Case No. 122654

IN THE
SUPREME COURT OF ILLINOIS

ALAN BEAMAN, Plaintiff-Appellant, v. TIM FREESMEYER, Former Normal Police Detective; DAVE WARNER, Former Normal Police Detective; FRANK ZAYAS, Former Normal Police Lieutenant; and TOWN OF NORMAL, ILLINOIS, Defendants-Appellees.	On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-16-0527 There Heard on Appeal from the Circuit Court of McLean County, Illinois Case No. 14 L 51

BRIEF OF DEFENDANTS-APPELLEES

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POINTS AND AUTHORITIES

NATURE OF THE CASE

On April 1, 1995, a McLean County jury found plaintiff Alan Beaman guilty of the murder of Illinois State University student Jennifer Lockmiller. Plaintiff was sentenced to 50 years in the Illinois Department of Corrections. The conviction was affirmed by the appellate court (*People v. Beaman*, 279 Ill. App. 3d 1115 (4th Dist. 1996)), and a petition for leave to appeal to the Illinois Supreme Court was denied (168 Ill. 2d 601 (1996)). Plaintiff then pursued a post-conviction petition. After an evidentiary hearing, the circuit court denied the petition, which was affirmed by the appellate court. *People v. Beaman*, 368 Ill. App. 3d 759 (4th Dist. 2006).

In 2008, the Illinois Supreme Court reversed plaintiff's conviction, finding the State violated his right to due process when it failed to disclose material and exculpatory information about an alternative suspect, Larbi John Murray ("John Doe" in the Court's written opinion). *People v. Beaman,* 229 Ill. 2d 56 (2008). In 2010, plaintiff filed a lawsuit under 42 U.S.C. §1983 in federal court against defendants Tim Freesmeyer, Dave Warner, and Frank Zayas (all former Town of Normal police officers), along with McLean County prosecutors and other police investigators, alleging they violated plaintiff's due process rights in the investigation of the murder and subsequent arrest and prosecutions. Plaintiff also added state law tort claims of malicious prosecution, intentional infliction of emotional distress (IIED), and conspiracy, and indemnification and respondeat superior claims against the Town of Normal.

The federal district court granted summary judgment on plaintiff's federal claims and relinquished jurisdiction over the state claims. *Beaman v. Souk*, 7 F.

Supp. 3d 805 (C.D. Ill. 2014). The Seventh Circuit affirmed the district court's decision. *Beaman v. Freesmeyer*, 776 F.3d 500 (7th Cir. 2015).

In April, 2014, plaintiff filed his state claims against defendants in McLean County, Illinois. Defendants moved for summary judgment and on June 22, 2016, the circuit court granted summary judgment, finding no triable issues. The circuit court found that defendants were entitled to a judgment because they did not commence or continue the prosecution, there was probable cause for the arrest and prosecution of plaintiff, defendants did not act maliciously, and the dismissal of the criminal charges against plaintiff was not indicative of innocence. On August 4, 2017, the appellate court affirmed the circuit court's decision, addressing only the commencement issue. *Beaman v. Freesmeyer*, 2017 IL App (4th) 160527.

Plaintiff then filed a petition for leave to appeal before this Court, challenging only the appellate court's determination regarding the "commencement or continuation" element of a state law malicious prosecution claim. On November 22, 2017, this Court denied plaintiff's petition for leave to appeal. Plaintiff filed a motion for leave to file a motion to reconsider the denial of the petition for leave to appeal, and attached a copy of his proposed motion to reconsider to his motion for leave. On December 8, 2017, this Court reversed itself by vacating the denial of the petition for leave to appeal, and granted plaintiff's motion to reconsider.

Plaintiff now seeks review of not only the appellate court's determination that defendants were entitled to a judgment because they did not commence or continue the prosecution, but also challenges the circuit court's findings on the remaining elements of plaintiff's malicious prosecution claim. Plaintiff also challenges the

dismissal of the remaining state law claims, IIED, civil conspiracy, and the derivative claims.

This Court should affirm the appellate court's decision affirming the circuit court's grant of summary judgment in favor of defendants. Neither in plaintiff's petition for leave to appeal nor in his brief does he provide a reason to justify expanding the tort of malicious prosecution to hold police to answer for decisions made by prosecutors when there is no evidence police conduct was a proximate cause of the prosecutor's allegedly wrongful decision to prosecute, a decision which otherwise would not have happened. In addition, despite plaintiff's assertion, there is no conflict in the law as to the "commencement or continuation" element. The law on the threshold element of malicious prosecution has been settled and clear for many years under Illinois precedent and the appellate court's decision was solidly in line with it. The appellate court should be affirmed, and if this Court finds reason to address the remaining elements, the circuit court's decision finding three other solid bases for summary judgment should be upheld as well.

ISSUES PRESENTED FOR REVIEW

Should defendants be required to stand trial for the disfavored tort of malicious prosecution and related torts where all prosecution decisions were made by the McLean County State's Attorney, there was clear probable cause for the prosecution, defendants lacked malice, and the murder charge against plaintiff was dismissed without any determination that indicated plaintiff was innocent of the murder.

STATEMENT OF FACTS

The Murder

On August 28, 1993, Jennifer Lockmiller's decomposed body was found in her apartment in Normal, Illinois. Lockmiller was a student at Illinois State University at the time. Lockmiller had been strangled with an electrical cord from an alarm clock in her bedroom, and had been stabbed in the chest with scissors. (C00327, ¶9).

Lockmiller's body was found by her close friend, Morgan Keefe (now Hartman). Keefe immediately told the police "I know who did it," and reported that Lockmiller was deathly afraid of her former boyfriend, plaintiff Alan Beaman. (C00327, ¶10). According to Keefe, plaintiff broke down Lockmiller's door several times and threatened suicide if she broke up with him. (C00327, ¶10; C00243, C02993, C01156, C01135, C02613, C00359).

The crime scene was a two-story frame apartment building containing four apartments. Lockmiller's body was found in apartment No. 4, which was on the west end of the second floor. The police concluded there were no signs of recent forced entry, and that all signs of damage to the apartment door frame were present prior to the date of Lockmiller's murder, actually the result of plaintiff's earlier forced entries to her apartment. (C00327, ¶11-12; C02243, C02993, C01156, C01135, C02613, C00359) (C00328, ¶13; C02243, C02993, C026313, C00359). A cabinet door under the kitchen sink was open, and a plastic garbage can was lying on its side in front of the open cabinet. A bag of garbage was found on the living room sofa filled with trash, with its contents spilling out. (C00328, ¶14-15; C02243, C02993, C02613).

Two book bags and Lockmiller's purse were on a table; all three were closed and undisturbed. Lockmiller's purse contained her driver's license and other identification, a wallet with $17.71 in cash, several credit cards and other personal effects. Officers did not detect any burglary signs because no items of value were missing, and there was new damage to the front door. The television was on and the air conditioning unit was running, both located in the living room. Lockmiller's grey Pontiac Sunbird had been parked for several days outside the front door to the building. (C00328-329, ¶16-17; C02311, C02613, C02993, C02243, C00693, C01156).

The door to Lockmiller's bedroom was open. A hole, approximately ten inches in diameter, was found on the south wall of the bedroom. NPD detectives learned plaintiff bashed the hole in the bedroom wall during an argument with Lockmiller weeks earlier. (C00329, ¶18; C02243, C02993, C02877). Several letters were located under Lockmiller's bed and placed into evidence. (C00331, ¶23; C02311, C02993, C01156).

The bedroom contained a single bed and a set of bunk beds. Lockmiller's body was found on the floor in between the beds in a supine position. Investigators could find no physical evidence of rape. A pair of scissors with red plastic handles was embedded in the center of Lockmiller's chest. The autopsy revealed Lockmiller died from strangulation and likely she was stabbed when she was already dead or her heart barely beating. Multiple other stab wounds were noted in the skin on Lockmiller's chest, apparently made with the scissors. (C00330, ¶20; C02243, C02993, C02613). A clock radio was on the floor next to Lockmiller's head, and the cord from the clock radio was wrapped around and tied in front of Lockmiller's neck. A box fan was resting on the

scissors in Lockmiller's chest, covering her face. (C00330-331, ¶21-22; C02243, C02993, C02613).

No defensive wounds were found on her body, and there were no signs of forced entry into the apartment. (C00331, ¶25). The police and prosecutors believed the murder was a crime of passion, involving an act of vengeance of some type, and that Lockmiller knew her killer. (C00331, ¶26). Two of plaintiff's fingerprints were identified on the clock used to strangle Lockmiller. One of plaintiff's fingerprints was on the back of the clock near the cord and another on the bottom of the clock. (C00331, ¶24).

The Murder Investigation

At the time of the Lockmiller murder investigation, defendants Timothy Freesmeyer, Dave Warner and Frank Zayas were police officers for the Town of Normal Police Department ("NPD"), and worked in the NPD's Criminal Investigations Division ("CID"). Freesmeyer was an investigator, Warner was an evidence technician, and Zayas was a lieutenant in charge of CID at the time. (C00325-326, ¶¶2-5). Tony Daniels was also a detective in CID and was involved in the Lockmiller murder investigation. (C00326, ¶6). James Souk was the Chief of the Felony Division in the McLean County State's Attorney's Office. Souk was the lead prosecutor in plaintiff's prosecution. (C00326, ¶7). Charles Reynard was the elected State's Attorney for McLean County at the time of the murder and prosecution. (C00326, ¶8).

On the day Lockmiller's body was discovered, a meeting was held in the NPD with Police Chief James Taylor, several CID detectives, Souk, and McLean County Coroner Dan Brady to discuss the case. The group discovered that plaintiff was in

Rockford, and Tony Daniels and Rob Hospelhorn, another NPD Detective, were assigned to go to Rockford to interview plaintiff that night. (C00331-332, ¶27).

Daniels and Hospelhorn conducted a short interview of plaintiff that night in Rockford, which plaintiff terminated abruptly. Daniels and Hospelhorn came away from it believing plaintiff's conduct was suspicious. They were particularly interested that while plaintiff was questioned about his relationship with Lockmiller, he never asked if something had happened to her. Daniels and Hospelhorn returned to Rockford the following day to attempt to talk to plaintiff again, but were told he was represented by counsel and would not talk to the detectives. (C00332, ¶28).

Throughout the first six weeks after the murder, every detective in CID worked on the investigation. Dozens of friends, neighbors, boyfriends, relatives and acquaintances were interviewed. Zayas, as the head of CID, assigned different parts of the investigation, and each detective worked on various facets of the case. (C00332, ¶29). The detectives in CID met periodically to discuss the investigation. At times, Souk or other attorneys from the State's Attorney's Office attended as well. (C00332, ¶30).

Morgan Keefe

Morgan Keefe (now Hartman) was Lockmiller's best friend. Immediately after discovering Lockmiller's body, Keefe called 911 and told the dispatcher that "I know who did it .... [Lockmiller] had this psycho ex-boyfriend that she broke up with. His name's Alan, he went to Wesleyan and I only met him once and he was psycho and he used to harass her all the time and he used to break down her door." (C00333, ¶32; C02785, C02613, C01135, C03010). Warner interviewed Keefe that day, and discovered that Keefe and Lockmiller went to a movie on the Tuesday night before Lockmiller was

found; they left the theater around midnight and that was the last time Keefe saw or spoke with Lockmiller. Keefe said Lockmiller had been dating plaintiff, but when she tried to break away from plaintiff, he would threaten suicide. Plaintiff broke down the door to Lockmiller's apartment a few times and Lockmiller's landlord fixed the lock. One night Keefe went to Lockmiller's apartment and there was a chair and a big beam against the front door. When Keefe opened the door, Lockmiller started screaming. Keefe told her, "Jen, it's me. It's ok," and Lockmiller said, "[Alan] broke down the door awhile ago." Keefe described Lockmiller as terribly afraid of plaintiff. (C00333-334, ¶34; C01135, C02785).

Lockmiller's Neighbors

Liza Everett and Lori Solomon, who lived in the apartment directly below Lockmiller, told NPD detectives they overheard fights repeatedly between Lockmiller and a man who drove a silver Ford Escort. Plaintiff drove a silver/grey Ford Escort. (C00334, ¶35; C01156, C02311).

David Singley, who lived directly across the hall from Lockmiller, told NPD detectives that a month before Lockmiller's murder he overheard an argument between Lockmiller and plaintiff, during which plaintiff tried to break into Lockmiller's apartment by kicking and throwing himself against her apartment door. Singley told police that plaintiff ran around the apartment parking lot yelling "slut." He returned to her apartment a short time later to yell something like "I see your cherry stain on the bed;" and "you slept with him but you wouldn't sleep with me;" and "the only reason you dated me was to go to bed with my friend." (C00334-335, ¶36; C01156).

Susan Jenkins, who lived with Singley, described this same incident to NPD, telling detectives that plaintiff seemed so "absolutely crazed" that she was afraid to call the police because she thought that if she did plaintiff would beat Lockmiller in response. (C00335, ¶37; C01156). Singley also told the police that he heard certain sounds in Lockmiller's apartment on the day of the murder that could suggest she was still alive at approximately 2:00 p.m. However, both Freesmeyer and Souk believed Singley was mistaken about the day he heard these sounds. (C00977, at 302-304; C02311, at 1998-2000).

Time of Death

Dan Brady, the McLean County Coroner, opined that Lockmiller's body was in her apartment for 2 to 4 days before she was discovered. The coroner estimated the time of death being between 9:00 a.m. on August 25, 1993 and 9:00 a.m. on August 27, 1993. (C00335, ¶38; C02993, C02613, C03193).

Claudine Moss told NPD detectives she spoke to Lockmiller at 8:00 a.m. on August 25, 1993, about a kitten Lockmiller was advertising for sale. Moss told police she and her husband went to Lockmiller's apartment to look at the cat around 4:20 p.m. that day, but Lockmiller did not answer her door. (C00335, ¶39; C02613, C02188).

NPD detectives obtained Lockmiller's class schedule for August 25, 1993 and learned that she had four classes on that date: (a) 9:00-9:50 a.m.; (b) 10:00-10:50 a.m.; (c) 11:00-11:50; and (d) 2:00-2:50 p.m. Lockmiller attended her first three classes, but did not attend her fourth class, which began at 2:00 p.m., and Lockmiller did not make a work meeting she was supposed to attend at 8:00 p.m. that night. (C00335-336, ¶40;

C02613, C01156). NPD detectives were unable to find any person who saw Lockmiller alive after her 11:00-11:50 a.m. class on August 25, 1993. (C00336, ¶41; C02613).

Plaintiff's Alibi

Freesmeyer interviewed plaintiff On October 11, 1993. The day before, NPD detectives learned that plaintiff made a deposit at Bell Federal Savings and Loan Bank, located at 1466 S. Alpine Road, Rockford, at approximately 10:11 a.m. on August 25. (C00336, ¶44; C01156, C02613). During the interview, plaintiff said that on August 25, he arrived home from work shortly after 9:00 a.m. and went to sleep until his parents woke him up at 3:30-4:00 p.m. when they got home. (C00336, ¶42; C01156, C02613). Plaintiff's supervisor where he worked, Dennis Clark (plaintiff's uncle), confirmed to NPD detectives that plaintiff got off work on August 25 at 9:00 a.m. (C00336, ¶43; C02613). NPD investigators discovered that plaintiff's attorney had subpoenaed information from the bank about a month earlier, and concluded then that plaintiff purposely liked about having gone to bed after work on the day of the murder.

Based on the distance between Rockford and Bloomington, NPD detectives believed it was possible for plaintiff to have left Bell Federal, traveled to Bloomington to commit the murder, and returned to Rockford by 3:00 p.m. (C00336, ¶45; C02613, C00359).

Plaintiff's Stormy Relationship with Lockmiller

The NPD detectives discovered that plaintiff and Lockmiller had broken off their stormy relationship approximately one month before her murder. During their two-year relationship, plaintiff and Lockmiller broke up and reunited about 18 times. They had many loud arguments, witnessed by their friends and neighbors. One argument resulted in

plaintiff drinking a bottle of nail polish remover as a suicide attempt, real or feigned, and the police being called. (C00337, ¶46; C00359, C00977, C02613). Friends and family told NPD that Lockmiller was afraid of plaintiff and she intended to seek an order of protection. (C00338, ¶52). Investigators found in the apartment undated letters plaintiff wrote to Lockmiller about his passion for her. Plaintiff wrote that he loved Lockmiller, "more passionately than Romeo did Juliet, more hopelessly than Ophelia did Hamlet, more vengefully than Medea, Jason" and added, "Don't worry, I won't kill anybody, I don't believe in that. I do unto others as I would have them unto me (from now on)." Plaintiff said, "I really just want you to be with me and only me," and other expressions of his passion that he felt for her. (C00337, ¶47; C01156, C02311).

The detectives discovered that during one of the instances in which plaintiff broke down Lockmiller's apartment door, she was with her friend and sometimes lover, Larbi John Murray ("John Doe"). Todd Barth, Lockmiller's friend, told NPD detectives that around 3 a.m., in the morning during the July before the murder, Lockmiller called him to say she had moved a dresser in front of the door because plaintiff was trying to break in. (C00337-338, ¶48; C00977, C01224, C03199).

On July 25, 1993, plaintiff suspected that Lockmiller was seeing and possibly sleeping with plaintiff's roommate, Michael Swaine, and again knocked down Lockmiller's apartment door. Swaine asked plaintiff around 2:00 a.m. that night to borrow his car to go to a party. Thinking Swaine was lying (he was), plaintiff followed Swaine on his bicycle to Lockmiller's apartment. Plaintiff banged on the door yelling, "I knew it! I know you are in there," and kicked in the door, looking for Swaine, who was hiding in the closet. (C00338, ¶49; C00359, C03193, C02877, C03143). On another

occasion, plaintiff pushed his way into Lockmiller's apartment and rummaged through her trash can looking for Swaine's used condoms as evidence of their affair. (C00338, ¶50; C00359).

Kris Perry, a close friend of both Lockmiller and plaintiff, told NPD Detective Hospelhorn that Lockmiller told Perry plaintiff once said he would kill her then kill himself. Hospelhorn interviewed Perry a second time a few days later and Perry changed his story to say that plaintiff only threatened to kill himself, not Lockmiller. (C00338, ¶51; C00481). Heidi Steinman, a close friend of Lockmiller's, told NPD detectives that plaintiff treated Lockmiller like she was his property. Lockmiller told Steinman that plaintiff once threw a glass at Lockmiller, and had also thrown and broken a lamp in her apartment. (C00339, ¶53; C03017, C03038).

Plaintiff's good friend, Mike Mackey, told police that Lockmiller would "fuck with his [plaintiff's] head so much that he would just go crazy . . . he would be irrational and mood swings . . . it just made him suicidal . . she just drove him crazy." (C00339, ¶55; C03102). NPD detectives learned that in the summer of 1993, plaintiff was seeing a psychiatrist, was not eating or sleeping, and was "a mess" and "a mental wreck" because of what he was "going through with Jen." (C00339, ¶56; C02877). Another witness, Jennifer Seig, told NPD detectives she believed plaintiff threatened to kill Lockmiller and Swaine if he ever caught them in bed together. (C00339, ¶57; C03121).

Katy Corbett, another of plaintiff's friends, told NPD detectives that at one time Lockmiller was ready to end it with plaintiff but did not because he "went through these times when he would be violent and he punched a huge hole in her wall at her apartment," and "he would get really upset." Lockmiller told Corbett she was going to

wait until the end of the summer to break it off because she did not want to make plaintiff upset while he was still in town working. Corbett stated that if "Alan was in the right frame of mind, he could be violent." Corbett said every time she saw plaintiff "in these violent rages he would usually take it out on something else, like there is holes in the apartment walls everywhere at our complex . . . he would bash things." (C00339-340, ¶58; C03038).

Swaine also confirmed to NPD detectives that plaintiff became violent and punched a large hole in Lockmiller's bedroom wall. (C00340, ¶59; C02877). Michael Bowen, Lockmiller's friend, informed NPD detectives that Lockmiller told him plaintiff "pushed her before." (C00340, ¶60; C01218). Meredith Haynes, another friend of Lockmiller's, said that Lockmiller told her that plaintiff broke into Lockmiller's apartment or broke down the door several times, pushed her around and knocked things over. (C00340, ¶61; C03134).

Swaine's Relationship with Lockmiller

During the summer of 1993, Michael Swaine and plaintiff were roommates and worked together. Swaine began a sexual relationship with Lockmiller in June 1993, while she and plaintiff were still dating. (C00340-341, ¶62).

On July 25, 1993, plaintiff searched Swaine's bedroom while he was at work for evidence that Lockmiller and Swaine were having a relationship. During the search, plaintiff found two letters from Lockmiller to Swaine, which plaintiff felt confirmed his suspicions about them. Plaintiff also found an open box of condoms in his and Swaine's apartment and believed some condoms were missing from the box. Plaintiff thought the

missing condoms meant Swaine was having sex with Lockmiller. (C00341, ¶64; C02613, C02877, C03121, C03048).

Plaintiff took the letters he found to the theater where he and Swaine worked together, and angrily confronted Swaine about his relationship with Lockmiller, accusing Swaine of "fucking my girlfriend." (C0034-3421, ¶65; C02877, C03038). Plaintiff then went immediately to Lockmiller's apartment, and pounded on her locked door. (C00342, ¶66; C03017). Steinman, who was with Lockmiller in her apartment at the time, told NPD detectives that plaintiff said, "Don't do this to me Jen. I'm going to kill myself" and kept threatening suicide until Lockmiller let him in. Once inside, plaintiff angrily confronted Lockmiller with the letters. He went through Lockmiller's bathroom garbage can and found a tampon applicator, and said "See this is prophylactic. I know it, I know it. You had sex with him." (C00342, ¶67; C03017).

Plaintiff Leaves for Ohio

Plaintiff left Bloomington on July 25 after confronting Swaine and Lockmiller and went to Ohio, where he stayed with a friend until August 4. (C00342, ¶68; C02877). Before leaving Bloomington, plaintiff gave his theater professor, Dr. Brown, a note stating " . . . But the things that I've found out and witnessed about my aforementioned roommate and my ex-fiancé have crushed any spirit. I had to get out of the slump, and it's really just time for me to leave. I'm just afraid I'd cause even more hell to break loose." plaintiff attached the two letters he found in Swaine's room to the note he left for Dr. Brown. (C00342-343, ¶69; C02613). While he was in Ohio, plaintiff called Lockmiller eight times. (C00343, ¶70; C03057, C02188).

Plaintiff Returns to Bloomington

On August 4, plaintiff returned to Bloomington to get his car. He went to the apartment he shared with Swaine and saw him driving Lockmiller's car. (C00343, ¶71; C02877). That same day, plaintiff went to Lockmiller's apartment for about 30-45 minutes "to talk to her because we had broken up." Plaintiff then drove Lockmiller to class, and when he dropped her off, she kissed him goodbye, and he told her "that might be the last time we ever kissed" because he did not think he could ever trust her again. (C00343, ¶72; C03143). Plaintiff told NPD detectives that August 4, 1993 was the last time he saw Lockmiller and that he had "no idea" if she was dating anyone "and didn't want to know." Plaintiff returned to Rockford on August 4, 1993. (C00343, ¶73-74; C03143, C02613).

Plaintiff's Contact with Lockmiller from Rockford

Heidi Steinman told NPD detectives that plaintiff called Lockmiller from Rockford to tell her that he loved her and missed her. (C00344, ¶78; C03017, C02613). Lockmiller's phone records show she made 28 calls to plaintiff's Rockford home on August 22, 1993. The next day, August 23, plaintiff and Lockmiller spoke on the telephone for 13 minutes. (C00344, ¶79; C02613, C02188). Plaintiff later told Freesmeyer that Lockmiller was asking to get back together with him during the August 23 call, but plaintiff said "No, I don't want to talk to you. You fucked my fucking roommate and I don't want to talk to you," then hung up. (C00344, ¶80; C03060).

The Other Suspects

In addition to plaintiff and Swaine, Stacey "Bubba" Gates, John Murray ("John Doe") and Rob Curtis were investigated as possible suspects early in the investigation. Like Swaine, Gates was ruled out as a suspect due to his alibi. (C00345, ¶82).

Tony Daniels was in charge of investigating Murray. Daniels and Hospelhorn interrogated Murray twice, and tape recorded the statements. A September 2, 1993 interview with Murray revealed that he sometimes dated Lockmiller. Murray said he visited Lockmiller's apartment sometime between August 19 and 23, and believed he left Bloomington to go home to Byron, Illinois on August 24 at 3 p.m., and was in Byron until September 1. Murray reported that one time when plaintiff and Lockmiller were dating, plaintiff "freaked out" and kicked in Lockmiller's door when Murray was there, and grabbed Lockmiller's arm. Lockmiller told Murray she was scared to break up with plaintiff because she "did not know what he was going to do" and that plaintiff was a "psycho." (C00345, ¶83; C00693, C00481, C01218, C01224, C01252).

In a follow-up interview on September 8, 1993, after talking to his live-in girlfriend, Debbie Mackoway, Murray corrected several facts he got wrong in his first statement. Murray corrected that he last saw Lockmiller on August 21, which he recalled after reviewing Mackoway's work schedule. He corrected that Mackoway left their apartment for work at 6:30 a.m. on August 25, and he was at their apartment that day from the time she left for work until she returned at 1 p.m. Murray corrected that he did not leave Bloomington for Byron until 4 p.m. that day He returned to Bloomington on September 2, 1993. Murray admitted he sold Lockmiller marijuana, and she owed him $20. Murray offered to take a polygraph and to provide his telephone records to the NPD. When Murray learned of Lockmiller's death, he and Mackoway moved to a hotel because they believed plaintiff killed Lockmiller and were afraid of him. (C00345-346, ¶84; C01252, C00481).

On September 30, 1993, Daniels took Murray to the Morton Crime Lab for a polygraph. Terrance McCann was the polygraph examiner who administered the test to Murray. McCann was unable to obtain a result because Murray could not follow McCann's directions, although McCann did not conclude at that time that Murray intentionally prevented a result to avoid the examination. (C00347, ¶86).

A week later, defendant Warner received the polygraph report about Murray, which was sent to Warner because he made the original appointment with the lab for the polygraph. When Warner received the report he gave it to Daniels. Warner did not know what Daniels did with the report. (C00347, ¶87; C00548). Warner believed the State Police Lab also sent Murray's report directly to the State's Attorney's Office, but the State's Attorney never did receive that report. (C00347-348, ¶88).

Daniels could not deny receiving Murray's polygraph report from Warner, only that he had no memory of it. Daniels testified that he believed Warner did not and would not have intentionally suppressed the Murray polygraph report. (C00348, ¶89-90; C00693). Daniels gave several possible explanations for the Murray polygraph report not getting to the State's Attorney file: Warner may have given it to Daniels and he misplaced it; an NPD intern who made copies for the file could have misplaced it; Daniels could have accidentally put the report in a different file; or the report could have otherwise fallen through the cracks somewhere in the NPD. (C00348, ¶91; C00693).

Freesmeyer's entire knowledge regarding Murray was documented in a comprehensive report Freesmeyer completed. Freesmeyer organized three polygraph examinations at the NPD on October 12, 1993, with Kenneth Frankenberry, a state polygraph examiner from Rockford. Frankenberry was to administer polygraphs for

plaintiff's friend, Chris Carbone; for Murray; and for plaintiff. Murray did not show up for his examination, and plaintiff refused. Freesmeyer had no other involvement with Murray. Freesmeyer did not interview Murray, and believed he never met with him. (C00348-349, ¶92; C00359, C01156).

In February, 1994, several NPD investigators met with Chicago Police Department homicide detectives to discuss the investigation. According to Daniels, alternative suspects, including Murray, were discussed at that meeting. The Chicago detectives recommended that the NPD investigators continue to focus on plaintiff as the prime suspect. (C00349, ¶93; C00693).

The Decision to Charge Plaintiff

On May 16, 1994, a meeting was held to decide if plaintiff should be arrested for Lockmiller's murder. NPD Chief James Taylor, Zayas, Daniels, Freesmeyer, State's Attorney Reynard, and Assistant State's Attorney Souk attended the meeting. (C00349, ¶94; C00977). The investigators provided input about what the nine month investigation had produced. As a result of that discussion, State's Attorney Reynard decided that plaintiff should be charged with Lockmiller's murder. NPD investigators did not lobby or urge the State's Attorney to charge plaintiff. The decision was solely made by Reynard, and Souk strongly agreed with the decision. According to Souk, no one at the meeting expressed any opposition to the decision to charge plaintiff. (C00349-350, ¶95; C00977).

Tony Daniels testified that he suggested that additional work on the case be done before plaintiff's arrest, but Souk responded "I think we've got our guy," and that "we went as far as we can with this case. We are going to go ahead and issue a warrant for [plaintiff's] arrest." (C00350, ¶97).

Freesmeyer agreed with the decision to proceed against plaintiff. Freesmeyer concluded there was probable cause for the arrest and prosecution of plaintiff based on the following information developed during the murder investigation.

- Plaintiff's fingerprints were on the murder weapon, an alarm clock used to strangle Lockmiller.
- NPD investigators discovered that one time plaintiff pulled a garbage bag out of a garbage can in Lockmiller's apartment to search for evidence of condoms deposited by Swaine or some other Lockmiller lover. At the crime scene police found a garbage bag had been pulled out of the can and was sitting on the living room couch.
- The police found voluminous letters plaintiff had written Lockmiller, which showed an intense passion for her. Telephone records showed 28 phone calls from Lockmiller to plaintiff's home residence within the days before the murder.
- There was a hole in plaintiff's alibi.
- Plaintiff had broken down Lockmiller's apartment door to get into her apartment twice before.
- Freesmeyer had asked plaintiff several times in interviews whether he had any evidence or information that could clear him. Plaintiff's response was that he had nothing.
- Freesmeyer asked plaintiff several times whether he had gone anywhere after he got off work the morning of the murder. Plaintiff said he did not. In reality, plaintiff had gone to a bank in Rockford that morning. A video from the bank showed plaintiff in the bank at 10:11 a.m., when plaintiff had told the police he got off work at 9:00 a.m., and went straight to bed.
- Freesmeyer knew that plaintiff's attorney had requested and received information from the Rockford bank in September, 1993, so Freesmeyer concluded plaintiff knew he had not gone straight to bed after work that morning and was lying.
- Plaintiff made several suspicious statements on an overhear with Swaine. Plaintiff said Lockmiller had "dug into him with every ounce of sharp silver she had." Freesmeyer concluded that the statement was not a normal expression and matched that Lockmiller was stabbed in the chest with a silver scissors, which had not been publicly reported when the statement was made.

- Plaintiff told Swaine on the overhear that he knew Swaine was sleeping with Lockmiller because "that pussy never tasted the same," which seemed to be a crude reference immediately after her death about somebody he supposedly once loved.

- Plaintiff told Swaine that Lockmiller was never going to be happy. In Freesmeyer's homicide investigation training, a killer will often say something like that to rationalize his action in his own mind.

- Plaintiff told Swaine that "she (Lockmiller) trained me good and she would have trained you just the same." Freesmeyer saw the statement as plaintiff offering another justification for his actions.

- A fan covered Lockmiller's face, which Freesmeyer saw as fitting a pattern where a person murders someone he knows then cannot face it.

- Lockmiller was stabbed multiple times after she was already dead, or close to dead. According to the coroner's report Lockmiller died of strangulation. There was no blood spatter at the crime scene, which indicated Lockmiller's heart was not pumping when stabbed. It was inconsistent with the act of a random person, and indicated the killer had vengeance as a goal. Lockmiller had hurt plaintiff very deeply, and no one else was known to have any passionate feelings about Lockmiller.

- There was no forced entry into Lockmiller's apartment. Valuables were lying around the apartment, including her purse. Freesmeyer thought a burglar would have taken things and there would have been a forced entry of some type.

(C00350-352, ¶98; C00359, C00156).

Souk and Reynard were aware of the evidence developed during the murder investigation. Souk considered it very significant that plaintiff's fingerprints were only found on the clock radio -- the murder weapon -- and not anywhere else in the apartment. (C00352, ¶99). He believed the motive evidence against plaintiff was the strongest he had ever seen; that there was sufficient evidence to establish probable cause, and a reasonable chance of prevailing at trial. (C00352, ¶99; C00977).

Todd Heyse, the owner of 412 Main Street where Lockmiller lived and the murder occurred, told police after plaintiff was charged that he saw two people fitting the

descriptions of plaintiff and Lockmiller around the time of the murder, possibly on the exact day. Heyse contacted the NPD after he saw a picture of plaintiff in the paper following his arrest in May 1994. Seeing plaintiff's photograph jarred Heyse's memory of seeing the two people and prompted him to call the police. (C00353-354, ¶106; C00977, C02845).

The Prosecution

Souk was the lead prosecutor in plaintiff's case and presented the case to the grand jury. A true bill was returned on July 14, 1994. In January, 1995, Freesmeyer moved into the State's Attorney's Office as they began to prepare for plaintiff's trial. (C00354, ¶111-112).

In Souk's mind, plaintiff was the only real suspect. Souk concluded after reviewing the information he had about John Murray that he was not a person of interest. At the time of plaintiff's prosecution, Souk did not believe there was any evidence to suggest that Murray killed Lockmiller. Souk did not believe Murray had any motive to kill Lockmiller, even though Souk was aware of their prior sexual relationship. Souk also knew that Murray gave narcotics and marijuana to Lockmiller, and that there were conflicting statements about whether Lockmiller owed Murray money for drugs. (C00354-355, ¶113; C00977). Souk also knew that Murray made differing statements regarding his alibi in his two interviews with Daniels and Hospelhorn. Souk did not consider the inconsistency suspicious. (C00355, ¶114; C00977). Souk was also aware of three criminal charges filed against Murray, two felony drug charges and a misdemeanor domestic battery case brought by Mackoway. (C00355, ¶116; C00977).

Souk was aware at the time of plaintiff's trial that Mackoway reported that Murray started taking steroids in January, 1994, and that he then began acting erratically,

which she attributed to the steroid use. (C00355-C00356, ¶117, 199; C00977; C0289). According to Mackoway, Murray was never physically violent toward her until January, 1994 when he started using steroids. (C00356, ¶118; C02829). Mackoway never believed Murray killed Lockmiller. (C00356, ¶120; C02829).

The State subpoenaed Murray for plaintiff's trial, and he was on Souk's witness list. Souk flagged information in the State's Attorney's files about Murray's pending cases so the Assistant State's Attorney handling those cases, Robert Freitag, would not offer Murray a plea in case they wanted to call Murray in plaintiff's trial. Souk was concerned a plea in Murray's pending cases could have been used to impeach him if the State called him as a witness, so Souk noted that Freitag should see Souk before any deals were made with Murray. (C00356, ¶122; C00977, C01752). Souk ultimately decided not to call Murray at trial.

On April 1, 1995, a McLean County jury found plaintiff guilty of Lockmiller's murder. After plaintiff's conviction was reversed, Souk was not surprised that the McLean County State's Attorney chose not to reprosecute him. After 13 years it would take a monumental effort by the police and prosecutors to regather the witnesses and evidence again. (C00357, ¶124; C00977).

STANDARD OF REVIEW

Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c). A grant of summary judgment is reviewed *de novo*. *Majca v. Beekil*, 183 Ill. 2d 407, 416 (1998). Summary judgment for the defendant is proper if the

plaintiff cannot establish any element of the cause of action. *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 215 (2006).

ARGUMENT

I. The Appellate Court Properly Affirmed the Granting of Summary Judgment on Plaintiff's Malicious Prosecution Claim Where the Evidence Showed the State's Attorney Initiated the Prosecution, There Was Clear Probable Cause for the Prosecution, There Was No Evidence of Malice, and The Murder Prosecution Was Never Terminated in a Manner Indicative of Innocence.

The appellate court properly affirmed summary judgment on plaintiff's malicious prosecution claim. Under Illinois law, malicious prosecution requires proof of: 1) commencement or continuation of a criminal proceeding by the defendant; 2) absence of probable cause for the proceeding; 3) malice; 4) termination of the proceeding in a manner indicative of the plaintiff's innocence; and 5) damages. *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996).[1] If one of the required elements is missing, the malicious prosecution claim fails. *Id.* at 512. The appellate court addressed only the "commencement" element and correctly concluded there was no evidence that any defendant influenced in any way the State's Attorney's independent judgment to initiate the prosecution. The court's decision on the commencement element was enough to affirm the circuit court, so it went no further.

A. The Appellate Court Applied the Right Standard

Plaintiff argues the appellate court applied a wrong standard for determining when a police officer commences a prosecution. Plaintiff believes three different

[1] The requirements of malice and lack of probable cause are also codified as an immunity from liability in Section 2-208 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-208.

approaches have developed to analyze the "commencement or continuance" element involving a police officer. Plaintiff describes these approaches as follows:

- The "significant role test," which allows a plaintiff to proceed against a police officer when the officer played a "significant role" in commencing or continuing the prosecution. Plaintiff cites *Frye v. O'Neill*, 166 Ill. App. 3d 963, 975 (4th Dist. 1988), as representative of this test.
- The "advice and cooperation test," which requires "participation of so active and positive a character as to amount to advice and cooperation," which plaintiff sees applied in *Fabiano v. City of Palos Hills,* 336 Ill. App. 3d 635, 647 (1st Dist. 2002).
- The "pressure, influence, or misstatement test," applied by the appellate court here, in which the plaintiff must establish that an "officer pressured or exerted influence on the prosecutor's decision or made knowing misstatements upon which the prosecution relied." *Beaman v. Freesmeyer,* 2017 IL App (4th) 160527 ¶58 (hereinafter referred to as "Op.¶58").

Plaintiff then lobbies for the Court to adopt his significant role test, which would appear to be the easiest for a plaintiff to establish to expose police to malicious prosecution litigation. These supposedly different approaches however, are actually quite consistent with each other, even if some of the language used by the courts differs, and in the end all find exactly what the appellate court found here, a need to prove causation.

The cases using what plaintiff considers different "approaches" all look for some action by the police that affects the prosecutors' independent judgment, in other words, actions which are the proximate cause of the prosecution. Courts have recognized that

liability for malicious prosecution is not confined to situations where the defendant officer made the prosecutorial decision and signed a complaint against the plaintiff, but more must be proven than mere involvement, even significant involvement, in the investigation. Plaintiff's "significant role" approach has never been accepted as a determinative test, or defined with any precision as a way to measure whether a police officer commenced a prosecution. Whenever it has been used the court using it has looked for a direct causal connection between police conduct and the prosecutorial decision.

Plaintiff gets the significant role language chiefly from *Frye*, 166 Ill. App. 3d at 975. *Frye*, however, dealt mainly with malice and probable cause, not commencement. The "significant role" language described a class of police officers who could potentially face malicious prosecution, but only if "all of the elements of the tort are present," including commencement. *Frye*, at 975. The *Frye* court never equated the significant role a police officer may play in a case with the commencement of its prosecution. In fact, regarding the defendant Williams in that case, who worked with the defendant O'Neil on the investigation leading to the plaintiff's arrest and prosecution, the appellate court ruled he should be cut from the case because he "did not, as a matter of law, instigate a common law malicious prosecution of Frye . . ." *Frye* at 975. A "significant role" analysis never entered into that conclusion.

Certainly other cases also utilize that language, but at the core of these cases is the same causation analysis the appellate court used here. For example, in *Bianchi v. McQueen,* 2016 IL App (2d) 150646, ¶72-73, the court used the "significant role" language, but to describe allegations that private investigators hired by the prosecutor

provided evidence they knew was false which caused the prosecutor to bring charges against the plaintiff. Similarly, in *Rodgers v. People's Gas Light & Coke Co.*, 315 Ill. App. 3d 340, 348 (1st Dist. 2000), the court used the "significant role" language referring to an employer who, working with a private security agency, entrapped the plaintiff in a drug transaction to fabricate grounds to terminate him from employment. The "significant role," however, was entrapping the plaintiff into delivering drugs, a crime he never would have been charged with but for the set-up by the defendants.

In *Collier v. City of Chicago*, 2015 WL 5081408, *9 (N.D.Ill. 2015), the court repeated the *Frye* language, that "liability extends to all persons who played a significant role in the prosecution of the plaintiff, provided all of the elements of the tort are present." The "significant role" in the prosecution there, however, was that the defendant officers fabricated evidence and knowingly included false statements in their reports, which in turn caused the plaintiff's prosecution.

The "significant role" language has never been applied to mean what plaintiff argues it means, or to support his ability to establish the commencement element here. The "significant role" observation may have achieved Westlaw Headnote status, but it has not supplanted the causation standard the appellate court applied here.

Plaintiff is not in actuality asking this Court to clarify differing standards, he is asking the Court to jettison any test in favor of a loose, diluted approach that has no real meaning in the real world of investigation of serious crime. He reveals his true intent in arguing that "Of course, ordinary officers have significant roles in commencing or continuing prosecution, but they do not go after innocent people because of malice and arrest without probable cause." (Pltf. Brief, p. 28). Plaintiff wants the commencement

element eliminated so the case goes straight to probable cause and malice. But nothing could be more unfair than to expose hard-working dedicated police officers to the rigors of protracted litigation for decisions ultimately made by prosecutors with absolute immunity for those decisions.

Plaintiff seeks a substantial expansion of the scope of the malicious prosecution tort -- exposing police to malicious prosecution claims in every major investigation, with the focus on the elements of whether they acted "maliciously" or "without probable cause," but without regard to whether the police actually played a prosecutorial role. Malicious prosecution claims are not favored under Illinois law. *Cult Awareness Network v. Church of Scientology International*, 177 Ill. 2d 267, 286, (1997); *Joiner v. Benton Ctmy. Bank,* 82 Ill. 2d 40, 44 (1980); *Shedd v. Patterson*, 302 Ill. 355, 359 (1922). Public policy favors the exposure of crime. Expanding the tort to mere "involvement" in a prosecution is contrary to many years of this Court's clear policy expressed in precedent, and by the General Assembly in Section 2-208 of the Illinois Tort Immunity Act (745 ILCS 10/2-208.)

The Seventh Circuit in *Reed v. City of Chicago,* 77 F.3d 1049, 1053 (7th Cir. 1996), accurately characterized a malicious prosecution action against a police officer as an anomaly, stating "This is because the State's Attorney, not the police, prosecutes a criminal action . . . and the chain of causation is broken [following an arrest] by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutors." *See also, Colbert v. City of Chicago*, 851 F.3d 649, 655 (7th Cir. 2017). In *Rehberg v. Paulk*, 566 U.S. 356 (2012), discussing testimonial immunity, the United States Supreme Court aptly

explained why this anomaly should not be expanded, an observation equally applicable here: "It would thus be anomalous to permit a police officer who testified before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute." The analysis of the tort of malicious prosecution, used by the appellate court here, is the proper one.

Plaintiff asks this Court to create an unfair, untenable rule of law, where police face liability for the decisions of prosecutors, only because they were significantly involved in the investigation that produced the evidence against the plaintiff. Police would face liability for a prosecutor's bad prosecutorial decision, for a botched prosecution, or even when the prosecutors got it all right but the jury or judge found for the accused anyway. The unimmunized police could face liability for decisions and actions completely out of their control.

Plaintiff and his amici say much about police accountability for reversed convictions, and certainly defendants offer no quarrel with holding police accountable for true wrongful conduct. But no support is offered for a conclusion that as a matter of policy opening the floodgates for malicious prosecution claims against police will have any impact on the reliability of criminal convictions. On the contrary, holding police accountable for merely playing a "significant role" in a case could completely and negatively change how police officers investigate crimes. Plaintiff suggests on page 21 of his brief that police officers should be held liable for "misconduct or biased" investigations, even when it does not pressure, influence or purposely mislead a prosecutor. What plaintiff is suggesting is a new cause of action for a negligent (or

willful and wanton) investigation, a claim to hold police liable for investigative mistakes, oversights, miscalculations, or such nebulous concepts as "tunnel vision." This Court has never endorsed such a cause of action, and the Illinois legislature has expressly precluded it in Section 4-102 of the Tort Immunity Act (745 ILCS 10/4-102).

The appellate court's approach achieves the right policy in that it requires a plaintiff to show police "pressured or exerted influence on the prosecutor's decision or made knowing misstatements upon which the prosecutor relied," and "protects officers in their performance of their police work while allowing plaintiffs to seek redress from officers who use fabrications or exert pressure on the prosecutor to secure prosecution of the innocent." (Op. ¶58.) This is a standard that has been consistently applied by Illinois courts, even if different words are sometimes used to describe it. The United States Supreme Court, again in *Rehberg*, saw that if the floodgates plaintiff wants this Court to open were opened, police "energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Rehberg*, 566 U.S. at 369.

B. The Appellate Court Properly Found that Defendants Did Not Commence or Continue the Prosecution

Plaintiff goes on to argue that the appellate court erred even applying the proximate cause analysis it applied, but his argument pays only lip service to the causation standard. His argument waters down causation to police actions having no impact on the prosecutorial decision.

Here, using a proximate cause analysis, the appellate court properly found no evidence that any defendant urged or lobbied for the prosecution, mislead the prosecutors, or exerted any undue influence on their decision. Plaintiff challenges the probative value of the evidence the prosecutors received, but he cannot dispute that the

prosecutors had that evidence or contend that they were purposely deprived of other evidence that would have changed their decision. The prosecutors, not the defendant police officers, had the decision-making capacity about who would be charged with Lockmiller's murder. The appellate court looked for and could not find the evidence all courts have looked for in cases like this – evidence that the prosecution would not have occurred absent some malicious conduct by police.

The testimony of the prosecutors and non-party NPD Investigator Tony Daniels showed conclusively that defendants did not initiate or continue the prosecution. The decision to prosecute plaintiff was made by the prosecutors after a nine month investigation, at a meeting on May 16, 1994. (C00349, ¶94). Attending the meeting were NPD investigators Tony Daniels, Freesmeyer, Zayas, and NPD Police Chief James Taylor, along with McLean County State's Attorney Charles Reynard and Assistant State's Attorney James Souk. (C00349, ¶94).

The appellate court properly recognized that the evidence showed that only the prosecutors, Reynard and Souk, made the decision to prosecute plaintiff, and no evidence contradicts this conclusion. Op. ¶62. Reynard and Souk were clear and unequivocal in their testimony that they made the decision to prosecute plaintiff uninfluenced by any defendant. (C02197, p. 71-72; C00977, p. 139-140). Defendants' input was only to discuss the evidence produced during the investigation, an investigation the prosecutors were close to from the beginning.

The appellate court also properly recognized that the deposition testimony of Tony Daniels "supported this conclusion by showing Souk shut down any effort to leave the case open." Op. ¶61. At his deposition, Daniels described wanting to discuss

additional investigation he thought should be pursued, which he learned about at a cold-case conference he had recently attended in Florida. When describing the meeting where the decision was made to arrest plaintiff, Daniels testified that Souk stopped Daniels when he began to discuss ideas he brought back from the conference, and instead stated that "he [Souk] thought that they went far enough in the investigation, they were going to go ahead and issue a warrant for Mr. Beaman's arrest." (C00350, ¶97; C00693).

Souk drew his own conclusions regarding the evidence that was uncovered during the investigation. Souk was influenced by plaintiff's obsession with Lockmiller; his breaking down her door on two occasions; his extreme jealousy toward her; his fingerprint on the murder weapon; and so on. (C00352-354, ¶99-110; C00977, C02845). Souk reviewed the information gathered in the investigation, and drew the conclusion that grounds existed to prosecute plaintiff. The decision was made by State's Attorney Reynard, with Souk's support. Souk was the only person at the May, 1994 meeting who advocated for or urged plaintiff's arrest. (C00349-350, ¶95; C00977).

The appellate court properly rejected plaintiff's position that defendant Freesmeyer pressured or exerted influence on Souk's decision to prosecute plaintiff. Op. ¶62. Plaintiff argues Freesmeyer initiated the prosecution because he was the "lead investigator" for the NPD, at least for part of the investigation; he arrested plaintiff; testified at the Grand Jury proceeding and trial; tested plaintiff's alibi; and during the months just prior to the trial, moved into the State's Attorney's Office to work with the prosecutors in preparing the case. These are actions that a homicide investigator might perform in any homicide investigation. It is precisely how plaintiff wants this Court to fashion the commencement analysis, to evaluate the "significant role" Freesmeyer played

in the case with initiation of the prosecution. None of those actions Freesmeyer performed in his significant role, however, influenced in any way the prosecutors' independent judgment.

Someone serves as a lead investigator in virtually every investigation. There is no support in this Court's precedent or any case law for an argument that the prosecutor's decision is attributed to a lead investigator simply because of that officer's prominent role in the investigation. That Freesmeyer arrested plaintiff is completely irrelevant to the commencement determination. Plaintiff does not allege false arrest. Freesmeyer, in fact, arrested plaintiff on a warrant the State's Attorney caused to be issued. No case has held (or should hold) that arresting a person at a prosecutor's direction can constitute commencement.

Neither could Freesmeyer's testimony before the grand jury and at the trial constitute commencement. Police testify at legal proceedings involving persons charged with crimes. That role carries out the prosecutor's decision, it does not cause it. If Freesmeyer could be found liable for his grand jury testimony, testimonial immunity that protects witnesses from liability and assumes the continued vitality of our legal justice system would be abrogated. *Rehberg v. Paulk*, 132 S. Ct. 1497, 1508 (2012); *Jurgensen v. Haslinger*, 295 Ill. App. 3d 139, 141-42 (3d Dist. 1998). The Supreme Court in *Rehburg* recognized explicitly that police could not be held accountable for a prosecutorial decision by testifying in the prosecution's legal proceedings. 132 S. Ct. at 1508.

That Freesmeyer worked within the prosecutor's office during the three months prior to the trial also means nothing. Freesmeyer moving into the prosecutor's office to

assist with trial preparation could not cause or even continue a prosecution that had already begun.

There can be no doubt, based on an independent review of the evidence, that the State's Attorney and his Assistants were convinced of plaintiff's guilt, as Souk explained in significant detail during his deposition. (C00352-354, ¶99-110; C00977, C02845). Because Souk has absolute immunity for the prosecution, as plaintiff has conceded, his testimony cannot be attacked for bias or interest. Souk had no motive except to present his honest view of the evidence. Certainly, plaintiff disagrees with Souk's view of the evidence, but that has no impact on the question of initiation of the prosecution.

Plaintiff argues that Freesmeyer lied to the grand jury, and doctored time trials. The appellate court and the Seventh Circuit in the federal appeal both properly found Freesmeyer did not lie or doctor time trials. Op. ¶63. While defendants dispute any misconduct, as a matter of law, none of these claims of misconduct could establish that Freesmeyer initiated the prosecution anyway. Even apart from the witness immunity that protects Freesmeyer for testifying, his testimony at the grand jury and trial could not proximately cause the State's Attorney's decision to prosecute that preceded the testimony. The so-called "doctored" time trials, which did nothing more than test, at the prosecutor's request, plaintiff's alibi, also occurred after the prosecution decision, so they could not have caused it either.

Regarding defendant Warner, the appellate court properly found that "no evidence shows Warner encouraged or exerted pressure on Souk to prosecute." ¶69. Plaintiff argues defendant Warner "hid" the Murray polygraph report. Certainly, Warner did not bury or hide the polygraph or any other evidence, which plaintiff's advocate Tony

Daniels himself conceded. (C00348, ¶90; C00693). Nevertheless, allegations of a failure to produce even exculpatory evidence does not itself constitute initiation of a prosecution for a malicious prosecution claim. *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶13-14; *Denton v. Allstate Ins. Co.*, 152 Ill. App. 3d 578, 584 (1st Dist. 1987); *Geisberger v. Vella,* 62 Ill. App. 3d 941, 944 (2d Dist. 1978); *Logan v. Caterpillar, Inc.*, 246 F.3d 912, 922 (7th Cir. 2001).

This Court held the Murray polygraph, along with the other unproduced Murray information, could have had an impact on the criminal trial, but the question for malicious prosecution is not whether the polygraph could have had an impact on the trial, the issue for the Supreme Court analyzing a *Brady* violation, but whether the polygraph could have had an impact on the prosecutor's decision to prosecute. Souk testified it would not have had any impact on the State's Attorney's decision to prosecute. (C00357, ¶123; C00977). Souk was aware of all of the other information about Murray: his charges of domestic abuse and drug transactions, and the report about his steroid use. (C00354-355, ¶113, 116; C00977). Souk never considered Murray a viable suspect because Souk believed Murray had no motive. In fact, Souk intended to call Murray as a witness at the trial to prove plaintiff's violent entry into Lockmiller's apartment while Murray was present, but decided not to because Murray could be impeached by his arrest record. (C00356, ¶121-122; C00977, C01752).

No reasonable jury could conclude that Souk would have abandoned the prosecution of plaintiff and proceeded against Murray without believing Murray had some motive. Souk knew the worst about Murray, and even knew he did not show up for

one scheduled polygraph session. It is beyond question that the inconclusive polygraph would have had no impact on the State's Attorney's prosecution decision.

Further, despite plaintiff's assertion to the contrary, the federal court did not find that Warner deliberately hid the polygraph report. The Seventh Circuit merely recognized that the report was not turned over and, if had been, might have been "used to persuade the trial judge to admit evidence indicating that Murray committed the murder." *Beaman v. Freesmeyer,* 776 F.3d 500, 508 (7th Cir. 2015).

Finally, the appellate court properly found "no evidence shows Zayas pressured or exerted influence over Reynard and Souk's decision to prosecute, and there is no evidence of any false statements by Zayas to the prosecutor." Op. ¶72. Plaintiff argues Zayas commenced the prosecution because he was in charge of CID. Under plaintiff's significant role construct, then, the head of any law enforcement unit involved in investigating crime would be subject to malicious prosecution. There is no support for such a conclusion. Illinois does not recognize a supervisor's liability for the tortious acts of an underling without direct participation in the act. *Reiter v. Illinois Nat. Casualty Co.*, 397 Ill. 141 (1947); *DeCorrevant v. Lohman*, 84 Ill. App. 2d 221, 227 (1st Dist. 1967). That Zayas participated in the May, 1994 meeting means nothing. Souk, Reynard and Daniels clearly testified the prosecutors made the decision at the meeting, not the investigators. No police officer lobbied, pressured or advocated for going forward with the prosecution or otherwise influenced the decision made solely by Souk and Reynard.

Finally, plaintiff argues that Zayas allowed the prosecution to go forward, even though he had questions about whether it was ready. Zayas had no control over whether the prosecution would go forward. The decision was made by the prosecutors in May.

That Zayas may have thought the case needed more work before it could go to trial shows he had no role in the prosecution decision. And more work was done in the four months between Zayas' retirement in November, 1994, and the trial itself several months later. Zayas never questioned whether there was probable cause to go forward with the prosecution.

In sum, the appellate court properly applied tort law proximate cause principles which Illinois courts, contrary to plaintiff's view, have long enforced, and concluded defendants did nothing to prevent the prosecutors from exercising their independent judgment and discretion to proceed with the charges. Plaintiff did not establish the first element of his malicious prosecution claim, and the appellate court properly affirmed summary judgment for defendants.

C. Probable Cause Existed for Beaman's Prosecution.

Significantly, there are three other meritorious bases for summary judgment here. Although the appellate court did not address the other elements in its decision because plaintiff could not establish the first one, the circuit court properly found probable cause existed for the prosecution, a lack of malice, and insufficient evidence of a disposition of the criminal case to establish the tort.

The circuit court properly found probable cause existed for plaintiff's arrest based on the detailed evidence recounted by Freesmeyer and Souk, and that the evidence supporting probable cause was sufficient to prove plaintiff's guilt beyond a reasonable doubt at trial. (C12497). Under Illinois law, probable cause is a complete defense to a malicious prosecution lawsuit. *Johnson v. Saville*, 575 F.3d 656, 659 (7th Cir. 2009). Probable cause is "a state of facts that would lead a person of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the person

arrested committed the offense charged." *Reynolds v. Menard, Inc.*, 365 Ill. App. 3d 812, 820 (1st Dist. 2006); *Sang Ken Kim v. City of Chicago*, 368 Ill. App. 3d 648, 654 (1st Dist. 2006). The existence of probable cause depends on the "totality of the circumstances" at the time of the arrest. *Gauger v. Hendle*, 2011 IL App (2d) 100316 ¶112. Probable cause may be based on the "collective knowledge" of the officers involved in the investigation. *People v. Long*, 369 Ill. App. 3d 860, 867 (2d Dist. 2007).

Despite plaintiff's assertion to the contrary, probable cause is not a jury question if the facts on which probable cause is based are undisputed. *Cervantes v. Jones*, 188 F.3d 805, 811 (7th Cir. 1999) ("when facts sufficient to create probable cause are undisputed, probable cause is a question of law"). While plaintiff may dispute that he committed the crime, and dispute that the facts submitted to the jury proved he committed the crime, he cannot dispute the facts supporting a probable cause finding.

Plaintiff's probable cause quarrel is a paradigm of denial. He trumpets that the family values he grew up in made him an unlikely suspect, even though he used drugs with Lockmiller, terrorized her for months, then spoke of her in vile terms after her death. His characterization that police interest in him as a suspect was "strange" is strange itself. He characterizes the accounts Lockmiller's friends offered the police about his obsession with her, his extreme emotional reactions to their relationship and her intense fear of him, as "collecting dirt." He misses the point that these were not figments of the officers' imaginations, they were first-hand accounts from Lockmiller's closest friends and neighbors, and of Lockmiller herself through her friends' accounts.

Plaintiff cannot realistically dispute that there was strong evidence of his obsession with Lockmiller; his violent behavior toward her prior to the murder; that he

bashed her door in on at least two prior occasions; his fingerprints on what the State considered the murder weapon; the inspection of Lockmiller's garbage which the State considered a signature; or the post-murder statements he made which the State considered suspicious. He may dispute his opportunity to commit the murder, but only that opportunity was improbable, not impossible. Indeed, opportunity was the focus of the criminal trial and the appeal from the conviction. The facts the State relied on in deciding to go forward with the prosecution clearly established probable cause. Souk's view that the evidence established the reasonable possibility of proving plaintiff's guilt beyond a reasonable doubt hardly can be disputed, given the outcome.

Plaintiff argues that because his conviction was vacated, and that he received a certificate of innocence and a pardon, there could not have been probable cause for his arrest and prosecution. The certificate and pardon, however, do not erase the evidence supporting probable cause. A trial here could only ask a jury to make a legal determination, whether the undisputed evidence established probable cause. Plaintiff would want the jury to decide whether the evidence was sufficient to prove guilt – but in a malicious prosecution trial the jury would only decide whether evidence of guilt existed, not whether that evidence was sufficient to prove plaintiff guilty of the crime.

Plaintiff attempts to pick apart evidence supporting probable cause by arguing that it was not indicative of plaintiff's guilt, and there was stronger evidence of innocence. However, the overwhelming evidence established probable cause for plaintiff's arrest. Defendants knew Lockmiller and plaintiff were involved in a volatile relationship that began in July of 1992 and ended just before her murder; plaintiff threatened to kill her and himself; plaintiff's jealousy led him to act out violently;

plaintiff broke down Lockmiller's door twice and punched a hole in her wall; Lockmiller was afraid of plaintiff; plaintiff suspected Lockmiller's involvement with Swaine; and the killer would have seen Swaine's belongings at the time of the murder. The nature of the crime scene and the personal manner in which Lockmiller was murdered further supported a reasonable belief that plaintiff was involved in her death. (C00327-00344, ¶9-80).

Evidence also linked plaintiff to the scene. Two of his fingerprints were found on the clock radio attached to the cord used to strangle Lockmiller. One of his prints was on the back of the clock, near the cord, and the other was on the bottom of the clock. (C00330, ¶24). A plastic garbage bag was lying on the couch in the living room with its contents spilling out, which was similar to plaintiff's past behavior, when he rummaged through Lockmiller's garbage looking for evidence that she was having sex with Swaine. (C00328, C00338, C00342, ¶15, 50, 67). Finally, due to the estimated date and time of death, defendants believed plaintiff had sufficient time to drive to Normal to commit the murder and return to Rockford by 3:30 p.m. (C00335-336, ¶38-45).[2]

At his deposition, Freesmeyer succinctly and convincingly recounted the facts which convinced him that probable cause existed. Souk agreed with Freesmeyer's analysis. There are no facts for a jury to arbitrate. The circuit court's reliance on the undisputed facts establishing probable cause was proper.

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[2] By the time of trial plaintiff's defense team began producing evidence, through the testimony of plaintiff's mother, to narrow the window. However, probable cause is determined at the time of arrest. *People v. Wear*, 229 Ill. 2d 545, 564 (2008). When plaintiff was charged and the case turned over to the prosecutors the window of opportunity for plaintiff to have committed the murder was longer. Moreover, neither the prosecution nor the jury were required to credit plaintiff's mother's alibi time line, and even if credited, there was still a window of opportunity, if a narrow one, for plaintiff to have committed the murder.

The circuit court's reliance on Assistant State's Attorney Souk's conclusion that there was probable cause for the arrest and prosecution was also proper. (C00352, ¶99; C00977). Importantly, at his deposition, Souk recounted the evidence that he believed not only established probable cause, but in his view provided the State with a reasonable chance of proving plaintiff guilty beyond a reasonable doubt. (C00352-354, ¶99-110; C00977, C02845). Indeed, in deciding to go forward with plaintiff's arrest and prosecution, Souk applied a higher standard than the reasonable grounds to believe plaintiff committed the murder needed to establish probable cause.

Finally, there was nothing improper about the circuit court's recognition that the evidence presented at plaintiff's jury trial was sufficient to prove his guilt beyond a reasonable doubt. (C12498). Whether the evidence presented at plaintiff's trial was sufficient to prove his guilt beyond a reasonable doubt has been fully litigated. Although plaintiff argues the circuit court should not have even acknowledged a verdict that was later vacated, there remains a certain absurdity to an argument that the evidence did not even indicate probable cause, where a State's Attorney and his Assistants, a Grand Jury, a trial court jury, a trial court judge, and an appellate court, all determined that the evidence was sufficient to prove plaintiff guilty beyond a reasonable doubt, and this court refused to review whether the evidence was sufficient. Then, in vacating plaintiff's conviction, this Court was careful to express no view impugning the sufficiency of the evidence.

Plaintiff argues post-conviction DNA tests showed his innocence, but Illinois courts disfavor consideration of post-prosecution evidence in malicious prosecution cases. Courts have held evidence that a third-party was later convicted of the crime for which the accused was prosecuted was inadmissible. *See Porter v. City of Chicago*, 393

Ill. App. 3d 855, 863 (1st Dist. 2009); *Gauger*, 2011 IL App (2d) at ¶137 (evidence of how real killer was later apprehended not admissible to show that police acted with malice); *Sang Ken Kim*, 368 Ill.App.3d at 660 (witness' later recantation did not affect probable cause inquiry because probable cause is measured at the time of the prosecution decision); *Manzanares v. Higdon*, 575 F.3d 1135, 1144 (10th Cir. 2009) ("[i]nformation gleaned post-hoc does not bear on the probable cause inquiry.")

Notwithstanding disagreements about guilt, no reasonable jury could conclude there was lack of probable cause to prosecute plaintiff. The evidence of it was overwhelming. An office of seasoned prosecutors and a grand jury thought so, which is *prima facie* proof of probable cause. *Freides v. Sani-Mode Mfg., Co.*, 33 Ill. 2d 291, 296 (1965). Even Tony Daniels believed there was probable cause. (C00802, p. 341). That plaintiff had the means, motive and opportunity to murder Lockmiller cannot be disputed. These factors alone can carry the day in establishing probable cause. *See e.g.*, *People v. Kidd*, 175 Ill. 2d 1, 22-23 (1996); *United States v. McMullin*, 568 F.3d 1, 7-8 (1st Cir. 2009); *People v. Yost*, 468 Mich. 122, 133 (2003); *Nugent v. Hayes*, 88 F. Supp. 2d 862, 869 (N.D. Ill. 2000); *Schertz v. Waupaca Cty.*, 683 F. Supp. 1551, 1565 (E.D. Wis. 1988), *aff'd* 875 F.2d 578 (7th Cir. 1989). Coupled with the other evidence implicating plaintiff, probable cause is overwhelmingly established, and no reasonable jury could decide otherwise. As such, the circuit court properly granted summary judgment in favor of defendants, and the appellate court properly affirmed that decision, though on another element of the claim.

D. Plaintiff Cannot Prove Defendants Acted With Malice.

The circuit court also properly found no malice by defendants. In the context of malicious prosecution, "malice" is "the initiation of a prosecution for any reason other

than to bring a party to justice." *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶19. Absence of malice can be decided on summary judgment where the record is devoid of any affirmative evidence of malice, an element on which the plaintiff bears the ultimate burden of proof. *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 937 (1st Dist. 1980).

As the circuit court explained, there is no evidence to allow a jury to conclude that defendants harbored any malice toward plaintiff. Rather, the evidence showed that defendants clearly acted on their honest beliefs that plaintiff killed Lockmiller, and therefore, the circuit court could not find that "sufficient facts exist to show that the defendants' involvement in this case was motivated by any other reason than to bring a party to justice." (C12498). Further, that defendants acted on advice of the State's Attorney, either directly or through his Assistants, itself vitiates any claim of malice. *Salmen v. Kamberos*, 206 Ill. App. 3d 686, 692 (1st Dist. 1990).

Plaintiff sees malice in defendants construing evidence as inculpatory, rather than exculpatory, and in defendants not agreeing with plaintiff's assessment of the evidence. None of the action which plaintiff identifies as proof of malice, however, can constitute malice, at least as defined for purposes of malicious prosecution. Malice found for prosecutions, for example, have been proxies for collecting a debt (*Szczesniak*, 2014 IL App (2d) at ¶14); to force an employee's termination (*Rodgers v. People's Gas Light & Coke Co.*, 315 Ill. App. 3d 340, 350 (1st Dist. 2000)); to discover why the plaintiff was on the defendant's property (*D.N. Vasquez v. Jacobs*, 23 Ill. App. 2d 457, 464 (2d Dist. 1960). Plaintiff complains of what at worst might be construed as zealous police work, but nevertheless its only purpose was to bring Lockmiller's killer to justice. Plaintiff

offers no evidence that can support a conclusion that defendants' actions were for any other purpose than to bring the person they thought killed Lockmiller to justice.

Plaintiff argues that, at a minimum, the jury could construe malice from a lack of probable cause. That inference, however, is only allowable when lack of probable cause is clear. *Szczesniak*, 2014 IL App (2d) at ¶19. Even plaintiff cannot argue that a lack of probable cause here was "clear." The circuit court properly found no malice because "the evidence has shown that more than probable cause existed for the prosecution to bring plaintiff to trial." (C12498). The circuit court explained that it rested its decision, in part, on Freesmeyer's detailed account of the facts leading to his belief that probable cause existed.

Further, plaintiff misstates the evidence regarding Warner and the polygraph report. As explained above, the Seventh Circuit did not find Warner intentionally hid the polygraph report. In addition, as explained above, that Zayas was in charge of the investigation, was present at the May, 1994 meeting, and believed that the case needed some work, does not show malice. The prosecutors, not Zayas, decided to charge plaintiff with murder and nothing about Zayas' belief that more on the case might be needed could possibly result in an inference of malice.

As explained above, the circuit court's finding was not based on irrelevant considerations – despite plaintiff's argument that because his conviction was vacated, there could not have been probable cause. Plaintiff's conviction was vacated for reasons unrelated to probable cause. In sum, the circuit court properly granted summary judgment in favor of defendants, and the appellate court properly affirmed that decision, although on another element of the claim.

E. Plaintiff Cannot Prove The Termination Of His Prosecution Was Indicative Of His Innocence.

Finally, the circuit court properly found plaintiff cannot prove the termination of his prosecution was indicative of his innocence. Plaintiff bears the burden of proving that termination of the prosecution in his favor occurred for reasons consistent with his innocence. *Swick v. Liataud,* 169 Ill. 2d 504, 513 (1996). To make that determination, the circumstances under which the dismissal is obtained must be examined, not the form or title given to it. *Id.*

Plaintiff's conviction was reversed, but the case was remanded for retrial. As the circuit court recognized, the Court specifically held that no part of its decision would suggest insufficient evidence or preclude a retrial. *People v. Beaman*, 229 Ill. 2d 82 (2008). The circuit court also recognized that, on remand, the McLean County State's Attorney decided not to reprosecute plaintiff, but nothing about that decision suggested plaintiff's innocence. Rather, relying on the deposition testimony of Souk (an experienced prosecutor and judge), the circuit court properly found the decision not to reprosecute plaintiff "was a matter of impracticability of reconstructing the evidence and relocating witnesses after so many years had passed." (C12499).

Plaintiff also relies on the Certificate of Innocence and governor's pardon to establish a termination indicative of innocence. The Certificate and pardon, however, have no impact in this case. A Petition for Certificate of Innocence proceeding is established under §2-702 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-702. The purpose of the proceeding is to allow a person who has been incarcerated to seek certain relief from the State in the Illinois Court of Claims. It is essentially a non-adversarial proceeding, although the statute allows the Illinois Attorney General or the State's

Attorney to intervene as parties in the action. The statute provides no ability of a municipal police agency or police officers to participate.

The State did not oppose plaintiff's Petition, quite likely as part of a settlement agreement in which plaintiff agreed to drop all claims against the McLean County defendants. Regardless, in order for that Certificate of Innocence to have any impact against these defendants, they needed a meaningful opportunity to oppose plaintiff's Petition in that litigation. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). They did not, and therefore, the Certificate can have no preclusive effect here.

Further, by the express language of the statute, the issuance of the Certificate of Innocence can have no impact in this case. 735 ILCS 5/2-702(j). The termination in favor of plaintiff was the *nolle prosequi* of the criminal charge against him after remand from the Supreme Court, which occurred long before the Certificate was issued. The Certificate, not issued until years later, played no role in the termination decision. Similarly, the governor's pardon, not issued until years later, played no role.

The cases plaintiff cites do not support his conclusion that the Certificate of Innocence can satisfy that element of his claim. In *Kluppelerg v. Burge*, 84 F. Supp. 3d 741, 745 (N.D. Ill. 2015), the district court found the certificate could be relevant to whether the defendants there withheld material evidence, and possibly for damages, but never actually decided whether the certificate could prove a termination indicative of innocence. In *Walden v. City of* Chicago, 391 F. Supp. 2d 660, 673 (N.D. Ill. 2005), the district court merely recognized that if a governor's pardon uses certain language, that pardon may indicate a conviction was terminated in the plaintiff's favor for purposes of a *Heck* analysis only. Nevertheless, a district court decision is not precedential here, and in

any event a case stands only for the issues it decides. *Sanner v. Champaign County*, 88 Ill. App. 3d 491 (4th Dist. 1980).

Plaintiff also argues the evidence showed he is innocent, but the termination element of his claim turns on why the case was terminated, not what the civil court hearing the malicious prosecution tort case thinks of the strength of the evidence against the plaintiff. Plaintiff has presented no other evidence to satisfy his burden, and therefore the circuit court properly granted summary judgment on plaintiff's malicious prosecution claim.

II. The Appellate Court Properly Found Plaintiff Forfeited his Intentional Infliction Of Emotional Distress Claim.

The appellate court properly found plaintiff forfeited his IIED claim because he did not develop his argument in support of the claim on appeal. Op. ¶74. Plaintiff attempts to argue that because he at least brought it up in his appellate court brief, he should be allowed to pursue it. However, as the appellate court properly recognized, "mere contentions, without argument or citation of authority, do no merit consideration on appeal." Op. ¶74.

In the alternative, even if this Court was to consider it, the circuit court properly recognized that plaintiff's IIED claim is based on the alleged malicious prosecution and, therefore, fails because plaintiff's malicious prosecution claim fails. *Jiminez v. City of Chicago*, 830 F. Supp. 2d 432, 451 (N.D. Ill. 2011) (success of the IIED claim was contingent on the success of malicious prosecution claim); *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 962 (N.D. Ill. 2010) (IIED claim was "intertwined" with the malicious prosecution claim). Here, because plaintiff bases his IIED claim on the alleged malicious prosecution, his IIED claim also fails. Moreover, absent proof sufficient to

establish common law malicious prosecution, defendants are immune from liability for a prosecution, regardless of how plaintiff styles his cause of action. 745 ILCS 10/2-208.

III. The Appellate Court Properly Affirmed Summary Judgment On Plaintiff's State Law Civil Conspiracy Claim.

The Appellate Court properly affirmed summary judgment on plaintiff's conspiracy claim. Op. ¶76. On appeal, plaintiff confines his conspiracy claim to defendants conspiring among themselves to maliciously prosecute him, abandoning his claim that defendants conspired with the McLean County State's Attorney. To prove a civil conspiracy, a plaintiff must show an agreement to accomplish either an unlawful purpose or a lawful purpose by unlawful means. *Mosley v. City of Chicago*, 614 F.3d 391, 399 (7th Cir. 2010); *Buchner v. Atlantic Plant Maint., Inc.*, 182 Ill. 2d 12, 23 (1998). Most significantly, a plaintiff must prove a meeting of the minds between the defendants. A conspiracy claim cannot be based on speculation or conjecture. The plaintiff must show the defendants acted in concert. *Fritz v. Johnson*, 209 Ill. 2d 302, 317-18 (2004).

The appellate court properly found that "because we have found defendants Freesmeyer, Warner, and Zayas are entitled to summary judgment to plaintiff's malicious-prosecution claim, plaintiff cannot establish the third element of this civil-conspiracy claim." Op. ¶76. Plaintiff argues that a conspiracy is shown by the following: (1) defendants collaborated closely on the case and shared information and therefore must have known there was no probable cause to arrest and prosecute Beaman; (2) Freesmeyer ignored exculpatory evidence and alternative suspects, lied to the grand jury and skewed time trials; (3) Warner "buried" the Murray polygraph; and (4) Zayas allowed the arrest to go forward, knowing the evidence could not justify it. Plaintiff's claims of misconduct aside, his argument flags nothing more than defendants all working on the same

investigation. If sufficient, such a conspiracy claim would be in every police investigation involving more than one officer.

In *Mosley*, the plaintiff alleged that investigating officers conspired to prosecute him by withholding evidence of an exculpatory statement made by a key eyewitness during a line-up (614 F.3d at 39). The officers failed to make a line-up report for fifteen months to hide the witness's statement. The court found the absent report and officers working together did not amount to evidence of a conspiracy. *Id.* at 400. In *Vodak v. City of Chicago*, 2009 WL 500678 (N.D. Ill. 2009), the plaintiff's evidence of various discussions between command personnel regarding the decisions to make arrests and charge the arrestees did not support a conspiracy finding.

Here, summary judgment was also properly granted on the conspiracy claim because, as the circuit court recognized, to prevail "plaintiff would need to show that the defendants conspired with themselves and with the prosecution to maliciously prosecute him." (C12499). Because plaintiff is no longer claiming a conspiracy with the prosecutors, summary judgment was properly granted pursuant to the intracorporate conspiracy doctrine. *Wright v. Illinois Dept. of Children and Family Svcs.*, 40 F.3d 1492, 1508 (7th Cir. 1994); *Buchner*, 182 Ill. 2d 12 at 24.

The intracorporate conspiracy doctrine precludes conspiracy claims against members of the same entity. *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 632 (7th Cir. 1999). *See Piphus v. City of Chicago*, 2013 WL 3975209, at 8 (N.D. Ill. 2013) (conspiracy claim was barred by the intracorporate doctrine because it was only directed at the police officers, employees of the same government entity); *Ghiles v. City of Chicago Hts.*, 2016 WL 561897, at 3 (N.D.Ill. 2016) (conspiracy claim was barred

under the intracorporate conspiracy doctrine because all defendants were City officials); *Mlaska v. Schicker,* 2015 WL 6098733 (S.D.Ill. 2015) (same with regard to the Illinois Department of Corrections). Similarly, here, the intracorporate conspiracy doctrine bars plaintiff's conspiracy claims. In sum, the Appellate Court properly affirmed summary judgment in favor of defendants on plaintiff's conspiracy claim.

IV. The Appellate Court Properly Affirmed Summary Judgment On Counts IV And V.

Finally, the Appellate Court properly found the respondeat superior and indemnification claims are derivative claims against the Town of Normal based on the substantive claims against the individual defendants. Op. ¶78. As such, the Appellate Court properly affirmed summary judgment on these claims as well.

CONCLUSION

For all of the foregoing reasons, the defendants respectfully request this Court affirm the judgment in this case.

Respectfully submitted,

TIM FREESMEYER / DAVE WARNER
FRANK ZAYAS / TOWN OF NORMAL

By: _____
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Case No. 122654

IN THE
SUPREME COURT OF ILLINOIS

ALAN BEAMAN,

Plaintiff-Appellant,

v.

TIM FREESMEYER, Former Normal Police Detective; DAVE WARNER, Former Normal Police Detective; FRANK ZAYAS, Former Normal Police Lieutenant; and TOWN OF NORMAL, ILLINOIS,

Defendants-Appellees.

On Appeal from the
Appellate Court of Illinois,
Fourth Judicial District,
No. 4-16-0527

There Heard on Appeal from the
Circuit Court of McLean County, Illinois
Case No. 14 L 51

CERTIFICATE OF COMPLIANCE

I, Thomas G. DiCianni, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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