**IN THE SUPREME COURT OF IOWA**

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**No. 22-0581**

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**JOSHUA VENCKUS**

**Plaintiff-Appellee,**

**vs.**

**CITY OF IOWA CITY and ANDREW RICH**

**Defendants-Appellants.**

**APPEAL FROM THE IOWA DISTRICT COURT**
**FOR JOHNSON COUNTY**
**HONORABLE CHAD KEPROS, JUDGE**

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# APPELLANT'S FINAL REPLY BRIEF

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## REPLY ARGUMENT

### ISSUE I. THERE MUST BE A MEANINGFUL DISTINCTION BETWEEN A FALSE ARREST CLAIM AND A MALICIOUS PROSECUTION CLAIM. MALICIOUS PROSECUTION CLAIMS MUST BE CONTINUING IN NATURE.

Rich argues for a probable cause standard in malicious prosecution claims that would create no distinction between a false arrest claim and a malicious prosecution claim. If someone were falsely arrested, there being no probable cause to initiate the arrest, that individual would not need to assert a claim for malicious prosecution. The arrest and any subsequent prosecution would be covered by the false arrest claim.

On the other hand, if someone were initially arrested with probable cause but was later determined to be innocent, but the arresting officer continued to press the now wrongful allegation of a crime, the innocent party would be unable to assert a claim for false arrest because probable cause existed at the time of the arrest but should be permitted to assert a claim for the continued prosecution despite sufficient evidence of probable cause. Rich argues that no such common law claim should exist.

Yet, our judicial system is premised on the notion that there should be a remedy for every wrong. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,

whenever he receives an injury." *Madison v. Marbury*, 5 U.S. 137 (1803). This Court should not entertain the argument that a malicious prosecution claim will not lie merely because the initial arrest was made with probable cause that was subsequently found to be erroneous.

**ISSUE II. AT THE SUMMARY JUDGMENT STAGE, THE FACTS MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO JOSHUA VENCKUS.**

Rich spends a significant portion of his brief citing to those facts that he contends supports his belief that he had probable cause. But such facts are disputed. Venckus' distillation of the facts is comprehensive and would permit a reasonable juror to conclude that whatever belief Rich had that he once had probable cause was undermined by the evidence that was provided to him or became known to him during the course of the prosecution. (Venckus Brief, pp. 22-36). *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000) ("In assessing whether summary judgment is warranted, we view the entire record in a light most favorable to the nonmoving party. We also indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question.").

Rich concedes that "Ryan Markley quickly emerged as a main suspect." (Rich Brief, p. 20). Given that the crime was committed by *only one person*, an admission that Rich made at trial (App. Vol. I, p. 86-87),

Markley's clear involvement completely undermined Rich's theory that Josh Venckus committed the crime. In his brief, Venckus provides a detailed analysis of all the evidence that undermined Rich's theory that Venckus was present at the time of the crime, notwithstanding the presence of his DNA. (Venckus Brief, pp. 41-52). While Rich can offer his theory and reasoning to a jury, the fact remains that there is substantial evidence from which a jury could disbelieve Rich, particularly when there were misrepresentations made and there is evidence that Rich had a motive to cover up mistakes made during his investigation. (Venckus Brief, pp. 47-52).

**ISSUE III. RICH'S BEHAVIOR UNDERMINES HIS CLAIM THAT HE WAS WITHOUT POWER TO CONTROL THE PROSECUTION.**

Throughout his brief, Rich contends that he was at the mercy of the prosecution and had no power to affect any change. This is factually untrue. There is substantial evidence in the summary judgment record that speaks to the significant involvement that Rich had with the prosecution, as well as with influencing prosecutorial decisions. For example, he was involved in the decision to provide Markley with a favorable plea agreement over the objections of Ms. Lahey. (App. Vol I, p. 87). He then lied about his knowledge of the plea negotiations, contending that he had only heard about them from Ms. Lahey. However, Ms. Lahey testified that not only was Rich present for the plea negotiations, but he argued in favor of them, over her objections.

(App. Vol I, p. 88). Additional involvement is reflected on page 35 of Venckus' brief. Rich should not be permitted to lie about his involvement with the prosecution and get to claim that he was without power to affect change.

**ISSUE IV. THE ARGUMENT THAT CLAIMS AGAINST MUNICIPALITIES DO NOT INCLUDE CONSTITUTIONAL TORT CLAIMS IS WITHOUT MERIT.**

Rich argues that constitutional tort claims are not applicable to municipalities because only the legislature can permit such claims. However, this Court made clear that Constitutional claims against municipalities fall within Chapter 670, citing to the language of the statute itself to support its conclusion:

> *"Tort*" means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights and *includes* but is not restricted to *actions based upon* negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or *denial or impairment of any right under any constitutional provision*, statute or rule of law.
>
> Iowa Code § 670.1(4) (2019) (emphasis added).

*Baldwin v. City of Estherville*, 929 N. W.2d 691, 697 (Iowa 2019) ("*Baldwin II*"). See also *Wagner v. State*, 952 N.W.2d 843, 852 (Iowa 2020) ("In 2019, in *Baldwin II*… [W]e held that the IMTCA generally governs constitutional tort damage claims against municipalities and municipal employees acting in their official capacities. Summing up, we said that "the IMTCA applies to Baldwin's Iowa constitutional tort causes of action.").

**ISSUE V. THE *HRBEK* CASE IS INAPPLICABLE TO IOWA CODE §670.4A.**

Rich places great emphasis on *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021). That case is inapplicable. *Hrbek* involved a statute that prohibits applicants for postconviction relief from filing *pro se* documents while represented by counsel. The statute would not prohibit those applicants who are unrepresented from making such filings. *Id.* at 781. Mr. Hrbek contended that the statute could not be applied retrospectively to his already pending postconviction application (an application that had apparently been on file a very long time). There, the Court noted "application of a statute is in fact retrospective when a statute applies a new rule, standard, or consequence to a *prior* act or omission." *Id.* at 782 (emphasis in original). The Court concluded that the filing of a document is not a prior act: "The event of legal consequence is the filing of pro se supplemental documents."

Here, the analysis of whether Rich met the standard for entitlement to qualified immunity is gauged from what occurred *before* Iowa Code §670.4A was enacted. In other words, it was an act that occurred prior to the enactment of the statute. Rich's argument would make every statute retroactive, as the legal analysis would be made by a court after the enactment of the statute.

Moreover, the "standard" at issue in this case ---whether Rich is entitled to qualified immunity under the Federal statute-- did not exist in the State of Iowa during the relevant time frame in this case. The "standard" at the time that Rich was involved with Venckus was the "all due care" requirement outlined in *Baldwin v. City of Estherville* ("*Baldwin I"*), 915 N.W.2d 259, 280-81 (Iowa 2018). This Court specifically rejected the *Harlow v. Fitzgerald, 457 U.S. 800 (1982)* standard for Iowa Constitutional claims. *Id.* at 279.

Finally, the result in *Hrbek* was that the applicant was required to utilize his attorney to file any documents but was not prohibited from filing such documents. Here, Rich's argument could deprive claimants of an opportunity to prove a violation of the Constitution. Those are drastically different scenarios.

Rich's argument that the statute is to be applied retroactively is without merit.

## CONCLUSION

There is substantial evidence to establish the common law claim for malicious prosecution and the Iowa Constitutional tort claims. Venckus requests that the Court reverse the grant of summary judgment and remand for trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE AND FILING

The undersigned certifies a copy of this Final Reply Brief was filed and served through the Electronic Document Management System on all counsel of record and the Clerk of Supreme Court.

_____/s/ Martin A. Diaz____

## CERTIFICATE OF COST

I further certify that because of use of EDMS, there was no cost associated with the printing and reproduction of this Final Reply Brief.

_____/s/ Martin A. Diaz__

## CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This Brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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_____/s/ Martin A. Diaz__