “inflicts the injury [for which] the government as an entity is responsible.” *Monell*, 436 US at 690. A plaintiff must “identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.” *Polk County v Dodson*, 454 US 312, 326 (1981).

As the Court will see, none of Plaintiff's allegations under federal law involve an analysis of whether the governmental employee caused the Plaintiff's injuries through an act of gross negligence or even negligence. In contrast, pursuant to MCL 691.1407(2)(c), a government employee such as Defendant is subject to tort liability in Michigan if his conduct amounts to gross negligence that is the proximate cause of the Plaintiff's claimed injuries. Gross negligence has

been defined by statute as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a).

In holding that summary judgment was proper in all regards, the 6th Circuit stated that “Jerome's claims depend upon a lack of probable cause to arrest, detain, and prosecute him and on the materiality of Crum's misrepresentation of A.K.'s August 21 interview. But any way that you examine it, those claims fail. Objectively, reviewing all of the evidence ourselves, we can see that probable cause for arrest and detention existed.” While Plaintiff disagrees with the 6th Circuit’s conclusions regarding the existence of probable cause, the Court was *legally* correct in finding that each of Plaintiff's claims (with the exception of the Due Process claim), required Plaintiff to show that there was not probable cause to arrest, imprison and prosecute him.

Because Plaintiff's federal claims were dependent on showing a lack of probable cause, the 6th Circuit’s opinion never discusses whether Crum was either negligent or grossly negligent in his handling of the case. Naturally, because the 6th Circuit never discusses Crum’s acts in the context of a negligence theory, the 6th Circuit likewise never discussed whether Crum’s potential negligence could be considered a proximate cause, let alone *the* proximate cause, of Mr. Jerome’s injuries. No reasonable reading of the 6th Circuit’s opinion could lead to any other conclusion. The terms “negligent” and “negligence” never appear in the opinion, with the exception of stating that the claim for gross negligence had been dismissed at the federal level without prejudice. The terms “causation,” “proximate cause” and “legal cause” likewise never appear in the opinion. Indeed, the term “cause” only appears in the opinion when the 6th Circuit is discussing the concept of “probable cause.”

It appears that in holding that collateral estoppel barred Plaintiff's claim for gross negligence, the majority here modified the collateral estoppel analysis. Instead of analyzing whether the prior

judgment resolved a factual issue necessary to the subsequent action (it did not), the majority essentially speculated as to what the 6th Circuit *would have done* had it been tasked with addressing proximate cause. The majority took an analytical shortcut, and in doing so, it impermissibly expanded the scope of collateral estoppel.

In this Court's recent opinion in *Ray v Swager*, 501 Mich 52 (2017), the Court engaged in a detailed analysis of what a Plaintiff must show in order to establish that a governmental defendant was "the proximate cause" of his injuries for purpose of the exception to governmental immunity. The Court discussed how the concept of proximate causation, as used in the GTLA, involved analyzing the legal responsibility of the defendant, with emphasis on the foreseeability of the consequences at issue.

In stark contrast to the dictates of *Ray*, the trial court in this case summarily dismissed Plaintiff's gross negligence claim with absolutely no analysis. On appeal, the majority likewise engaged in no meaningful analysis of causation, finding that the 6th Circuit's conclusions obviated the need. Plaintiff has presented clear evidence that Jerome's failure to disclose the videotape at issue, along with his misrepresentation of what occurred in his final interview of AK, was the key factor in his continued imprisonment. Once the prosecution was presented with the truth of what happened in that interview, it decided to drop its pursuit of Mr. Jerome. There is no authority that precludes Plaintiff from pursuing a claim for gross negligence under state law under that factual scenario.

As of now, a finder of fact has never determined whether Mr. Crum was grossly negligent in his dealings with the prosecution and his handling of AK's interview, nor has there been any determination that Mr. Jerome would have suffered the same damages had Mr. Crum acted without reckless disregard for whether he injured Mr. Jerome. The application of collateral estoppel carries

significant consequence as it disposes of a Plaintiff's opportunity to have the merits of his claim considered. In light of those significant consequence, our courts are obligated to only apply collateral estoppel where there has been an actual determination of a necessary fact in the subsequent action. Here, the majority squinted at the 6th Circuit's opinion, stretched it beyond its original meaning and, in the process, failed to follow binding precedent. The error demands correction.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Plaintiff respectfully requests that this Honorable Court grant this Application for Leave to Appeals to give full consideration to the issue presented above. Alternatively, Plaintiff requests that this Honorable Court either peremptorily reverse the Court of Appeals for the reasons set forth in Judge Gleicher's partial dissent or grant oral argument on this Application for Leave to Appeal.

Respectfully submitted,

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