

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE MICHIGAN COURT OF APPEALS)

SAMUEL JEROME,

Plaintiff-Appellant,

v

LIEUTENANT MICHAEL CRUM, in his individual
and representative capacity, and the CITY OF
BERKLEY, a municipal entity,

Defendants-Appellees.

SC No. 159093
COA No. 335328
LC No. 15-148401-CZ
(Oakland County Circuit Court)

**DEFENDANTS-APPELLEES LIEUTENANT MICHAEL CRUM AND THE CITY OF BERKLEY'S
SUPPLEMENTAL BRIEF ON APPEAL**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

This Court issued an order directing the Clerk to schedule oral argument on Jerome’s application for leave to appeal and requiring the appellant to file a “supplemental brief addressing whether the circuit court erroneously granted summary disposition to the defendants on the ground of collateral estoppel.” (10/4/19 Order, APX 000585b.) The order omits any request for discussion concerning whether this is an appropriate case for this Court’s jurisdiction – either to correct claimed error or to announce some new rule of law regarding collateral estoppel and/or governmental immunity.

At the risk of addressing a point that the Court chooses not to consider, this brief will also explain why this is a particularly poor candidate for review or error correction unless this Court wishes to send a message that it is cutting back on Michigan appellate courts’ longstanding precedent limiting review (particularly in this Court) to issues that were properly briefed and argued in the trial court – and raised by the parties on appeal. As long ago as 1917, this Court held that it would not consider issues not raised in the court below. *Lake Erie Land Co v Chilinski*, 197 Mich 214, 226; 163 NW 929 (1917). And it has reiterated these principles regularly over the decades since. See *e.g.*, *People v Taylor*, 386 Mich 204, 208; 191 NW2d 310 (1971). This Court has required litigants to demonstrate that they have asserted meritorious grounds for their position in the lower courts in order to obtain review by this Court. In *State of Ohio, Dep’t of Taxation v Kleitch Bros, Inc*, 357

Mich 514, 516; 98 NW2d 636 (1959), this Court declined to consider belatedly raised arguments explaining:

Appellant seeks also to present a belated contention that the Ohio statute violated due process by requiring posting of bond prior to hearing and appeal of the assessments. This falls on two grounds. First, it was not pleaded as an affirmative defense before, nor considered or decided by, the Michigan court below. *Krause v Faulkner*, 318 Mich 422; 28 NW2d 232; *Fowler v McQuigg*, 222 Mich 178; 192 NW 708; *Auditor General v Chase*, 132 Mich 630; 94 NW 178. Second, although appellant has in many ways disputed Ohio's right to levy this tax, there is no showing in this record that it has ever asserted any meritorious grounds for appeal of the assessments. We decline to decide a constitutional question not properly raised below where it is plain that appellant has suffered no injury from the statutory provisions complained of.

Id. at 516. In *Mitcham v Detroit*, 355 Mich 182; 94 NW2d 388 (1959), this Court observed that the “[f]ailure to brief a question on appeal is tantamount to abandoning it.” 355 Mich 182, 203; 94 NW2d 388 (1959). That principle applies whether an issue was never raised in the trial court or on appeal. In *Mitcham*, this Court pointed out that “[n]either question is argued in any real sense of the word and neither is briefed; they are simply announced.” *Id.* Based on this, this Court refused to consider the issues because the inadequate briefing was “insufficient to present these questions for consideration in this forum.” *Id.* This Court emphasized that “[i]t is not enough for an appellant in his brief to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Id.* In this Court’s

words, “The appellant himself must prime the pump; only then does the appellate well begin to flow.” *Id.*

These principles are even more appropriately applied here where the entire argument offered to this Court is derived from a dissenting decision in the Court of Appeals – and not from anything that Jerome briefed and argued in that Court or in the trial court. Jerome’s brief in the Court of Appeals challenged the trial court’s collateral estoppel ruling on the basis that the City and Lieutenant Crum raised the collateral estoppel argument in support of summary disposition in a reply brief, filed after Jerome’s response to their motion was filed.¹

At the hearing, Jerome’s counsel asserted that the federal and state claims were different, an argument that does not refute either claim preclusion (because different claims are precluded when they arise out of the same transaction or occurrence) nor issue preclusion (because the entire premise of issue preclusion is that factual findings as to issues necessary to prove one claim can be used to also preclude success on another claim).

¹ Jerome fails to mention that the timing occurred because the federal district court issued a decision, that collaterally estopped Jerome from bringing his state law claims, on the same day that Jerome filed his response brief to the City and Crum’s summary disposition motion. Ethically-bound to advise the trial court of potentially controlling authority, Defendants alerted the state court to the controlling federal district court decision and raised the issue of collateral estoppel at the earliest possible opportunity. Jerome failed to file any motion for leave to file a sur-reply or other relief although there was plenty of time for him to do so before the state court hearing on the motion. Jerome was also afforded the opportunity to address the collateral estoppel issue before the trial court during the oral argument it permitted before issuing its decision. (9/28/16 Transcript, pp 2-10, APX 000574b-000582b.)

(9/28/16 Transcript, p 6, APX 000578b.) His argument is set forth in its entirety here:

MR. AHMAD: Thank you, your Honor, again, Jay Ahmad on behalf of the plaintiff, your Honor. It – in terms of the collateral estoppel argument, your Honor, you know, that was briefed only in the defendant’s rebuttal brief. Our brief – their initial motion was brought on the merits of the state law claim.

I would request, if this Court were so inclined, to determine or rule on the collateral estoppel argument, that we get an opportunity – a fair opportunity to brief that issue because it was again, only briefed in their reply brief, which we don’t get to reply to. So, that would be number one.

At – as Ms. McGiffert did explain to you though, the – the federal claim is under appeal and it would be our position, your Honor, that the federal claims and the state claims are completely separate from each other. There is a different jurisprudence for the federal claims and the state claims under false imprisonment, false arrest, malicious prosecution and there is a state claim with regard to gross negligence, which there was not in the federal claim.

So even that – just on that mere issue alone, you can’t decide, respectfully, your Honor, the state claims just based on the federal law in this matter. Dealing with the – the merits of the – the arguments that were initially brought to this Court, it is our firm belief that there are significant fact issues with regard to the arguments that have been set forth by the defendant, most notably, with regard to the issues of probable cause and governmental immunity.

As this Court is aware, and as I’ve set forth in my brief, particularly at page 11 and 12, the defendant in this case, Detective Rum, interviewed in violation of his own procedures and protocols, our client for a third and fourth time after the – the victim in this case, Ms. Krahe – the alleged victim, was put through a forensic interview in which she recanted all of her allegations against my client.

Detective Crum testified that it his – it is his practice to defer to what the findings are in the forensic interview, but instead of doing that, instead of closing his case as he indicated he was going to do, he continued to pursue Ms. Krahe and pursue the allegations against my client. He interviewed her for a third time without any parental consent because the grandmother had brought her in, again in violation of his own policies and protocols, and then, tried to submit the case to the prosecutor for warrant.

The prosecutor requested more information and the detective interviewed her for a fourth time, this time, videotaped, which he did not produce and that videotape interview, your Honor, which we've provided to the Court, had significant discrepancies, which we have listed, I think there were almost a dozen of them, between her first story and her videotaped story.

But instead of relating that to the prosecutor, Detective Crum deliberately falsified what was in that interview and said her stories were exactly the same to the prosecutor. It was based upon that that the prosecutor proceeded to trial. My client stayed in jail for a year and then when Detective Crum "suddenly" discovered this video and brought it to Judge Nichols' attention and the prosecutor and the defense attorney had a chance to review the videotape. A mistrial was declared. Bless you.

MS. McGIFFERT: Excuse me.

MR. AHMAD: A mistrial was declared and then, the prosecutor declined to bring the charges again. It is our position, your Honor, that based on those significant discrepancies, that there was no probable cause here. The only person who testified at the probable cause hearing was the victim herself. Had the defense attorney been armed with this knowledge about these discrepancies, then the probable cause hearing could have been overcome though it was unlikely that the prosecutor would have proceeded in the first place.

In terms of governmental immunity, your Honor, it's our position that there is no conceivable way that the defendant can argue that he had good faith in falsifying what the allegations were in this matter when he knew that Ms. Krahe had significant discrepancies in her first story and her last story. So that - that is not a matter of good faith on the part of the detective, nor is it a matter of discretion.

He is obligated, as he admits in his deposition, to turn over all exculpatory evidence in this case, your Honor. I think our brief adequately lays out the law and the other factual aspects of this case and I would rely in that. And if the Court has any questions in that regard, but I do believe that there are significant factual issues for a jury to resolve in this case regarding the merits of the claim. Thank you.

(9/28/16 Transcript, pp 6-9, APX 000578b-000581b.)

Jerome did not raise the arguments he presents in this Court in his brief or at oral argument before the Court of Appeals. (Plaintiff-Appellant's Brief on Appeal.) His brief set forth two questions for the Court of Appeals:

- I. Did the trial court err in granting summary disposition on the basis of collateral estoppel where that issue was not presented in a way that allowed for a meaningful response?
- II. Did the trial court err in concluding that the entirety of plaintiff's state law action was barred by collateral estoppel while plaintiff's claim in federal court was pending appeal and where plaintiff's state law case involved distinct claims?

(Plaintiff-Appellant's Brief on Appeal, p iv.) In the body of his brief on appeal, Jerome contended that a reversal was required on the basis of due process because the collateral estoppel argument was not raised in Defendants' opening brief. The Court of Appeals correctly rejected this due process argument because he was given the opportunity to orally contest the collateral estoppel argument at the hearing before the trial court and took advantage of that opportunity to argue that collateral estoppel did not bar the claims. *Jerome v Crum*, unpublished per curiam opinion of Court of Appeals, issued December 27, 2018 (Docket No. 335328).

The Court of Appeals correctly pointed out that the *only* collateral estoppel arguments Jerome presented were "that collateral estoppel did not bar the claims because (1) at that time the federal judgment was under appeal; and (2) the federal claims were completely separate from the state claims." *Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328), p 4.

Jerome never raised the arguments he included in his application for leave to appeal to this court in the trial court or the Court of Appeals.

First, Jerome's sole substantive collateral estoppel argument was wrong, confusing the fact that the federal and state action involved different *claims* with the collateral estoppel effect of findings as to the same *factual issues*, which were decided adversely to Jerome in the federal action.

Second, Jerome's collateral estoppel argument in the Court of Appeals was limited to a mere paragraph of conclusory assertions about gross negligence, and was largely focused on an effort to persuade the Court of Appeals that the trial court's decision was premature, and that the matter should be remanded because the Sixth Circuit had not ruled, or because Jerome should be afforded the opportunity to file an additional brief. The arguments about collateral estoppel, gross negligence, and proximate cause belatedly raised in the application were created out of whole cloth by the dissenting judge in her opinion, and were never raised or briefed by Jerome. Indeed, the City and Crum had no opportunity to brief the precise arguments offered in the Court of Appeals dissent because Jerome never raised them in his brief or at oral argument before the Court of Appeals.

This makes this case an extremely poor candidate for review. Heretofore, this Court has not sought out cases in which issues have not been presented to the lower courts for review. Doing so deprives this Court of the benefit that comes when the arguments have been raised, briefed, and argued in the lower courts. Jerome's arguments on collateral estoppel in the

trial court and the Court of Appeals were flatly wrong – missing the distinction between claim and issue preclusion and failing to adequately grapple with the district court’s decision and the factual findings that necessarily provided the undergirding for its ruling. This case does not satisfy the criteria this Court has established for granting leave to appeal in MCR 7.305(B) and leave is properly denied.

COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

I.

IS LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT PROPERLY DENIED (A) BECAUSE THE ARGUMENTS JEROME PROPOSES TO RAISE ON APPEAL WERE BELATEDLY MADE IN A DISSENTING OPINION ISSUED BY THE COURT OF APPEALS AND NOT ADEQUATELY RAISED OR BRIEFED IN JEROME'S BRIEF IN THE COURT OF APPEALS, (B) BECAUSE THE LOWER COURT CORRECTLY HELD THAT JEROME'S GROSS NEGLIGENCE CLAIM IS COLLATERALLY ESTOPPED BY THE FEDERAL COURT DECISION ARISING OUT OF THE SAME INCIDENT THAT GAVE RISE TO THIS SUIT, (C) AND BECAUSE THE JUDGMENT CAN BE AFFIRMED ON ALTERNATE GROUNDS IN ITS SUPPORT, AND FOR ALL OF THESE REASONS, THE CASE PRESENTS AN EXTREMELY POOR CANDIDATE FOR REVIEW?

The Oakland County Circuit Court granted summary disposition and presumably answers, "Yes."

The Court of Appeals affirmed the circuit court order granting summary disposition and presumably answers, "Yes."

Plaintiff-Appellant Samuel Jerome answers, "No."

Defendants-Appellees Lieutenant Michael Crum and the City of Berkley answer, "Yes."

COUNTER-STATEMENT OF FACTS

A. Nature of the action

Plaintiff-Appellant, Samuel Jerome (“Jerome”), brought suit against Defendants-Appellees, Lt. Michael Crum (“Crum”) and City of Berkley (“the City”) (collectively, “Defendants”), under 42 USC § 1983, alleging federal claims of false arrest and imprisonment, malicious prosecution, a violation of due process, and municipal liability. He further asserted state law claims for unlawful arrest, malicious prosecution, false imprisonment, and gross negligence. Jerome’s claims arise out of his September 2013 arrest for criminal sexual conduct in response to repeated allegations by then 13-year-old Alyxis Krahe (“Allie”) that Jerome, her stepfather, had inappropriately touched her vagina and breasts. Jerome’s criminal prosecution ended in a mistrial, and the prosecutor subsequently decided not to re-try him. The federal district court granted summary judgment to the City and Crum as to all federal claims. It declined to exercise its supplemental jurisdiction to retain the state law claims, which were remanded to state court and resulted in this lawsuit.

Defendants moved for summary judgment of the federal claims and for summary disposition of the state-law claims. On August 25, 2016, after Defendants’ motion for summary disposition had been filed in state court, the district court granted Defendants’ motion on the federal claims, finding that probable cause existed for Jerome’s arrest and prosecution. (Opinion and Order Granting Defendants’ Motion for Summary Judgment, APX 000535b-

000548b.) Defendants alerted the state circuit court to the decision arguing that it was controlling. Under the doctrine of collateral estoppel, the circuit court held that the federal court's determination on the issues of probable cause, causation, and immunity barred Jerome's state-law claims. The circuit court therefore entered summary disposition in Defendants' favor. (Summary Disposition Opinion and Order, APX 000584b.) The Court of Appeals affirmed in a per curiam opinion (*Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328)).

B. Material facts

1. *In May 2013, Allie reported to the Berkley Police Department that Jerome had sexually abused her through inappropriate touching*

On May 7, 2013, 13-year-old Alyxis Krahe ("Allie") reported to her mother, Stacey Krahe Jerome ("Stacey"), that her stepfather Jerome had sexually abused her by inappropriately touching her. Stacey notified her mother (Allie's maternal grandmother), Judith Stiltner ("Judy"), of the alleged abuse. Judy drove Allie to the Berkley Police Department to report the alleged crime. Sergeant Michael Crum ("Crum") became the investigating detective.² (City of Berkley Police Report regarding CSC Investigation, APX 000046b-000066b.)

² Since that time, Sergeant Crum was promoted to the rank of Lieutenant, and is now the Deputy Chief of the Department.

Specifically, Allie reported to Crum that around Christmas 2012 (when Stacey was hospitalized), Jerome rubbed her stomach and then inappropriately touched her vagina. (City of Berkley Police Report regarding CSC Investigation, p 5, APX 000051b.) Allie also reported that in late April 2013, while Stacey was away at a work conference, Jerome rubbed her stomach and then touched her vagina under her clothing and rubbed her breasts on both the outside and inside of her clothing. (*Id.*, p 6, APX 000052b.)

Crum obtained basic information from Allie in order to classify the alleged crime, prepare a report, and establish a basis for referring Allie to Care House for a forensic interview. As required by law, he notified Child Protective Services (“CPS”) of the alleged assault. He scheduled Allie for a Care House forensic interview on May 16, 2013. (City of Berkley Police Report regarding CSC Investigation, p 6, APX 000052b.)

2. *Jerome appeared at the Berkley Police Station on that same day and admitted to rubbing Allie’s stomach, but denied any inappropriate touching*

Although not summoned, Jerome appeared at the station on the same day as Allie (May 7) and asked to speak with Crum. Jerome admitted to Crum that he rubbed Allie’s stomach. (City of Berkley Police Report regarding CSC Investigation, p 6, APX 000052b.) He denied the inappropriate touching. (*Id.*) Jerome agreed to submit to a polygraph examination, which Crum scheduled for May 21, 2013, and confirmed the date with Jerome. (*Id.*) Jerome agreed to leave the residence for the remainder of the investigation. (*Id.*)

On May 15, 2013, Crum spoke with Stacey about the scheduled Care House interview scheduled for the following day. (City of Berkley Police Report regarding CSC Investigation, p 7, APX 000053b.) Stacey advised Crum that she had allowed Jerome to move back into the residence, and that Allie was staying with Judy until after the polygraph. Stacey advised Crum that she no longer believed Allie's assault allegations and that Allie was just trying to get "attention." (*Id.*)

3. *At the Care House interview, Allie changed her story, and as a result, Crum's investigation became inactive*

The Care House forensic interview occurred on May 16, 2013. (City of Berkley Police Report regarding CSC Investigation, pp 7-8, APX 000053b-000054b.) Stacey, who brought Allie to the Care House facility, advised that she suffered from Dissociative Identity Disorder (previously known as multiple personality disorder). Stacey indicated that she did not believe Allie and thought everyone was "being played" by Allie. (*Id.*, p 7, APX 000053b.)

Allie changed her story at her Care House interview when the discussion turned to touching her vagina. Just as in the initial interview, she told interviewer Tricia Schuster that Jerome rubbed her stomach and rubbed lower. However, Allie denied that Jerome touched her vagina, either above or below her clothing. Allie also recalled Jerome rubbing her breast but "made it sound like an accident." (City of Berkley Police Report regarding CSC Investigation, p 7, APX 000053b.)

During the interview, Allie made excuses for Jerome and took most of the blame for the incident. Crum considered the Care House interview to be

“a complete reversal of [Allie’s] recollection of the assaults in [his] office just a few days prior.” (City of Berkley Police Report regarding CSC Investigation, p 7, APX 000053b.)

After the interview, Stacey immediately asked Crum if he still believed Allie; he responded that he did. (City of Berkley Police Report regarding CSC Investigation, p 8, APX 000054b.) Stacey was upset and pressed Crum to tell her what Allie had said and if she had changed her story. Crum refused to answer Stacey’s questions and reiterated the need for Jerome to take a polygraph. (*Id.*) But given Allie’s recantation of her story and Stacey’s refusal to let Crum talk to Allie to determine why her story had changed, Crum’s investigation became inactive. (Crum Affidavit, ¶ 6, APX 000189b.)

4. *After the Care House interview, Jerome refused to take the polygraph examination and Allie’s mother repeatedly opined that Allie made the assault allegations up and requested Crum to close the case*

Despite his initial approval, Jerome subsequently refused to take the polygraph examination “on the advice of his attorney.” (City of Berkley Police Report regarding CSC Investigation, p 8, APX 000054b.) On June 9, 2013, Crum asked Stacey if he could talk to Allie to discuss the change in her story. Stacey refused, stating that “it would be best for the family to just drop the case.” (*Id.*) Stacey told Crum that Allie admitted to making up the assault allegations and requested Crum close the case and have no further police involvement. (*Id.*) Crum reiterated his desire to speak with Allie before closing the case as she, not Stacey, was the victim. (*Id.*)

5. ***Almost two months after the Care House interview, Allie's grandmother approached Crum and authorized Crum to discuss the case with Allie, who told Crum that her mother made her change her story at Care House and reiterated to Crum her initial allegations of sexual assault by Jerome***

On July 11, 2013, Judy came to the station to talk to Crum, and notified him that Stacey was telling everyone that Jerome had passed the police department's polygraph with "flying colors" and that Crum did not believe Allie. (City of Berkley Police Report regarding CSC Investigation, p 8, APX 000054b.) Judy, who was Stacey's legal guardian³, now had temporary custody of Allie and her 10-year-old sister, Sabrina, because Stacey was confined to a mental hospital in Texas. Judy authorized Defendant Crum to discuss the case with Allie. (*Id.*)

Allie told Crum that her mother had made her change her story at Care House, telling her (at least four times a day leading up to the Care House interview) that she (Stacey) would commit suicide if Allie testified against Jerome, Allie would be responsible for Stacey's death, and Allie and Sabrina would be placed in a foster home and raped daily. (City of Berkley Police Report regarding CSC Investigation, p 8, APX 000054b.) Allie told Crum that she felt intimidated and was afraid of causing her mother to commit suicide, and that she and her younger sister would be raped in a foster home. (*Id.*, pp 8-9, APX 000054b-000055b.)

³ Stacey Krahe's mother, Judy Stiltner, had been her legal guardian for many years due to Stacey's mental illness.

Allie then confirmed to Crum that Jerome had inappropriately touched her, describing the two incidents again, and confirming that her original description of the incident as articulated on May 7 was the truth. (City of Berkley Police Report regarding CSC Investigation, p 9, APX 000055b; Crum Affidavit, ¶ 7-8, APX 000189b.) Allie expressed concern and fear that Jerome was abusing Sabrina as she witnessed him touching and rubbing Sabrina's stomach in the same fashion he had rubbed Allie's stomach. (City of Berkley Police Report regarding CSC Investigation, p 9, APX 000055b.)

6. *Three days after Allie reiterated the allegations of sexual assault, Crum learned that Stacey, who was returning from her out-of-state hospitalization, had threatened Allie and caused Allie to run away*

On July 14, 2013, Crum learned that en route home from her Texas hospitalization, Stacey had learned about Allie talking to Crum and had called and threatened Allie with "severe consequences," prompting Allie to run away from Judy's residence. (City of Berkley Police Report regarding CSC Investigation, p 9, APX 000055b.) A runaway report was filed and entered into the LEIN ("law enforcement information network") system. (*Id.*, p 9, APX 000055b; Berkley PSD Police Report regarding Runaway Incident, APX 000067b-000071b.)

On July 15, Stacey notified the Berkley police that she had found Allie. (City of Berkley Police Report regarding CSC Investigation, p 9, APX 000055b.) Officers asked to see Allie to confirm her return so they could take her out of the LEIN system. (*Id.*) In response, Stacey sent the police on a "wild goose chase", first saying she was taking Allie to Beaumont Hospital because

Allie was allegedly drinking (but when they arrived there, she was not there), then changing it to Providence Hospital (but when they arrived there, she was not there), then finally notifying Crum that she was south of Toledo going to Georgia (for a “fresh start”). (*Id.*) Stacey refused Crum’s request to allow him to see Allie to confirm she was safe. (*Id.*)

Stacey admitted that she had lied about the hospitals in order to get out of Michigan before Crum realized Stacey was taking Allie away so he could not speak with her about the assault. (City of Berkley Police Report regarding CSC Investigation, p 9, APX 000055b.) At that point, Crum did not do anything further to actively pursue the case.

7. *Crum spoke with Allie a third time on August 2, 2013, when both Stacey and Jerome were arrested for domestic violence in which Allie was punched, choked, and dragged up the stairs by her hair*

Crum was not aware that the Jerome family was back in Michigan until police were called by Judy regarding a disturbance that occurred at the Jerome residence shortly after midnight on August 2, 2013. (City of Berkley Police Report regarding CSC Investigation, p 10, APX 000056b.) Officers who were dispatched to the home witnessed (and photographed) injuries to Allie consistent with her account that she was physically assaulted by both her mother and Jerome. As a result of this incident, both Jerome and Stacey were arrested later that day (August 2) for Domestic Violence. (Police Reports regarding Family Trouble/Domestic Violence Case, APX 000072b-000089b.)

When Crum spoke with Allie, she told him that her mother forced her to record messages on various topics and would threaten and assault Allie if

she did not say what her mother wanted. (City of Berkley Police Report regarding CSC Investigation, p 10, APX 000056b.) Crum concluded that Stacey “has interfered with my investigation by threatening and intimidating a 13-year old victim into changing her story and then assaulting her to make sure she does not tell the truth. It is this investigators [sic] opinion that Stacey Krahe is a danger to her children.” (*Id.*)

8. On August 6, 2013, Crum forwarded the domestic violence case to the Oakland County Prosecutor’s Office for consideration

On August 6, 2013, Crum received a complaint, warrant, and subpoena from the Oakland County Prosecutor’s Office for domestic violence (MCL 750.812) for both Stacey and Jerome. (Police Reports regarding Family Trouble/Domestic Violence Case, APX 000072b-000089b.) Crum, considering all the evidence and information in its totality, “concluded that there was probable cause sufficient to submit the case to the Prosecutor’s Office for consideration of Criminal Sexual Conduct (“CSC”) charges.” (Crum Affidavit, ¶ 16, APX 000191b.)⁴

On August 21, 2013, Assistant Prosecutor S. Lynch of the Oakland County Prosecutor’s office requested “further information” and asked Defendant Crum to obtain the answers to specific questions. (City of Berkley Police Report regarding CSC Investigation, p 11, APX 000057b.) On that date,

⁴ The prosecutor decided to pursue the action against Jerome, but not against Stacey because Stacey was anticipated to be a witness in the criminal sexual conduct case.

Judy arrived at the police station with Allie and Sabrina, and Crum interviewed all three of the witnesses in order to obtain the information that the Prosecutor had requested. Allie reiterated that she had been sexually assaulted by Jerome. (*Id.*) Crum did not video record the interviews, and was not aware that the DVR video recording equipment had been turned on and left on by someone else. (Crum Affidavit, ¶ 14, APX 000191b.) Crum forwarded all pertinent information of which he was aware to the prosecutor's office, knowing that the prosecutor would independently consider and determine whether probable cause existed. (*Id.*, ¶¶ 12-13, APX 000190b.)

9. Both the prosecutor and judge determined that probable cause existed to try Jerome on the criminal sexual conduct charges

On September 18, 2013, after having determined that probable cause existed, the Oakland County Prosecutor sought and obtained an arrest warrant from the Honorable James Wittenberg (45A District Court). (City of Berkley Police Report regarding CSC Investigation, p 13, APX 000059b.) Pursuant to the arrest warrant, Crum arrested Jerome on that date. (Crum Affidavit, ¶ 20, APX 000191b.) Jerome was incarcerated in the Oakland County jail.

On October 9, 2013, the preliminary exam was held before Judge Wittenberg. The only evidence Judge Wittenberg considered was Allie's testimony. (10/9/13 Transcript, APX 000090b-000144b.) Allie testified about the two incidents of inappropriate touching, and was cross-examined

by Jerome's defense attorney. *Crum did not testify or actively participate in that proceeding.* After hearing Allie's testimony and determining that probable cause existed ("based on her testimony"), Judge Wittenberg bound the matter over to the circuit court for trial on the CSC charges. (*Id.*, pp 45-46, APX 000135b-000136b.)

Jerome's criminal trial commenced before the Honorable Rudy Nichols on August 4, 2014, and proceeded on August 5 and 7, 2014. Numerous witnesses testified during the course of the trial; Crum testified on August 5 and 7. He testified that it is his department's practice not to video record interviews of sexual assault victims, and that he had not video recorded any of his interviews of Allie in the criminal sexual conduct case. (Crum Affidavit, ¶¶ 24-25, APX 000192b.)

After he testified, Crum learned that, in fact, unbeknownst to him, the DVR video recorder had been on during his August 21, 2013 interviews of Allie, Sabrina and Judy. As soon as he became aware of this information, Defendant Crum had disks made of the interviews, promptly notified the Assistant Prosecutor, and they notified the Court (and the parties) early on the morning of August 8. (Crum Affidavit, ¶¶ 25-27, APX 000192b.)

Because the existence of these recordings had not been known and presented before, a mistrial was declared. (City of Berkley Police Report regarding CSC Investigation, p 15, APX 000061b.) Subsequently, the prosecutor's office decided not to re-try Jerome and on October 6, 2014, an Order of *Nolle Prosequi* was entered. (*Id.*)

C. Material proceedings

- 1. Jerome filed a complaint in federal district court, alleging both federal and state law claims based on a lack of probable cause for the arrest and prosecution; the federal court declined to exercise supplemental jurisdiction over the state law claims of unlawful arrest, malicious prosecution, false imprisonment, and gross negligence***

On June 24, 2015, Jerome filed a complaint against Lt. Crum and the City of Berkley under 42 USC § 1983, alleging false arrest and false imprisonment, malicious prosecution, denial of due process, unconstitutional policy or custom (against City of Berkley only), and further asserting state law claims for unlawful arrest, malicious prosecution, false imprisonment, and gross negligence. (Complaint in United States District Court for the Eastern District of Michigan, APX 000519b-000534b.) The district court subsequently issued an order of partial dismissal in which it declined to exercise supplemental jurisdiction over Jerome's state law claims pursuant to 28 USC § 1367(c). (7/27/15 Order of Partial Dismissal.)

- 2. While the decision on the federal motion for summary judgment was pending, Defendants moved for summary disposition of Jerome's state law claims in the circuit court***

After briefing was completed on a motion for summary judgment in the federal district court seeking summary judgment, but before that court issued a decision, Defendants moved for summary disposition of Jerome's state-law claims in the Oakland County Circuit Court. (Defendants' Motion for Summary Disposition, APX 000021b-000204b.) Defendants argued that probable cause existed, which vitiated Jerome's unlawful arrest, malicious prosecution, and false imprisonment claims. In addition, Defendants argued

that Crum was shielded by governmental immunity from these intentional tort claims under *Odom v Wayne County*, 482 Mich 459; 760 NW2d 217 (2008). With respect to the gross negligence claim, Defendants argued that this was merely a restatement of Jerome's unlawful arrest and false imprisonment claims and therefore failed to state a claim upon which relief could be granted. Defendants also argued that the facts do not support a prima facie case of gross negligence, and that Crum's actions were not "the" proximate cause of Jerome's alleged damages. Finally, with respect to the City of Berkley, Defendants argued that the City was entitled to governmental immunity under MCL 691.1407.

Jerome opposed summary disposition, arguing that issues of material fact existed regarding whether Crum's claimed reckless disregard for the truth (based on the alleged "inadequate investigation" and "misleading report") precluded a finding of probable cause. (Plaintiff's Answer to Defendants' Motion for Summary Disposition, APX 000205b-000511b.) With respect to Crum's governmental immunity argument, Jerome argued that Crum could not prove that he reasonably believed he was acting within the scope of his authority or in good faith because he falsely informed a prosecutor that no additional video evidence existed and mischaracterized the contents of the interview with Allie in order to conjure up probable cause. (*Id.*) Jerome also argued that Crum's conduct was not discretionary. (*Id.*) Finally, with respect to the gross negligence claim, Jerome conceded that the

allegations “do relate to intentional tort[,]” but maintained that “there is an element of gross negligence or recklessness involved.” (*Id.*)

3. On August 25, 2016, the federal district court issued an opinion and order granting Defendants’ motion for summary judgment

After Jerome filed his brief opposing summary disposition of the state-law claims, but before Defendants filed their reply, the federal district court issued an opinion granting Defendants’ motion for summary judgment of the federal claims. (Opinion and Order Granting Defendants’ Motion for Summary Judgment, APX 000535b-000548b.) In so doing, the district court noted that the claimed inconsistencies between Allie’s May 7 and August 21 accounts of Jerome’s assault, “while relevant to Allie’s credibility and to whether the prosecutor could meet its ultimate burden, d[id] not defeat probable cause.” (*Id.*, p 10, APX 000545b.) The district court aptly noted that the issue was whether Crum had probable cause – *not* whether the evidence would be sufficient to support a conviction. (*Id.*, p 11, APX 000546b.) Further, the district court concluded that “Crum’s omission of the inconsistencies in his report was not material to the finding of probable cause” because the judge at the preliminary examination relied “solely upon Allie’s testimony, not Crum’s report.” (*Id.*, pp 10-11, APX 000545b-000546b.) The district court also noted that Allie testified at the preliminary examination in a manner consistent with her interview with Crum on August 21. (*Id.*, p 10, APX 000545b.) The district court found that the judge relied solely on Allie’s testimony and not Crum’s report. (*Id.*) Under the totality of the

circumstances, the district court concluded that Crum had probable cause to forward the case to the Oakland County Prosecutor. (*Id.*, p 11, APX 000546b.) In addition, the district court found that any inconsistencies between Allie's accounts were known to the prosecution and defense attorney at the time of the preliminary examination. (*Id.*) Thus, Jerome could not prevail on his false arrest or malicious prosecution claims and Crum was entitled to qualified immunity. (*Id.*)

The district court found that Crum "reasonably believed he had sufficient probable cause to submit the case to the prosecutor." (Opinion and Order Granting Defendants' Motion for Summary Judgment, p 11, APX 000546b.) The district court also dismissed Jerome's due process claim brought under *Brady v State of Maryland*, 373 US 83; 83 S Ct 1194 (1963), finding that Jerome could not demonstrate prejudice under prevailing Sixth Circuit law where the criminal proceedings resolved in his favor. (*Id.*, p 12, APX 000547b.) Finally, because Jerome could not demonstrate that Crum violated his constitutional rights, the district court held that Jerome could not show municipal liability on the part of the City of Berkeley and thus dismissed Jerome's municipal liability claim. (*Id.*, p 13, APX 000548b.) A corresponding judgment was entered. (8/25/16 Judgment.)

4. Defendants promptly notified the trial court of the federal district court's ruling in Defendants' reply brief in support of their motion for summary disposition

On September 14, 2016, Defendants filed a five-page reply brief in support of their motion for summary disposition, in which they informed the

Oakland County Circuit Court of the federal district court's recent ruling. (Defendants' Reply Brief in Support of Motion for Summary Disposition, APX 000512b-000572b.) Specifically, Defendants argued that the federal court's recent findings that probable cause existed, that the changed testimony was not material, and qualified immunity applied barred Jerome's state-law claims of unlawful arrest, false imprisonment, malicious prosecution, and Jerome's gross negligence claim under the doctrine of collateral estoppel. (*Id.*, pp 1-2, APX 000513b-000514b.) Defendants further responded to the points raised in Jerome's response brief. (*Id.*, pp 2-5, APX 000514b-000517b.)

The Honorable Denise Langford Morris of the Oakland County Circuit Court entertained oral argument on Defendants' motion for summary disposition on September 28, 2016, two weeks after Defendants filed their reply brief. (9/28/16 Transcript, APX 000573b-000583b.) At the hearing, Defendants stressed that the federal court's determination of probable cause collaterally estopped Jerome's state law claims, which were based on an assertion of a lack of probable cause. (*Id.*, pp 3-5, APX 000575b-000577b.) The circuit court allowed Jerome's counsel an opportunity to orally respond⁵ to Defendants' collateral estoppel argument – at which time counsel for Jerome argued that “the federal claim is under appeal and it would be our position, your Honor, that the federal claims and the state claims are

⁵ Jerome's counsel also asked the trial court to brief the issue of collateral estoppel “if th[e] Court were so inclined.” (9/28/16 Transcript, p 6, APX 000578b.) However, the trial court did not request further briefing from the parties.

completely separate from each other.” (*Id.*, p 6, APX 000578b.) Jerome’s counsel then went on to argue the facts that he asserted set forth “significant factual issues for a jury to resolve[.]” (*Id.*, pp 6-9, APX 000578b-000581b.) At the conclusion of the hearing, the court indicated that it “wanted to take a final look at” the parties’ briefs and would issue a written decision. (*Id.*, p 10, APX 000582b.)

Ultimately, the circuit court issued a written opinion granting Defendants’ motion for summary disposition on the basis that “the Federal Court’s determination and ruling here bars Plaintiff’s claims in this case of, unlawful arrest, false imprisonment, malicious prosecution and gross negligence on the basis of collateral estoppel and issue preclusion.” (Summary Disposition Opinion and Order, APX 000584b.) Citing *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004), the circuit court held that Jerome “is collaterally estopped from proceeding in state court with claims based on issues that have already been adjudicated by the Federal Court.” *Id.*

5. Jerome appealed to the Court of Appeals, which upheld the trial court decision

Jerome claimed an appeal to the Court of Appeals. In his brief, Jerome argued that the trial court “erred in ruling that collateral estoppel barred plaintiff’s claims where that issue was not present to the court in defendant’s motion for summary disposition.” (Plaintiff-Appellant’s Brief on Appeal, pp 8-9.) Jerome contended that he was precluded from opposing the motion “in a meaningful way” because the issue was raised in a reply brief. (*Id.*) He

therefore urged the Court of Appeals to remand that matter to permit him to more fully brief it. (*Id.*)

Notably, Jerome acknowledged that *VanVorous v Burmeister*, 262 Mich App 467 (2004) applied, a point that he now seeks to challenge in this Court. Jerome did not challenge the principles adopted in *VanVorous* by arguing it was wrongly decided or by suggesting that the trial court incorrectly applied them. Jerome merely contended that the “trial court should have stayed this matter pending the final resolution of Plaintiff’s federal cause of action.” (Plaintiff-Appellant’s Brief on Appeal, p 9.) Since his appeal to the Sixth Circuit remained pending at the time of briefing in the Michigan Court of Appeals, he also argued that the Sixth Circuit might reverse the district court. (*Id.* at p 9-10.)

In three short paragraphs citing only MCL 691.1407 and *Robinson v Detroit*, 462 Mich 439, 462 (2000), Jerome asserted in conclusory terms that collateral estoppel did not apply because no federal cause of action for gross negligence exists and the federal ruling did not preclude a reasonable fact-finder from concluding that Defendant Crum was grossly negligent and that his gross negligence was the proximate cause of injury. (Plaintiff-Appellant’s Brief on Appeal, pp 10-11.)

It is questionable whether Jerome’s argument was even sufficient to place the issue properly before the Court of Appeals. *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) makes clear that it is “not enough for an appellant in his brief simply to announce a position or assert

an error and then leave it up to this Court to discovery and rationalize the basis for his claims, or unravel and elaborate them for him his arguments, and then search for authority either to sustain or reject his position. *Id.* The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.” *Id.* Jerome entirely failed to prime the pump, citing one published decision from the Court of Appeals, *VanVorous*, which he conceded seemed to control and which held against him to apply collateral estoppel to bar the gross negligence claim.

The dissenting opinion disregarded these deficiencies to pick up the cudgel and try to rationalize an argument that Jerome never made.⁶

The City and Lieutenant Crum urged an affirmance based on two main arguments. (Defendants-Appellees’ Brief on Appeal, pp 19-38.) The City argued that the trial court correctly applied collateral estoppel to bar Jerome’s claims because the federal court found Lieutenant Crum’s actions to be supported by probable cause and therefore lawful, Jerome had addressed the collateral estoppel argument at the summary disposition hearing, and in any event, the pendency of an appeal does not alter the finality of a judgment.⁷ (*Id.*, pp 24-25.) Defendants pointed out that no law supports the issuance of a stay pending an appeal of a judgment before collateral estoppel may be applied. (*Id.* at p 25.)

⁶ This Court cannot grant relief without doing violence to longstanding principles of appellate preservation.

⁷ And of course, by the time of oral argument before the Michigan Court of Appeals, the Sixth Circuit had affirmed the federal district court judgment.

In addition, Defendants argued that the existence of probable cause meant that Jerome's state law claims for unlawful arrest, false imprisonment, and malicious prosecution could not survive. (Defendants-Appellees' Brief on Appeal, pp 19-22.) Defendants also pointed out that the district court's conclusion that Crum did not act with reckless disregard for the truth bars Jerome's state-law gross negligence claim, even if Jerome had properly pleaded such a claim, which is also questionable. (*Id.* at pp 19-24.)

Defendants explained that Jerome's gross negligence claim was squarely premised on the same intentional conduct that it challenged in its intentional tort claims. Defendants pointed out that the federal court expressly ruled that "the court cannot conclude that Crum acted with reckless disregard for the truth," thus entitling him to qualified immunity. (Opinion and Order Granting Defendants' Motion for Summary Judgment, p 11, APX 000546b.) Accordingly, the federal court's finding that Crum did not act with reckless disregard for the truth collaterally estops Jerome's gross negligence claim, similarly premised on reckless disregard for the truth in purportedly withholding undisclosed and exculpatory evidence. (*Id.*) Finally, Defendants explained that Jerome had ample opportunity to respond to the argument, which Defendants raised at the earliest opportunity. (Defendants-Appellees' Brief on Appeal, pp 24-25.) And Defendants pointed out that under controlling precedent, the trial court had no obligation to stay the matter to await the Sixth Circuit review. (*Id.* at pp 25-26.)

Defendants' second argument on appeal was that summary disposition was also properly affirmed on the basis of alternate grounds in support of the judgment. Defendants pointed out that regardless of the collateral estoppel defense, Jerome's intentional tort claims were barred by governmental immunity. (Defendants-Appellees' Brief on Appeal, pp 27-30.) In addition, Defendants contended that Jerome's gross negligence claim was merely a restatement of its immunity-barred intentional tort claims and therefore subject to dismissal. (*Id.* at pp 34-35.) And finally, Defendants argued that the facts do not support a prima facie claim of gross negligence. (*Id.* at pp 36-37.)

The Court of Appeals affirmed the circuit court's order granting summary disposition in favor of the defendants. The Court reviewed the facts and the procedural history. It rejected Jerome's due process argument and denied his request for a remand. *Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328). The Court pointed out that Jerome "fails to acknowledge that he was given the opportunity at the motion hearing in the trial court to orally contest the motion and in fact availed himself of the opportunity." *Id.* at p 4. The Court observed that "plaintiff fails to explain how, in light of his having been timely apprised of the issue in advance, being permitted to argue at the motion hearing did not constitute a meaningful opportunity to contest the motion." *Id.* at pp 4-5.

The Court also rejected Jerome's argument regarding collateral estoppel. The Court first noted that his focus was not that the elements of collateral estoppel are not met, but that "because the federal district court's judgment was pending appeal in the Sixth Circuit at the time the trial court in this case granted summary disposition, the trial court should have stayed the matter" *Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328), p 5. The Court of Appeals concluded that this issue "is moot, as the Sixth Circuit has since then affirmed the federal district court's ruling." *Id.* The Court also reasoned that, regardless, "the federal district court's decision retained whatever preclusive effect it had during the pendency of the federal appeal." *Id.* The Court also addressed Jerome's argument that collateral estoppel does not bar his claims, noting that his argument was presented "in summary fashion," and concluding that Counts I, II, and III could not survive because Jerome was not entitled to relitigate the issue of probable cause, which had been decided against him in the federal action. *Id.* at pp 6-7.

The Court rejected Jerome's argument that the federal decision could not preclude his state-law claim for gross negligence. *Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328), p 7. The Court concluded that the claim was barred because Jerome could not demonstrate causation as required under state law since the "Sixth Circuit expressly ruled that Crum's failure to disclose the tape of the August 21 interview did not cause any harm

to plaintiff.” *Id.* The Court explained that the federal courts had “already determined that the failure to turn over the tape of the interview had no effect on plaintiff’s prosecution or imprisonment” and thus, concluded that Jerome could not relitigate the issue of causation. *Id.* at pp 7-8. Finally, in response to the dissenting opinion, the Court explained:

Moreover, assuming that collateral estoppel was not applicable as the dissent suggests, summary disposition would be appropriate under MCR 2.116(C)(10) for lack of a genuine issue of material fact. For the reasons already outlined, there is no evidence to show that Crum’s failure to turn over the video recording of the August interview was a cause, let alone the proximate cause, of plaintiff’s continued prosecution or imprisonment. Any suggestion that the prosecution would have dropped the case against plaintiff sooner if it had been aware of the tape earlier is to engage in impermissible speculation. See *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993) (“[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet their burden of providing evidentiary proof establishing a genuine issue of material fact.”). Any reliance on the prosecution’s ultimate decision to decline pursuing the case after the mistrial is misplaced because there is nothing in the record to show that the prosecution’s decision was based on the existence of the videotape. Indeed, there are a host of possible reasons not related to the late production of the videotape why the prosecution could have decided to forgo a second trial, including that the witnesses perhaps testified in an unexpected way at the first trial or that the complainant perhaps simply decided that she was not going to testify or cooperate any more after having already been subjected to several interviews and having already testified in court twice. Hence, plaintiff cannot maintain his claim of gross negligence, and summary disposition is properly entered in favor of defendants. Thus, assuming the trial court erred when it granted summary disposition on plaintiff’s gross negligence claim on the basis of collateral estoppel, we nonetheless affirm because summary disposition was warranted under MCR 2.116(C)(10). See *Gleason v Dep’t of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) (“A trial court’s ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.”).

Id. at pp 8-9.

The dissent attacked the majority's collateral estoppel argument on the basis of arguments that Jerome never made in the trial court or raised in his brief in the Court of Appeals. The dissent contended that the majority had incorrectly concluded that the Sixth Circuit decision contained a finding regarding proximate cause that was not made by that Court. The dissent ignored the federal district court's finding that "[a]ny inconsistencies between Allie's account of the alleged abuse were known to the prosecutor and defense attorney as of the preliminary exam..." *Jerome v Crum*, unpublished opinion per curiam of the United States District Court – Eastern District, issued August 25, 2016 (Docket No. 15-12302), p 11. The dissent also argued that gross negligence involved different elements, and contended that the majority improperly blurred the concepts of probable cause and proximate cause, and failed to analyze the issues that were actually litigated and necessarily determined in the prior action. (*Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328), Dissenting Opinion, pp 4-5.)

COUNTER-STATEMENT OF THE STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dybata v Wayne Co*, 287 Mich App 635, 638; 791 NW2d 499 (2010). The applicability of collateral estoppel is a question of law, which is also reviewed on appeal de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by immunity. When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party. *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 638; 692 NW2d 398 (2004).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). A motion under this subrule may be granted where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 119, citing *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corely v Detroit Bd of Ed*, 40 Mich 274, 278; 681 NW2d 343 (2004). This Court reviews a motion brought under this rule by considering the pleadings, admissions, and other evidence submitted

by the parties in the light most favorable to the non-moving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the non-moving party. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

PRESERVATION

When an argument was not raised by plaintiff below and, consequently, was not addressed by the trial court, it is not preserved for appellate review. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). In *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) our Supreme Court explained:

Michigan generally follows the “raise or waive” rule of appellate review. Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court. Although this Court has inherent power to review an issue not raised in the trial court to prevent a miscarriage of justice, generally a failure to timely raise an issue waives review of that issue on appeal.

The principal rationale for the rule is based in the nature of the adversarial process and judicial efficiency. By limiting appellate review to those issues raised and argued in the trial court, and holding all other issues waived, appellate courts require litigants to raise and frame their arguments at a time when their opponents may respond to them factually. This practice also avoids the untenable result of permitting an unsuccessful litigant to prevail by avoiding its tactical decisions that proved unsuccessful.

Generally, a party may not remain silent in the trial court, only to prevail on an issue that was not called to the trial court's attention. Trial courts are not the research assistants of the litigants; the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute. (Citations and quotation marks omitted).

Walters, 481 Mich at 387-388. Even when there exists a basis for waiving preservation requirements, this Court has cautioned that appellate courts should exercise their discretion sparingly and only when there are exceptional circumstances that warrant review. *Napier v Jacobs*, 429 Mich

222, 233; 414 NW2d 862 (1987). No such circumstances exist here. As a result, this Court ought not review these issues in disregard of its own longstanding precedent regarding preservation.

ARGUMENT

LEAVE TO APPEAL TO THE MICHIGAN SUPREME COURT IS PROPERLY DENIED BECAUSE (A) THE ARGUMENTS JEROME PROPOSES TO RAISE ON APPEAL WERE NOT ADEQUATELY RAISED OR BRIEFED IN THE COURT OF APPEALS OR RAISED IN THE CIRCUIT COURT BUT INSTEAD BELATEDLY DEVELOPED IN A DISSENTING OPINION ISSUED BY THE COURT OF APPEALS, (B) THE LOWER COURT CORRECTLY HELD THAT JEROME'S GROSS NEGLIGENCE CLAIM IS COLLATERALLY ESTOPPED BY THE FEDERAL COURT DECISION ARISING OUT OF THE SAME INCIDENT THAT GAVE RISE TO THIS SUIT, AND (C) THE JUDGMENT CAN BE AFFIRMED ON ALTERNATE GROUNDS IN ITS SUPPORT

I. Leave to appeal is properly denied from an appeal raising arguments that Jerome never raised or briefed in the lower courts

Leave to appeal is properly denied in this case because it raises no issues of broad jurisprudential significance, it was correctly decided below, the bulk of the arguments proffered by Jerome for review were never presented to the trial court or briefed or argued by him in the Court of Appeals, and in any event, the decisions below were correct both on the basis of the lower courts' reasoning and on the basis of alternate grounds in support of the judgment. Jerome's application for leave to appeal is largely predicated on belatedly-made points first articulated in the dissenting opinion, and Jerome never raised these issues or arguments in the trial court or in his brief in the Court of Appeals or at oral argument there. As a result, this case is an exceedingly poor candidate for review. And if this Court issues any opinion it should only be to reiterate that appellate courts review arguments raised by litigants; they do not announce and elaborate new positions never raised below. *Napier, supra; Mitcham, supra.*

This Court can best evaluate the legal issues as applied to the facts of any case when it has the benefit of the advocates' briefing and argument in the lower courts coupled with the lower courts' decisions. The process helps to sharpen and define the issues and provides this Court with the benefit of the advocates thinking as well as that of the trial court and the Court of Appeals. Given the absence of any real jurisprudential need to make new law in the area of collateral estoppel, this is a particularly ungrantworthy appeal. Leave is therefore properly denied.

Moreover, this Court's decision to hold oral argument on the application merely encourages belatedly raised arguments. Jurists and scholars have repeatedly emphasized the importance of limiting issues on appeal to those adequately raised in the trial court – absent plain error that denies a litigant substantial justice, an argument that has neither been raised nor shown on this record.

II. The lower courts correctly held that collateral estoppel bars Jerome's claim for gross negligence

In an effort to upset the unfavorable decisions by the lower courts, Jerome insists that none of his 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." (Plaintiff-Appellant's Application for Leave to Appeal, p 13.) This assertion reflects the two fatal flaws in Jerome's analysis: he grounds his argument on the fact that the federal claims did not have a specific claim labeled as gross negligence and the contention that the federal court did not make a factual finding regarding

whether Crum's failure to disclose the tape caused Crum's injury. In other words, Jerome takes the position that no factual issues actually litigated and necessarily resolved in the federal action can bar his state law claims because no federal claim had a specific element requiring a showing of gross negligence.

This contention reflects a misreading of this Court's precedent governing collateral estoppel. And it entirely ignores the identical factual issues, (1) whether Crum acted in reckless disregard of the truth, and (2) whether Crum's conduct had any effect on Jerome. These issues were actually litigated and necessarily decided adversely to Jerome in the federal suit and bar his state law gross negligence claim.

"Collateral estoppel bars re-litigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Leahy v Orion Twp*, 269 Mich App 527, 530; 711 NW2d 438 (2006). Generally, for collateral estoppel to apply, three elements must be satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *William Beaumont Hosp v Waas*, 315 Mich App 392, 398; 889 NW2d 745 (2016), citing *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004).

Each of those elements is satisfied here. Jerome does not dispute elements two and three; he argues, as did the dissenting opinion, that the same question of fact was not litigated in both the federal and state actions. But this is inconsistent with both federal district court's and the Sixth Circuit's decisions and the record here.⁸

The trial court correctly applied the doctrine of collateral estoppel where the federal court's findings that probable cause, causation, and qualified immunity defeated Jerome's federal claims and now bar Jerome's corresponding state law claim of gross negligence. *VanVorous v Burmeister*, 262 Mich App 467; 687 NW2d 132 (2004). Judge O'Meara issued a written opinion granting summary judgment against Jerome. The opinion determined that probable cause to prosecute existed despite the belatedly found and disclosed audio, the point Judge Gleicher focused on in her dissent, *Jerome v Crum*, unpublished per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 3355328), pp 4-5 (Gleicher, J., concurring in part and dissenting in part). But Judge Gleicher inaccurately contends that the majority "conflated" probable cause and proximate cause and that the district court and Sixth Circuit's opinions were based only on probable cause. She insists that probable cause was the only issue actually litigated. Not so.

⁸ Jerome does not take issue with the lower courts' conclusion that collateral estoppel bars his intentional tort claims. He argues only that collateral estoppel does not bar his gross negligence claim.

The district court determined that Crum's failure to disclose the recording "was not material to the finding of probable cause." *Jerome v Crum*, unpublished opinion per curiam of the United States District Court – Eastern District, issued August 25, 2016 (Docket No. 15-12302). Defendants had argued that the nondisclosure of the recording made no difference to the outcome because Crum was not involved in any way in providing testimony at the preliminary examination and because Allie's testimony at the preliminary examination contained the same details as she provided in the recorded interview. The district court found that "[i]n finding probable cause at the preliminary examination, the judge relied solely on Allie's testimony, not Crum's report." *Id.* The district court underscored its finding that Crum was not the proximate cause of Jerome's prosecution, pointing out two additional facts: (1) "Allie testified at the preliminary examination in a manner *consistent* with her interview with Crum on August 21." *Id.* The district court pointed out that the nondisclosure of the recording had no effect on the prosecution because "both Plaintiff's defense counsel and the prosecution had Crum's report and the opportunity to explore those inconsistencies at the preliminary examination." *Id.* at p 11.

Judge Gleicher wrongly ignored the district court's factual determinations in an effort to make out a case for Jerome that he failed to make for himself. The district court specifically determined that "[i]f the August 21 video had been available at the preliminary exam, Plaintiff cannot

show that it would have changed the Judge's finding of probable cause." *Id.* at p 11.

The district court also specifically determined that Crum did not act with reckless disregard for the truth." *Id.* at p 11. The district court necessarily decided this fact as part of its consideration of qualified immunity.

Finally, Judge Gleicher's dissent and Jerome's argument on appeal entirely misstate the causation analysis by focusing on the cause of the prosecutor's decision not to pursue a second trial after the mistrial. The Court of Appeals correctly held that Jerome offered no basis for showing that the decision not to pursue a second trial was based on the video. Judge Gleicher wrongly argues in dissent – and Jerome picks this up in his briefing to this Court – that the Court of Appeals majority refuted causation based on speculation. First, unless this court proposes to overrule *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999) and *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999), Jerome was obligated to offer sufficient evidentiary material to create a fact question. He failed to do so regarding causation as Judge Gleicher pointed out.

Second, the causation analysis determined in federal court was not whether the retrial would have taken place. It was whether nondisclosure of the videotape had any impact, i.e., was a cause, of the prosecution at the outset. Judge O'Meara determined that Crum's nondisclosure of the video did not have any effect on the prosecution. Notably, and contrary to Judge

Gleicher's dissent and Jerome's arguments to this Court, an element of malicious prosecution is whether the "defendant made, influenced, or participated in the decision to prosecute." *Jerome v Crum*, unpublished opinion per curiam of the United States District Court – Eastern District, issued August 25, 2016 (Docket No. 15-12302), p 8.

Judge Gleicher and Jerome entirely ignore this element and urge this Court to look only at the existence of probable cause; they do so in order to ignore the second finding of the district court, which was whether Crum's nondisclosure of the video influenced the prosecution. They then argue that no factual finding in federal court bars a jury trial on causation in state court. This is flatly wrong on multiple grounds.

First, probable cause was not the only element to the federal claims that was actually litigated and necessarily determined. The district court identified four elements:

The plaintiff must show that a criminal prosecution was initiated and that (1) the defendant made, influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause; (3) the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the prosecution was resolved in the plaintiff's favor. *Sykes v Anderson*, 625 F3d 294, 308-309 (6th Cir 2010).

And in concluding that defendants were entitled to summary judgment, the district court decided two elements: whether Crum's nondisclosure of the video influenced the prosecution and whether the videotape vitiated probable cause. The district court specifically decided that Jerome could not show that Crum's nondisclosure of the video "would have changed the judge's

finding of probable cause.” *Jerome v Crum*, unpublished opinion per curiam of the United States District Court – Eastern District, issued August 25, 2016 (Docket No. 15-12302), p 8. In other words, Crum’s nondisclosure of the video had no effect on the prosecution.

Consistently, the Sixth Circuit upheld the district court’s two factual findings. The Sixth Circuit concluded that Jerome could not show that evidence of Allie’s description during the interview damaged Allie’s credibility below the level needed for probable cause. The Sixth Circuit also concluded that Jerome could not show that Crum’s nondisclosure of the videotape or his purported misrepresentation of details of the interview were material to the prosecution. *Id.*, p 14. In other words, the Sixth Circuit squarely upheld the district court’s determination that Crum’s conduct was not a cause of the prosecution:

Objectively, reviewing all of the evidence ourselves, we can see that probable cause for arrest and detention existed. And what is more, it is clear that all of the arguments against probable cause were in view once A.K. gave her inconsistent testimony at the preliminary examination and yet probable cause was found independent of Crum. Jerome’s arguments ultimately are unavailing because nothing Crum did manufactured or removed probable cause.

Id.

The Court of Appeals correctly concluded that Jerome’s gross negligence claim is collaterally estopped by the federal decision. The Court agreed that a “determination of probable cause in the federal prosecution does not equate to a finding regarding gross negligence,” but it properly concluded that “the claim is still barred under principles of collateral

estoppel.” *Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328) at p 7. The Court of Appeals pointed out that the Sixth Circuit expressly ruled that “Crum’s failure to disclose the tape of the August 21 interview did not cause any harm to plaintiff.” *Id.* The federal court made this finding because Jerome had argued that the failure to disclose the tape meant that Jerome’s incarceration continued past the initial arrest and incarceration. The test for such a federal claim is whether the defendant “‘knowingly and deliberately, or with reckless disregard for the truth, made false statements or omissions that create[d] a falsehood’ and ‘such statements or omissions [we]re material, or necessary, to the finding of probable cause.’” *Jerome v Crum*, 695 F Appx 935, 941 (6th Cir 2017); quoting *Wilson v Russo*, 212 F2d 781, 786-87 (3d Cir 2000). The Sixth Circuit concluded that Jerome’s claim for continued detention and prosecution failed because “Jerome cannot show that Crum’s omission of the details of the August 21 interview was material to or strengthened the case against him because A.K. stated the same version of events in the preliminary examination that she did in the August 21 interview.” *Jerome*, 695 F Appx at 942.

Crum’s omission of the details of the August 21 interview, in other words, did not cause any change in the likelihood of Jerome being incarcerated since Allie had stated the same version of events during the preliminary examination. Thus, Crum’s omission could not have been the proximate cause of the arrest, prosecution, or continued detention of him. It

was not even “a” proximate cause. Contrary to Judge Gleicher’s dissent and Jerome’s belatedly made arguments to this Court, the federal district court made two findings: one as to probable cause and the other as to causation, i.e., materiality, both of which were elements of Jerome’s federal claims. The Sixth Circuit held 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.” *Jerome*, 695 F Appx at 943. It then determined that probable cause for arrest and detention existed and that “Jerome’s arguments ultimately are unavailing because nothing Crum did manufactured or removed probable cause.” *Id.*

When determining the preclusive effect of these findings from the federal action, the Michigan Court of Appeals correctly concluded that Jerome could not establish causation for his gross negligence claim because “the Sixth Circuit expressly ruled that Crum’s failure to disclose the tape of the August 21 interview did not cause any harm to plaintiff.” *Jerome v Crum*, unpublished opinion per curiam of the Michigan Court of Appeals, issued December 27, 2018 (Docket No. 335328) at p 7. The Court relied on the Sixth Circuit finding that “the withholding of the information within the August 21 interview was not material to the prosecution.” *Id.*, citing and quoting *Jerome*, 695 F Appx at 942-943. The Michigan Court of Appeals correctly concluded that “the federal court ruled that Crum’s failure to turn the tape of the August interview over to either the prosecution or plaintiff did not affect the continuation of the prosecution against plaintiff and had no effect on

plaintiff's continued confinement while awaiting trial." *Jerome*, unpub op at pp 7-8.

None of Jerome's state law claims can survive. Summary disposition against Jerome was properly affirmed. If the failure to turn over the tape was not material to, that is, had no effect on, the prosecution or continuation of the prosecution of Jerome, as a matter of both law and logic, it cannot have been a proximate cause of his claimed injuries, let alone "the proximate cause" of Jerome's injuries. Thus, the trial court ruling was correct and it was properly affirmed on appeal.

Judge Gleicher's dissent and Jerome's arguments to this Court also ignore and misstate the facts and law relating to gross negligence in other ways. Notably, neither Jerome nor the dissenting opinion mentions or distinguishes *VanVorous v Burmeister*, a case that Jerome had conceded in his Court of Appeals brief "seemingly" applied. (Plaintiff-Appellant's Brief on Appeal, pp 10-11.) Both entirely ignored the *VanVorous* court's collateral estoppel discussion, rationale, and holding. The decision is highly relevant to the collateral estoppel issues raised here and supports the trial court and Court of Appeals rulings in this case. In his brief in the Court of Appeals, Jerome conceded "the seeming applicability of *VanVorous*," (Plaintiff-Appellant's Brief, p 9), but attempted to carve his gross negligence claim out from under the collateral estoppel umbrella by arguing that the federal court's determination that Crum had "had probable cause to arrest, imprison and prosecute" Jerome does not necessarily mean that Crum's conduct "was

per se reasonable.” (Plaintiff-Appellant’s Brief, pp 10-11.) In Jerome’s view, “[n]othing in the federal court’s ruling precludes a reasonable finder of fact from concluding that this Defendant was grossly negligent and that his gross negligence was the proximate cause of Plaintiff’s injuries.” (*Id.*, p 11.) But Jerome ignores the federal court’s qualified immunity determination, which specifically characterized his omission as not in reckless disregard of the truth. And Jerome ignores the *VanVorous* court’s recognition that his gross negligence claim was based on the same facts as his intentional tort claims.

The Court of Appeals addressed and rejected the same argument in *VanVorous* dismissing the plaintiff’s gross negligence claim:

As defendants correctly note, this Court has rejected attempts to transform claims involving elements of intentional torts into claims of gross negligence (citations omitted). Thus, plaintiff did not state a claim upon which relief could be granted. MCR 2.116(C)(8). Moreover, unveiling plaintiff’s true claim of excessive force leads to the inevitable conclusion that the claim is also collaterally estopped.

VanVorous, supra, at 483-484. Likewise, in this case, Jerome’s gross negligence claim was properly dismissed because it is fully premised on Jerome’s conduct that was the basis for the claims of unlawful arrest, false imprisonment, and/or malicious prosecution claims. Jerome’s complaint alleged that Crum was grossly negligent “when Crum withheld undisclosed and exculpatory evidence[.]” (Complaint in the United States District Court for the Eastern District of Michigan, ¶ 87, APX 000533b.) It’s the same intentional conduct.

In addition, to prevail on a gross negligence claim under Michigan law, a plaintiff must show that the defendant's conduct was "so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407 (7)(a). Gross negligence has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks. *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). The federal court expressly ruled that "the court cannot conclude that Crum acted with reckless disregard for the truth," thus entitling him to qualified immunity. (Opinion and Order Granting Defendants' Motion for Summary Judgment, p 11, APX 000546b.) Accordingly, the federal court's finding that Crum did not act with reckless disregard for the truth collaterally estops Jerome's gross negligence claim, similarly premised on reckless disregard for the truth in withholding undisclosed and exculpatory evidence.

In sum, under the reasoning and holding of *VanVorous*, the issue of reckless disregard is collaterally estopped and Jerome's state-law claim for gross negligence is barred because the federal district court decided that the Crum did not act with reckless disregard for the truth. Thus, the lower courts properly granted summary disposition in favor of Crum and the City.

III. An affirmance is also proper on the basis of right result, wrong reason

If this Court disagrees with Crum on the collateral estoppel issue, this Court can and should nonetheless affirm the trial court's grant of summary disposition to Defendants for several additional reasons. Under the recognized "right result, wrong reason" theory, "[a] trial court's ruling may

be upheld on appeal where the right result issued, albeit for the wrong reason.” *Gleason v Michigan Dept of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

1. Jerome has failed to state a gross negligence claim upon which relief can be granted

The crux of Jerome’s gross negligence claim (Count IV of his Complaint) is that Crum allegedly “withheld undisclosed and exculpatory evidence against Samuel.” (Complaint in the Oakland County Circuit Court, ¶ 52, APX 000010b.) This purported gross negligence claim is merely a restatement of Jerome’s unlawful arrest and false imprisonment claims (set forth in Counts I and III). This scenario is addressed explicitly and definitively in *Norris v Lincoln Park Police Officers*, 292 Mich App 574, 582; 808 NW2d 578 (2011):

A party’s choice of label for a cause of action is not dispositive. We are not bound by the choice of label because to do so “would exalt form over substance. A party cannot avoid the dismissal of a cause of action through artful pleading. The gravamen of plaintiff’s claim is determined by examining the entire claim. The courts must look beyond the procedural labels in the complaint and determine the exact nature of the claim. A review of the amended complaint reveals that the gross negligence claim is premised on the alleged assault of plaintiff. Elements of intentional torts may not be transformed into gross negligence claims. (Citations omitted). Accordingly, the trial court erred by denying summary disposition of the gross negligence count for failure to state a claim. (Emphasis added).

Norris, supra at 582, quoting *VanVorous v Burmeister*, 262 Mich App 467, 483 (2004).

In *Norris, supra* and *VanVorous, supra*, the courts rejected the plaintiff's attempt to transform an intentional tort claim (assault) into a gross negligence claim, and this Court dismissed the gross negligence claim pursuant to MCR 2.116(C)(8).

In *Latits v Phillips*, 298 Mich App 109, 119-120; 826 NW2d 190 (2012), this Court concluded that the allegations on which the plaintiff purportedly founded the gross negligence claim was actually an intentional tort (i.e., assault/shooting), not reckless or accidental conduct. Likewise, in the instant case, Jerome claims that Crum's intentional conduct led to his arrest, incarceration and prosecution. These decisions could theoretically form the basis for the intentional torts of "false arrest" and "false imprisonment", but not even arguably form the basis for a "gross negligence claim."

Thus, Jerome cannot transform his intentional tort claims of false arrest and false imprisonment into a gross negligence claim. The dismissal of Jerome's gross negligence claim (for failure to state a claim upon which relief can be granted pursuant to MCR 2.116(C)(8)) can be upheld on this additional basis.

2. *Moreover, the facts do not support a prima facie claim of gross negligence*

The "gross negligence" exception to the shield of governmental immunity is found in MCL 691.1407 (2)(c), with "gross negligence" being defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a). Gross

negligence has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks. *Oliver v Smith*, 290 Mich App 678, 685; 810 NW2d 57 (2010). With regard to the requirements for finding “gross negligence”, *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004) aptly notes:

Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. However, saying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness.

Likewise, in this case, there are no facts to support the “so reckless” threshold that would create a question of fact for a jury to determine. Jerome’s claims that Crum’s investigation should have been more thorough, should have used better judgment in assessing the evidence, or should have given more weight to purported inconsistencies in Allie’s various accounts, does not suffice to establish the requisite conduct that can be characterized as “so reckless.” Therefore, the dismissal of Jerome’s gross negligence claim can be affirmed on this basis also. See *e.g.*, *Criss v City of Kent*, 867 F2d 259, 263 (6th Cir 1985)(once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which might exculpate the accused.).

Finally, in order for Jerome to prevail on a gross negligence claim, Crum’s conduct would have to be “*the proximate cause*” of Jerome’s injury or damage. MCL 691.1407 (2)(c); *Robinson v City of Detroit*, 462 Mich 439; 613

NW2d 307 (2000). The Michigan Supreme Court has interpreted “the proximate cause” to mean the “most immediate, efficient, and direct cause” of the injury. *Robinson, supra* at 462. The Supreme Court Justices continue to recognize that gross negligence that is *the* proximate cause of injury is “a very narrow exception” to immunity, and that exceptions to governmental immunity “must be narrowly construed.” *Beals v Michigan*, 497 Mich 363, 370, 378; 871 NW2d 5 (2015).

Under no stretch of the imagination can Crum’s conduct be determined “the” proximate cause of Jerome’s arrest, incarceration, and prosecution. Crum simply turned over the information to the prosecutor, who then conducted his own evaluation of probable cause. Next, the district court judge found that probable cause existed to bind Jerome over for trial. Much like in *Beals, supra*, Crum is protected from tort liability by governmental immunity because the “gross negligence” exception to immunity is inapplicable in this case to defeat his immunity protection on not one, but three separate bases.

In addition, the evidence in this case demonstrates Crum’s good faith and lack of malice. “The good faith element of the *Ross* test is subjective in nature. It protects a defendant’s honest belief and good-faith conduct with the cloak of immunity while exposing to liability a defendant who acts with malicious intent.” *Odom, supra* at 481-482. The Michigan Supreme Court has described a lack of good faith as “malicious intent, capricious activity or corrupt conduct” or “willful and corrupt misconduct” (citations omitted). *Id.*

at 474. The Michigan Supreme Court Justice's pronouncement in *Odom* is especially significant with regard to the facts in this case:

A police officer would be entitled to immunity under *Ross* if he acted in good faith and honestly believed that he had probable cause to arrest, even if he later learned that he was mistaken.

Id. at 481.

The standard in evaluating the governmental immunity question is *not* whether, when viewing the facts objectively with the benefit of hindsight, the police officers' conduct was justified; rather, the standard is a subjective one from the perspective of the defendant with respect to whether he was acting in good faith. *Latits v Phillips*, 298 Mich App 109, 116; 826 NW2d 190 (2012). In the instant case, much like in *Latits, supra*, the substance of Jerome's argument is that Crum exercised poor judgment or was mistaken about his justification for his actions. Much like the ruling in *Latits*, even if the Court were to agree with Jerome's argument in this regard, "it would not affect the immunity analysis." *Id.* at 114-115. Although Jerome may disagree with the results of Crum's decision-making, the evidence supports the fact that Crum undertook his actions in good faith and without malice. There is no competent evidence to the contrary. (Crum Affidavit, ¶¶ 30-31, APX 000193b.)

Jerome also complained that Crum was in possession of "undisclosed and exculpatory evidence" (Complaint in the Oakland County Circuit Court, ¶ 35, APX 000006b.) But Jerome cannot show that Crum intentionally withheld any information from the Prosecutor or the court, and the evidence shows

the contrary. Crum testified that he did not video record his August 21, 2013 interviews of witnesses, and he was unaware that the interviews had been taped, consistent with his sworn testimony in August 2013. (Crum Tr, pp 159-163, 174, APX 000167b-000171b, APX 000182b.) His affidavit remains consistent in that regard as well. (Crum Affidavit, ¶¶ 24-25, APX 000192b.) Indeed, as soon as Crum learned that the video recording existed, he promptly brought it to the prosecutor's attention, and they in turn, brought it to the trial court's attention as soon as court resumed. If Crum had withheld the video recording initially, there would be no reason why he would later choose to voluntarily disclose and produce it. There is simply no evidence that Crum intentionally suppressed or concealed that information.

This analysis also makes this a singularly unattractive candidate for review. Even if this Court wanted to reach the well-established collateral estoppel principles raised by the case, it would not change the outcome here because of the alternate grounds in support of an affirmance. Jerome's application for leave to appeal fails to adequately grapple with these issues or to explain why this Court's review would be anything other than dicta given the strength of these alternate grounds in support of summary disposition. Thus, review is properly denied.

RELIEF

WHEREFORE, Defendants-Appellees, Lieutenant Michael Crum, in his individual and representative capacity, and the City of Berkley, a Municipal entity, request this Court to deny Plaintiff-Appellant's application for leave to appeal for lack of merit in the ground presented, or in the alternative, affirm and enter any other relief this Court deems appropriate under the circumstances.

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Dated: January 3, 2020

CERTIFICATE OF COMPLIANCE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

MARY MASSARON, being first duly sworn, certifies and states the following:

1. She is a shareholder with the firm Plunkett Cooney, and is in principal charge of the above-captioned cause for the purpose of preparing the attached brief on appeal;

2. The brief on appeal prepared by her office complies with the type-volume limitation;

3. Plunkett Cooney relies on the word count of their word processing system used to prepare the brief, using Cambria size 12 font; and

4. The word processing system counts the number of words in the brief as 14,247.

/s/Mary Massaron
MARY MASSARON

Dated: January 3, 2020

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