

**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. 159093

v

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

Defendants-Appellees.

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**PLAINTIFF SAMUEL JEROME'S SUPPLEMENTAL BRIEF**

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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 *Jerome v Crum*, unpublished opinion of the Court of Appeals, issued December 27, 2018 (Docket No. 335328)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 set forth, that review is proper for several reasons identified by MCR 7.302(B). Specifically, pursuant to MCR 7.302(B)(2), the 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 6<sup>th</sup> 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 6<sup>th</sup> Circuit never addressed the concept of negligence in its opinion affirming summary judgment, nor did the 6<sup>th</sup> 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 6<sup>th</sup> 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.

**QUESTION PRESENTED**

- I. DID THE CIRCUIT COURT ERR IN GRANTING DEFENDANTS SUMMARY DISPOSITION ON THE BASIS OF THE THE DOCTRINE OF COLLATERAL ESTOPPEL?

Lower Courts Answered: NO  
Defendants-Appellees Answered: NO  
Plaintiff-Appellant Answered: YES

### STATEMENT OF FACTS

This cause of action arises out of the arrest, imprisonment and prosecution of Plaintiff Samuel Jerome, who was accused of sexual assault before all charges were ultimately dropped after exculpatory evidence surfaced during his criminal trial.

On May 7, 2013 at approximately 10:00 AM, the alleged victim, AK, was brought to the Berkley Police Station by her maternal grandmother, Judith Stiltner, with an allegation that AK was 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. **App at 004a-006a.**

The Berkley Police investigated the alleged crime, which resulted in 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 regarding the alleged sexual abuse on May 7, 2013, he admitted that he is not qualified and has not had any training in conducting forensic interviews of juveniles. **App at 006a-007a, 071a-073a.**

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 he complied. AK essentially recanted the allegations of sexual wrongdoing during the expert forensic interview. **App at 007a.**



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. **App at 035a-036a, 093a.**

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. **App at 007a-008a, 088a-092a, 104a, 137a-138a, 159a, 180a.**

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. **App at 007a-009a.** 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” and advised that Stacey and her children “cut all ties” with Ms. Stiltner. **App at 043a.** Nevertheless, Detective Crum accepted Ms. Stiltner’s allegations and 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, in which he indicated that AK re-iterated her earlier allegations of sexual assault against Plaintiff Jerome. **App at 007a-009a.**

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 it could issue a warrant. **App at 183a-184a.** Consequently, 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. **App at 010a-012a.**

There was no written statement to verify the conclusions that Defendant Crum 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 45A Judicial District Court for the County of Oakland in the matter of *The People 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, Crum admitted

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.” **App at 059a-061a.**

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 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, those videotapes 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. **App at 241a-279a.**

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. **App at 025a-026a, 234a-235a.**

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 before making the decision to issue an arrest warrant for Plaintiff. **App at 218a-224a, as well as Exhibit D to Plaintiff's application for leave to appeal, the video interview of AK on August 21, 2013.** Once the prosecutor actually reviewed those tapes and discovered that they called into question the credibility of Mr. Jerome’s accuser, the prosecutor committed to dismissing the case in its entirety.

#### **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. **App at 313a-314a.** Thereafter, Plaintiff filed this action in Oakland Circuit Court. **App at 315a-325a.** 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 law claims 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. **App at 281a-294a.** 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. Defendant primarily relied upon the decision in *VanVorous v Burmeister*, 262 Mich App 467 (2004), which will be discussed in detail below. **App at 341a-347a.** 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 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. **App at 350a-357a.** 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, stating that it was bound by the findings of the federal district court. **App at 359a.**

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 6<sup>th</sup> 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 6<sup>th</sup> 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 in the Michigan Court of Appeals, the parties proceeded to oral argument in the 6<sup>th</sup> Circuit. The 6<sup>th</sup> Circuit affirmed the grant of summary judgment on all of Plaintiff's federal claims. See *Jerome v Crum*, 695 Fed Appx 935 (2017) (**App at 281a-294a**). 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 6<sup>th</sup> 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. 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 6<sup>th</sup> Circuit's opinion precluded Plaintiff from re-litigating the issue of causation. According to the majority, the 6<sup>th</sup> 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 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. **App at 295a-303a.**

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. **App at 304a-312a.**

Plaintiff subsequently sought leave to appeal in this Court. On October 4, 2019, this Court issued its order directing the Clerk to schedule oral argument on Plaintiff's application for some future date. The Court additionally ordered that Plaintiff submit a supplemental brief addressing "whether the circuit court erroneously granted summary disposition to the defendants on the ground of collateral estoppel." For the reasons set forth below, as well as the reasons set forth throughout Judge Gleicher's dissenting opinion and in Plaintiff's Application for Leave to Appeal, the doctrine of collateral estoppel is inapplicable to Plaintiff's state law claims of gross negligence and the circuit court 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 CIRCUIT COURT UNQUESTIONABLY COMMITTED A LEGAL ERROR WHEN IT FOUND THAT THE DOCTRINE OF COLLATERAL ESTOPPEL ENTITLED DEFENDANTS TO SUMMARY DISPOSITION**

As is stated above, this Court has requested supplemental briefing on the issue of “whether the circuit court erroneously granted summary disposition to the defendants on the ground of collateral estoppel.” To address that issue necessarily requires an examination of what was argued to, and ruled on, by the circuit court. As this Court will see, while that point may seem elementary, the majority opinion in the Court of Appeals entirely failed to conduct that examination.

#### **A. The circuit court erred in holding that *VanVorous* necessitated granting summary disposition**

When Defendants moved for summary disposition, they initially argued that there were no genuine issues of material fact relating to any of Plaintiff’s claims under state law. At the time of that argument, Plaintiff’s claims in federal district court were still pending. Then, after Plaintiff

responded to Defendants' motion for summary disposition, but before the hearing on that motion, the federal district court ruled that Defendants were entitled to summary judgment on Plaintiff's claims under *federal law*, having previously elected to not address the merits of Plaintiff's state law claims.

Defendants took the ruling of the federal district court and argued in their reply to Plaintiff's response to the motion for summary disposition that collateral estoppel now barred all of Plaintiff's state law claims. As is explained in more detail below, a party invoking 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." *People v Trakhtenberg*, 493 Mich 38, 48; 826 NW2d 136 (2012) (cleaned up).

In advancing that doctrine in this case, Defendants almost exclusively relied upon the Court of Appeals decision in *VanVorous*. *VanVorous* was the central legal support for the estoppel argument in Defendants' reply brief, was similarly the focus of Defendants' argument at the summary disposition hearing and was the *only* authority the circuit court cited in its cursory order granting Defendants' motion. Despite that, the Court of Appeals somehow never addressed whether the sole authority both Defendants and the circuit court relied upon *actually* supported the order from which Plaintiff appealed.

The circuit court erred in concluding that *VanVorous* supported Defendants' assertion of a collateral estoppel defense. In *VanVorous*, the Plaintiff was fatally shot by three police officers following a lengthy police chase. That chase culminated in the Plaintiff's vehicle colliding with one of the police cruisers and then continuing to accelerate, while its bumper was hooked to that police cruiser, causing the Plaintiff's vehicle to slowly push the police cruiser toward a ditch. After

the Defendant officers repeatedly ordered the Plaintiff to stop his vehicle to no avail, the three officers intentionally opened fire, killing the Plaintiff. *VanVorous*, 262 Mich App at 470-472.

Following those events, the Plaintiff's estate brought suit in Federal district court, bringing a mix of state and federal claims. It appears that the estate asserted a claim under federal law alleging the Defendants violated the Plaintiff's right to be free from unreasonable force, as guaranteed by the Fourth Amendment. The estate also asserted three claims under state law- assault and battery, intentional infliction of emotional distress and gross negligence. *VanVorous*, 262 Mich App at 473.

The *VanVorous* Defendants moved for summary judgment in federal court. The district court subsequently granted summary judgment relative to the Fourth Amendment claim and then dismissed the state law claims without prejudice upon electing to not exercise jurisdiction over those claims. In ruling that summary judgment was proper on the federal claim, the court found that Defendants were entitled to qualified immunity because their use of force was reasonable and justified. *VanVorous*, 262 Mich App at 473-476.

The estate filed an action in state court, reasserting the claims of assault and battery, intentional infliction of emotional distress and gross negligence. Thereafter, the Defendants moved for summary disposition and invoked collateral estoppel, arguing that the issue of whether the use of force was reasonable had already been litigated and that the parties were bound by the district court's determination. The circuit court agreed, and the Plaintiff's state law claims were dismissed. *VanVorous*, 262 Mich App at 476.

On appeal to the Michigan Court of Appeals, the Plaintiff argued that the circuit court improperly relied on collateral estoppel. The Court of Appeals affirmed the grant of summary disposition. The Court explained that to prevail on a claim for intentional infliction of emotional

distress, the Plaintiff had to show that the Defendants acted outrageously. Such a showing, however, would contradict the district court's finding that the use of force was reasonable and justified. Similarly, to meet its burden on the assault and battery claim, the estate would have to show that Defendants unlawfully utilized unjustified force when fatally shooting Plaintiff. Again, such a showing would contradict the district court finding that the force used was reasonable and justified. *VanVorous*, 262 Mich App at 481-483.

The most important portion of *VanVorous* for purposes of the instant case was the portion addressing the Plaintiff's claim of gross negligence. The Court explained that the Plaintiff alleged that the Defendants

“breached the duty of care they owed to Mr. VanVorous by utilizing excessive force to subdue or control Mr. VanVorous and failing to follow proper police procedure in apprehending him.” Thus, plaintiff's claim of gross negligence is fully premised on her claim of excessive force. As defendants correctly note, this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence. Thus, plaintiff did not state a claim on which relief could be granted. Moreover, unveiling plaintiff's true claim of excessive force leads to the inevitable conclusion that the claim is also collaterally estopped.” [*VanVorous*, 262 Mich App at 483-484.]

As the above passage from *VanVorous* demonstrates, the Court of Appeals concluded that the Plaintiff in that case *did not* actually present a gross negligence claim. Rather, the Plaintiff was asserting that it was *grossly negligent* for Defendants to *intentionally* use excessive force. It was a mere repackaging of the Plaintiff's excessive force claim under the Fourth Amendment, which compelled the Court of Appeals to find that the federal district court's prior opinion was binding. The Court thus *did not* find that collateral estoppel precluded a claim of gross negligence, but that Plaintiff never theorized that the Defendants were grossly negligent.

Imagine that in *VanVorous*, the Plaintiff was shot a single time and alleged that the officer intentionally used force that was unjustified under the circumstances. If that Defendant then

admitted that he did indeed shoot the Plaintiff, but that his gun accidentally discharged because he was not wielding it in a safe fashion, the Plaintiff would have surely been able to assert a claim of excessive force as well as a claim of gross negligence, leaving it to the jury to determine the credibility of the witnesses and weigh the various pieces of evidence. That claim of gross negligence would not have been impacted by the federal district court's findings regarding the Fourth Amendment.

In the present case, Plaintiff's Complaint set forth that Defendants were in possession of exculpatory evidence in the form of the video of Crum's interview with the accuser. The Complaint then stated that Crum, either through intentionality or gross negligence, failed to produce that evidence in a timely fashion. **App at 320a.** Plaintiff contends that a reasonable trier of fact could conclude that Crum acted intentionally and that he knowingly lied in order to have Plaintiff arrested, imprisoned and prosecuted. *However*, Crum has alleged that he did not know that the evidence in question existed and that he did not intentionally mislead the prosecutor about the contents of the last interview of the accuser. Stated differently, Crum was admitting that he was unaware or had forgotten that the interviews were recorded, that he was not familiar enough with his own file to know that it contained the DVDs of the interviews and that he did not recall the contents of those interviews well enough to provide the prosecutor with an accurate oral description of what occurred. In light of that defense, one of two things is true- either Crum intentionally withheld evidence and misstated facts to harm Plaintiff, or Crum harmed Plaintiff through his acts of gross negligence. Plaintiff is not merely renaming the same cause of action but is instead pleading claims that are consistent with the evidence.

Unlike the Court in *VanVorous*, the circuit court in this case never analyzed Plaintiff's allegations to compare them to the allegations in the federal case. Likewise, unlike in *VanVorous*,

the circuit court conducted no analysis of the federal district court's opinion and order to determine whether that opinion addressed the issues raised in the state litigation. Had it done so, it would have seen that the district court's opinion never used the terms "negligence," "causation" or "proximate cause." As this Court will see upon reviewing the hearing transcript and the order granting summary disposition, the circuit court essentially provided zero reasoning in dismissing Plaintiff's claims. It appears that the circuit court felt that *VanVorous* compelled the application of collateral estoppel (despite in being distinguishable from the present case) and, in turn, felt it unnecessary to analyze the collateral estoppel elements described in cases like *Trakhtenberg*. **App at 359a.**

The lack of analysis at the circuit court level is particularly problematic when taken in conjunction with the procedural history of this case. Again, Defendants raised the issue of collateral estoppel for the first time in a reply brief. Plaintiff requested an opportunity to brief the issue, which the circuit court denied. Respectfully, if the circuit court determined that it was unnecessary to allow Plaintiff to brief the issue of collateral estoppel, it was incumbent upon the Court to ensure that it was thoroughly analyzing Defendants' argument and examining the federal district court's opinion and the binding authority of this state before taking the step of dismissing a case in its entirety.

**B. Just as *VanVorous* did not support applying collateral estoppel to this case, neither did the jurisprudence of this Court**

As Judge Gleicher stated in her partial dissent in this case, "[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 applied, the circuit court necessarily had to compare the claims being litigated in state court with the claims that were litigated in federal court in order to determine 1.) whether a fact essential to the claim currently being litigated was necessarily decided in the claim in which there was a final judgment and 2.) whether the parties had a full and fair opportunity to litigate that issue. As described above, instead of conducting that analysis, the circuit court simply pointed to *VanVorous*, apparently believing that it was factually and legally indistinguishable from the present case. Had the Court conducted the requisite analysis, it would have determined that collateral estoppel did not bar Plaintiff's state law claim for gross negligence.

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, noting in advance that none of the federal claims involve determining whether a Defendant was negligent or whether the Defendant's conduct caused the Plaintiff's injuries.

**i. Plaintiff's claims in the federal action**

Plaintiff's complaint in federal district court included a claim for false arrest. "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). As such, much of the litigation in a false arrest case revolves around the concept of probable cause. 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 [in support of the warrant] 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.*

Plaintiff likewise brought a claim of malicious prosecution under federal law. “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 also brought a claim for a due process violation in his federal complaint, which was premised on the argument that Defendant violated Plaintiff's right to due process when Defendant 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).

**ii. Plaintiff's state law claim for gross negligence**

In the state action, Plaintiff included several claims that overlapped in name with portions of the federal claim- false arrest, false imprisonment and malicious prosecution- as well as one claim that was entirely distinct from the federal claims- gross negligence.

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 1.) gross negligence that is 2.) 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).

Pursuant to this Court’s holdings, a Plaintiff who alleges that he or she was injured by a governmental actor’s gross negligence must also show that the gross negligence was the one most immediate, efficient and direct cause of the Plaintiff’s injuries. See *Robinson v City of Detroit*, 462 Mich 439 (2000). 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 “the well-established understanding of proximate cause, which, as we have long recognized, involves the foreseeability of the consequences of the conduct of human actors.” *Id.* at 67. This Court also explained that “before an actor can be a proximate cause, there must be the prerequisite determination that the actor was negligent—that is, that the actor breached a duty.” *Id.* at 74.

**iii. The resolution of Plaintiff's claims under federal law did not involve findings relating to the issues of gross negligence or proximate causation**

As the Court can see above, none of Plaintiff’s allegations under federal law involve an analysis of whether Defendant Crum was the proximate cause of Plaintiff’s injuries through an act of gross negligence or even ordinary negligence. In holding that summary judgment was proper in all regards, the 6<sup>th</sup> 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 6<sup>th</sup> 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, neither the 6<sup>th</sup> Circuit's opinion nor the district court's opinion *ever* discussed whether Crum was either negligent or grossly negligent in his handling of the case. Naturally, because the federal courts never discussed Crum's acts in the context of a negligence theory, they 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 federal courts' opinions could lead to any other conclusion. The terms "negligent" and "negligence" never appear in the opinions, 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 opinions when the courts are discussing the concept of "probable cause." Likewise, those concepts were never briefed or argued by the parties. They were, in short, never decided or litigated.

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 6<sup>th</sup> 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 the accuser, 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. While the federal courts found that there was probable cause during portions of the criminal investigation and prosecution, that probable cause was the product of Defendant's gross negligence, at a minimum.

It appears that in holding that collateral estoppel barred Plaintiff's claim for gross negligence, the lower courts 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 lower courts essentially speculated as to what the federal courts *would have done* had it been tasked with addressing gross negligence and proximate causation. The lower courts took an analytical shortcut, and in doing so, impermissibly expanded the scope of collateral estoppel with dangerous consequence.

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 is a dispositive doctrine. To the extent that the doctrine's existence is motivated by a desire to give effect to a court's prior rulings on an issue, the outcome in the lower courts in this case frustrates that purpose- when the district court had a chance to address the merits of Plaintiff's state law claim for gross negligence, it elected to dismiss the claim without prejudice so that it could be decided in state court. Oddly, that state court then promptly ruled that it was precluded from addressing the merits of the claim because the district court had already effectively done so. Collateral estoppel thus became a means of relegating Plaintiff's claim to a sort of judicial black hole- the claim was dismissed, yet never even discussed.

#### **CONCLUSION AND RELIEF REQUESTED**

As this Court has frequently explained, it is not merely an error-correcting Court, such as the Michigan Court of Appeals. Instead, this Court's function is, generally, to address errors in our

jurisprudence that could impact future litigants and that are prone to potential repetition. Our legislature has determined that governmental employees are subject to liability when, through their gross negligence, they are the proximate cause of an individual's injuries. Mr. Jerome alleged an action under that exception to governmental immunity and then, with no factual or legal analysis, saw that action dismissed through the doctrine of collateral estoppel. The undersigned counsel frequently represents individuals in federal actions that allege a mix of state and federal claims. It is not uncommon for the state law claims to be dismissed without prejudice and then to be filed and litigated in state court. Should the Courts of this state perpetuate in the practice of broadly applying collateral estoppel without conducting even minimal analysis, residents of this state will surely have valid claims under state law needlessly dismissed, frustrating the intent of the legislature. Those future errors will not be limited to individuals asserting claims against the government, but will trickle into actions of all types.

For the reasons set forth above and in Plaintiff's Application for Leave to Appeal, to ensure that our courts are conscientiously applying the doctrine of collateral estoppel consistent with this Court's prior decisions, this Court should reverse the grant of summary disposition in Defendants' favor and remand this matter for further proceedings.

Respectfully submitted,

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