Case No. 122654

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF PLAINTIFF-APPELLANT
ALAN BEAMAN

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1/12/2018 7:10 PM
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NATURE OF THE CASE

The wrongful conviction of Alan Wayne Beaman is a stain on the history of Illinois. This case will decide whether the men who caused that conviction through a dishonest and biased investigation face a trial. Do we, a state with a national reputation for convicting the innocent, ignore this evil, or do we allow a jury to decide whether to condemn it?

This Court is familiar with the criminal case against Mr. Beaman, which resulted in his wrongful conviction and incarceration for over a dozen years. The Court reversed the conviction unanimously in 2008, finding that the State hid evidence and underscoring "the tenuous nature of the circumstantial evidence against [Mr. Beaman]." *People v. Beaman*, 229 Ill. 2d 56, 81 (2008). The prosecution then dropped all charges, Mr. Beaman won a certificate of innocence based on DNA evidence, and the governor pardoned him, noting his innocence. Appendix ("A.") 340-342, 2961, 3377.

Mr. Beaman brought this suit, sounding principally in malicious prosecution, and named as defendants the detectives responsible for his wrongful conviction. A.308-337. The circuit court granted summary judgment against Mr. Beaman, A.27-33, and the appellate court affirmed. *Beaman v. Freesmeyer*, 2017 IL App (4th) 160527. This Court granted Mr. Beaman's petition for leave to appeal.

ISSUES PRESENTED FOR REVIEW

The tort of malicious prosecution consists of five elements: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff.

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Swick v. Liautaud, 169 Ill. 2d 504, 512 (1996). The issues presented for review concern the first four of these elements:

1. Commencement or continuance prong: Is this element satisfied if police officers charged with an investigation play a significant role in commencing or continuing the prosecution of an innocent person, but claim not to have pressured, influenced, or lied to the prosecutor?

2. Indicative of innocence prong: Did the proceedings against Mr. Beaman conclude in a manner indicating his innocence, where this Court unanimously vacated his conviction, he won a certificate of innocence, and the governor pardoned him on the basis of innocence?

3. Lack of probable cause prong: Does lack of probable cause against Mr. Beaman present an issue for the jury given the paucity of evidence against him, his lack of opportunity to commit a murder 130 miles from his home, and the existence of more viable suspects?

4. Malice Prong: Does the malice of the defendants present an issue for the jury where the defendants immediately selected Mr. Beaman as the killer and then concealed evidence, manipulated evidence, and misled a grand jury in order to secure his wrongful conviction?

STATEMENT OF FACTS

A. Introduction and Summary

As the summer of 1993 gave way to fall, Alan Beaman was home in Rockford, where he spent the latter half of the summer catching up with childhood friends, working nights at his uncle's grocery store, singing and playing guitar at his family's church, and

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preparing to start his senior year at Illinois Wesleyan University. A.951-952, 2900. On August 28, Jennifer Lockmiller, Mr. Beaman's former girlfriend, was found dead in her apartment in Normal, some 130 miles away. A.38.

Defendant Timothy Freesmeyer, a detective in the Normal Police Department, immediately selected Mr. Beaman as the primary suspect. A.1576. Aided by Defendants David Warner and Frank Zayas, Freesmeyer conducted an investigation to reach a predetermined result: Beaman did it. *See infra* at 4-5, 10-14. The defendants lied in court, hid a polygraph report inculpating a steroid-abusing drug dealer who beat women, manipulated driving times to discredit Mr. Beaman's alibi, brushed aside exculpatory evidence, and refused to conduct a serious investigation of the viable suspects. *See infra* at 11-14.

It worked. Freesmeyer "solved" the murder of a college student in a small town and testified as the prosecution's star witness at trial. A.2971, 2975. He walked out of the Lockmiller case with a sergeant's chevrons and a glowing recommendation from the lead prosecutor, and he now runs a law enforcement consulting business. A.1409-10, 2971, 3207. Meanwhile, the man who killed and raped Ms. Lockmiller remains on the streets. Alan Beaman—slight, scrawny, and innocent—spent nearly 13 years in prison, while his friends completed their education, married their spouses, and raised their children.

B. The Murder

Jennifer Lockmiller was last seen alive at noon on August 25, 1993. A.46-47. Three days later, her body was found in the bedroom of her apartment. A.38. Her shirt was pulled up exposing her breasts, her shorts and underwear were pulled down, a pair of scissors protruded from her chest, and an alarm clock cord was tied around her neck. A.38, 41.

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C. A Witness Makes a Guess, and Freesmeyer Targets Beaman

On Day One of the investigation, Defendant Freesmeyer, who was to become the lead investigator in the case, selected Mr. Beaman as the primary suspect. A.1576. Morgan Keefe, an acquaintance of the victim, had discovered the body and told the police Mr. Beaman might be the killer, though she had no personal knowledge of the crime. A.1374. She was "guessing." A.1374.

On the first day of the investigation, no alibies had been investigated, there were no eyewitness accounts, no physical evidence linked Mr. Beaman to the crime, and the autopsy had not been completed. A.3213, 3305-07. The crime scene suggested a killer of considerable strength and power; Mr. Beaman was thin and small. A.1360, 3221-22.

Lockmiller lived on a busy thoroughfare in a transient college town; this produced, in the words of Defendant Zayas, the overall head of the detective division, "an open case" with "so many possibilities." A.1353. The victim might have been killed by an intimate partner. Or a man she had recently met. A.1716-18, 1723-25, 1731, 1733. Or a would-be burglar she discovered in the apartment. A.1358-62. Zayas summed it up:

Q. So there were a lot of different factors that pointed to a potentially broad range of suspects, right?

A. Yes, sir, it did.

A.1353.

The scene pointed to a stranger because Lockmiller's apartment, usually tidy, was in disarray. A.1359, 1372-73. Someone appeared to have rummaged through the closet, A.1359, left food and dishes out on the kitchen counter, and tossed a garbage bag on the living room couch. A.72-73, 1359-60, 1372-73, 1594-95. One of Lockmiller's earrings was

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on the floor near the door, and a shoe was near the bedroom. A.1360. The scene suggested that the assailant attacked Ms. Lockmiller at the entry to her apartment, overpowered her, forced her into the bedroom, raped her, and killed her. A.1360.

Ms. Lockmiller encountered a cast of potential killers through excessive drinking, heroin use, and partying. A.1288, 1292. A new paramour had moved in with her two or three weeks before the murder. A.1727-28. She had broken up with another man who wanted her back. The two planned to see each other two days after the murder. A.1729-30.

Late at night on the first day of the investigation, Mr. Beaman agreed to a lengthy interview by two detectives, voluntarily accompanied them to a police station, agreed to have the interview taped, declared his innocence throughout the interview, and discontinued the interview only when it became highly accusatory. A.2900-2948. None of this mattered. Freesmeyer admitted that, within hours of the discovery of the body, he had already designated Alan Beaman as the primary suspect and likely killer. A.1576.

D. Alan Beaman and Jennifer Lockmiller

Alan Beaman was an unlikely murder suspect. He grew up in Rockford in a devout Methodist family. A.948-951. His father worked as an engineer. A.944. His mother taught math at the local high school. A.943. Since childhood, he was a music lover. A.948-951. He was in the high school marching band. Like his parents, Mr. Beaman was active in the local Methodist parish, where he played guitar for the youth group. A.948-951. As a student at Illinois Wesleyan University in Normal, Mr. Beaman majored in drama. A.355. He had no criminal history.

Mr. Beaman had ended his romantic relationship with Ms. Lockmiller over a month before the murder. A.2951-52. The relationship was unhappy, while it lasted. Ms.

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Lockmiller was intimate with other men, including Michael Swaine, Mr. Beaman's roommate and close friend. A.1752, 3314-15. The couple fought. Mr. Beaman displayed temper more than once, raising his voice at Ms. Lockmiller and, on two occasions when Ms. Lockmiller was being unfaithful, kicking open the door to her apartment. A.1752, 3314-16. There was no indication that Mr. Beaman ever directed violence at any person, and police were informed that he was "not physical." A.2950.

A few days before her death, Ms. Lockmiller called Mr. Beaman many times, trying to restart their relationship. A.1044, 1046-48. Mr. Beaman refused. A.1046-48. He had begun seeing someone else. A.1145.

E. Suspects Ignored

The defendants decided to ignore every avenue but one—the murderer was an intimate partner. A.3242. They did not bother to find out whether other burglaries or sexual assaults had been reported in the area, A.3243, 3246, or to interview all of the people Lockmiller had been in contact with in the days and hours prior to her death, A.1650-51, 2584. Other detectives on the case did not share this strange fixation on Mr. Beaman. A.1970, 2583, 2293-94, 1354.

The defendants also ignored other potential suspects. While they confirmed alibis for two suspects, Stacey Gates and Michael Swaine, they ignored the rest. A.3231, 3242. As one example of the many potential suspects, Ms. Lockmiller flirted with and rejected several men on August 21, four days before the murder, when she drank at various bars. At one of the bars, Spanky's, Ms. Lockmiller met a long-haired stranger. A.1716-17. Lockmiller, described by her friend as "the queen of scamming drinks off guys," flirted with the stranger, and then "kind of walked off." A.1723. This man called Ms. Lockmiller

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two days before the murder. He asked Ms. Lockmiller on a date and was rebuffed. A.1725, 1731. But this man kept calling her. A.1733. After Lockmiller and her friends left Spanky's and were en route to another bar, they encountered two other men, one of whom gave Lockmiller his phone number, writing it on a piece of paper with lipstick that he borrowed from Lockmiller's friend. A.1717-18, 1725. Lockmiller threw the piece of paper away. A.1725. On the day before the murder, one of Lockmiller's friends encountered these two men again. A.1718. They asked why Lockmiller had not called them, and told Lockmiller's friend to have Lockmiller call them. A.1718. Investigators did not attempt to locate these potential suspects. A.1653-54, 2867-70.

An even more likely suspect was John Murray, who had an on-again, off-again sexual relationship with Ms. Lockmiller and was seeking to rekindle the relationship when she was killed. A.1733, 1752, 1757, 1764-75. Murray bragged to police: "[S]he completely like wanted to go out with me still. Like if she was alive today she would be calling me wanting to go back out with me." A.1752.

The crime scene suggested that the murder would have required a person who, unlike Mr. Beaman, was of "considerable strength and power." A.1360. Murray was a frightening, physically imposing man. A.1773, 1775, 1777 (stating that Murray "was big. He was big and long, curly dark hair and just—I don't know how to say it more than he was kind of a scary person"; describing Murray as "someone that could be explosive in his anger"; stating that Murray was "physically large" and "scary").

Murray was a drug dealer, and he sold drugs to Ms. Lockmiller. A.1795-96. In fact, she owed him money for drugs at the time of her death. A.1795. Although Murray's story was that Lockmiller owed him approximately $20, Detective Daniels, a member of the

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investigative team, thought that she might have owed Murray more money for drugs. A.2348-49. This could have added to Murray's motive to kill her. A.1824, 2348-49.

The investigators learned that Murray beat women. A.1729-30. On October 7, 1994, Murray beat his girlfriend, Deborah Mackoway, pinning her to the floor and elbowing her repeatedly in the chest. A.2544. The night before, Murray had grabbed her and bruised her. A.2545. He beat her, she reported, "on a continual basis." A.2543.

Murray abused steroids both before and after the Lockmiller murder, and these drugs made him violent and erratic. A.2558, 2559, 2547. Murray had been using steroids (and cocaine) in 1993, the year Ms. Lockmiller was killed. A.2558-59.[1] In 1994, Murray was again experimenting with street steroid injections, making his behavior "unexplainable," as Mackoway put it. A.2547. He gave her a black eye while on the drugs. A.2547. Murray was violent toward other women as well. He slapped a different girlfriend, and may have abused yet a third. A.1773, 2561.

During the investigation, Murray lied to investigators about several matters, including his whereabouts on the day of the murder. During his first interview with police, Murray claimed that he left Normal and drove home at 3:00 p.m. on August 24, the day before the murder. A.1741. Mackoway, however, told investigators that Murray did not leave town until after 4:20 p.m. on *August 25*, the day of the murder. A.2563. Furthermore, no one could account for Murray's whereabouts on August 25 between when Mackoway left for work in the morning and 2 p.m. A.2563-64. Murray also lied to investigators about several other matters, including the fact that he sold Ms. Lockmiller drugs, A.1746, 1795-

[1] The appellate court incorrectly stated that "Murray began taking steroids in January 1994 and he had begun acting erratically." Op. ¶ 14. In fact, police reports show that Murray was also taking steroids in 1993, before the murder. A.2558-59.

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96, drove over to her apartment to collect a drug debt shortly before she was killed, A.1738-40, 1791, and was having sex with her while she was dating Mr. Beaman (not just "talking," as Murray originally claimed). A.1744, 1752, 2347-48.

Murray refused to comply with a polygrapher's instructions during a lie detector test about whether he murdered Jennifer Lockmiller. The polygrapher reported: "After being advised several times to follow directions, the subject informed this examiner that he was not able to comply. Subsequently, the subject was dismissed from this laboratory." A.2586. Two decades later, during his deposition in this case, John Murray refused to answer any questions about his role in the Lockmiller murder, invoking his Fifth Amendment right against self-incrimination. A.1769-70.

F. Warner Hides Evidence

The Murray polygraph report was concealed from the prosecutor. A.3268-69 Defendant Warner received the report from the polygrapher, and was the last person to have the report before it disappeared. A.2744-45. Warner claims to have handed the Murray polygraph report to Detective Daniels, but Daniels has no recollection of it. A.2239, 2477-78, 2535, 2744-45. Warner's story that he gave the report to Daniels (and no one else) is not consistent with the three-prong policy he was trained to follow upon receipt of such a report: (1) ensure that the head of the detective division received a copy, (2) submit the report to central records, and (3) disseminate copies to all investigators on the case. A.1354-55. Warner failed to perform all three of these mandatory steps. A.2744-45. Many years later, the suppression of evidence incriminating Murray led this Court to vacate Mr. Beaman's conviction. *See infra* at 15-16.

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G. Attempts To Obtain a Confession Fail

Defendants tried several times to obtain an incriminating admission from Mr. Beaman, all to no avail. A.1305-06, 1308-11, 1320, 1326, 1328-29, 1334-35. Freesmeyer spoke with Mr. Beaman many times during the nine-month investigation of the Lockmiller homicide, often while wearing a wire. A.1320, 1326, 1328-29, 1334-35. The defendants convinced Mr. Beaman's friend and roommate to wear a wire and engage Mr. Beaman in two separate conversations about the murder. A.1305-06, 1308-11, 2224-27, 3328–44, 3345–54, 3320-21, 3322-23. Mr. Beaman made no incriminating statements. He also maintained his innocence over a series of interrogations in which defendants insisted he was the killer. A. 1316, 2613-14, 2900-2948. Freesmeyer even threatened Mr. Beaman with the death penalty if he refused to confess. A.1318. None of it worked.

H. No Physical or Eyewitness Evidence

No probative physical evidence connected Mr. Beaman to the crime. Two of his fingerprints were found on the alarm clock at the crime scene, but that fact lacked evidentiary significance. A.1587, 2332-33, 2967, 2969, 3253, 3266. Mr. Beaman had repeatedly been an overnight visitor in Ms. Lockmiller's apartment and used the alarm clock. A.874-75, 953, 2332-33. Michael Swaine, whom the investigators quickly eliminated as a suspect, had also stayed overnight at Lockmiller's apartment and used the alarm clock. Four of Swaine's prints were found on the alarm clock, as well as an unidentified fingerprint. A.3324-25. Apart from the irrelevant fingerprints, there was no other physical evidence that linked Mr. Beaman to the crime. A.1356-57.

Lacking serious evidence, the defendants turned to collecting dirt about Mr. Beaman's relationship with Ms. Lockmiller. Mr. Beaman had yelled at her, been jealous,

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become angry over her infidelity, and called her crude names, A.1764, 3297, but no witness (and no other evidence) placed him in Normal, as opposed to Rockford, where he was home with his parents, on the day of the murder. A.3226.

I. Freesmeyer Manipulates Time Trials

Freesmeyer stuck with his Day One guess—Beaman did it—even when an alibi made that guess impossible. A.1576, 2620. A security video showed Mr. Beaman at his bank in Rockford, some 130 miles from Ms. Lockmiller's apartment, at 10:11 a.m. on the day of the murder. A.1312. At 10:37 and 10:39 a.m., two calls were placed from the Beaman family residence to Mr. Beaman's youth minister. A.3285. When Mr. Beaman's mother returned home at approximately 2:15 p.m. that afternoon, Mr. Beaman was in his room asleep, with the family dog lying in the adjacent hallway. R.3271–78. It would have been impossible for Mr. Beaman to leave the family home in Rockford following the 10:39 a.m. call, drive the 130 miles to Normal, kill and rape Ms. Lockmiller, and return 130 miles to his bedroom prior to his mother's 2:15 p.m. return. A.2955–59.

Freesmeyer therefore set out to create evidence that Mr. Beaman did not make the calls. A.1339, 3219-20. Scrupulously adhering to speed limits and using a downtown route on city streets—not the "bypass route" used by locals—Freesmeyer purported to establish that Mr. Beaman did not have time to get home from the bank in time to make the calls. A.1339, 3219-20. On the other hand, taking the bypass route—even while never exceeding the speed limit—would have given Mr. Beaman ample time to make the calls. A.2958, 3219-20. In fact, Freesmeyer did a time trial using the bypass route, which proved this very point, even while he drove the entire route at 55 miles per hour on a four-lane interstate highway. A.3219-20. But he omitted the exculpatory time trial from his detailed police

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report and avoided telling the jury about it at trial. A.1339, 2648–50, 3070-71. Not so for the slower time trial that suggested Mr. Beaman could not have made the calls. Freesmsyer recorded that in his report, and he let the jury know about it. A.1339, 3070-71.

No one other than Mr. Beaman could have made the calls. His father was undeniably at work. A.957. Plaintiff's mother, Carol Beaman, also stated that she did not make the calls. A.3279. And she could not have made them. Records confirm that Carol Beaman signed her elderly mother in at the convalescence facility where she was a resident at 10 a.m. that morning, after she returned from taking her mother on an outing. A.2572-73. The facility was more than ten miles from the Beaman residence. A.955. Carol Beaman spent 20 to 30 minutes settling her mother back into her room and then went to a Walmart—which was directly across the street—where she shopped for school supplies and stood in a check-out line. A.2574-75, 2577–81, 3279–80. A receipt proved that Carol Beaman checked out of Walmart at 11:10 a.m., meaning that she could not have made the crucial 10:37 a.m. call because she was at the Walmart across town. A.2577. Mr. Beaman was the only remaining person with access to the phone. A.3280.

Carol Beaman stated that she naturally went from the convalescence facility to the Walmart right across the street, but that did not fit with Freesmeyer's theory that she went home in between the facility and the Walmart to call the youth minister. A.2576. Freesmeyer decided that she must have driven 10 miles home, made a call, and then driven ten miles back to the Walmart. A.2660.

Even assuming Mr. Beaman *did not* make the calls, committing the murder would have been nearly impossible. That scenario would have Mr. Beaman leaving the Rockford bank around 10:11, driving 130 miles to Ms. Lockmiller's apartment in Normal,

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committing a rape and murder, driving 130 miles back to his family home in Rockford, and returning before his mother's arrival at 2:15. In testing this scenario, Freesmeyer first observed the speed limit, but the trip took four hours and eleven minutes—more time than the four hours and four minutes between the bank video at 10:11 and Carol Beaman's confirmation of Mr. Beaman's presence home in Rockford at 2:15. A.1339. To discredit the alibi, Freesmeyer then drove much faster, at an *average* speed of 75 miles per hour, 10 miles per hour over the posted speed limit. A.1345-46. Freesmeyer was able to make the trip in three hours and 45 minutes. A.1345-46. Mr. Beaman could not have coaxed his Ford Escort to travel at such a high average speed for well over 100 miles: the car frequently broke down, could sustain high speeds, and was described by one passenger as a "piece of junk." Even then, Mr. Beaman would have had a 20-minute window to commit the rape and murder. A.1345-46, 1789–90, 3284–84. Of course, this scenario also requires Mr. Beaman's mother to have placed the calls, meaning she left the convalescence facility, drove 10 miles home to make two telephone calls, drove 10 miles back to Walmart (directly across from the convalescence facility), and then drove home again.

J. Defendants Ignore a Witness who Exonerates Mr. Beaman

In addition to dismissing Mr. Beaman's alibi, the defendants ignored critical evidence that exculpated him. David Singley lived in the second floor apartment directly across the hall from Ms. Lockmiller. Singley told the investigators that, as he arrived home from class at approximately 2 p.m. on the day of the murder, he heard someone quickly slam shut the door to Ms. Lockmiller's apartment. A.3300-01, 3304. He heard the stereo on in Ms. Lockmiller's apartment. A.3300-01, 3304. About 10 minutes later, Singley heard

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Lockmiller's door open and shut again, followed by the sound of footsteps going down the stairs and the outside door to the building being opened. A.3300-01, 3304.

Singley's information established either that Lockmiller was alive at 2 p.m. or, if she was already dead, that her killer was still present in the apartment. In either event, it would have been impossible for Mr. Beaman to kill Ms. Lockmiller. All agree that he was in Rockford, some 130 miles away, no later than 2:15 p.m. A.87.

K. Beaman Arrested: "I Think We Needed To Work on it Some More"

Mr. Beaman was arrested in May 1994. A.1335. Five months later, Zayas admitted that that the evidence was still not sufficient for the case to be ready for prosecution:

> Q. Were you certain that Alan Beaman killed Jennifer Lockmiller at any point prior to your retirement?
>
> A. No. I don't think we had all the information needed at the time when I left. That was still in limbo.
>
> ….
>
> A. I don't think the case was ready to be sent to the State [for prosecution] yet. I think we needed to work on it some more.

A.1356.

L. Freesmeyer Delivers the Indictment and Conviction

Following Mr. Beaman's arrest, Freesmeyer moved into the State's Attorney's Office and worked on the case full time through Mr. Beaman's trial and conviction. A.2595. He was the principal witness before the grand jury and testified over the course of three days. A.3217, 3223. He lied about alternative suspects, particularly Murray, claiming that investigators had not "locate[d] any other person anywhere who had any conceivable motive to kill Jennifer Lockmiller." A.3218. The grand jury indicted Mr. Beaman.

At trial, Freesmeyer, now a sergeant, testified as the star witness for the prosecution over the course of two days. A. 3217, 3223. Alan Beaman was convicted on April 1, 1995,

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a good day for Timothy Freesmeyer. As another investigator agreed, Freesmeyer would garner the most credit for solving the case, and would have received the most blame if it went unsolved. A.1384. The prosecutor slapped Freesmeyer on the back in a letter to the Chief of Police: "Beyond any question in my mind, this case would not have been won without Tim Freesmeyer." A.3207. Alan Beaman was sentenced to 50 years in prison. The appellate court affirmed on direct appeal, over the vigorous dissent of Justice Cook, who found the evidence insufficient to prove guilt. No. 4–95–0396 (unpublished order under Supreme Court Rule 23) (Cook, J., dissenting).

M. Alan Beaman Clears His Name

The jury that convicted Alan Beaman never heard the evidence against John Murray. For that reason, this Court unanimously vacated the conviction in 2008. *People v. Beaman*, 229 Ill. 2d 56 (2008). The case against Mr. Beaman had fallen apart when his post–conviction lawyers unearthed evidence hidden from him and his criminal defense lawyer that inculpated Murray (referred to in this Court's previous opinion as "John Doe"). *Id.* at 66, 80. The Court divided the suppressed Murray evidence into four categories:

> (1) John Doe failed to complete the polygraph examination; (2) Doe was charged with domestic battery and possession of marijuana with intent to deliver prior to petitioner's trial; (3) Doe had physically abused his girlfriend on numerous prior occasions; and (4) Doe's use of steroids had caused him to act erratically.

Id. at 74–75. The Court found that the suppressed polygraph evidence was important because it "would have bolstered a claim by petitioner that Doe was a viable suspect not only because the circumstances may be viewed as evasive, but also because the polygraph examiner indicated that Doe was specifically identified as a suspect." *Id.* at 76. The Court next considered the fact that Murray beat his girlfriend and behaved erratically because he

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abused steroids, finding that the evidence "supported an inference of a tendency to act violently toward others." *Id*. The Court also analyzed the evidence that showed Murray to be a drug dealer, to whom Ms. Lockmiller owed a drug debt at the time she was killed. *Id.* at 76–77. The Court noted that the evidence against Murray was especially critical given the weakness of the evidence against Mr. Beaman. *Id.* at 79. "It is clear," the Court found, "that the evidence of petitioner's opportunity to commit the murder is not as strong as that against Doe." *Id.* Indeed, Murray "had a clear opportunity to commit the offense. He lived approximately 1 ½ miles from Jennifer's apartment and did not have any verification of his location before 1 p.m. on the day of the murder." *Id.* at 80. Moreover, Murray lied about his alibi—he "gave a false alibi stating he left town the day before the murder. That false exculpatory statement could be used as probative evidence of consciousness of guilt." *Id.* at 80–81. Finally, Murray had a "motive to commit the murder"—he wanted to rekindle his sexual relationship with Lockmiller, but she was entangled with another man. *Id*. at 80.

The paucity of incriminating evidence and the concealment of exculpatory evidence made the conviction a nullity: "We cannot have confidence in the verdict finding petitioner guilty of this crime given the tenuous nature of the circumstantial evidence against him, along with the nondisclosure of critical evidence." *Id.* at 81.

After this Court's unanimous ruling, the State's Attorney's Office dropped all charges against Mr. Beaman. A.2961. He then petitioned for a certificate of innocence. After DNA testing requested and directed by the State provided yet further evidence of Mr. Beaman's innocence, A.3355-58, the State dropped its opposition to the petition, A.51. On April 29, 2013, Alan Beaman was declared innocent of the murder of Jennifer Lockmiller by the Circuit Court for the Eleventh Judicial District. A.51-52. Even after the certificate

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of innocence, the Governor of Illinois granted a pardon to Mr. Beaman "based upon innocence as if no conviction."[2]

N. Procedural History: Federal Litigation

Mr. Beaman brought a lawsuit in federal court against a group of defendants that includes those named in the case before this Court. *Beaman v. Souk*, 7 F. Supp. 3d 805 (C.D. Ill. 2014), *aff'd sub nom. Beaman v. Freesmeyer*, 776 F.3d 500 (7th Cir. 2015). Mr. Beaman's principal claim was that the defendants withheld exculpatory evidence under *Brady v. Maryland*. *Id.* at 820. The district court held that most of the suppressed exculpatory evidence was not actionable under *Brady* because the defendants provided it to the prosecutor, who enjoyed absolute immunity under federal law for his failure to disclose it to the defense. *Id.* at 826.

The Murray polygraph was different in three respects. First, the federal court found that a reasonable jury could conclude that Warner concealed the polygraph from the prosecution. *Id.* at 827. Second, the court held that suppression of the polygraph report would constitute a *Brady* violation even if the other exculpatory evidence had been turned over to the prosecutor. *Id.* at 823. The polygraph itself could have changed the course of the prosecution: "Perhaps if the prosecutor had received the polygraph report, he would no longer have agreed Murray was not a viable suspect." *Id.* at 830 n.8.

Third, the court concluded that a reasonable jury could find the requisite intent—Warner buried the polygraph deliberately. *Id.* at 827. Specifically, the court found:

[2] The pardon (A. 3377) is not in the circuit court record but is judicially noticeable. *People v. Morris*, 219 Ill. 2d 373, 394–95 (2006) (Karmeier, J., dissenting) (taking judicial notice of governor's speech discussing commutations); *Chicago & A.R. Co. v. Keegan*, 152 Ill. 413, 416–17 (1894) (document signed by governor and bearing seal of state is judicially noticeable).

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> Plaintiff . . . has pointed to sufficient evidence to support an alternative inference that [Warner] intentionally withheld the information from Souk. The only officer that undisputedly had the polygraph report in his possession at any point is Warner. Under NPD policy, the polygraph reports would then be given to Zayas, who would give them to the records department and ensure a copy was given to the prosecutor. However, for reasons unknown, this policy was not followed with the Murray polygraph, and the parties dispute what happened to it once received by the NPD. Warner claims he gave it to Daniels instead of Zayas, but Daniels has no recollection of ever receiving the report. A jury could infer from the failure to follow policy and the conflicting testimony that there was intentional suppression of the evidence by Warner, the only Defendant shown by the record to have possessed the polygraph report.

Id. at 827.

Despite the genuine issue of material fact over Warner's deliberate suppression of the polygraph, the district court nonetheless granted summary judgment to Warner on the ground of qualified immunity, a doctrine that pertains to federal damages claims arising under 42 U.S.C. § 1983. *Id.* at 831. Although a jury could find that Warner violated the Constitution, he enjoyed qualified immunity because the right of a criminal defendant to receive polygraph reports incriminating alternative suspects had not yet been clearly established at the time Warner suppressed the evidence. *Id.*

In addition to the federal law claims for *Brady* violations, Mr. Beaman also invoked the federal court's supplemental jurisdiction over state law claims for malicious prosecution, civil conspiracy, intentional infliction of emotional distress, respondeat superior, and indemnification. *Id.* at 811. Having dismissed the federal law claims, the court was divested of supplemental jurisdiction over the state law claims. *Id.* at 831. The court dismissed the state law claims without prejudice, not reaching their merits. *Id.* The Seventh Circuit affirmed the dismissal of the federal law *Brady* claim with prejudice and the dismissal of the state law claims without prejudice. *Beaman*, 776 F.3d at 503.

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O. Procedural History: The Instant Case

Mr. Beaman brought the current action in the Circuit Court of McLean County in April 2014, pleading the state law claims that the federal court had dismissed without prejudice. A.308–337. He requested and was granted assignment of an out-of-circuit judge (Douglas County Circuit Court Judge Richard L. Broch). Judge Broch granted the defendants' motion for summary judgment on June 22, 2016, A.28-33.

In a malicious prosecution suit, the plaintiff must establish five elements: (1) the commencement or continuance of an original proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages. *Swick*, 169 Ill. 2d at 512. In this case, the circuit court reasoned that Mr. Beaman could not satisfy the commencement or continuance, lack of probable cause, malice, and indicative of innocence prongs. A.28. The circuit court dismissed the remaining claims as dependent on the malicious prosecution claim. Mr. Beaman appealed A.3368-70.

The appellate court affirmed the grant of summary judgment on the commencement or continuance element of malicious prosecution, and did not address the circuit court's other grounds for dismissing that claim. Op ¶ 50. The court observed that prior malicious prosecution cases against police officers in three appellate districts and federal court had applied the "significant role" test to the commencement or continuance prong. *Id.* ¶¶ 51–53. Under this test, "liability extends to all persons who played a significant role in causing the prosecution of the plaintiff, provided all of the elements of the tort are present." *Id.* ¶¶ 51–53. The appellate court nevertheless rejected this test and "question[ed] the propriety of limiting consideration of the commencement element to only the significance of one's

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role in instituting the prosecution." *Id.* ¶¶ 51–54. Instead, the court imported into police cases the "pressure, influence, or misstatement test," a standard that had previously been applied only in malicious prosecution cases against "a civilian reporting a crime." *Id.* ¶ 56. Under the new test, the court held that "the plaintiff must establish that [an] officer pressured or exerted influence on the prosecutor's decision or made knowing misstatements upon which the prosecutor relied." *Id.* ¶ 58. The court concluded that Mr. Beaman could not meet this test for commencement or continuance as a matter of law, and affirmed the grant of summary judgment on the malicious prosecution claim. *Id.* ¶¶ 60–72. The court also affirmed dismissal of the other claims, which were dependent on the malicious prosecution claim. *Id.* ¶¶ 72–78. This Court granted leave to appeal.

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ARGUMENT

A. Summary of Argument

The significant role test for the commencement or continuance prong of the malicious prosecution tort strikes the appropriate balance between holding police accountable for causing wrongful prosecutions and closing the door to unfounded claims. The appellate court erred by replacing this standard with the pressure, influence, or misstatement test—a rule no other Illinois court has ever applied to a malicious prosecution case against police defendants.

The court went astray because it considered the commencement or continuance prong in isolation, ignoring the other elements that cabin the malicious prosecution cause of action, including malice, lack of probable cause, and termination of the criminal proceedings in a manner indicative of innocence. Of course, a police officer should not be found liable merely for playing a significant role in causing a prosecution. But police officers should be held accountable when, motivated by malice, they have a significant role in causing an innocent person to be prosecuted without probable cause.

Illinois's disproportionate rate of wrongful convictions makes police accountability imperative, and the malicious prosecution tort is the principal civil remedy under state law for police misconduct. To weaken the cause of action, as the appellate court did, is to promote impunity. Prosecutors rely on investigations performed by detectives to indict and try the right people. Detectives can therefore set the trajectory of a wrongful prosecution not only by pressuring or lying to a prosecutor, but also by arriving at pre-determined outcomes through misconduct and biased investigations. In such cases, police should not escape liability merely because they did not pressure, influence, or lie to a prosecutor.

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In any case, the actions of Freesmeyer, Warner and Zayas meet any conceivable test for commencement or continuance of a prosecution, even the appellate court's pressure, influence, or misstatement test. Faced with a high-profile murder that shook a college town, they selected a perpetrator and worked backwards from there. To achieve the desired result, they manipulated time trials, lied in court, and hid evidence—even from the prosecutor. The concealment of exculpatory evidence amounts to a knowing misstatement.

If Mr. Beaman prevails on the commencement or continuance prong, the Court should exercise its discretion to address the circuit court's alternative grounds for summary judgment and remand the malicious prosecution claim for trial, even though the appellate court did not reach these alternative grounds. Mr. Beaman was arrested and jailed in the second year of the Clinton Administration. He has waited long enough for a day in court.

The circuit court's reasoning on the other prongs is indefensible. The court found that the proceedings against Mr. Beaman did not conclude in a manner indicative of innocence, even though this Court unanimously vacated his conviction, the State dropped all charges, Mr. Beaman won a certificate of innocence, and the Governor pardoned him on the basis of innocence. The court found probable cause to arrest Mr. Beaman as a matter of law without examining the record, which presented a thicket of disputed facts and inferences. Instead, the court simply incorporated the defendants' brief, finding probable cause "as specifically stated in paragraphs (a) through (p) of Defendants' Memorandum of Law." A.30-31. Finally, the circuit court found no malice as a matter of law by ignoring the bias and misconduct that pervaded the investigation.

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Mr. Beaman's remaining claims (intentional infliction of emotional distress, conspiracy, respondeat superior, and indemnification) are intertwined with the malicious prosecution claim. The claims all rise or fall together and should be remanded for trial.

B. Standard of Review

"[S]ummary judgment is a drastic means of disposing of litigation . . . ." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423 (1998). This Court must reverse the grant of summary judgment to the defendants unless the case is "clear and free from doubt." *Id.* at 424. This means that summary judgment is impermissible unless: (1) the material facts are undisputed *and* (2) the only reasonable inferences one can draw from those facts preclude liability. *Seymour v. Collins*, 2015 IL 118432 ¶ 42; *Carney v. Union Pacific R. Co*., 2016 IL 118984, ¶ 25. This Court's review is *de novo*. *Jackson*, 185 Ill.2d at 424.

C. The Malicious Prosecution Claim Should Proceed to a Trial on the Merits.

1. Commencement or Continuance Prong: The Defendants Commenced or Continued Mr. Beaman's Wrongful Prosecution by Securing His Indictment and Conviction through a Fraudulent Investigation.

The appellate court erred in finding no genuine issue of material fact on the commencement or continuance element of the malicious prosecution tort. Not only did the appellate court select a narrow and incorrect legal standard, but the facts, properly understood, satisfy even that restrictive test.

a. The Appellate Court Applied the Wrong Standard to the Commencement or Continuance Prong.

In cases against police officers, courts in Illinois have applied three tests:

Significant role test: The predominant rule in Illinois's lower courts is that a police officer satisfies the commencement or continuance prong if she played a "significant role in commencing or continuing the prosecution." *Frye v. O'Neill*, 166 Ill. App. 3d 963, 975

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(4th Dist. 1988); *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 72; *Barnett v. Baker*, 2017 IL App (1st) 152443-U, ¶ 40; *Rodgers v. Peoples Gas, Light & Coke Co*., 315 Ill. App. 3d 340, 348–49 (1st Dist. 2000). Federal cases against Illinois police officers routinely employ this standard[3] and use it in jury instructions.[4]

Advice and cooperation test: Some state and federal decisions have also mentioned another test: participation of so active and positive a character as to amount to advice and cooperation. *E.g.*, *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 647 (1st Dist. 2002); *Collier v. City of Chicago*, 2015 WL 5081408, at *9 (N.D. Ill. Aug. 26, 2015).

Pressure, influence, or misstatement test: In this case, the Fourth District adopted a third rule, one more restrictive than the other two: "[T]he plaintiff must establish that [an]

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[3] *See, e.g.*, *Mitchell v. Elgin*, No. 14 CV 3457, 2016 WL 492339, at *7–8 (N.D. Ill. Feb. 9, 2016); *Collier v. Chicago*, No. 14 C 2157, 2015 WL 5081408, at *9 (N.D. Ill. Aug. 26, 2015); *Mosley v. Pendarvis*, No. 13 C 5333, 2015 WL 2375253, at *4 (N.D. Ill. May 15, 2015); *Green v. Chicago,* No. 11 C 7067, 2015 WL 2194174, at *6 (N.D. Ill. May 6, 2015); *Fields v. Chicago*, No. 10 C 1168, 2014 WL 477394, at *12 (N.D. Ill. Feb. 6, 2014); *Starks v. Waukegan*, 946 F. Supp. 2d 780, 794–95 (N.D. Ill. 2013); *Padilla v. City of Chicago*, 932 F. Supp. 2d 907, 928 (N.D. Ill. 2013; *Hunt v. Roth*, No. 11 C 4697, 2013 WL 708116, at *8 (N.D. Ill. Feb. 22, 2013); *Reno v. Chicago*., No. 10 C 6114, 2012 WL 2368409, at *6 n.2 (N.D. Ill. June 21, 2012); *Brown v. Navarro*, No. 09 C 3814, 2012 WL 1986586, at *7 (N.D. Ill. June 4, 2012); *Phipps v. Adams*, No. 11-147-GPM, 2012 WL 686721, at *3 (S.D. Ill. Mar. 2, 2012); *Johnson v. Arroyo*, No. 09 C 1614, 2010 WL 1195330, at *3 (N.D. Ill. Mar. 22, 2010); *Swanigan v. Trotter*, 645 F. Supp. 2d 656, 686 (N.D. Ill. 2009); *Lipscomb v. Knapp*, No. 07 C 5509, 2009 WL 3150745, at *11-12 (N.D. Ill. Sep. 30, 2009); *Montgomery v. Harvey*, No. 07 C 4117, 2008 WL 4442599, at *7 (N.D. Ill. Sep. 29, 2008); *Bruce v. Perry*, No. 03-cv-558-DRH, 2006 WL 1777760, at *8 (S.D. Ill. June 23, 2006); *Montes v. Disantis*, No. 04 C 4447, 2005 WL 1126556, at *11–12 (N.D. Ill. May 10, 2005); *Patterson v. Burge*, 328 F. Supp. 2d 878, 900-01 (N.D. Ill. 2004); *Harris v. Harvey*, No. 97 C 2823, 2000 WL 1468746, at *9 (N.D. Ill. Sep. 29, 2000).

[4] *E.g.*., Final Jury Instructions, *Brown v. Spain*, No. 11-C-08403, 2014 WL 6813086 (N.D. Ill. Oct. 16, 2014) ("An officer commences or continues the prosecution of a person if the officer played a significant role in causing the commencement or the continuation of the prosecution of the person."); Instructions to the Jury, *Payne v. Maher*, No. 11-cv-6623, 2014 WL 7684881 (N.D. Ill. Nov. 14, 2014) (same); Jury Instructions, *Wells v. Johnson*, No. 06CV06284, 2012 WL 1569523 (N.D Ill. Apr. 19, 2012) (same).

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officer pressured or exerted influence on the prosecutor's decision or made knowing misstatements upon which the prosecution relied." Op. ¶ 58.

While this Court has not previously addressed the standard for commencement or continuance in a case against police defendants, the prevalence of the significant role test in police cases litigated in this State's other courts over the past four decades suggests that the test is useful and effective. Although the significant role test is by far the majority rule, no one in this litigation has pointed to an instance in which the usual rule has produced an unfair result. In fact, we are unaware of any previous instance in which a police defendant has even complained about the significant role test. The standard has acquitted itself well over a long tenure.

The Court should hesitate to replace the tested standard—significant role—with a more narrow rule that could undermine police accountability. Whatever problems Illinois may face, too much police accountability is not among them. In 2016, Illinois stood second only to Texas in the number of wrongful convictions that ended in exoneration.[5] Cook County has been called "the wrongful conviction capital of the U.S."[6] Illinoisans convicted of crimes and later exonerated have spent an aggregate 2,287 years behind bars for offenses they did not commit.[7] These lost years are an affront to justice, for "concern about the injustice that results from the conviction of an innocent person has long been at

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[5] NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 5 (2017), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf.

[6] *See, e.g.*, Andy Grimm, *Kim Foxx Planning To Revamp Cook County Wrongful-Conviction Unit*, CHI. SUN-TIMES, Mar. 15, 2017, *available at* http://chicago.suntimes.com/politics/kim-foxx-planning-cook-county-wrongful-conviction-unit-revamp/.

[7] *Exonerations by State,* NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Jan. 10, 2018).

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the core of our criminal justice system." *Schlup v. Delo*, 513 U.S. 298, 325 (1994). Wrongful convictions also threaten public safety, as this case demonstrates. By targeting Mr. Beaman, the defendants left a dangerous rapist and murder to wander the streets.

The malicious prosecution tort provides the principal civil remedy under state law for investigative misconduct that results in wrongful convictions. Such misconduct may also give rise to claims for intentional infliction of emotional distress, failure to intervene, conspiracy, and respondeat superior, but all of these claims are contingent on the success of the malicious prosecution claim. *Jimenez v. City of Chicago*, 830 F. Supp. 2d 432, 451 (N.D. Ill. 2011). For practical purposes, then, the malicious prosecution cause of action is the lynchpin of state law civil accountability for investigative misconduct.

The lower court's pressure, influence, or misstatement test would undermine police accountability. When police officers cause wrongful convictions, they generally do so through corrupt investigations driven by malice, not by lying to prosecutors. "[A] prosecutor ordinarily relies on police and other agencies for investigation of criminal acts." *People v. Ringland*, 2017 IL 119484, ¶ 24 (2017). To indict the right people, prosecutors rely on police officers to conduct investigations based on the facts, not based on malice and bias directed against a particular suspect. For practical reasons, this Court has noted that the prosecutor generally must accept the results of the investigation: "[T]he State's Attorney does not possess the technical facilities nor the manpower that the police have. *Consequently, it is the recognized practice that the State's Attorney sensibly defers to the investigative duties of the police*." *Id.* (emphasis in original) (citations omitted).

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In cases like this one—where police target a manifestly innocent individual with a biased investigation, and thereby have a significant role in commencing or continuing the prosecution—liability is appropriate. The defendants caused Alan Beaman's wrongful prosecution and conviction by selecting him as their man on Day One, and then conducting a biased investigation to reach the predetermined result.

The remaining standard that courts sometimes apply—participation of so active and positive a character as to amount to advice and cooperation—is difficult to flesh out. Courts have used this test varyingly. Sometimes, this standard appears all by itself, *e.g.*, *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d at 647, sometimes it appears along with the significant role test, *Collier v. City of Chicago*, 2015 WL 5081408, at *9, and sometimes, as in the decision below, it appears along with the pressure, influence, or misstatement test. Op. ¶ 56. The advice and cooperation test suffers from the same flaws as the pressure, influence, or misstatement test. A police officer need not advise or cooperate with a prosecutor to cause a malicious prosecution. A coerced confession or biased investigation often will suffice to convict an innocent person.

In hypothesizing that the significant role test would create liability for ordinary police work, the Appellate Court lost sight of the other elements required by this Court's disjunctive test for malicious prosecution. Op. ¶ 54; *Swick*, 169 Ill. 2d at 512. "Significant role" is the proper standard for one element of the tort; standing alone, it does not constitute malicious prosecution any more than driving a car constitutes vehicular homicide. The other elements of the tort—among them termination of the prosecution in a manner indicating innocence, lack of probable cause, and malice—ensure that only blameworthy defendants face liability. *Swick*, 169 Ill. 2d at 512. Of course, ordinary officers have

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significant roles in commencing or continuing prosecutions, but they do not go after innocent people because of malice and arrest them without probable cause.

If, as the lower court worried, the significant role test would create liability for ordinary police work, surely there would be, among the high volume of malicious prosecution cases decided under that standard, one example where the test actually produced such a result. Op. ¶ 54. The lower court did not supply one.

Because no court of this State had ever applied the pressure, influence, or misstatement test to a malicious prosecution claim against a police officer, the lower court borrowed it from appellate decisions about malicious prosecution by private defendants, and a recent federal case that resulted in a split decision. Op. ¶¶ 56–57 (citing *Denton v. Allstate Insurance Co.*, 152 Ill. App. 3d 578 (1st Dist.1986); *Geisberger v. Vella*, 62 Ill. App. 3d 941 (2d Dist. 1978); and *Colbert v. City of Chicago*, 851 F.3d 649 (7th Cir. 2017)). The first two cases have nothing to do with malicious prosecution by a police officer. Only *Colbert* involves police defendants. In that case, however, the majority purported to construe state law in adopting the pressure, influence, or misstatement test, but relied only on cases about prosecution without probable cause as a federal cause of action under 42 U.S.C. § 1983. *Colbert*, 851 F.3d at 655 (citing *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) and *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 902 (7th Cir. 2001)). *Colbert* did not really construe state law; it used federal law on prosecution without probable cause to supply the standard for commencement or continuance in a state law malicious prosecution suit. This Court is the arbiter of state law, and should not accept *Colbert*'s incorrect interpretation of state law, which was based solely on federal law. This Court already cabins malicious prosecution claims with the lack

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of probable cause, indicative of innocence, and malice requirements; there is no reason to restrict further the state law malicious prosecution claim with a rule designed for a distinct federal cause of action.

The Fourth District also downplayed the break with its previous adoption of the significant role test in *Frye v. O'Neill*, 166 Ill. App. 3d at 975. *Frye* did not adopt the significant role test for commencement or continuance, the court reasoned, because *Frye* stated that the test applies "provided all of the elements of the tort are present." *Id.* ¶ 53. But *Frye*'s qualification hardly undermines the significant role test—it merely acknowledges that the plaintiff must also meet the other elements. *See Swick*, 169 Ill. 2d at 512. There was no reason for the Fourth District to depart from its longstanding precedent.

b. The Defendants' Misconduct in this Case Satisfies Any Conceivable Test for Commencement or Continuance of the Prosecution.

The record in this case meets any imaginable test for commencement or continuance of a prosecution by a police officer. Under any of these tests, the defendants helped to cause the commencement and the continuance of Mr. Beaman's wrongful prosecution. If the defendants had conducted an honest investigation, someone else might have been indicted, and the murderer might have been caught. Mr. Beaman might not have been indicted if the defendants examined John Murray the way they examined Mr. Beaman—if they had bugged the conversations he had with his friends, threatened him with the death penalty if he did not confess, interrogated his friends about every time he yelled at someone or made a crude remark, or, for that matter, investigated Murray's history of beating women, abusing steroids, and selling drugs. As the federal court concluded, the results might have been different if Warner had not concealed the Murray polygraph report: "Perhaps if the

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prosecutor had received the polygraph report, he would no longer have agreed Murray was not a viable suspect." *Beaman*, 7 F. Supp. 3d at 831.

Likewise, Mr. Beaman might never have been indicted if the detectives investigated the man whom Ms. Lockmiller met just before her death and who wouldn't stop calling her, or the man who wrote his phone number for her in lipstick and continued asking about her. Mr. Beaman might never have been indicted if Freesmeyer told the prosecutor that Mr. Beaman's alibi held up, or that it was absurd to think that Carol Beaman would drive 20 miles across town and then return to the Walmart, rather than just going across the street. Mr. Beaman might never have been indicted if the defendants had kept an open mind and took obvious steps like finding out whether other burglaries or sexual assaults had been reported in the area—rather than deciding Beaman was good enough at the outset and working backwards from there. In short, a rational juror could find a causal link between the defendants' misconduct and the commencement and continuance of Mr. Beaman's prosecution. Summary judgment was therefore improper.

The appellate court also went astray by concluding that the defendants could not be responsible for commencement or continuance because "[t]he evidence shows the prosecutors, Reynard and Souk, made the decision to prosecute plaintiff." Op. ¶ 62. Of course they did: police officers never have authority to initiate a prosecution. According to the appellate court's logic, police who cause wrongful convictions can never be liable for malicious prosecutions simply because they are not prosecutors.

The appellate court thought it significant that the lead prosecutor decided to indict Mr. Beaman during a May 16, 1994 meeting, even though a non-defendant detective wanted to continue the investigation. Op. ¶ 62. Zeroing in on a single day ignores the nine

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months between the August 1993 murder and the May 1994 meeting. If the defendants had conducted an honest investigation in the many months given to them, the evidence available and the decision made at the May 1994 meeting might have been quite different. At minimum, a reasonable juror could infer as much.

The Appellate Court also misunderstood the federal court's conclusion that Warner violated the Constitution by withholding the Murray polygraph from the prosecutor. Op. ¶ 68. While this Court considered the Murray evidence cumulatively in *People v. Beaman*, the federal court considered the Murray polygraph by itself because the prosecutor received the other evidence from the defendants. *Beaman*, 7 F. Supp. 3d at 823. The federal court concluded that the Murray polygraph standing alone constituted exculpatory evidence under *Brady*, and the Appellate Court therefore erred in stating that the federal opinion did not find "the failed and inadmissible polygraph result, considered alone, to be material and exculpatory." Op. ¶ 68. The Appellate Court also ignored the federal court's finding that a rational juror could find that Warner deliberately concealed the Murray polygraph because Warner admits both to receiving it before it disappeared and to violating the procedures required to preserve and disseminate it among the officers. *Beaman*, 7 F. Supp.3d at 827. By misreading the federal decision and ignoring the evidence from which a juror could infer that Warner deliberately hid the polygraph, the appellate court reduced Warner's role in commencing or continuing Mr. Beaman's prosecution.

We turn now to each of the three tests for commencement or continuance:

Significant role test: Under the proper test, the defendants played a significant role. Freesmeyer was the lead investigator and focused on Mr. Beaman from the first day of the investigation, even as others questioned Beaman's guilt. He manipulated time trials

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to discredit Mr. Beaman's otherwise unassailable alibi, omitted the exculpatory time trial from his police report, and deceived the grand jury about the existence of alternative suspects. *See supra* at 11-14. The grand jury was deceived by Freesmeyer in the same way that this Court ultimately found the jury was misled by the prosecutor—by covering up the existence of alternative suspects. Warner hid the polygraph report, which could have changed the outcome of the case. Zayas ran the detective division during the investigation, had ultimate responsibility for the Lockmiller case, and supervised the detectives working on the case. A.1416-17, 2296-97. He participated in the May 16, 1994 meeting where the decision was made to arrest Mr. Beaman, and there is no evidence to suggest that he tried to stop the arrest. A.1334. Indeed, he allowed the arrest to occur even though he knew that the case was not ready to be charged and prosecuted. A.1356–23.

Pressure, influence, or misstatement test: Even if this Court were to adopt the pressure, influence, or misstatement test, the defendants' intentional concealment of critical evidence is the functional equivalent of a misstatement. The decision below immunizes the defendants' dishonesty by reading "misstatement" out of the pressure, influence, or misstatement test. There is a genuine issue of fact as to whether Warner intentionally buried the John Murray polygraph report. *See supra* at 9, 17-18. This was a critical piece of evidence because "the circumstances of the polygraph examination indicate that [Murray] intentionally avoided the test. He did not comply with the polygraph examiner's instructions during the first attempt and failed to cooperate in scheduling a second attempt." *Beaman*, 229 Ill. 2d at 76 (2008). Indeed, the federal court stated: "Perhaps if the prosecutor had received the polygraph report, he would no longer have agreed Murray was not a viable suspect." 7 F. Supp. 3d at 831 n.8. Freesmeyer's

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manipulation of the time trials and his lies to the grand jury likewise constitute significant misstatements. *See supra* at 11-14.

Advice and cooperation test: The appellate court mentioned this test, but did not really apply it to the facts. Op. ¶ 56. Freesmeyer moved into the prosecutor's office to help prosecute the case. Op. ¶ 20 When Mr. Beaman was wrongfully convicted, the prosecutor declared, "[b]eyond any question in my mind, this case would not have been won without Tim Freesmeyer"— a piece of evidence the decision below ignores. A.3207. Had the lower court actually considered the facts, it would have been compelled to find participation of so active and positive a character as to amount to advice and cooperation.

2. The Circuit Court's Alternative Grounds for Dismissing the Malicious Prosecution Claim Are Incorrect.

This Court should address the remaining prongs of Mr. Beaman's malicious prosecution claim, even though the appellate court did not. The circuit court held—as a matter of law—that no genuine issue of material fact existed on the indicative of innocence, probable cause, and malice prongs. The circuit court erred as to each of these elements: Mr. Beaman's innocence is undeniable, and the complex facts of this case make probable cause and malice impossible to resolve as a matter of law. He deserves a prompt trial. This Court should clear the way for one by addressing the *ratio decidendi* of both the appellate court and the circuit court and remanding the case for trial.

a. Indicative of Innocence Prong: The Unanimous Reversal of Mr. Beaman's Conviction, the Abandonment of Charges, the Certificate of Innocence, and the Governor's Pardon Indicate Mr. Beaman's Innocence.

Contrary to the circuit court decision, the criminal case against Mr. Beaman concluded in a manner indicative of his innocence. Prosecutors dropped the charges after

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this Court unanimously threw out the conviction, Mr. Beaman won a certificate of innocence, and the Governor pardoned him on the basis of innocence. Any one of these events would defeat summary judgment on the indicative of innocence prong all by itself. Together, they make this issue a no-brainer. Nonetheless, the Circuit Court found—as a matter of law—that the proceedings did *not* terminate in a manner indicative of innocence.

The pardon states that it is "Based Upon Innocence." A.3377. A gubernatorial pardon on the basis of innocence alone establishes that the proceedings concluded in the plaintiff's favor. *Walden v. City of Chicago*, 391 F. Supp. 2d 660, 664, 680 (N.D. Ill. 2005). Although *Walden* addressed when a malicious prosecution claim accrued under state statute of limitations law, that distinction does not make a difference. Walden's malicious prosecution claim accrued at the moment the Governor pardoned him on the basis of innocence because the pardon fulfilled the indicative of innocence prong of the malicious prosecution claim. *Id.* at 680. When the Governor pardoned Mr. Beaman, that likewise fulfilled the indicative of innocence prong.

Mr. Beaman also holds a certificate of innocence from the Circuit Court of McLean County. A certificate of innocence is "relevant at least to the 'indicative of innocence' element of plaintiff's malicious prosecution claim." *Kluppelberg v. Burge*, 84 F. Supp. 3d 741, 744, 745 (N.D. Ill. 2015) (citation omitted). The instant case comes to this court on summary judgment; therefore, relevant evidence satisfies plaintiff's burden.

Even if Mr. Beaman had not won a certificate of innocence and a pardon from the Governor on the basis of innocence, the indicative of innocence prong still would be an issue for the jury. The prosecution not only dropped all charges, but did so after this Court unanimously threw out Mr. Beaman's conviction and declared: "We cannot have

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confidence in the verdict finding [Mr. Beaman] guilty of this crime given the tenuous nature of the circumstantial evidence against him . . . ." 229 Ill. 2d at 81. The "dismissal of a . . . charge against the plaintiff at the instance of the prosecutor" generally suffices to show favorable termination. *Rich v. Baldwin*, 133 Ill. App. 3d 712, 715 (5th Dist. 1985).

The circuit court postulated that the State's Attorney's Office declined to reprosecute the case because it would have been difficult to reconstruct the facts after so many years, rather than because of Mr. Beaman's innocence. A.32. There is no evidence for this conclusion. The court cited paragraph 124 of Defendants' Statement of Material Facts (A.68), which in turn relies entirely on a deposition in which the original prosecutor speculated that staleness might have affected the decision to drop all charges. A.2962-66. But the prosecutor had long since departed the State's Attorney's Office and was speculating without personal knowledge about the possible reasons his successors theoretically might have had for dismissing the charges. A.2962-66.

The purpose of the indicative of innocence prong is to ensure that innocent people—and only innocent people—reap the benefit of the malicious prosecution tort. It is difficult to imagine a plaintiff with greater proof of innocence than Alan Beaman, equipped as he is with a unanimous reversal of his conviction by this Court, a certificate of innocence, and a pardon based on innocence. If the indicative of innocence prong defeats Alan Beaman's claim, it defeats almost any malicious prosecution claim brought by a wrongfully convicted plaintiff. The circuit court's absurd holding therefore stands the indicative of innocence prong on its head.

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b. Lack of Probable Cause Prong: Defendants Lacked Probable Cause To Arrest Mr. Beaman Because They Had No Probative Evidence Against Him, Dismissed his Alibi, and Ignored the Likely Killers.

A jury should decide whether defendants had probable cause to arrest and jail Mr. Beaman because the record is beset with complex facts from which rational individuals could draw competing inferences. In a malicious prosecution case, summary judgment is impermissible unless: (1) the material facts are undisputed *and* (2) the only reasonable inferences that one can draw from those facts constitute probable cause. *Seymour v. Collins*, 2015 IL 118432 ¶ 42; *Carney v. Union Pacific R. Co*., 2016 IL 118984, ¶ 25; *Frye*, 166 Ill. App. 3d at 972–73; *Skorupa v. Guzick*, 2015 IL App (1st) 133082-U, ¶¶ 17–18; *Fabiano*, 336 Ill. App. 3d at 642; *Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993).[8]

Even if reasonable minds could disagree on probable cause, a rational juror could find it wanting based on the facts that obtained at the time of Mr. Beaman's arrest:

- There was no probative physical evidence against Mr. Beaman and no one could place him in the town where the murder occurred. *See supra* at 10-11.

[8] The districts disagree on whether probable cause is a question of fact or a mixed question of law and fact in a civil case. *Robinson v. Econ-O-Corp., Inc*., 62 Ill. App. 3d 958, 961 (2d Dist. 1978) (question of fact); *Salmen v. Kamberos*, 206 Ill. App. 3d 686, 691 (1st Dist. 1990) (same). *But see Howard v. Firmand*, 880 N.E.2d 1139, 1142, 317 Ill.Dec. 147, 150, 378 Ill. App. 3d 147, 150 (1st Dist. 2007) (mixed question). That distinction is beside the point, because this case depends on the inferences to be drawn from the facts, and the inferences must be drawn in favor of the party opposing summary judgment, regardless of whether the question is characterized as factual or mixed. *Seymour*, 2015 IL 118432 ¶ 42; *Frye*, 166 Ill. App. 3d at 973; *Skorupa*, 2015 IL App (1st) 133082-U ¶¶ 17–18; *Fabiano*, 336 Ill. App. 3d at 642; *Maxwell v. City of Indianapolis*, 998 F.2d at 434.

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- Mr. Beaman maintained his innocence despite a barrage of accusatory interrogations, surreptitious overhears, and death penalty threats. *See supra* at 5, 10.
- Any number of men (known and unknown) could have committed the crime. *See supra* at 4-5, 6-9.
- The statement of the victim's across-the-hall neighbor indicated that the murder occurred after 2:00 pm, which eliminated any possibility for Mr. Beaman to commit the crime. *See supra* at 13-14.
- In the late morning on the day of the murder, Mr. Beaman was at a bank in Rockford, some 130 miles from the scene of the crime. A.1312.
- The crime scene indicated that the killer was a stranger. *See supra* at 4-5.
- The crime scene indicated that the killer was a much larger and more powerful man than Mr. Beaman. *See supra* at 4.
- The evidence against Murray was much stronger than the case against Mr. Beaman. *See supra* at 7-9.

The defendants may have inferred probable cause from these circumstances, but because it was not the only reasonable inference to be drawn from the circumstances, they cannot establish probable cause as a matter of law.

So far, the lower courts have avoided a meaningful consideration of the facts germane to probable cause. The appellate court did not address the circuit court's conclusion that probable cause existed as a matter of law, and the circuit court avoided a serious engagement with the facts in three ways. First, the circuit court opined that the thoroughly discredited conviction proved Mr. Beaman's "guilt beyond a reasonable doubt"

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and therefore established probable cause. A.31. A vacated conviction, however, is "null and void," and therefore inadmissible. *People v. Shook*, 35 Ill. 2d 597, 599 (1966). Next, the court ceded its independent judgment to an attorney who prosecuted Mr. Beaman and who believed that "probable cause existed for the arrest of plaintiff." A.31. Such opinion evidence is inadmissible as to legal questions, all the more so because probable cause is an ultimate issue in this case. *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (1st Dist. 2009). Third, rather than analyzing the facts, the court adopted defendants' brief, stating, "[i]n this case, grounds for probable cause to charge plaintiff with murder existed as specifically stated in paragraphs (a) through (p) of Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment, filed in this cause recounting the facts in defendant, Freesmeyer's deposition." A.30-31.

A genuine review of the record shows that different reasonable inferences could be drawn from each assertion that the circuit court copied from the defendants' brief in support of probable cause. We address these assertions in turn.

Fingerprints (Item A incorporated into circuit court opinion): The fingerprint evidence did not support the case against Mr. Beaman. His prints were not found on the alarm clock cord used to strangle Lockmiller or the scissors lodged in her chest. The alarm clock console had seven prints—two Mr. Beaman's, four belonging to Michael Swaine, one unidentified. A.3264-65. The prints did not inculpate Mr. Beaman: he had used the alarm clock previously, and fingerprints cannot be dated. A.3253. Freesmeyer decided to treat the prints as evidence of guilt based "solely on [his] own interpretation." A.1587.

Garbage Bag (Item B incorporated into lower court opinion): The murder scene included a garbage bag left out on a coffee table. A.1361. If this evidence had any

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significance, it pointed to a burglar, not Mr. Beaman. A.1361. Burglars often seek out sacks and other receptacles in which to carry the loot. A.1361.

Letters (Item C incorporated into lower court opinion): The police found some racy letters from Mr. Beaman in Ms. Lockmiller's apartment. A.546-84. They were old, almost all from 1992. A.546-84. Mr. Beaman had terminated the relationship well before the murder. *See supra* at 5-6.

Unreturned calls (Item D incorporated into lower court opinion): Ms. Lockmiller called Mr. Beaman several times in the days before the murder, but the phone records show that he did not answer or return the calls. A.338-39. When the two did speak, on August 23rd, Mr. Beaman told Ms. Lockmiller he was no longer interested in dating. A.1048-49. These facts are exculpatory. As part of his biased investigation, however, Freesmeyer somehow interpreted them as a basis for probable cause. A.1593-94.

Supposed "Hole" in Mr. Beaman's Alibi (Item E incorporated into lower court opinion): As an initial matter, Freesmeyer did not even perform time trials to test the alibi prior to arresting Mr. Beaman. A.1624-27, 3239. The supposed "hole" in the alibi, then, hardly furnished probable cause for arrest. In any case, the alibi was bulletproof. At 10:11 a.m., Mr. Beaman drove from the bank (where he was captured on video making a deposit) to his family's home, where he placed calls at 10:37 a.m. and 10:39 a.m. *See supra* at 11-13. It would have been literally impossible for Mr. Beaman to leave the family home after the second call at 10:39, drive to Bloomington-Normal to commit the murder, and be back to the family home again by 2:15 p.m., when his mother returned. *See supra* at 11-13.

Breaking Down the Door (Item F incorporated into lower court opinion): The two occasions on which Mr. Beaman kicked open Ms. Lockmiller's door could be used at

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trial by the defendants to show that Mr. Beaman sometimes displayed a temper. These instances do not establish the capacity for murder or probable cause as a matter of law. Michael Swaine and Mr. Beaman were close friends and roommates, but Swaine began a sexual relationship with Ms. Lockmiller during her relationship with Mr. Beaman. A.3314-15. One night, Swaine borrowed Mr. Beaman's car under the pretext of driving to a party; as part of the ruse, Swaine faked a phone conversation (with no one on the other end of the line) in front of Mr. Beaman. A.3311-13. Mr. Beaman grew suspicious, biked over to Ms. Lockmiller's building, and saw his own car, which Swaine had taken, in the parking lot. A.389. As Mr. Beaman arrived at the apartment, his girlfriend and roommate had just completed oral sex and were headed to the bedroom. A.3314-15. While Mr. Beaman kicked the door open, he did not lay a finger on Lockmiller or Swaine; instead, he calmly gave Swaine a ride back to their shared apartment. A.3317, 3318-19. On the other occasion, Ms. Lockmiller was having sex with Murray. A.1752. Mr. Beaman did not touch either of them. Murray, in contrast, had a long history of beating women. *See supra* at 8.

Bank Video (Items H-I incorporated into lower court opinion): The bank video proved that on the day of the murder, Mr. Beaman was some 130 miles from the crime scene at 10:11. *See supra* at 11. But Freesmeyer decided that the discovery of the bank video was evidence of guilt. A.1578, 1584. To him, Mr. Beaman seemed dishonest and guilty because he did not bring up the bank trip when Freesmeyer asked him for proof of innocence. A.1578, 1584.

Overhears (Items J-M incorporated into lower court opinion): The defendants moved heaven and earth to get an incriminating admission by bugging Mr. Beaman's conversations with Swaine and Freesmeyer. *See supra* at 10. They got nothing. In fact, Mr.

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Beaman told Swaine, "Dude, I don't know shit, that's the problem" and stated he no longer had a romantic interest in Ms. Lockmiller at the time of her death. A.3329. Freesmeyer, however, seized on the fruitless overhears as evidence of guilt. A.1579. Mr. Beaman had made a crude comment to Swaine about his relationship with Ms. Lockmiller. A.1579.

Box Fan (Item N incorporated into lower court opinion): The killer covered the victim's face with a box fan. A.1581. Freesmeyer decided this meant that the two knew each other. A.1581. If anything, this was more probative of a home invasion: burglars often cover the heads of their victims while conducting a search. A.1360.

Manner of Stabbing (Item O incorporated into lower court opinion): The manner of stabbing with the scissors suggested that the assailant did not know the victim. A.1361. Personal and emotional stabbings tend to have more wounds, indicating a frenzy. A.1361. Freesmeyer reversed this too, imagining "an act of vengeance over someone that [Lockmiller] had hurt deeply," rather than a random attacker. A.1581.

No Obvious Signs of Forced Entry (Item P incorporated into lower court opinion): There were not obvious signs of forced entry to the apartment, but forced entry often does not leave obvious signs. A burglar could have entered with a loid, which is a piece of plastic that can slip the lock without leaving visible damage to the wood or the metal. A.1360.

From the same facts, one might also draw inferences more favorable to the defendants. Perhaps a juror would think that the kitchen garbage bag points to Mr. Beaman rather than a burglar's improvised sack because Mr. Beaman once checked Ms. Lockmiller's trash for evidence of contraceptives. But why then would the kitchen trash at the crime scene be removed but the trash in the bedroom left undisturbed? A.3308, 3309.

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Or perhaps a juror would reject the possibility that a stranger killed Ms. Lockmiller because her purse was not visibly disturbed and there were not obvious signs of forced entry. On the other hand, burglars can easily pick locks with loids, and the purse could have been forgotten once Ms. Lockmiller interrupted the burglar and the crime turned into rape and murder. A.1360. Moreover, if the perpetrator was not a burglar, why the signs of rummaging? A.1360. Questions like these are the reason trials exist. The defendants might advocate one set of inferences, but others are permissible. For that reason, the defendants are not entitled to summary judgment on probable cause. *Seymour v. Collins*, 2015 IL 118432 ¶ 42; *Carney v. Union Pacific R. Co.*, 2016 IL 118984, ¶ 25.

c. Malice Prong: The Defendants' Deliberate Misconduct and Fraudulent Investigation Demonstrate Their Malice.

The defendants' dishonest investigation of the Lockmiller homicide—everything from the immediate fixation on Mr. Beaman, to the refusal to undertake a serious investigation of other viable suspects, to perjury, to manipulated time trials, to concealment of evidence—demonstrates their lack of good faith. At minimum, malice is a jury question.

The appellate court did not address the issue of malice, and the circuit court's reasoning was nonsensical. First, the circuit court opined that malice was implausible because "in the minds of the prosecutors, there was sufficient reason … to proceed solely against the plaintiff." A.31. But every prosecution of a single-perpetrator crime includes a prosecutor who decides to "proceed solely" against one defendant—it is unheard of in such cases to indict two people for the same crime just to see what happens. By the circuit court's logic, any investigation that results in a wrongful conviction in a single-perpetrator offense is malice-free as a matter of law.

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To compound the error, the circuit court expressed the view that the wrongful conviction itself negated a finding of malice: "At a jury trial, the State provided the jury with proof beyond a reasonable doubt that plaintiff had both motive and opportunity to commit the murder." A.31. The circuit court failed to acknowledge not only that this Court unanimously vacated the conviction, but also that this Court made specific findings about opportunity to commit the crime: "[T]he evidence of petitioner's opportunity to commit the murder is not as strong as that against [John Murray]." *People v. Beaman*, 229 Ill. 2d at 79.

Freesmeyer's Malice: A rational juror could infer that Freesmeyer acted in bad faith. Freesmeyer selected Mr. Beaman as the primary suspect on Day One despite the obvious weakness of the evidence against him. *See supra* at 4-5. There was little that pointed to him other than "guessing" by Morgan Keefe, Lockmiller's friend who had discovered the body; no work had been done to check alibis, to process fingerprints, or to obtain autopsy results; there were no eyewitnesses to the crime, or even anyone who could place Mr. Beaman in the same city as the victim on the day of the murder; Mr. Beaman maintained his innocence in the face of an aggressive interrogation; there was no physical evidence implicating him; and the state of the crime scene pointed to a burglary-turned-rape and suggested a perpetrator of much larger size and physical power than Mr. Beaman. *See supra* at 4-5.

The case against Mr. Beaman only deteriorated from there, but Freesmeyer held on to the idea that Alan Beaman was his man. When the time-of-death evidence obtained by the victim's neighbor made it impossible for Mr. Beaman to have committed the crime, Freesmeyer ignored it. *See supra* at 13-14. When the fingerprint evidence proved fruitless, Freesmeyer seized on it based "solely on [his] own interpretation." A.1587. When the state

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of the crime scene pointed away from Mr. Beaman, Freesmeyer construed it as evidence of guilt. *See supra* 41. When Mr. Beaman denied guilt in seven surreptitiously recorded conversations, Freesmeyer fixated on a few crude comments and decided they were incriminating. *See supra* at 40-41.

The pattern continued as Freesmeyer labored to discredit Mr. Beaman's alibi. Freesmeyer careened at speeds Mr. Beaman never could have reached when driving to and from the crime scene because speeding during those time trials hurt the alibi. *See supra* at 11-13. But when a slower speed would hurt the alibi, Freesmeyer selected the slower route and crawled along between the bank and the Beaman home at the posted limit. *See supra* at *See supra* at 11-13. Freesmeyer went on to conceal the time trial that showed that Mr. Beaman easily could have made the trip from the bank to his home in time for the 10:37 and 10:39 calls by omitting it from his report and trial testimony. *See supra* at 11-12. When Carol Beaman said that she did not make the calls because she was with her mother at her retirement home and then across the street shopping at Walmart, Freesmeyer set out to show that she drove 20 miles home and back between seeing her mother and visiting the Walmart, rather than just crossing the street. *See supra* at 12. Freesmeyer threatened Mr. Beaman with the death penalty, and later arrested him, even though his supervisor, Zayas, thought the crime was unsolved, "in limbo," and not ready to be prosecuted. A.1356–23, 1318.

Plaintiff's expert in criminal investigations, a former FBI agent with 45 years of criminal investigation experience, opined:

> The defendants violated the basic standards for police investigations by rushing to a judgment about the type of crime they were investigating, who was responsible for having committed it and either searching for or creating evidence that supported those conclusions while withholding exculpatory

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> information about drive times and alternate suspects from the defense and consequently from the jury. In doing so they showed an utter disregard for the truth that not only denied justice for Mr. Beaman, but also needlessly endangered the public by leaving a murderer on the streets free to kill again.

A.3248-49. Freesmeyer disregarded every fact that did not fit the result he selected at the beginning the very beginning: Alan Beaman was the killer.

Perhaps a juror could conclude that Freesmeyer botched the case due to error rather than malice. Maybe Freesmeyer ignored the evidence exculpating Mr. Beaman out of gross incompetence rather than malice; maybe it was an innocent mistake to floor the accelerator when a fast speed would hurt Mr. Beaman's alibi and to brake when *that* would hurt the alibi; and maybe Freesmeyer remembered to memorialize in his report every time trial except one that exculpated Mr. Beaman due to an innocent mistake. Yes—maybe.

All of these maybes reflect what is obvious: there are competing inferences that might be drawn from the record regarding Freesmeyer's credibility and subjective state of mind. In our system of justice, we get to the truth on these issues through a trial, which is what must occur in this case.

Warner's Malice: A genuine issue of material fact also exists as to whether Defendant Warner contributed to the malicious prosecution by intentionally burying the Murray polygraph report. *See supra* at 9, 17-18. As the federal court found, a jury question exists as to whether Warner "intentionally withheld" evidence that could have changed the trajectory of the case. 7 F. Supp. 3d at 827. Such deliberate malfeasance would obviously constitute malice.

Zayas's Malice: Frank Zayas was in charge of the Criminal Investigations Division, making him the boss of Freesmeyer and the other detectives. A.91, 1416-17, 2296-97. He participated in the May 16, 1994 meeting where the decision was made to

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arrest Mr. Beaman and, despite his direct authority over Freesmeyer, acquiesced in the arrest and did nothing to stop it. A.1334, 2296-97. Since then, he has admitted that at the time of Mr. Beaman's arrest and even months later—in November of 1994—the case was not ready for charging and prosecution:

> Q. When you left you felt that the case against Beaman was – was weak? Is that a fair statement?
>
> A. At that point – I'll put it this way.
>
> I don't think the case was ready to be sent to the State [for prosecution] yet. I think we needed to work on it some more.
>
> Q. And that was true in November of '94 when you retired?
>
> A. Yes, sir.

A.1356–23.

Direct admissions of malice are exceedingly rare. A defendant never breaks down at the deposition table and admits to acting maliciously. This is as close as it gets to a direct admission: Zayas knew that the case was not ready "to be sent to the State," but he let it happen anyway. At minimum, this admission makes his malice a jury question.

D. Mr. Beaman's Remaining Claims Should Proceed to Trial.

In addition to the malicious prosecution claim, Mr. Beaman also brought claims for intentional infliction of emotional distress, civil conspiracy, respondeat superior, and indemnification. Although the circuit court granted summary judgment on these claims and the appellate court affirmed, each claim rises or falls with the malicious prosecution claim. If the Court reinstates the malicious prosecution claim, it should also reinstate these claims.

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1. The Intentional Infliction of Emotional Distress Claim Should Proceed to Trial.

The appellate court erred in holding that Mr. Beaman abandoned his intentional infliction of emotional distress claim on appeal. Op. ¶ 74. Section II of Mr. Beaman's appellate brief was captioned "The Intentional Infliction of Emotional Distress Claim (Count II) Must Proceed To Trial." A. 3379. That section, which appeared after a detailed recitation of the defendants' malfeasance in the malicious prosecution section of the brief, stated: "It goes without saying that the conduct at issue here—pursuing plaintiff's conviction maliciously, disregarding and manipulating the evidence, and sending an innocent man to prison for a dozen years for a crime he could not have committed—is extreme and outrageous conduct." A.3379. This argument was followed by a string cite to six cases in which courts in Illinois have allowed intentional infliction of emotional distress claims to proceed on facts that relate principally to malicious prosecution. A.3379. The section concluded by stating: "[T]he circuit court erred in granting summary judgment on the intentional infliction of emotional distress claim." A.3379.

The defendants did not argue in their response brief that Mr. Beaman had abandoned the claim; instead, they asserted that the outcome of this claim depended on the court's resolution of the malicious prosecution claim. A.3383-84. On reply, Mr. Beaman agreed. A.3381.

Waiver occurs if: (1) no authority is cited, (2) no argument is made, or (3) an argument is merely "listed or included in a vague allegation of error." *Vancura v. Katris*, 238 Ill.2d. 352, 369-70 (2010). Nothing of the sort happened in this case. Mr. Beaman developed the intentional infliction of emotional distress claim in his opening brief, and he should not be punished for briefing an undisputed issue in a concise manner. Such an

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outcome would encourage litigants to waste judges' time and clients' money with elongated discussions of undisputed points, just to avoid a *sua sponte* finding of waiver. Finally, even if Mr. Beaman had waived the emotional distress claim, the defendants "waived the wavier" by failing to assert at any point that waiver occurred.

In numerous prior cases, courts in Illinois have held that emotional distress claims may proceed when they are attached to viable malicious prosecution claims. *See Carrocia v. Anderson*, 249 F. Supp. 2d 1016, 1028 (N.D. Ill. 2003); *Treece v. Village of Naperville,* 903 F. Supp. 1251, 1259–60 (N.D. Ill. 1995), *aff'd,* 213 F.3d 360 (7th Cir. 2000)); *Padilla v. City of Chicago*, 932 F. Supp. 2d 907, 930 (N.D. Ill. 2013); *Wallace v. City of Zion*, No. 11 C 2859, 2011 WL 3205495, at *6 (N.D. Ill. July 28, 2011); *Fox v. Tomczak*, No. 04 C 7309, 2006 WL 1157466, at *6 (N.D. Ill. Apr. 26, 2006); *McDonald v. Vill. of Winnetka*, No. 00 C 3199, 2001 WL 477148, at *6 (N.D. Ill. May 3, 2001). To our knowledge, no case has ever allowed a malicious prosecution claim to proceed while rejecting an emotional distress claim (or *vice-versa*). The reasons are obvious: Robbing a person of liberty maliciously and without probable cause is the very sort of "extreme and outrageous" intentional conduct that constitutes intentional infliction of emotional distress. *McGrath v. Fahey*, 126 Ill.2d 78, 86 (1988). In this case, the defendants' biased investigation, lying in court, manipulating time trials, and hiding evidence constitute such outrageous conduct.

The parties have always agreed that Mr. Beaman's emotional distress and malicious prosecution claims either proceed together or fail together. There is no reason for the Court to upset that agreement.

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2. The Civil Conspiracy Claim Should Proceed to Trial.

The appellate court affirmed dismissal of the civil conspiracy claim solely because that claim rested on the malicious prosecution claim: the malicious prosecution of Alan Beaman was the object of the conspiracy. Op. ¶ 75. If this Court reinstates the malicious prosecution claim, it should also reinstate the conspiracy claim.

"Since conspiracies are generally evolved under the cloak of secrecy, the courts have traditionally permitted proof of a conspiracy by indirect or circumstantial evidence . . . ." Here, the defendants collaborated closely on the case, met frequently, and shared information. A.91-92. They all read each other's detailed reports. A.1352. From the content of those reports, they would know the state of the case and the absence of any basis for arrest or prosecution—the lack of any physical evidence, the lack of eyewitness testimony, Mr. Beaman's alibi, the vast universe of alternative suspects, and the fact that Murray was a more likely suspect. It would have been a remarkable coincidence if they all fixated on Mr. Beaman independently despite the lack of evidence against him, and if all of their parallel actions to manipulate evidence to convict him were uncoordinated. *People v. Small*, 319 Ill. 437, 449 (1925) ("[W]hen taken in connection with other acts, it may appear clearly that the series of wrongful acts result from concerted and associated action."). Freesmeyer ignored exculpatory evidence and alternative suspects, lied to the grand jury, and skewed the time trials (*see supra* at 6-9, 11-14); Warner buried a polygraph that helped to exculpate Mr. Beaman (*see supra* at 9, 17-18); and Zayas let the arrest go forward, knowing that the evidence could not justify it (*see supra* at 32). Based on the defendants' close collaboration on the case and their parallel acts of malfeasance—each of which was aimed at wrongfully convicting Mr. Beaman—a reasonable juror could infer a

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conspiracy. *See Pearce v. Thiry*, No. CIV.A.08 C 4483, 2009 WL 3172148, at *9 (N.D. Ill. Oct. 1, 2009) (stating that plaintiff could establish conspiracy among defendant police officers by producing evidence that they "engaged in concerted acts sufficient to raise a reasonable inference of mutual understanding"); *Newsome v. James*, No. 96 C 7680, 2000 WL 528475, at *16 (N.D. Ill. Apr. 26, 2000); *Rainey v. City of Chicago*, No. 10 C 07506, 2013 WL 941968, at *11 (N.D. Ill. Mar. 11, 2013).

3. The Respondeat Superior and Indemnification Claims Should Proceed to Trial.

The appellate court's rationale for dismissing the respondent superior and indemnification claims was entirely dependent on its reasons for dismissing the claims discussed above. The dismissal of these claims therefore must be reversed as well.

CONCLUSION

For the foregoing reasons, the Court should reverse the appellate court and remand this case for a trial on the merits.

Respectfully submitted,

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Case No. 122654

IN THE SUPREME COURT OF ILLINOIS

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

CERTIFICATE OF COMPLIANCE

I, David M. Shapiro, 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 50 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.

s/David M. Shapiro

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NOTICE OF FILING

TO: Thomas G. DiCianni
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PLEASE TAKE NOTICE that on January 12, 2018, the undersigned served and filed by electronic means the BRIEF OF PLAINTIFF-APPELLANT ALAN BEAMAN and APPENDIX with the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701.

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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, No. 14 L 51

CERTIFICATE OF SERVICE

I, David M. Shapiro, an attorney, certify that on January 12, 2018, the foregoing BRIEF OF PLAINTIFF-APPELLANT ALAN BEAMAN and APPENDIX were filed by electronic means with the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701. I further certify that the same were served by electronic transmission on:

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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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