Case No. 122654

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT ALAN BEAMAN

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POINTS AND AUTHORITIES

Defendants and their amici spill a lot of ink arguing that the malicious prosecution tort requires causation, but no one disputes that obvious point.[1] In fact, the "significant role" test includes a causation requirement—a defendant must have a significant role not merely in an investigation, but in "in causing the prosecution of the plaintiff." *Frye v. O'Neill*, 166 Ill. App. 3d 963, 975 (4th Dist. 1988). In this case, the defendants caused the wrongful prosecution by concealing evidence, conducting a biased and dishonest investigation, manipulating time trials, and committing perjury. The prosecutor himself declared that Alan Beaman could not have been convicted "without Tim Freesmeyer." A.3207. A reasonable juror could find causation on these facts.

A reasonable juror could also find for Mr. Beaman on the remaining elements of the malicious prosecution claim. On probable cause and malice, a thicket of disputed facts and inferences point in opposite directions and preclude summary judgment. Mr. Beaman clearly must prevail on the indicative of innocence prong, equipped as he is with this Court's unanimous vacatur of his conviction, a certificate of innocence, and a gubernatorial pardon on the basis of innocence. And because the remaining claims rise or fall with the malicious prosecution claim, the entire case should be remanded for trial.

I. The Malicious Prosecution Claim Should Proceed to Trial.

A. The Defendants Caused the Malicious Prosecution of Alan Beaman.

The basis for causation in this case is simple: The defendants caused the malicious prosecution and wrongful conviction of Alan Beaman by selecting him as their man on

[1] *E.g.*, Plaintiff's Brief (Pl. Br.) 27 ("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.") (emphasis added), 30 ("In short, a rational juror could find a *causal link* between the defendants' misconduct and the commencement and continuance of Mr. Beaman's prosecution.") (emphasis added).

Day One, and then conducting a biased investigation and concealing evidence to reach the predetermined result. The prosecution of the wrong man was the natural and foreseeable result of the defendants' biased, dishonest investigation and their concealment of evidence. But for their misconduct, the malicious prosecution would not have occurred.

"[P]roximate cause consists of two distinct elements: cause in fact and legal cause." *Evans v. Shannon*, 201 Ill.2d 424, 434 (2002). Both are "factual matters for the jury to decide." *Lee v. Chicago Transit Authority*, 152 Ill.2d 432, 454 (1992); *see also French v. City of Springfield*, 65 Ill.2d 74, 79 (1976); *Ney v. Yellow Cab Co*., 2 Ill.2d 74, 84 (1954).

In this case, causation is an issue for trial because a rational juror could find that the biased investigation and concealment of evidence caused the prosecution in the following ways, individually or in combination: ***First***, defendants caused the prosecution by hiding the Murray polygraph from the prosecutors. As the federal district court stated, "[p]erhaps if the prosecutor had received the polygraph report, he would no longer have agreed Murray was not a viable suspect." *Beaman v. Souk*, 7 F. Supp. 3d 805, 831 n.8 (C.D. Ill. 2014). Defendants' assertion that the lead prosecutor "testified [that the Murray polygraph] would not have had any impact on the State's Attorney's decision to prosecute," Defendants' Brief (Def. Br.) 34, is flatly untrue and unsupported by the proffered citation. In fact, the prosecutor testified that polygraph evidence is "useful for investigative purposes," and that if he had known about the Murray polygraph, he would have "asked some questions and looked at it more." R.10109. ***Second*****,** a rational juror could find that Mr. Beaman never would have been charged if defendants had investigated information inculpating other possible suspects, including: (1) identifying similar burglaries or sexual assaults in the area, (2) attempting to locate the stranger who would not stop calling Lockmiller, (3)

looking for the other stranger who gave Lockmiller his phone number in lipstick just before her death, and (4) subjecting John Murray to the same scrutiny, wiretapping, bias, and browbeating as plaintiff. Pl. Br. 6-7. ***Third*****,** Freesmeyer caused the continuation of the prosecution through grand jury perjury, lying about the existence of other viable suspects with motives to kill Ms. Lockmiller. *Id.* 13-14. If the grand jury knew about this evidence, it might not have returned a true bill. Although grand jury perjury does not create a malicious prosecution claim all by itself, it may be "used, along with other allegations, to support [a] malicious prosecution claim." *White v. City of Chicago*, 2012 WL 2525654, at *34 (N.D. Ill. 2012); *see also Brooks v. City of Chicago*, 564 F.3d 830, 833 (7th Cir. 2009) (stating that a claim for prosecution based on "false evidence or testimony . . . is, in essence, one for malicious prosecution") (citations omitted). ***Fourth*****,** Freesmeyer furthered the prosecution by manipulating the time trials. Pl. Br. 11-13. If Freesmeyer had conducted honest, consistent time trials—rather than driving as fast as possible when that would hurt plaintiff's alibi and driving as slow as possible when that would hurt plaintiff's alibi—the investigation would have confirmed the alibi, likely averting prosecution. *Id.* The basis to prosecute also relied on the notion that Carol Beaman drove 20 miles round-trip for no reason. Freesmeyer furthered the prosecution by performing time trials to support this ridiculous scenario. *Id.* at 12. ***Fifth*****,** the prosecutor himself declared that Freesmeyer was a "but for" cause of the conviction: "Beyond any question in my mind, this case would not have been won without Tim Freesmeyer." A.3207.

The prosecutors made the final charging decision at the May 16, 1994 meeting, but that decision was the inevitable result of the defendants' biased and dishonest investigation. After all, "it is the recognized practice that the State's Attorney sensibly defers to the

investigative duties of the police." *People v. Ringland*, 2017 IL 119484, ¶ 24; *see also* Amicus Brief of Former Prosecutors 4-5 (stating that wrongful prosecutions may occur "when police provide biased or unreliable information"). Defendants pretend that the final meeting occurred in a vacuum, as if it were unaffected by the investigation that produced the decision to charge Mr. Beaman. Contrary to defendants' claim that the prosecutors "made the decision to prosecute plaintiff *uninfluenced* by any defendant," Def. Br. 30 (emphasis added), the charging decision reflected the "investigator's input," R.1011 (Souk), and was based on the "evidence [the detectives] had uncovered during their investigation," R.2214 (Reynard). After all, Freesmeyer had decided on the outcome at least seven months before, when he told plaintiff he was "going to be arrested for Jennifer's death at one point or another." A.1318. On these facts, causation cannot be resolved as a matter of law.

Contrary to the defendants' argument that only pre-charge misconduct is relevant to causation, the test is "commencement *or continuance*" of the prosecution. *Freides v. Sani-Mode Mfg. Co.*, 33 Ill.2d 291, 295 (emphasis added). "The only logical conclusion to be drawn from this language ['continuation'] is that malicious prosecution may be established . . . by evidence of continuing the proceedings in the proscribed manner." *Peterson v. Littlejohn*, 56 Wash. App. 1, 12 (Wash Ct. App. 1989). Thus, a court properly considers evidence "concerning the post-charge investigation of [a] suspect." *Id.*; *see also Howard v. City of Chicago*, No. 03 C 8481, 2004 WL 2397281, at *15 (N.D. Ill. Oct. 24, 2004) (police defendants who suppressed and altered evidence post-arrest "were responsible for continuing the malicious prosecution"); *Gelband v. Hondo*, 671 F. Supp. 2d 175, 176 (D. Me. 2009); *Smithfield Packing Co., Inc. v. Evely*, 905 A.2d 845, 858 (Md. Ct. App. 2006).

1. Cause in Fact

The defendants were a "but for" cause of the prosecution and conviction of Alan Beaman. The prosecutor said so—the conviction could not have been obtained "without Tim Freesmeyer." A.3207. Without the defendants conducting a dishonest and biased investigation, hiding evidence, lying to the grand jury, and ignoring exculpatory facts, the prosecution would not have been brought and continued, and Mr. Beaman would not have gone to prison. *See Price v. Philip Morris, Inc.*, 219 Ill.2d 182, 269 (2005) ("[T]he relevant inquiry is whether the harm would have occurred absent the defendant's conduct."); *Thacker v. UNR Industries, Inc.,* 151 Ill.2d 343, 354–55 (1992).

Even if the prosecutor were an additional "but for" cause of the prosecution, the actions of two or more individuals can be necessary to inflict an injury. *See Turner v. Roesner*, 193 Ill. App. 3d 482, 490 (2d Dist. 1990). A "but for" cause need not be "the sole cause" of an injury. *Id*; *see also Espinoza v. Elgin, Joliet and E. Ry.*, 165 Ill.2d 107, 118 (1995). At minimum, the defendants' malfeasance was a cause in fact because it was "a material element and a substantial factor" in causing the injury. *Thacker*, 151 Ill. 2d at 354 (1992); *Krywin v. Chicago Transit Authority*, 238 Ill.2d 215, 226 (2010); *Abrams v. City of Chi.*, 211 Ill.2d 251, 258 (2004). A reasonable juror therefore could find causation in fact.

2. Legal Cause

Legal causation, "is essentially a question of foreseeability." *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 258 (1999). The inquiry is "whether the injury is of a type that a reasonable person would see as a likely result of his conduct." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351, 395 (2004). Legal causation is easily satisfied here because the malicious prosecution and wrongful conviction of Alan Beaman were the

natural and foreseeable results of defendants' malicious fixation on him, their dishonest investigation, their grand jury perjury, and their suppression of evidence. *See supra* at 2-3. It is hardly a surprise that investigative misconduct like this can lead to wrongful prosecutions. The prosecutor's charging decision might be viewed as an intervening cause of the injury, but a *foreseeable* intervening cause does not defeat legal causation. *Bentley v. Saunemin Tp.*, 83 Ill.2d 10, 16 (1980); *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 316-17 (1943); *First Springfield Bank*, 188 Ill.2d at 257. The charging decision therefore does not negate legal causation or the defendants' liability.

B. The Court Should Adopt the "Significant Role" Test for the "Commencement or Continuance" Prong.

1. The "Significant Role" Test Incorporates Ordinary Rules of Causation.

The "significant role" test requires causation: The defendant must have a "significant role in causing the prosecution of the plaintiff." *Frye v. O'Neill*, 166 Ill. App. 3d 963, 975 (4th Dist. 1988); Pl. Br. 23-24 (citing cases). Defendants and their amici conclude that the "significant role" test dispenses with causation only because they mischaracterize the standard, claiming that the test renders investigators liable merely for "playing significant roles in criminal investigations." Amicus Brief of the City of Chicago, et al. (Am. Br.) 47; Def. Br. 25, 28, 32. Not true. The standard is not significant role *in an investigation*, but significant role *in commencing or continuing a prosecution.* Therein lies causation—and that causation requirement makes the "significant role" test fully consistent with the history of the "commencement or continuance" prong described in the amicus brief. Am. Br. 4-32.

Defendants imagine dire consequences flowing from the "significant role" test—including the notion that detectives will refuse to investigate crimes so as not to have a

significant role in investigations—but this parade of horribles is based on the false premise that the "significant role" test would unmoor malicious prosecution claims from ordinary causation principles. *See* Def. Br. 26-27; Am. Br. 33-42. That assumption is simply wrong. Of course, an officer who plays a significant role in an investigation should not be held liable if the suspect just happens to be prosecuted for reasons unrelated to the officer's actions. That is precisely why the law extends liability only to those officers who have a significant role in the commencement or continuation of a prosecution. And the law further narrows liability through the other disjunctive elements of the tort—malice, prosecution without probable cause, and favorable termination of the false charges. *See* Pl. Br. 27-28.

2. The "Pressure, Influence, or Misstatement" Test Contradicts Ordinary Causation Rules and this Court's Jurisprudence.

The "pressure, influence, or misstatement" test would stand ordinary causation on its head by *excluding* many of the principal causes of malicious prosecutions and wrongful convictions. Police can cause malicious prosecutions by extracting false confessions through physical and psychological coercion, refusing to investigate more likely alternative suspects, intimidating witnesses, maliciously fixating on a single individual as the culprit and working backwards to frame him or her, hiding evidence, or using deliberately suggestive lineups or photo arrays. None of these situations necessarily involve pressure, influence, or misstatement to a prosecutor, but liability should attach where investigative misconduct of this nature *causes* the malicious prosecution of an innocent person.

At bottom, defendants' "pressure, influence, or misstatement" test is not about causation at all. Rather, it is about immunizing some of the most dangerous and repugnant police misconduct that causes wrongful convictions just because the misconduct does not fit into a narrow, defendant-friendly box. No principle of causation or logic creates a

distinction between, on the one hand, lying to a prosecutor and, on the other, hiding evidence, leading a deliberately biased investigation, or coercing a confession. If such conduct results in a malicious prosecution, causation is present. The "significant role" test follows that logic; the defendants' test illogically demands more than ordinary causation.

Not only has this Court never mentioned the "pressure, influence, or misstatement" test in *any case*, but prior to this case, no court of this State had ever applied that test to a law enforcement defendant. In fact, the defense amici and plaintiff agree that the "pressure, influence, or misstatement" test originated in cases in the lower courts of this State against private citizens, *i.e.*, complaining witnesses. Am. Br. 11-13. That context is significant. The "pressure, influence, or misstatement" test perhaps serves as a rough shorthand for most or all of the ways that a complaining witness can cause a wrongful prosecution. After all, it is difficult to think of how a private citizen could cause a criminal charge except by lying to or unduly influencing the authorities. But "pressure, influence, or misstatement" is badly underinclusive as a proxy for causation by police investigators because they can cause malicious prosecutions by abusing investigative powers that ordinary citizens lack. Private citizens cannot hold people in custody against their will, search homes and cars, bug phones and plant wires to record private conversations without consent, or threaten people with the death penalty. They cannot cause malicious prosecutions by abusing investigatory prerogatives. But police officers can and sometimes do. As a result, applying the "pressure, influence, or misstatement" test to police investigators would contravene ordinary causation rules and also immunize abuses of official power and public trust.

3. The Remaining Test—"Participation of So Active and Positive a Character as to Amount to Advice and Cooperation"—Is Too Narrow.

The final test for the first prong of the malicious prosecution tort is "participation of so active and positive a character as to amount to advice and cooperation." Pl. Br. 27. A century and a half ago, this Court applied that test to a private citizen in *Gilbert v. Emmons*, 42 Ill. 143, 147, (1866), but it has never applied the test to a police officer (or to any defendant since *Gilbert*).

This test resembles the "significant role" test more than the "pressure, influence, or misstatement" test because it focuses on the scope of the defendant's role—it requires a role that is "active and positive," *id.*, without requiring anything so narrow as deceit or undue influence. Nonetheless, the test is still too narrow as a proxy for causation of malicious prosecution by police defendants. A police officer need not advise or cooperate with a prosecutor to cause a malicious prosecution. A coerced confession or biased investigation alone can achieve that result.

C. Regardless of the Test Applied, the Defendants Commenced or Continued the Prosecution of Alan Beaman.

Regardless of which test the Court adopts for "commencement or continuance," whether this case meets that standard is a question of fact that cannot be resolved as a matter of law and requires a trial. "[S]ummary judgment is a drastic means of disposing of litigation," and is not proper unless the case is "clear and free from doubt." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423-24 (1998). Under any standard, the causal relationship between the defendants' misconduct and the false charges is one for a jury to decide.

The discussion of causation in Section I makes it clear that the defendants meet the "significant role" test because they had a significant role in causing the commencement or

continuation of the prosecution. As for the "advice and cooperation" test, Freesmeyer and the prosecutor worked closely together on the investigation and prosecution, to the point that Freesmeyer moved into the prosecutor's office. 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.3207. Finally, Freesmeyer and Warner's misconduct meets even the narrow "pressure, influence or misstatement" test. The federal district court found that a jury question exists as to whether Warner "intentionally withheld" evidence that could have changed the trajectory of the case. *Beaman*, 7 F. Supp. 3d at 827. Concealing the Murray polygraph was a deceitful act tantamount to misstatement. The same is true of Freesmeyer's distorting the case and obtaining a false charge through his refusal to undertake a serious investigation of other suspects, manipulation of time trials, and perjury. Pl. Br. 4-9, 11-14. Even under the "pressure, influence, or misstatement" test, it would be wrong to deprive Mr. Beaman of his right to a jury trial.

D. The Court Should Reach the Issues of Probable Cause, Malice, and Conclusion of the Proceedings in a Manner Indicative of Innocence.

If this Court reverses the appellate court on the "commencement or continuance" prong, it would be useful to proceed to the remaining bases for the circuit court's grant of summary judgment, as opposed to remanding the case to the appellate court to consider those issues in the first instance.[2] A decade has passed since this Court vacated Mr. Beaman's wrongful conviction. This case calls for resolution.

[2] Defendants' statement that the petition for leave to appeal did not challenge the circuit court's holdings on the other elements, Def. Br. 2, is incorrect, *see* Petition at 21-23.

E. A Rational Juror Could Find that Defendants Lacked Probable Cause.

A jury must decide whether defendants had probable cause to arrest and jail Mr. Beaman because the record is beset with complex facts from which competing inferences could be drawn. Defendants want the Court not only to take some of the facts as undisputed but to *adopt their inferences* about whether those facts inculpate Mr. Beaman and help to establish probable cause. A court may grant summary judgment if (1) the material facts are undisputed *and* (2) the only rational inferences that one can draw from those facts amount to probable cause. *Seymour v. Collins*, 2015 IL 118432, ¶ 42; *Carney v. Union Pacific R. Co.*, 2016 IL 118984, ¶ 25; *see also* Pl. Br. 36 & n.8 (citing additional cases). True, under the first part of this analysis, plaintiff and defendants agree on some of the facts. The Court, however, cannot resolve the second part—the proper inferences to draw from those facts—on summary judgment in this case.

For example, police found Mr. Beaman's fingerprints on the alarm clock console (not the cord used to strangle the victim) along with both Michael Swaine's prints and additional prints that could not be identified. Pl. Br. 38. This fact is not disputed, but the inferences are the rub. A rational juror considering the fingerprints could easily say, "Of course Alan Beaman's prints were on the alarm clock. He had spent the night there and used the alarm clock, but they don't mean anything because no one can date fingerprints, and Swaine's prints were on the clock too. Plus, the unidentified prints probably belonged to the killer! At best the fingerprint evidence is irrelevant to probable cause; if anything, the unidentified prints are exculpatory."

The circuit court failed to perceive the competing inferences surrounding each piece of evidence and usurped the role of the jury when it adopted, wholesale and without elaboration, the inferences defendants set forth in "paragraphs (a) through (p) of

Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment." A.30-31. Defendants reiterate the (a) through (p) list in their facts section, Def. Br. 19-20, and rely on it for their probable cause argument, but like the fingerprint evidence discussed above, every other item on the list could be considered irrelevant, if not exculpatory. Plaintiff's opening brief detailed this analysis item-by-item on pages 38-41, and we will not repeat it here. At best, each item of evidence cuts both ways. That means a court must stay its hand and let the jury decide. One rational juror might agree with defendants that some of these facts support probable cause; another might consider them irrelevant, if not exculpatory. The complex summary judgment record in this case (comprising 91 pages of briefs, 272 pages of statements of material facts and responses thereto, and 11,066 pages of exhibits) presents a thicket of competing inferences that only a factfinder can resolve.

Wherever a rational juror came down on items (a) through (p), that juror would also have to assess the evidence known to defendants that excluded Alan Beaman as a viable suspect. After Mr. Beaman made the bank deposit and placed the 10:37 and 10:39 calls, it would have been impossible—literally—for him to travel to Normal, commit the murder, and return home by 2:15, when Carol Beaman confirmed he was at the family residence. Pl. Br. 11. Singley's evidence, which established the time of death as 2 p.m. or later, made the scenario doubly impossible. *Id*. 13-14. Defendants even acknowledge a disputed issue on whether "opportunity was improbable." Def. Br. 38. It strains logic to say that cause is *probable* as a matter of law while conceding that opportunity is *improbable.*

A rational juror would also consider that no witness could place Mr. Beaman in Bloomington-Normal (much less at the victim's apartment), that he maintained his

innocence both under vigorous interrogation and in conversations with a friend that police recorded in secret, and that no physical evidence connected him to the crime. Pl. Br. 10-11. Surely a rational juror would consider the many potential killers (some known, others not) who floated in and out of the victim's high-risk life. *Id.* 4-9. No potential juror could ignore John Murray, the steroid-abusing drug dealer known to beat women. He had sex with the victim and sold her drugs, could not complete a polygraph about the killing, and lied about his alibi. *Id.* 7-9. At the end of it all, some rational jurors would reject probable cause to arrest Alan Beaman; perhaps others would find it. The solution to this problem is a trial.

Defendants also rely on their and the prosecutor's personal opinion that probable cause existed, but "[an] official's subjective belief as to the legal basis of the prosecution is irrelevant; the test for probable cause is an objective one." *Penn v. Chicago State University*, 162 F. Supp. 2d 968, 976 (N.D. Ill. 2001). On the other hand, if a defendant's personal views of probable cause ought to be considered, then Defendant Zayas's own opinion, well after Mr. Beaman had been arrested and jailed, that the case was "in limbo" and not "ready to be sent to the State" for prosecution would cut against any finding of probable cause as a matter of law. A.1356.

While the disputed inferences alone preclude summary judgment, disputed issues of fact make the circuit court's error all the more manifest. Defendants' inaccurate and one-sided recitation of the facts—some of which are pure fiction with no grounding in the record—makes it clear that important issues of fact cannot be resolved as a matter of law. A few examples follow. Defendants think that "Jennifer Seig told NPD detectives she believed Beaman threatened to kill Lockmiller and Swaine if he ever caught them in bed

together," Def. Br. 12, but they don't mention that Seig admitted she might have heard this "in a dream or something." R.3126. "[T]his will sound really weird to you," said Seig, "I don't know if that was, it's hard to explain, but I don't know if he said that or if that's the, or if I had it in a dream or something." *Id*. Defendants assert that plaintiff's "fingerprint [was] on the murder weapon," Def. Br. 31, but omit that police found no prints on the cord and no prints on the scissors lodged in the victim's chest—only on the console, where they also found prints from Swaine and an unidentified stranger. Pl. Br. 38; A.3256-3257, A.3264-3265. Defendants claim that "Daniels and Hospelhorn came away from [the Beaman interview] believing plaintiff's conduct was suspicious," Def. Br. 7, but Hospelhorn in fact testified that after the interview, he had "[n]o suspicions at all" that Beaman committed the murder, A.2583, R.8043-44. According to defendants, Singley told police that plaintiff yelled derogatory comments at Ms. Lockmiller, Def. Br. 8, but this appears only in Freesmeyer's own report, and no interview transcript confirms it. Defendants think that Kris Perry told police that Lockmiller said that plaintiff stated that he would kill her, Def. Br. 12, but that is a misrepresentation based solely on Officer Hospelhorn's report. In an interview transcript, Perry denied ever saying such a thing to Hospelhorn. R.11337. Plaintiff himself also made it clear he never made the supposed statement. A.3342. Defendants claim that plaintiff threw a lamp, Def. Br. 12, but Mr. Beaman stated it was Ms. Lockmiller who threw things at him, not the other way around. A.2918. In fact, while defendants falsely claim that plaintiff was "violent" toward Ms. Lockmiller prior to the murder, Def. Br. 37, 38, defendants did not know of any evidence that plaintiff had ever been physically violent to the victim's person. A.1592; A.2879, and were told that plaintiff was "not physical." A.2950. Defendants suggest that after Murray

told the police that he left town the day before the murder, he "corrected" his statement. Def. Br. 16. In fact, Murray lied in his first interview and changed his story only after his girlfriend told the police that he was in town on the day of the murder. A.77-78. While defendants' brief claims that Mr. Beaman forced open the door "several times," Def. Br. 4, it happened but twice. (Both times, Ms. Lockmiller was having sex with other men while dating plaintiff.). A.86. Defendants emphasize strife that occurred when Mr. Beaman and Ms. Lockmiller had been dating but ignore witness accounts that plaintiff had gotten past the relationship and moved on with his life by the time of the murder A.85-86. By then, acquaintances told police that plaintiff was dating someone new, appeared calm, and was not angry about anything. A.85-86. Defendants claim that Mr. Beaman called Ms. Lockmiller shortly before the murder to "tell her that he loved her and missed her," Def. Br. 15, but the phone records say otherwise. A.339 (phone records showing that in August of 1993, Ms. Lockmiller called Mr. Beaman repeatedly, he called her only once, and that call lasted 13.8 seconds). Defendants claim there were "no signs" of forced entry, Def. Br. 6, but ignore other evidence of burglary, including the disarray of the usually tidy apartment. Pl. Br. 4-5. Defendants claim that Todd Heyse saw "two people fitting the description of Beaman and Lockmiller around the time of the murder, possibly on the same day," Def. Br. 20-21, but Heyse did not see these people in the week of the murder, nor did his description match plaintiff. R.3439. These are but a few examples of the factual disputes that permeate the record. A jury should weigh these complex and disputed questions.

F. A Rational Juror Could Find that the Defendants Acted With Malice.

"The question of malice is one of fact for the jury." *Lindquist v. Friedman's, Inc.*, 366 Ill. 232, 237 (1937); *see also Freides v. Sani-Mode Mfg. Co.*, 33 Ill.2d 291, 297 (1965)

("The issues of 'probable cause' and malice were for the jury."). Here, the defendants respond to the evidence of malice by ignoring most of it. They assume that their bias in the investigation—the twisting of irrelevant or exculpatory facts into evidence of guilt—is the only evidence of malice. Wrong. To be sure, defendants' biased interpretation of the facts certainly helps to support a finding of malice, Pl. Br. 32, 36; *see also Cage v. City of Chicago*, 979 F. Supp. 2d 787, 807 (N.D. Ill. 2013), but the defendants' biased view of the facts is where the evidence of malice begins, not where it ends. Freesmeyer lied under oath in the grand jury proceedings about other suspects with a motive for the murder. Pl. Br. 14. He doctored time trials, flooring it when speed would hurt Mr. Beaman in court, then braking when delay would make him easier to convict. *Id*. at 11-13. When a time trial showed that Mr. Beaman had plenty of time to make the 10:37 and 10:39 calls, Freesmeyer kept it out of his report and hid it from the jury. *Id.* at 11-12. When the evidence showed that Carol Beaman could not have made the calls because she was helping her mother and then shopping at the Wal-Mart across the street, Freesmeyer set out to prove the ludicrous notion that Mrs. Beaman took a 20-mile detour to drive across town before returning, immediately, to where she was before. *Id.* at 12.

All of this makes malice a jury question: A rational juror could infer malice from investigative misconduct. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 97-100 (1st Dist. 2008) (orchestrated confessions demonstrated malice); *Jimenez v. City of Chicago*, 830 F. Supp. 2d 432, 451 (N.D. Ill. 2011) (incomplete investigation demonstrated malice); *Grayson v. City of Aurora*, 157 F. Supp. 3d 725, 746-47 (N.D. Ill. 2016) (incomplete investigation demonstrated malice); *Cage*, 979 F. Supp. 2d at 807 (misconduct relevant to

malice); *Chagolla v. City of Chicago*, No. 07 C 4557, 2012 WL 403920, at *8 (N.D. Ill. Feb. 8, 2012) (false charges demonstrated malice).

As for Warner, Judge McDade found in the federal litigation that a genuine issue of material fact existed as to whether Warner *intentionally suppressed* the Murray polygraph report. *Beaman*, 7 F. Supp. 3d at 827. Judge McDade determined that this document, when it came to light, undermined confidence in the conviction under *Brady v. Maryland*, 373 U.S. 83 (1963). *Beaman*, 7 F. Supp. 3d at 823; *see also People v. Beaman*, 229 Ill. 2d 56, 58-59 (2008). Warner received the report and violated the policy that dictated how to handle it. Pl. Br. 9. He claims he gave the report to Daniels instead of following the policy, but Daniels does not remember receiving the report and was not responsible for concealing it. *Id.* The trail goes cold at Warner. A juror, as the federal court found, could conclude that Warner buried the report on purpose because it helped Mr. Beaman. *Beaman*, 7 F. Supp. 3d at 827. That screams malice.

Freesmeyer and Warner's boss, Zayas, let Mr. Beaman get arrested even though he knew that the case was not "ready to be sent to the State [for prosecution]" and that his investigators "didn't have all the information needed." R.1356. A juror could find malice because Zayas knew full well that the case was half-baked and let Mr. Beaman get arrested and jailed for murder anyway by failing to intervene. Pl. Br. 14, 45-46, R.1356-1357.[3]

G. A Rational Juror Could Find that the Criminal Proceedings Against Mr. Beaman Concluded in a Manner Indicative of Innocence.

Prosecutors dropped the charges against Mr. Beaman after this Court threw out the

[3] Defendants argue that advice of state's attorneys defeats a claim of malicious prosecution, Def. Br. 42, but do not make any showing that a state's attorney advised them to suppress evidence or otherwise engage in misconduct.

conviction, then Mr. Beaman won a certificate of innocence through litigation in the Circuit Court of McLean County, and then 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.

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). 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 (N.D. Ill. 2015) (citation omitted). The instant case comes to this Court on summary judgment; therefore, relevant evidence satisfies plaintiff's burden. The mere fact that the certificate is not *preclusive* in this proceeding "does not bar evidentiary use of the certificate." *Id.* at 745.[4]

Even if Mr. Beaman did not come to court with a certificate of innocence and a pardon from the Governor, the "indicative of innocence" prong still would be a jury question. 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 State's Attorney's Office not only dropped the charges, but it did so after this Court unanimously declared, "We cannot have confidence in the verdict finding [plaintiff] guilty of this crime given the tenuous nature of the circumstantial evidence

[4] The certificate of innocence resulted from an adversarial judicial proceeding in which the State opposed the petition. R.3472. DNA testing initiated by the State then proved that plaintiff did not kill Ms. Lockmiller. *Id.* Only then did the State drop its opposition to the certificate of innocence. *Id.* It did so because the DNA evidence established plaintiff's innocence, A.3355-3366, not because of some "settlement agreement," Def. Br. 45, between plaintiff and the State. R.121.

against him . . .” *Beaman*, 229 Ill. 2d at 81.

Defendants fail to come forward with admissible evidence to refute the ordinary presumption that proceedings conclude in a manner indicative of innocence if a court throws out a conviction and a prosecutor drops the case. The testimony of Mr. Souk about why the State’s Attorney might have dropped the charges after this Court’s ruling is inadmissible because Mr. Souk was speculating and lacked personal knowledge. A.2962-2966. He had long since departed the State’s Attorney’s Office to assume a judicial role and was not consulted about dropping the charges. *Id*.

II. The Civil Conspiracy Claim Must Proceed to Trial.

The defendants’ parallel malfeasance provides the strongest evidence of conspiracy. Freesmeyer lied to the grand jury, manipulated time trials, and concealed exculpatory evidence. Zayas let Mr. Beaman get arrested even though he knew the case was shoddy and incomplete. Whether Warner hid the Murray polygraph presents a genuine issue of fact, as the federal district court recognized. Taking these facts as true, it would be an extraordinary coincidence if the defendants all decided in solitude to cook the evidence in a way that would nail Alan Beaman, a college student with an alibi that placed him 125 miles from the scene. This claim, too, must go to a jury.

The intra-corporate conspiracy doctrine does not bar this claim. “Courts have recognized two exceptions to the Illinois intracorporate conspiracy doctrine: (1) a conspirator acts out of self-interest rather than in the interest of the principal; and (2) when the scope of the conspirators act beyond the scope of their official duties.” *Whitley v. Taylor Bean & Whitacker Mortg. Corp.*, 607 F. Supp. 2d 885, 897 n.5 (N.D. Ill. 2009) (citation omitted). Relying on these exceptions, courts routinely refuse to apply the doctrine to

police misconduct [5] This Court should do the same. Misconduct and evidence suppression neither benefit a police department nor fall within a detective's legitimate duties.

III. The Remaining Claims Must Proceed to Trial.

Plaintiff did not waive his intentional infliction of emotional distress claim, as his appellate brief addressed it with argument and citation. A.3379. Defendants contend that this claim must rise or fall with the malicious prosecution claim, Def. Br. 46-47, and plaintiff agrees. The same holds for the respondeat superior and indemnification claims—they should be reinstated with the malicious prosecution claim.

IV. Conclusion

The Court should reverse the appellate court and remand this case for trial.

Respectfully submitted,

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[5] *See Newsome v. James*, No. 96 C 7680, 2000 WL 528475, at *15 (N.D. Ill. Apr. 26, 2000); *Emery v. Northeast Illinois Regional Commuter R.R. Corp*., No. 02 C 9303, 2003 WL 22176077, at *4 (N.D. Ill. Sept. 18, 2003); *Hobley v. Burge*, No. 03 C 3678, 2004 WL 1243929, at *11 (N.D. Ill. June 3, 2004); *Johnson v. Village of Maywood,* No. 12 C 3014, 2012 WL 5862756, at *3 (N.D. Ill. Nov. 19, 2012); *Salto v. Mercado*, No. 96 C 7168, 1997 WL 222874, at *1-2 (N.D. Ill. Apr. 24, 1997); *Northen v. City of Chicago*, No. 93 C 7013, 1999 WL 342441, at *4 (N.D. Ill. May 17, 1999); *Cannon v. Burge,* No. 05 C 2192, 2006 WL 273544, at *15 (N.D. Ill. Feb. 2, 2006).

Case No. 122654

IN THE SUPREME COURT OF ILLINOIS

ALAN BEAMAN,	)	
Plaintiff-Appellant,	)	On Appeal from the Appellate Court of Illinois, Fourth Judicial District,
v.	)	No. 4-16-0527
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, and the certificate of service, is 20 pages.

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

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NOTICE OF FILING

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

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CERTIFICATE OF SERVICE

I, David M. Shapiro, an attorney, certify that on June 12, 2018, the foregoing REPLY BRIEF OF PLAINTIFF-APPELLANT ALAN BEAMAN 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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