ELECTRONICALLY FILED SEP 19, 2022 CLERK OF SUPREME COURT

IN THE IOWA SUPREME COURT

No. 22-0581

JOSHUA VENCKUS,

Plaintiff-Appellant,

v.

CITY OF IOWA CITY and **ANDREW RICH**,

Defendants-Appellees.

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

DEFENDANTS-APPELLEES' FINAL BRIEF

Elizabeth J. Craig ATM520022
Assistant City Attorney
Jennifer L. Schwickerath ATM520023
Assistant City Attorney
410 E. Washington Street
Iowa City, IA 52240
(319) 356-5030
icattorney@iowa-city.org
ATTORNEYS FOR CITY OF
IOWA CITY AND ANDREW RICH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

STATEMENT OF ISSUES FOR REVIEW

I. WHETHER THE DISTRICT COURT PROPERLY DISMISSED VENCKUS'S "CONTINUING MALICIOUS PROSECUTION" CLAIM.

Iowa Cases
Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)
Yoch v. City of Cedar Rapids, 353 N.W.2d 95 (Iowa 1984)
Vander Linden v. Crews, 231 N.W.2d 904 (Iowa 1975)
Sundholm v. Bettendorf, 389 N.W.2d 849 (1986)
Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984)
Johnson v. Miller, 82 Iowa 693, 47 N.W. 903 (Iowa 1891)
Sisler v. Centerville, 372 N.W.2d 248 (Iowa 1985)
Children v. Burton, 331 N.W.2d 673 (Iowa 1983)
Ashland v. Lapiner Motor Co., 247 Iowa 596, 75 N.W.2d 357 (1956)
Wilson v. Hayes, 464 N.W.2d 250 (Iowa 1990)
Craig v. City of Cedar Rapids, No. 12-0318, 2012 WL 6193862 (Iowa Ct. App. Dec. 12, 2012)
Venckus v. Iowa City, 930 N.W.2d 792 (Iowa 2019)
Smith v. State, 324 N.W.2d 299 (Iowa 1982)

Federal Cases
Wheeler v. Nesbitt, 65 U.S. 544 (1860)
Thompson v. Clark, ---- U.S. ----, 142 S.Ct. 1332, 212 L.Ed.2d 312 (2022)
Garang v. City of Ames, 2 F.4th 1115 (8th Cir. 2021)

Other State Cases
Heib v. Lehrkamp, 704 N.W.2d 875 (S.D. 2005)
Walsh v. Eberlein, 114 Ariz. 342, 560 P.2d 1249 (Ariz. Ct. App. 1977)

Iowa Statutes
§ 801.4(11), Code of Iowa
§ 801.4(13), Code of Iowa

Rules
Rule 2.2, Iowa Rules of Criminal Procedure
Rule 2.33(1), Iowa Rules of Criminal Procedure

Treatises
Restatement (Second) of Torts § 674
Restatement (Second) of Torts § 655

II. WHETHER THE DISTRICT COURT PROPERLY DISMISSED VENCKUS'S IOWA CONSTITUTIONAL TORT CLAIMS BECAUSE *GODFREY* CLAIMS DO NOT APPLY TO MUNICIPALITIES AND THEIR EMPLOYEES.

Iowa Cases
Bd. of Water Works Trustees of City of Des Moines v. Sac County Bd. of Supervisors, 890 N.W.2d 50 (Iowa 2017)
Lough v. City of Estherville, 122 Iowa 479, 98 N.W. 308 (1904)
Van Baale v. City of Des Moines, 550 N.W.2d 153 (Iowa 1996)
Lennette v. State, 975 N.W.2d 380 (Iowa 2022)
Godfrey v. State, 898 N.W.2d 844 ("*Godfrey II*") (Iowa 2017)
Thomas v. Gavin, 838 N.W.2d 518 (Iowa 2013)
Baldwin v. City of Estherville, 915 N.W.2d 259 ("*Baldwin I*") (Iowa 2018)
Baldwin v. City of Estherville, 929 N.W.2d 691 ("*Baldwin II*") (Iowa 2019)
Wagner v. State, 952 N.W.2d 843 (Iowa 2020)
Ackelson v. Manley Toy Direct, L.L.C., 832 N.W.2d 678 (Iowa 2013)
Boyer v. Iowa High Sch. Athletic Ass'n, 256 Iowa 337, 127 N.W.2d 606 (1964)
Garrison v. New Fashion Pork, LLP, 977 N.W.2d 67 (Iowa 2022)
Venckus v. v. Iowa City, 930 N.W.2d 792 (Iowa 2019)

Federal Cases
Egbert v. Boule, ---- U.S. ----, 142 S.Ct. 1793, 213 L.Ed.2d 54 (2022)

Iowa Statutes
§ 670.14, Code of Iowa
§ 669.14(4), Code of Iowa
§ 670.4, Code of Iowa

III. WHETHER THE DISTRICT COURT CORRECTLY DISMISSED VENCKUS'S IOWA CONSTITUTIONAL TORT CLAIMS UNDER THE INALIENABLE RIGHTS CLAUSE AND SEARCH AND SEIZURE CLAUSE BECAUSE SUCH CLAIMS HAVE NOT BEEN RECOGNIZED BY THE IOWA SUPREME COURT.

Iowa Cases
Godfrey v. State, 898 N.W.2d 844 ("*Godfrey II*") (Iowa 2017)
City of Sioux City v. Jacobsma, 862 N.W.2d 335 (Iowa 2015)
Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004)
Garrison v. New Fashion Pork, LLP, 977 N.W.2d 67 (Iowa 2022)
State v. Wright, 961 N.W.2d 396 (Iowa 2021)
Wagner v. State, 952 N.W.2d 843 (Iowa 2020)
Lennette v. State, 975 N.W.2d 380 (Iowa 2022)

Federal Cases
Davis v. Burke, 179 U.S. 399, 21 S.Ct. 210, 45 L.Ed. 249 (1900)
Gamble v. United States, ---- U.S. ----, 139 S.Ct. 1960 (2019)

Other State Cases
Katzberg v. Regents of Univ. of California, 29 Cal.4th 300, 58 P.3d 339 (2002)
Jones v. Philadelphia, 890 A.2d 1188 (Pa. Commw. Ct. 2006)
Fields v. Mellinger, 851 S.E.2d 789 (W. Va. 2020)
Tutt v. City of Abilene, 877 S.W.2d 86 (Tex. App. 1994)
Moody v. Hicks, 956 S.W.2d 398 (Mo. Ct. App. 1997)

Other Authorities
Article I, § 1, Iowa Constitution
Article I, § 8, Iowa Constitution

IV. WHETHER THE DISTRICT COURT CORRECTLY RULED THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON ANY OF VENCKUS'S PURPORTED IOWA CONSTITUTIONAL TORT CLAIMS.

Iowa Cases

State v. White, 887 N.W.2d 172 (Iowa 2016)
Christenson v. Ramaeker, 366 N.W.2d 905 (Iowa 1985)
Godfrey v. State, 898 N.W.2d 844 ("*Godfrey II*") (Iowa 2017)
Lennette v. State, 975 N.W.2d 380 (Iowa 2022)
Behm v. City of Cedar Rapids, 922 N.W.2d 524 (Iowa 2019)
Al-Jurf v. Scot-Conner, 2011 WL 1584366 (Iowa Ct. App. April 27, 2011)
Sheeler v. Nevada Comm. Sch. Dist., No. 17-1275, 2018 WL 3655090 (Iowa Ct. App. Aug. 1, 2018)
Blazek v. City of Nevada, 939 N.W.2d 123, 2019 WL 3711358 (Iowa Ct. App. Aug. 7, 2019)

Federal Cases

Wendt v. Iowa, 971 F.3d 816 (8th Cir. 2020)
Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)
Stockley v. Joyce, 963 F.3d 809 (8th Cir. 2020)
Walz v. Randall, 2 F.4th 1091 (8th Cir. 2021)
Hawkins v. Gage Cnty., 759 F.3d 951 (8th Cir. 2014)
Wilson v. Lawrence County, 260 F.3d 946 (8th Cir. 2001)
Akins v. Epperly, 588 F.3d 1178 (8th Cir. 2009)

Iowa Statutes

§ 804.1, Code of Iowa

Rules

Rule 6.903(2)(g)(3), Iowa Rules of Appellate Procedure

Other Authorities

Article I, § 1, Iowa Constitution
Article I, § 9, Iowa Constitution

V. WHETHER THE DISTRICT COURT CORRECTLY RULED JUDICIAL PROCESS IMMUNITY BARS ALL OF VENCKUS'S CLAIMS.

Iowa Cases
Venckus v. v. Iowa City, 930 N.W.2d 792 (Iowa 2019)
Minor v. State, 819 N.W.2d 383 (Iowa 2012)

Federal Cases
Rehberg v. Paulk, 566 U.S. 356, 132 S.Ct. 1497, 182 L.Ed.2d 593 (2012)

VI. WHETHER THE DISTRICT COURT CORRECTLY RULED DISCRETIONARY FUNCTION IMMUNITY BARS ALL OF VENCKUS'S CLAIMS.

Iowa Cases
Thomas v. Gavin, 838 N.W.2d 518 (Iowa 2013)
Smith v. State, 324 N.W.2d 299 (Iowa 1982)

Federal Cases
Saidu v. City of Des Moines, Iowa, 791 F. Appx. 626 (8th Cir. 2019)
District of Columbia v. Wesby, 583 U.S. ----, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018)

Iowa Statutes
Chapter 670, Code of Iowa
Chapter 669, Code of Iowa

VII. WHETHER THE DISTRICT COURT CORRECTLY RULED CHAPTER 670 IMMUNITIES BAR ALL OF VENCKUS'S CLAIMS.

Iowa Cases
Gordon v. Noel, 356 N.W.2d 559 (Iowa 1984)

Federal Cases
Garang v. City of Ames, 2 F.4th 1115 (8th Cir. 2021)

Iowa Statutes
§ 670.4(1)(d), Code of Iowa
§ 670.4(1)(j), Code of Iowa
§ 801.4(12), Code of Iowa
§ 801.4(13), Code of Iowa

Rules
Rule 2.33(1), Iowa Rules of Criminal Procedure

VIII. WHETHER THE DISTRICT COURT CORRECTLY RULED IOWA CODE SECTION 670.4A QUALIFIED IMMUNITY BARS VENCKUS'S CLAIMS.

Iowa Cases
Hrbek v. State, 958 N.W.2d 779 (Iowa 2021)
Baldwin v. City of Waterloo, 372 N.W.2d 486 (Iowa 1985)
Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989)
Baldwin v. City of Estherville, 915 N.W.2d 259 ("*Baldwin I*") (Iowa 2018)
State v. Thompson, 954 N.W.2d 402 (Iowa 2021)
Wagner v. State, 952 N.W.2d 843 (Iowa 2020)
Boyer v. Iowa High Sch. Athletic Ass'n, 256 Iowa 337, 127 N.W.2d 606 (1964)

Federal Cases
Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)
Combs v. Comm'r of Soc. Sec., 459 F.3d 640 (6th Cir. 2006)
United States v. Nunemacher, 362 F.3d 682 (10th Cir. 2004)
United States v. Mallon, 356 F.3d 943 (7th Cir. 2003)
United States v. Holloman, 765 F. Supp.2d 1087 (C.D. Ill. 2011)

Iowa Statutes
§ 670.4A(1)(a)-(b), Code of Iowa
Chapter 670, Code of Iowa
§ 670.4A(1), Code of Iowa
§ 670.4A, Code of Iowa
Chapter 668, Code of Iowa
§ 123.92, Code of Iowa
§ 670.4A(5), Code of Iowa
§ 670.4A(3), Code of Iowa
§ 670.4A(4), Code of Iowa

IX. WHETHER THE DISTRICT COURT CORRECTLY RULED RICH IS ENTITLED TO *BALDWIN* QUALIFIED IMMUNITY ON VENCKUS'S PURPORTED IOWA CONSTITUTIONAL TORT CLAIMS.

Rules
Rule 6.903(2)(g)(3), Iowa Rules of Appellate Procedure

X. WHETHER THE DISTRICT COURT CORRECTLY RULED VENCKUS'S CLAIMS WERE UNTIMELY FILED AND ARE BARRED BY THE STATUTE OF LIMITATIONS.

Federal Cases
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)
Livers v. Schenck, 700 F.3d 340 (8th Cir. 2012)

Iowa Statutes
§ 670.5, Code of Iowa

ROUTING STATEMENT

Defendants agree with Venckus that the Iowa Supreme Court should retain this case to finally determine the viability of his Iowa constitutional tort claims.

STATEMENT OF THE CASE

A. Nature of the Case

Venckus appeals from the district court's dismissal of his "continuing malicious prosecution" claim and purported Iowa constitutional tort claims on summary judgment. It is undisputed that probable cause existed to charge Venckus with sexual abuse. Venckus contends, though, he should not have been prosecuted and brought to trial, despite his DNA (including sperm) being on the victim's cervix, underwear, fingernails, bite mark, and dress because he asserted an alibi defense he believed was "overwhelming" and his retained DNA expert witness testified that his DNA was on and inside the victim because of transfer from a blanket. The assistant county attorneys responsible for prosecuting Venckus disagreed, believed he was guilty, fiercely litigated the case for over two years, and brought him to trial, where he was acquitted.

Venckus fully rehashed his criminal case below, but failed to make out any actionable claim for damages against the detective who charged him, Andrew Rich. The district court ruled that Venckus's claims failed on multiple grounds—

failure to state a claim, lack of a genuine issue of material fact, statutory immunity, common law immunity, and statute of limitations. Venckus appeals.

B. Relevant Events of the Prior Proceedings and Disposition in District Court

Defendants agree with Venckus's recitation of the relevant events of prior proceedings in this lawsuit.

STATEMENT OF FACTS

A. The Sexual Assault on February 16, 2013

On February 16, 2013 a brutal sexual assault occurred at 516 S. Van Buren Street, a rental house in Iowa City. Plaintiff Joshua Venckus was a tenant at the address, which consisted of both a large rental house, and "the addition" which was a converted garage space that had a separate entrance. (App. I, p. 18; Exh.[1] CCC (Venckus Depo, pp. 124:21 - 129:9)). Venckus lived in the basement of the addition. (Exh. CCC, pp. 127:22 - 128:15). He was friends with the five other renters who lived at the address. (Exh. C (Roommate Interviews); Exh. CCC p. 9:7 - 10:4). One of the other tenants was Venckus's childhood best friend, Kyle Luzzi. (Exh. C; Exh. CCC p. 9:7 - 10:4).

Venckus knew Luzzi was planning a party at the house for February 15, 2013 for at least several days before it was to occur. (Exh. GGG). L.M., one of

[1] All "Exh." citations refer to Defendants' Confidential Summary Judgment Exhibits, filed on October 28, 2021.

Luzzi's coworkers, attended the party and became intoxicated. L.M.'s friends left the party around 3:00 a.m., and L.M. laid down on the couch in the main living room of 516 S. Van Buren Street and fell asleep. (App. II, p. 41). L.M. was awoken by the attack. (App. II, pp. 37-38). She remembered two distinct attacks, separated in time by about ten seconds. (Exh. D, L.M. Interview, 2/16/13, D-496 - 498; App. II, pp. 37-38).

L.M. escaped, running and screaming out the back door toward an alleyway behind the house. (App. II, pp. 37-38). John Munn, a person who happened to be in the area trying to help his son with a stalled vehicle, heard screaming from several blocks away. (App. II, p. 216 (Munn Depo pp. 6:14-7:24)). Munn testified he saw L.M. run out the back door and also saw a male at the back door of 516 S. Van Buren Street. (App. II, p. 217 (Munn Dep pp. 10:4-13:22)). The male slammed the back door shut with such force that it popped back open. (App. II, p. 217 (Munn Depo p. 12:13-23)). Munn testified that at the same time, he saw a second male walking around the south side of 516 S. Van Buren Street. (App. II, p. 220 (Munn Depo p. 22:2-25)).

L.M. underwent a forensic examination by a sexual assault nurse examiner ("SANE"). (App. II, p. 86). L.M. had terrible injuries to her face, neck, arms, and genital area. (*Id.*). She had been bitten on the back. (*Id.*). The SANE collected

L.M.'s clothing for forensic testing and swabs from L.M.'s genital area, including her cervix, fingernails, the bite mark, and other areas. (*Id.*).

B. The Pre-Arrest Investigation: February 16, 2013 - January 24, 2014

The sole individual defendant in this case, Detective Andrew Rich,[2] was the Iowa City Police Department's on-call investigator on the weekend of February 15, 2013. (App. II, p. 19).

Ryan Markley quickly emerged as the main suspect. His wallet was found outside of 516 S. Van Buren on the morning of the crime. (App. II, p. 20). Markley denied involvement in the sexual assault but admitted to being at the party and told the police he "may have committed the assault without remembering." (App. II, pp. 27-28). Detective Rich applied for and obtained a warrant to search Markley's apartment on February 16, 2013. (Exh. G (513 Bowery Street #6 Search Warrant, D-603-612)). Officers transported Markley to the police department, and he underwent a forensic examination where his DNA was collected. (Exh. J (SANE Release Forms; App. II, p. 93). In addition to Markley, forensic examinations were performed and DNA samples collected from every other male occupant of the house except Venckus. (Exh. J; Exh. C). These

[2] Rich is now a Sergeant with the Iowa City Police Department, but will be referred to as "Rich" in these filings.

forensic examination kits were sent to the Iowa Department of Criminal Investigation (DCI) Criminalistics Laboratory for processing. (App. II, p. 38).

Rich also applied for and obtained a search warrant for 516 S. Van Buren Street (Venckus's house where the assault occurred) on February 16, 2013. (Exh. F (516 S. Van Buren Search Warrant, D-621-638)). Fifty pieces of evidence from the crime scene were collected. (Exh. H (Hartman Crime Scene Report, D-516-528)). This included couch cushions; couch pillows; L.M.'s phone found at the scene; hairs; a White Sox blanket found at the scene of the crime; the windowpane to the basement area of the addition; a cutting from a chair seat; and many other items. (Exh. H, D-516-528).

Venckus was not initially the focus of Detective Rich's investigation. (App. II, p. 43). Venckus was not present the morning after the crime, and at first no evidence was collected from him directly. But the course of the investigation changed on March 7, 2013. (App. II, pp. 129, 39). On that date, the Criminalistics Lab returned its first DNA analysis report. (App. II, p. 129). Markley's skin cell DNA was found on L.M.'s body and clothing (including her underwear), and L.M.'s blood was identified on Markley's jeans. (App. II, p. 129).

Additionally, a second male's DNA ("Male B") was found in multiple places on L.M.'s clothing and body. But the identity of "Male B" was unknown. (App. II, pp. 129, 39). Rich then sought out DNA samples from every male known

to have attended the party, and sought a DNA sample from Venckus, too. (App. II, p. 43). But Rich had trouble getting in contact with Venckus to obtain his DNA sample. (App. II, p. 44). There were several unanswered phone calls. (App. II, p. 44). Luzzi told another ICPD officer that he did not know how to contact Venckus or where he was. (Exh. D (D-464)). Eight months went by before Venckus agreed to come into the police station and provide a DNA sample. (App. II, p. 44). When he came on November 12, 2013, he told Rich he was in Chicago on the February 2013 weekend that the assault happened. (App. II, p. 44). Venckus wanted to know if they had caught anybody, and Rich told him that they had not, but that they had a guy they suspected and were working on another. (App. II, p. 44).

The DCI lab returned its analysis of Venckus's DNA sample on January 3, 2014. (App. II, p. 142). His profile matched the profile of "Male B." (App. II, p. 142). Venckus's DNA was identified on L.M.'s underwear, fingernail swabs, on the chest of her dress, and from a swab of the bite mark on her back. (App. II, p. 142). The probability of finding the same DNA profile as Venckus's on L.M.'s underwear and dress "would be less than 1 out of 100 billion." (App. II, p. 142). The DCI lab notified Rich of the results, and notified the county attorney's office, as well. (Exh. K (BEAST Prelog System- Email Notification Example)). Notification of these results came through the DCI's "BEAST" system—as did numerous subsequent reports from the DCI lab. (*Id.*). The BEAST system

automatically sends notifications to both prosecutors and law enforcement when new reports are uploaded on a case. (*Id.*).

On January 22, 2014 Detective Rich filed criminal complaints accusing both Venckus and Markley of 2nd Degree Sexual Abuse, in violation of Iowa Code Section 709.3. (App. II, pp. 13-14). Judge Stephen Gerard signed arrest warrants on the same day for both men. (App. II, pp. 15-16).

Detective Rich and Detective Dave Gonzalez of the ICPD interviewed Venckus on January 24, 2014. (App. II, p. 45; Exh. GGG (Video of Venckus Interview, 1/24/14)). Venckus again told the officers he was in Chicago on the weekend of the assault. (App. II, p. 45; Exh. GGG). He told Rich and Gonzalez to call his parents. (App. II, p. 45; Exh. GGG). He told them he thought that he took the Megabus home, but that if he didn't, he got a ride from his friend, Mike Concannon. (App. II, p. 47; Exh. GGG). At the end of the interview, Detective Rich arrested Venckus and Venckus was transported to the Johnson County Jail. (App. II, p. 47; Exh. GGG). The detectives obtained Venckus's bank information from him. (App. II, p. 45; Exh. GGG). They also seized Venckus's phone, but it was not the same phone Venckus had on February 16, 2013. (App. II, p. 45; Exh. GGG). Venckus had bought a new phone on February 17, 2013, the day after the sexual assault, and had gotten rid of his old one. (Exh. CCC, 138:14-25; App. II, p. 45; Exh. GGG).

C. The Post-Arrest Investigation: January 24, 2014 - February 5, 2014

Venckus was in the jail for six days, from January 24, 2014-January 30, 2014, until his mother posted bond. (Exh. O (Order as to Bond Modification, 1/30/14)). Another important piece of evidence emerged on January 30, 2014, the day of Venckus's bond hearing at the Johnson County Courthouse. (Exh. Q (Deputy David Stanton Narrative, 1/31/14)). After the hearing, a sheriff's deputy overheard Venckus's mother, Jeanine Venckus, tell someone on her cell phone that "they made me say he was in Chicago." (Exh. Q). The deputy reported this information to Assistant Johnson County Attorney Anne Lahey, who was working on the case. (Exh. Q).

Rich made efforts to test Venckus's claim that he was in Chicago. (Exh. YY (Rich Interrogatory Ans. No. 1, 12/9/20)). He checked Megabus records and found nothing. (*Id.*). He worked with the county attorney's office to subpoena records from Venckus's bank and cell phone company. (App. II, pp. 98-107). He contacted Venckus's alibi witness, Mike Concannon. (Exh. R (1/31/14 Concannon Interview Report, D-80-D-86)). Special Agent Derek Riessen from the DCI administered a polygraph on Concannon on February 10, 2014. (App. II, pp. 108-119). Riessen concluded Concannon lied during the polygraph about Venckus being in Chicago. (App. II, pp. 114).

D. The Prosecution: February 5, 2014 - September 21, 2016

On February 5, 2014, Assistant Johnson County Attorney Anne Lahey filed a combined trial information against Venckus and Markley. (App. II, pp. 60-97). Lahey had been a prosecutor for approximately thirty-five years, beginning in the Johnson County Attorney's Office in 1979. (Exh. EEE, p. 3:9-20). She had tried hundreds of cases throughout her career. (Exh. EEE, p. 65:3-7). She tried "at least 50 . . . [p]robably more" sexual assault cases, specifically. (Exh. EEE, p. 65:8-11). Many involved DNA evidence, which, Lahey believed could be "pretty compelling." (Exh. EEE, p. 65:12-66:2). Lahey was assisted primarily by Assistant Johnson County Attorney Naeda Elliott, who is now the Mills County and Fremont County Attorney. (Exh. EEE, p. 66:24-67:11).

In the trial information, Lahey charged Venckus and Markley with Second Degree Sexual Abuse in violation of Iowa Code Sections 709.1(1), 709.3(3), 702.17 and 703.1. (App. II, pp. 60-97). Lahey listed thirty-six witnesses in the minutes of testimony, including law enforcement, emergency personnel, party attendees, medical professionals, forensic nurse examiners, DCI Criminalistics personnel, and other fact witnesses. (App. II, pp. 60-97).

Venckus's defense was that he was in Chicago when the crime occurred, and that his DNA was present on and inside of the victim due to transfer from a blanket—his blanket—which was found at the scene of the crime. (Exh. AA

(4/15/16 Ruling on Motion to Sever)). Venckus claimed he generally used the "White Sox blanket" to clean up with after sex or masturbation, that it was "replete" with his DNA, and that during the night of the party someone had left the main house, went outside into the frigid February night, entered the separate addition, went into the basement, retrieved the blanket from Venckus's lower level bedroom, took the blanket back outside, went back into the living room of the separate main house, put it on L.M. where it remained until the assault, and that Markley then transferred Venckus's DNA to L.M. with a wet penis or finger during the assault. (Exh. CCC, p. 131:19-133:6; App. II, p. 188).

During the course of the prosecution, the prosecutors tested Venckus's alibi defense. They subpoenaed his bank and cell phone carrier. (App. II, pp. 98-107). They deposed every single one of Venckus's alibi witnesses, in total, thirteen. (App. II, p. 120). They subpoenaed employment records for Venckus's sister to verify her deposition testimony. (Exh. DD (8/27/15 App for Authority to Issue SDT)). They sought reciprocal discovery from defense Attorney Cole. (Exh. EE (9/9/15 Cole Letter to Elliott)). Cole provided Elliott with access to a Google online share drive containing defense exhibits in August of 2015 and emailed pdf's of the contents of the Google drive to Elliot. (Exh. EE). Lahey viewed printouts of the exhibits that Cole had put on the Google drive. (Exh. FFF (Rich Civil Depo), p. 121:1-7). The prosecutors sought orthodontic molds from Venckus so

they could have a forensic dental examination done related to the bite mark on L.M. (App. II, pp. 121-128). The forensic examination of Venckus and Markley's teeth impressions was "inconclusive." (Exh. GG (James W. Cahillane, D.D.S. (Forensic Odontologist) Report (Inconclusive)).

The prosecution also sought to test Venckus's DNA transfer theory. Lahey took the deposition of both of Venckus's DNA experts. (Exh. EEE, p. 72:15-17). Lahey had additional DNA testing performed by a private laboratory, Bode Cellmark, which confirmed the presence of Venckus's sperm on the victim's cervix. (App. II, pp. 171-175). Bode's testing also identified Venckus's DNA on the back of L.M.'s dress. (App. II, pp. 171-175). In total, there were seventeen DNA reports issued by the Iowa DCI Criminalistics lab, testing different pieces of evidence, plus two reports from the private lab. (App. II, pp. 129-175). Lahey testified that there were numerous conversations among herself, Elliot, and DCI staff regarding Venckus's DNA transfer theory. (Exh. EEE, p. 76:4-77:4). DCI analysts told Lahey they believed Venckus's transfer theory was "almost impossible" on a cervical swab, and Lahey testified that nothing DCI staff told her caused her any concern with moving forward with the charge against Venckus. (Exh. EEE, pp. 47:18-48:4, 75:23-77:4). Lahey noted that Venckus's experts did not have the "same compunction" as DCI criminalists regarding testifying about

their opinions regarding *how* DNA was deposited in a certain place. (Exh. EEE, p. 76:6-10).

There was significant motion practice. Venckus sought to exclude entirely the DCI's DNA analyses as unreliable, and Lahey resisted. (Exh. MM (4/27/16 Venckus Motion to Exclude DNA and Serology Test Results and Request for Daubert Hearing); Exh. NN (6/17/16 State's Brief Regarding Admissibility of DNA Evidence)). The district court denied his motion in its July 1, 2016, ruling that DCI's methods were scientifically accepted, and that the weight of the DNA evidence was for the jury. (App. II, pp. 176-186).

When asked by Venckus's attorney, Lahey refused to dismiss the charge. (Exh. EEE, p. 54:19-55:23). There were "a lot of reasons" in addition to the DNA that made her believe Venckus committed the crime. (Exh. EEE, p. 56:24-61:2). Lahey believed the occupants of the house—all Venckus's friends, not Markley's—were trying to protect Venckus. (Exh. EEE, p. 56:24-61:2). Lahey pointed out that when Luzzi was interviewed on the morning of the crime, he stated that "Josh" had been at the party, but later backed out of that statement. (Exh. EEE, p. 56:24-61:2). Lahey did not believe Luzzi's claims that he did not hear L.M. being assaulted, because his bedroom was right next to where the assault occurred and neutral witnesses outside the home said they heard the screams. (Exh. EEE, p. 56:24-61:2). Lahey pointed out that John Munn saw two men as

L.M. escaped the house. (Exh. EEE, p. 56:24-61:2). And Lahey pointed out that Venckus got rid of his cell phone, which "would have been good evidence" on the same weekend of the assault without any good explanation as to why. (Exh. EEE, p. 56:24-61:2).

The Johnson County Attorney's Office offered a plea deal to Markley, and Markley entered an *Alford* plea to Second Degree Burglary, a class C felony, and Assault with Intent to Commit Sexual Abuse Without Injury, an aggravated misdemeanor, on May 4, 2016, with his sentencing set after Venckus's trial date in September 2016. (Exh. QQ (Markley Plea, 5/4/16)). Lahey and Elliot both objected to the plea. (Exh. EEE, p. 78:20-79:21). Lahey did not believe that Markley was a credible witness and did not see value in making a plea deal with him so that he would testify against Venckus. (Exh. EEE, p. 78:20-79:21).

Shortly before his trial began in September 2016, Venckus filed a motion for a bill of particulars, alleging it was unclear what evidence the State was relying upon. (App. II, pp. 187-190). The State resisted, arguing it was well known that it was relying primarily on the DNA evidence. (App. II, pp. 189). When Lahey resisted Venckus's motion in July 2016, she had already been provided with his expert DNA reports; taken all his alibi witnesses' depositions; taken his experts' depositions; reviewed the case with the DCI lab analysts; sat through two defense depositions of the DCI analyst who worked on the case (Criminalist Tara Scott);

heard Rich's deposition testimony; and reviewed the allegedly exculpatory contents of the Google drive. (App. II, pp. 187-190). The district court summarily denied Venckus's motion. *Id.*

Venckus's case proceeded to a jury trial on September 6, 2016. (Exh. UU (9/21/16 Trial Order)). Lahey called 27 witnesses and submitted 164 exhibits. (App. II, pp. 191-211). At the end of the State's case, Venckus moved for a directed verdict which the Court denied. (App. II, pp. 203-208). Venckus again moved for a directed verdict at the close of all the evidence, which the Court again denied. (App. II, pp. 209-211).

The district court submitted the case to the jury on September 20, 2016 at 4:20 p.m. (Exh. UU). At 3:30 p.m. the next day, the jury returned a verdict of not guilty. (Exh. TT (Verdict)).

Venckus filed this civil action on March 15, 2018. (App. I, pp. 7-16).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED VENCKUS'S "CONTINUING MALICIOUS PROSECUTION" CLAIM.

A. Preservation of Error and Scope and Standard of Review

Rich and the City moved for summary judgment on Venckus's "continuing malicious prosecution" claim because Iowa law does not recognize such a claim and even if it did, Venckus's claim would fail on the merits. (App. I, p. 642). The district court ruled that (1) a "continuing malicious prosecution" claim has not

been recognized under Iowa law, and (2) if such a cause of action had been recognized, Venckus's claim would nonetheless fail on the merits because there "simply is no factual dispute that would support Plaintiff being able to proceed to trial with his continuing malicious prosecution claim . . . ." (App. I, p. 648). Error is preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Rich and the City agree with Venckus regarding the proper scope and standard of review.

B. Merits

1. The District Court Correctly Rejected Venckus's Self-Styled "Continuing Malicious Prosecution" Claim as Unrecognized Under Iowa Law

The elements of a malicious prosecution claim based upon a prior criminal proceeding are well-established. To prove malicious prosecution against a law enforcement officer under Iowa common law, six elements must be proven: (1) a previous prosecution, (2) instigation of or procurement thereof by defendants, (3) termination of the prosecution by an acquittal or discharge of plaintiff, (4) want of probable cause, (5) malice in bringing the prosecution on the part of the defendant, and (6) damage to the plaintiff. *Yoch v. City of Cedar Rapids*, 353 N.W.2d 95, 103 (Iowa 1984). Additionally, with regard to the malice element:

> The element of actual malice essential to an action for malicious prosecution involving a defendant who is a public official cannot simply be inferred from a lack of probable cause, but must be the subject of an affirmative showing defendant's instigation

> of criminal proceedings against plaintiff was [p]rimarily inspired by ill-will, hatred or other wrongful motives. If the defendant's purpose in instigating proceedings was otherwise proper, the fact he felt indignation or resentment toward the plaintiff will not subject him to liability.

Vander Linden v. Crews, 231 N.W.2d 904, 906 (Iowa 1975).

a. Venckus's Concession That Rich Had Probable Cause To Charge Him With Sexual Abuse is Fatal to His Malicious Prosecution Claim

The district court correctly ruled Venckus's claim fails on its face to meet the elements of a malicious prosecution claim because Venckus concedes Rich had probable cause when he filed his criminal complaint. The tort's focus on the existence of probable cause at the initiation of a prosecution is reflected in the rule that the accused party's innocence is no evidence that probable cause was lacking to initiate the prosecution. *See Sundholm v. Bettendorf*, 389 N.W.2d 849, 852 (1986) ("Even in a malicious prosecution claim probable cause does not depend upon the guilt or innocence of the accused party. Rather it depends upon the honest and reasonable belief of the party causing the prosecution."); *Gordon v. Noel*, 356 N.W.2d 559, 562 (Iowa 1984) (citation omitted) ("Probable cause does not depend upon the guilt of the accused party in fact, but upon the honest and reasonable belief of the party commencing the prosecution."). It is also reflected in the temporal focus of the source of damages—the commencement of a wrongful charge. *Vander Linden*, 231 N.W.2d at 907 ("the principal basis of recovery in

actions for malicious prosecution is mental anguish and suffering arising from the wrongful charge and arrest . . . .”). Further, malice must be proven at “the instigation of criminal proceedings.” *Id.* at 906.

Venckus has *never* cited an Iowa case that recognizes a “continued malicious prosecution” claim against a law enforcement officer where probable cause indisputably existed to file a criminal charge. *Every* Iowa malicious prosecution case cited by Venckus involving prior criminal proceedings concerned a charge by the plaintiff that probable cause was lacking for the commencement or instigation of criminal charges against them, not the “continuation” of the criminal prosecution by prosecutors. *Id.* at 905 (“plaintiff initiated the within action against defendant Crews . . . alleging the defendants had falsely, maliciously and without probable cause, caused him to be arrested, imprisoned and prosecuted for selling stimulant drugs without a prescription); *Wheeler v. Nesbitt*, 65 U.S. 544, 545 (1860) (“the plaintiff alleged that the defendants, falsely and maliciously contriving and intending to injure him in his good name and reputation, . . . falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen four horses . . . .”); *Johnson v. Miller*, 82 Iowa 693, 47 N.W. 903, 904 (Iowa 1891) (defendants commenced criminal larceny prosecution against plaintiff despite not believing he was guilty); *Sisler v. Centerville*, 372 N.W.2d 248, 252 (Iowa 1985) (plaintiffs alleged “the prosecution

was instigated without probable cause" where officers charged them with theft of a dog). Though *Sisler* quotes the Restatement (Second) of Tort's definition of probable cause, which utilizes the word "continues" in its definition, *Sisler* did not involve and did not endorse a "continuing prosecution" claim where probable cause indisputably existed for the instigation of the prosecution through the filing of a criminal charge. *Id.*

And though Venckus argues a "continued prosecution" claim must exist in order to distinguish malicious prosecution from false arrest, there is an obvious difference between false arrest cases and malicious prosecution cases—false arrest "requires confinement of the person" and malicious prosecution does not. *Children v. Burton*, 331 N.W.2d 673, 678 (Iowa 1983). "[T]he gravamen" of malicious prosecution "is the initial institution of the criminal proceedings." *Ashland v. Lapiner Motor Co.*, 247 Iowa 596, 601, 75 N.W.2d 357, 360 (1956). An arrest can occur without a prosecution, and vice versa. *See Thompson v. Clark*, ---- U.S. ----, 142 S.Ct. 1332, 1341—43, 212 L.Ed.2d 312 (2022) (Alito, J., dissenting) (providing extensive analysis of the difference between the common law torts of false arrest and malicious prosecution). The Iowa Rules of Criminal Procedure specifically contemplate that an arrest may be made without a charge being filed, but that after an arrest without a warrant, "a complaint shall be filed forthwith." Iowa R. Crim. P. 2.2. Venckus's claim on this point is without merit.

Venckus therefore turns to a civil malicious prosecution case, *Wilson v. Hayes*, 464 N.W.2d 250 (Iowa 1990) for support. The entire focus of *Wilson*, however, was malicious prosecution in the civil context and specifically analyzing "a special rule" in the Restatement "to govern review of an attorney's conduct in commencing and continuing a lawsuit." *Id.* at 259-266 (referring to Restatement (Second) of Torts § 674, "Wrongful Use of Civil Proceedings"). *Wilson* never applied or endorsed a "continuing prosecution" theory in the criminal context, and over thirty years later, Iowa courts have still not recognized such cause of action.

Venckus's "continued malicious prosecution" claim fails as a matter of law, and the district court correctly applied Iowa's settled law on malicious prosecution.

2. Venckus's Claim Based on Restatement of Torts § 655 "Continuing Criminal Proceedings" Fails Both Legally and on the Merits

Not finding support in Iowa law, Venckus relies upon Restatement (Second) of Torts § 655 to support his claim. (Venckus Proof Brief, p. 37). The district court correctly ruled that this section has not been adopted by Iowa courts; does not apply to Rich, who is not a "private person" as required by the Restatement; and even if it did apply, Venckus's claim would fail on the merits because Rich did not control the prosecution (the prosecutors did), probable cause never dissipated, and Venckus generated no genuine issue of material fact regarding whether Rich acted with any malice against him. (App. I, pp. 647-648).

a. Restatement of Torts (Second) Section 655 Does Not Apply

In order to fit into this Restatement provision, Venckus inconsistently and with no authority declares Rich is a "private person" for "the purposes of a malicious prosecution claim." (Venckus Proof Brief, p. 40). This is contrary to Iowa law, which provides that "police officers of cities" are "peace officers." Iowa Code § 801.4(11). Further, Venckus acknowledges that malicious prosecution caselaw classifies police officers as public officials, but alleges with no authority that this classification only applies to the malice element of malicious prosecution. *See Yoch*, 353 N.W.2d at 102-03 (applying limited liability to police officers as peace officers). No Iowa case holds that a police officer or detective is a "private party" for the purpose of all elements of a malicious prosecution claim except for the malice element. The malice element of malicious prosecution is different for police officers *because* of their status as public officials. *Id*.

b. Venckus's Claim Fails Because Prosecutors Controlled the Criminal Case Against Him, Not Rich

Comment c to Section 655 states that where a private party initiates a prosecution which is then turned over to a prosecutor's control, the private party is not liable even if they discover facts that "clearly indicate the innocence of the accused." Restatement (Second) of Torts § 655, cmt. c. (emphasis added). In this case, Venckus himself alleged that the prosecutors had all the supposed

"exonerating" Google drive evidence, and that *they* should have dismissed on that basis. (App. I, p. 22). Lahey and her co-counsel, fellow prosecutor Elliot, made strategic decisions about how to proceed with the case after the trial information was filed. They conducted significant discovery and obtained expert testimony from DCI, Bode Cellmark Labs, and a rape victim advocate. They communicated with and plea bargained with Venckus and Markley's defense attorneys. They filed and resisted motions, including resisting Venckus's *Daubert* attempt to discredit and exclude the DCI's DNA analyses.

And Lahey believed in the prosecution. In Lahey's words: "I thought that there was other evidence that negated to me the alibi and that I believed he was at that party." (Exh. EEE, p. 41:1-12); "I believe [Markley] had sexual contact with the victim and that he probably used a condom and Venckus had sexual contact with the victim and didn't use a condom." (*Id.*, p. 51:19-25); "I believed that there is compelling evidence that [Venckus] was there and the DNA to me was compelling. . . . I thought there was circumstantial evidence too that he was there besides the direct evidence of the DNA." (*Id.*, p. 55:14-23). Lahey felt Venckus's alibi witnesses were trying to protect him. (*Id.*, p. 60:23-61:2, 78:15-19). She did not believe his DNA transfer theory. (*Id.*, p. 47:23-48:1). Lahey rebuffed Venckus's allegation that it was impossible for him to have committed the crime based on his timeline of events. (*Id.*, p. 14:17-19). Lahey personally rejected

defense Attorney Cole's "invitation" that the case be dismissed. (*Id.*, p. 54:19-55:23). She prepared the case for a two-week trial, marshaling 27 witnesses and 166 pieces of evidence, trying the case by herself, and obtaining favorable rulings from Judge Chicchelly against the defense's two motions for directed verdict.

All of this occurred without Rich. In fact, Lahey outright *rejected* the one important opinion Rich did express regarding the prosecution, i.e., that Markley should be put on the stand to testify against Venckus. (*Id.*, 37:13-22). This was Lahey's judgment call, even though Markley in the end claimed that he saw Venckus at the scene of the crime. (*Id.*, p. 28:1-20; Exh. XX (Markley Sentencing Recommendation)).

Lahey testified during her civil deposition—and it is a matter of Iowa law, supreme court rule, and undisputed fact in this case—that Rich could not have dismissed the case against Venckus even if he had wanted to. (Exh. EEE, p. 74:23-75:2); Iowa Code § 801.4(13) (defining prosecution); Iowa R. Crim. P. 2.33(1) (only prosecutor or court can dismiss a pending criminal prosecution). According to Lahey, the fate of Venckus's criminal charge was up to the prosecutors' discretion. (Exh. EEE, p. 74:23-75:2). The district court therefore court rightfully dismissed Venckus's "continued malicious prosecution" claim as a matter of law because it was the prosecutors, not Rich, controlling the case after Rich filed his charge. *Cf. Craig v. City of Cedar Rapids*, No. 12-0318, 2012 WL 6193862, *4-5

(Iowa Ct. App. Dec. 12, 2012) (affirming dismissal of malicious prosecution claim on summary judgment because city officials did not instigate a prosecution when an assistant attorney general brought the charge solely based upon his independent conclusion that probable cause existed and there was no evidence in the record that the city purposely concealed information or acted without good faith throughout the process); *Garang v. City of Ames*, 2 F.4th 1115, 1123 (8th Cir. 2021) (affirming dismissal on summary judgment of "continued detention" claim because there was arguable probable cause for the arrest and the officers could not control what happened after the defendant was transferred to the jail, thus destroying the causal link between plaintiff's claimed damage and the officers' actions); *Heib v. Lehrkamp*, 704 N.W.2d 875 (S.D. 2005) (an officer cannot be held liable for continuing a prosecution where the officer provided prosecutors with the exculpatory evidence he had prior to trial); *Walsh v. Eberlein*, 114 Ariz. 342, 560 P.2d 1249, 1250 (Ariz. Ct. App. 1977) (police officer could not be liable for his participation in a prosecution where the prosecuting attorney had access to all the same evidence the officer had and "directed the prosecution" until its dismissal).

c. Rich's Reasonable Belief in Probable Cause Never Dissipated

In any event, Venckus's claim would fail because probable cause existed throughout the entirety of the prosecution. The Restatement requires that a private party pressed for the proceedings "after he has discovered that there is no probable

cause for them." Restatement (Second) § 655, cmt. b. Probable cause for the charge against Venckus was judicially confirmed on numerous occasions at various points in time during the prosecution: when the district court issued arrest warrants; when Lahey filed the trial information and the district court approved it; when Lahey filed the amended trial information and the district court again approved it; when Venckus's motion for a bill of particulars was denied; and when the district court denied Venckus's two motions for directed verdict during trial.

And none of the forensic evidence that Rich relied upon in filing his charge against Venckus in January 2014 was ever conclusively rebutted. Throughout the prosecution, the DNA reports from DCI continued to show Venckus's DNA profile on L.M.'s body in staggering odds. So did the DNA reports from the State's private DNA lab, Bode Cellmark. (App. II, pp. 171-175). The DCI lab informed the prosecution, including Detective Rich, that Venckus's DNA transfer theory was "extremely highly improbable," or in other words "almost impossible." (Exh. FFF (Rich Civil Depo), p. 61:20-62:5).

Further, Venckus's retained DNA expert, Angela Butler, never tested the blanket that was the alleged source of transfer. She only looked at pictures. (App. I, pp. 633-634). DCI tested numerous parts of the blanket on two different occasions, and only found Venckus and L.M.'s DNA - not Markley's. (App. II, pp. 144-145; App. II, pp. 164-166).

Venckus inexplicably contends Rich's belief that Venckus went back to Chicago on Friday somehow precluded Venckus from returning to Iowa City and committing the crime on Saturday, thereby destroying probable cause. (Venckus Proof Brief, p. 41). But Rich's belief that Venckus had left Iowa City on Friday proved nothing about whether Venckus returned for some part of the party on early Saturday morning when the assault occurred. Venckus's alibi timeline relied entirely upon his own claims and the claims of friends and family, and Lahey doubted their credibility. Venckus's mother made statements in public that a sheriff's deputy interpreted as indicating she was untruthful about Venckus's whereabouts. Venckus's friend Kyle Luzzi was believed to be evasive because he appeared to avoid contact with police. The supposed other "Josh" that Luzzi named as one of the last party attendees on the morning of the crime during his interview was never identified. And the other individuals Luzzi named along with "Josh" during that interview were also residents of the house (Zach, Landon)—just like Venckus. Venckus's sister's testimony regarding the timeline as to when she saw Venckus in their home changed between the time of her deposition and trial.[3] (Venckus Proof Brief, p. 27). Venckus sought to explain a restaurant charge on his credit card at a Panda Express in Iowa City by claiming the charge was not from

[3] Venckus inconsistently criticizes Rich for changing his belief about whether Venckus went to Chicago between the time of his deposition and trial, while he

the date reflected on his statement—Sunday, February 17, 2013. (App. II, pp. 98-107). But he inconsistently relied on the accuracy of the date and time of his card swipe at the movie theater as proof of his alibi. (App. II, pp. 98-107). Venckus's bank records also indicated recent out of state charges—just the weekend before the sexual assault, his bank card was swiped in St. Louis, Missouri; Chesterfield, Missouri; and at the Flying J in Wayland, Missouri, even though Venckus claimed he lacked interstate transportation. *Id.* Venckus has characterized these inconvenient facts as "red herrings" or "misrepresentations"—but what they really are is evidence that did not fit his theory. (Venckus Proof Brief, p. 47). A probable cause determination must consider all of the facts—and given all of the facts at hand, Rich reasonably believed (as did the criminal court and prosecutors) that probable cause existed throughout the prosecution.

d. Venckus Never Generated a Fact Issue on the Element of Actual Malice

With no record evidence of actual malice, Venckus asked the district court to infer actual malice from "the human response" of Rich after he allegedly "screwed up this case . . . ." (Venckus Proof Brief, p. 51). The district court correctly refused this invitation. Venckus's "actual malice" theory was grounded in his complaints regarding the plea deal prosecutors made with Markley. *Id.* Setting

---

suggests that his sister's change in testimony simply was the result of her obtaining more accurate information.

aside the fact that prosecutors exercising their discretion to enter a plea deal with Markley and continue the case against Venckus cannot reasonably be interpreted as competent evidence that Rich acted with actual malice toward Venckus, this claim is also barred by the law of the case. The Supreme Court has already reviewed Venckus's claims related to the Markley plea and stated: "None of this challenged conduct is actionable." *Venckus v. Iowa City*, 930 N.W.2d 792, 804 (Iowa 2019). This is not a viable theory of "actual malice."

Further, Venckus proclaims that Rich "screwed up" the case, should have done the "proper thing" and dismiss the case against him, and acted with actual malice in moving forward as a witness against him in order to "save face."[4] (Venckus Proof Brief, p. 51). This actual malice theory is affirmatively barred, too. "[I]ndignation or resentment" is not evidence of actual malice where "officers' purpose in initiating the prosecution was otherwise proper." *Gordon v. Noel*, 356 N.W.2d 559, 562 (Iowa 1984). It is undisputed in this case that Rich had probable cause to charge Venckus.

[4] Venckus's argument here amounts to nothing more than an inactionable negligent investigation claim. *Smith v. State*, 324 N.W.2d 299, 300 (Iowa 1982) (holding "there is no tort of negligent investigation of a crime."). In fact, Venckus's claim closely resembles the failed negligent investigation claim from *Smith* in that it relies not upon the lack of probable cause for the filing of the criminal charge, but upon alleged investigative failures to establish liability. Yet Venckus's claim is even weaker, because the alleged investigative failures occurred *after* probable cause was already established and control of the case had passed from law enforcement to prosecutors.

Venckus also appears to believe that Rich's testimony verifying that he worked with the Johnson County Attorney's Office to take Venckus's case to trial creates a genuine issue of material fact as to whether Rich improperly insisted upon or urged prosecution of Venckus. (Venckus Proof Brief, p. 51). Again, his claim falls flat. "It is not enough that [a defendant] appears as a witness against the accused either under subpoena or voluntarily, and thereby aids in the prosecution . . . ." Restatement (Second) § 655, cmt. c.

The district court correctly ruled Venckus's "continuing malicious prosecution" claim failed as a matter of law on multiple levels and its ruling should be affirmed.

II. THE DISTRICT COURT PROPERLY DISMISSED VENCKUS'S IOWA CONSTITUTIONAL TORT CLAIMS BECAUSE *GODFREY* CLAIMS DO NOT APPLY TO MUNICIPALITIES AND THEIR EMPLOYEES.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus that error is preserved on this issue and regarding the proper scope and standard of review.

B. Merits

The Iowa Supreme Court has never directly held constitutional tort claims apply to municipalities or their employees. More fundamentally, there is no provision of the Iowa Constitution that independently authorizes an Iowa constitutional tort damage claim against municipalities or municipal employees.

The legislature is the creator of Iowa's political subdivisions and it has not statutorily authorized Iowa constitutional tort claims against municipalities. *Bd. of Water Works Trustees of City of Des Moines v. Sac County Bd. of Supervisors*, 890 N.W.2d 50, 60 (Iowa 2017) ("Counties and other municipal corporations are, of course, the creatures of the legislature . . . .") (quotation omitted). In 2021 the Iowa legislature made explicit that it has not waived governmental immunity for municipalities for claims for money damages under the Constitution of the State of Iowa. 2021 Iowa Acts, ch. 183, §15 (codified at Iowa Code § 670.14). Nor do constitutional torts against municipalities find support in Iowa common law. *Lough v. City of Estherville*, 122 Iowa 479, 485, 98 N.W. 308, 310 (1904) (affirming dismissal of money damage claims against mayor and city council members for alleged constitutional violation related to municipal debt, and stating "While a violation of the Constitution in the respect in question is to be condemned, and the courts should interfere to prevent such violation whenever called upon so to do, yet we are not prepared to adopt the suggestion that an action for damages may be resorted to . . . ."); *cf. Van Baale v. City of Des Moines*, 550 N.W.2d 153, 157 (Iowa 1996) (affirming dismissal of damage claim against City of Des Moines and its employees based upon Iowa's equal protection clause).

Common law tort damage claims have of course been permitted against municipal employees—but those claims rest on a different footing than a money

damage action based solely upon the alleged violation of Iowa constitutional rights. *See Lennette v. State*, 975 N.W.2d 380, 407—08 (Iowa 2022) (McDonald, J., concurring).

The parties in *Godfrey II* did not include municipalities or municipal employees. *Godfrey v. State*, 898 N.W.2d 844, 845 ("*Godfrey II*") (Iowa 2017). The Iowa Supreme Court has previously refused to lump municipalities in with the State, in entirely different factual circumstances, when it comes to liability. *Cf. Thomas v. Gavin*, 838 N.W.2d 518 (Iowa 2013) (rejecting attempt to sweep municipalities and their employees into the ambit of Iowa Tort Claims Act in order to give municipal actors access to the intentional tort exemptions in the ITCA which do not exist in the IMTCA).

Post-*Godfrey II*, Iowa constitutional tort cases suggest the classes of defendants subject to *Godfrey* claims do not include *all* government entities and employees. In the first *Venckus* appeal, the Iowa Supreme Court pointed out *sua sponte* that the parties had not addressed certain predicate questions going to the viability of Venckus's Iowa constitutional tort claims against the municipalities, including "whether *Godfrey*-type claims can be asserted against municipalities." *Venckus*, 930 N.W.2d at 799 n.1. Neither *Baldwin* case directly decided the foundational issue of whether these types of claims apply to parties other than the State of Iowa and state officials acting in their official capacities. *Baldwin v. City*

of Estherville, ("Baldwin I"), 915 N.W.2d 259, 265 (Iowa 2018); *Baldwin v. City of Estherville ("Baldwin II")*, 929 N.W.2d 691, 701 (Iowa 2019). The procedural posture of these cases matters—as certified question cases, the supreme court was obligated to restrict its answers to the facts provided by the certifying court. *Id*. at 693. Notably, the supreme court decided *Venckus* two weeks after the *Baldwin II* decision (and nearly one year after *Baldwin I*). And yet, the court itself posed the question of whether *Godfrey* claims could be made against municipalities.

In *Wagner v. State*, 952 N.W.2d 843, 857 (Iowa 2020) the supreme court reiterated its holding in *Godfrey II*, stating: "In *Godfrey II*, we held that under certain circumstances, an aggrieved party could bring a constitutional claim against *the State* even though the legislature had not enacted a damages remedy for violation of that constitutional provision." (Emphasis added).

Nor should the *Godfrey* remedy be expanded to apply to municipalities and municipal employees. For over 160 years, no direct constitutional damage claim was recognized in Iowa's courts. *Godfrey II*, 898 N.W.2d at 884 (Mansfield, J. dissenting). Creating rights and remedies implicates policy considerations that are more appropriate for the legislature. *See Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013); *Boyer v. Iowa High Sch. Athletic Ass'n*, 256 Iowa 337, 347, 127 N.W.2d 606, 612 (1964) (declining plaintiffs' request to judicially abrogate the doctrine of governmental immunity, and stating that

"whether or not the state or any of its political subdivisions or governmental agencies are to be immune from liability for torts is largely a matter of public policy. The legislature, not the courts, ordinarily determines the public policy of the state."); *cf. Garrison v. New Fashion Pork, LLP*, 977 N.W.2d 67, 85 (Iowa 2022) ("The people, then, have vested *the* legislative authority, *inherent in them*, in the general assembly.") (emphasis in original) (quotation omitted); *Egbert v. Boule*, ---- U.S. ----, 142 S.Ct. 1793, 1797, 213 L.Ed.2d 54 (2022) (stating "At bottom, creating a cause of action is a legislative endeavor.").

Finally, public policy does not support expansion of the *Godfrey* remedy to municipalities and their employees. Expanding municipal liability necessarily impacts municipal planning and budgets, making budgets less predictable and subject to depletion by money judgments resulting from this new class of claims. *Venckus*, 930 N.W.2d at 809. And municipalities are already subject to liability for a broader range of common law intentional torts than the State. *Compare* Iowa Code § 669.14(4) *with* Iowa Code § 670.4. Further, the judicial creation of unpredictable liability could have a chilling effect on the zeal with which municipalities and their employees undertake their responsibilities. *See Egbert*, 142 S.Ct. at 1807 ("[A]ny new *Bivens* action 'entail[s] substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'").

Iowa's judiciary of course has a vital role in enforcing the Iowa Constitution as the supreme law of the land and as a negative check on unconstitutional government action. But the judiciary should not use its power to *make* law, a task that is exclusively the province of the legislative branch.

III. THE DISTRICT COURT CORRECTLY DISMISSED VENCKUS'S IOWA CONSTITUTIONAL TORT CLAIMS UNDER THE INALIENABLE RIGHTS CLAUSE AND SEARCH AND SEIZURE CLAUSE BECAUSE SUCH CLAIMS HAVE NOT BEEN RECOGNIZED BY THE IOWA SUPREME COURT.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus that error is preserved on this issue and regarding the proper scope and standard of review.

B. Merits

Whether the inalienable rights clause and search and seizure clause are "self-executing" such that those clauses can independently support a money damage claim for their alleged violation is a matter of first impression. In *Godfrey II* the plurality held that "[a] constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected . . . and is not self-executing when it merely indicated principles. . . . In short, if [it is] complete in itself, it executes itself." *Godfrey II*, 898 N.W.2d at 870 (quoting *Davis v. Burke*, 179 U.S. 399, 403, 21 S.Ct. 210, 45 L.Ed. 249 (1900)). The Iowa Supreme Court has never gone through this analysis with regard to the

Inalienable Rights Clause or Search and Seizure Clause in relation to constitutional tort claims.

1. The Inalienable Rights Clause

The Inalienable Rights Clause of the Iowa Constitution provides:

> All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness.

Iowa Const. art. I, § 1; *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 348 (Iowa 2015). At most, Article I, § 1 has been invoked to challenge legislation. *See, e.g.*, *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004) (applying Article I, § 1 to determine whether legislation was a reasonable exercise of the State's police power) *overruled by Garrison*, 977 N.W.2d 67, 85 (Iowa 2022). In *Garrison*, Justice Mansfield noted that the clause is "very generally worded and aspirational" and "could be invoked for practically any purpose by a court in search of previously undiscovered rights." *Id.* at 91. (Mansfield., J. concurring). That is, it is plainly not self-executing. Though Article I, § 1 expresses our State's aspirations and ideals, it is not "complete in itself" or self-executing.

2. The Search and Seizure Clause

Iowa Const. Article I, § 8 is entitled "Personal security—searches and seizures," and provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

While the clause certainly is "self-executing" in the sense that it is judicially enforceable, whether it is "self-executing" in the sense of permitting a damage claim is a different question. The California Supreme Court has considered this subtlety, observing "[o]ccasionally the argument over damages is cast in terms of whether the clause is 'self-executing.' However, [the 'self-executing' issue] truly concerns the question whether a clause is *judicially* enforceable at all, and does not automatically answer the question whether damages are available for enforceable clauses." *Katzberg v. Regents of Univ. of California*, 29 Cal. 4th 300, 307, 58 P.3d 339, 343 (2002).

The Iowa Supreme Court embraces a strong, independent interpretation of the Iowa Constitution's search and seizure clause for the purpose of protecting individual rights. *See State v. Wright*, 961 N.W.2d 396, 402 (Iowa 2021). But this is not the same as permitting a damage claim. The *Godfrey II* plurality relied upon prior cases that it interpreted as establishing that Article I, § 8 had previously been held to be self-executing in the sense of permitting a direct damage claim. *See Godfrey II*, 898 N.W.2d at 862-63. The *Godfrey II* dissent and the majority in *Wagner* has since criticized the *Godfrey II* plurality's legal analysis on this point,

clarifying that what has been allowed is traditional common law claims, not constitutional tort claims. *See Godfrey II*, 898 N.W.2d at 887 (Mansfield, J., dissenting); *Wagner*, 952 N.W.2d at 857; *see also Lennette*, 975 N.W.2d at 402 (McDonald, J. concurring) ("In the one hundred and sixty years between the adoption of the constitution and *Godfrey*, this court had never recognized a constitutional tort claim. And for good reason: there was and is no such cause of action.").

Other states have explored this issue, some finding no basis to hold their state search and seizure clauses self-executing such that a damage cause of action should be implied. *See Jones v. Philadelphia*, 890 A.2d 1188, 1213-1215 (Pa. Commw. Ct. 2006) (appeal denied Oct. 25, 2006) (discussing various policy considerations that counseled against recognizing a damage action for violation of the Pennsylvania Constitution's search and seizure clause); *Fields v. Mellinger*, 851 S.E.2d 789, 792 (W. Va. 2020) (no private right of action for money damages for violation of search and seizure clause, reasoning "Patently absent from this provision is any allowance for a private right of action for money damages"); *Tutt v. City of Abilene*, 877 S.W.2d 86, 89 (Tex. App. 1994), writ denied (Feb. 16, 1995) (no private cause of action under Texas Constitution search and seizure clause); *Moody v. Hicks*, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997) (declining to recognize private cause of action for money damages for violation of Missouri's

search and seizure clause and stating "[a money damages action for the federal search and seizure clause] is cognizable only because Congress enacted that legislation authorizing suits for federal constitutional violations. The Missouri General Assembly has not enacted similar legislation. Whether such a cause of action should be permitted is best left to the discretion of the General Assembly."). Likewise, Iowa's elected branch is the proper body to decide whether a damage remedy in this context is appropriate policy for our state.

C. Alternatively, *Godfrey II* Should Be Overturned

Godfrey II should be overturned for the reasons stated by Justice Mansfield's dissent in *Godfrey II*, and Justice McDonald's concurrence in *Lennette*. "In the one hundred and sixty years between the adoption of the constitution and *Godfrey*, this court had never recognized a constitutional tort claim." *Lennette*, 975 N.W.2d at 402 (McDonald, J., concurring). The "creation of a constitutional tort was contrary to the text of the constitution and was not supported by precedent, custom, or tradition." *Id.* "[A]dhering to demonstrably erroneous constitutional precedent disregards the supremacy of the Constitution and perpetuates a usurpation of the legislative power." *Id.* quoting *Gamble v. United States*, ---- U.S. ----, 139 S.Ct. 1960, 1984 (2019) (Thomas, J., concurring). This case presents an opportunity to correct course.

IV. THE DISTRICT COURT CORRECTLY RULED THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON ANY OF VENCKUS'S PURPORTED IOWA CONSTITUTIONAL TORT CLAIMS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus that error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly ruled "there are no genuine issues of material fact on the alleged constitutional violations." (App. I, p. 651).

B. Merits

1. Venckus Generated No Facts to Support an Article I, Section 1 Claim

Venckus's Article I, § 1 Claim is based on his allegation that Rich pursued "a meritless criminal investigation and prosecution." (Venckus Proof Brief, p. 62). He asserts an Inalienable Rights Clause violation occurs if a government official's conduct is "arbitrary conduct."[5] It is undisputed that there was probable cause to charge Venckus with sexual assault and undisputed that he was acquitted. A charge supported by probable cause cannot be arbitrary, as probable cause is all the law demands. Iowa Code § 804.1 (a criminal proceeding may be commenced by filing a complaint supported by probable cause). Further, the undisputed testimony

[5] Venckus's failure to cite any authority in support of his claim for violation of Article I, § 1 should be deemed a waiver of this claim. Iowa R. App. P. 6.903(2)(g)(3).

of prosecutor Anne Lahey regarding the many reasons *she* believed Venckus committed the sexual assault, none of which had anything to do with pressure exerted by Rich, set forth abundant undisputed facts that justified her continued prosecution. (Exh. EEE, p. 41:1-12).

2. Venckus Generated No Facts to Support an Article I, Section 8 Claim

Venckus claims he was "continually seized" because of the "wrongful allegations and continuing prosecution by Rich . . . ." (Venckus Proof Brief, p. 63). But he makes no allegation at all of an unlawful physical seizure. "A seizure occurs when an officer by means of physical force or show of authority in some way restrains the liberty of a citizen." *State v. White*, 887 N.W.2d 172, 176 (Iowa 2016). Venckus goes on to claim that his court-ordered pretrial restrictions amounted to an unlawful seizure. (Venckus Proof Brief, p. 63). But pretrial restrictions do not amount to a seizure. *See Wendt v. Iowa*, 971 F.3d 816, 819 (8th Cir. 2020) (pretrial restrictions such as being forced to post bond, appear in court, or made to answer charges do not constitute a Fourth Amendment seizure). And "wrongful allegations"—especially where the existence of probable cause for a criminal charge is conceded—do not support a constitutional violation under Iowa law, either. Long ago the Iowa Supreme Court stated "The Constitution does not guarantee that only the guilty will be arrested. If it did, section 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect

released." *Christenson v. Ramaeker*, 366 N.W.2d 905, 908 (Iowa 1985) (quoting *Baker v. McCollan*, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979)).

3. Venckus Generated No Facts to Support an Article I, Section 9 Claim

Preliminarily, Venckus suggests the established "shocks the conscience" test is not applicable to his *Godfrey* claim. (Venckus Proof Brief, p. 65). Even after deciding *Godfrey II*, the Iowa Supreme Court has continued to apply the "shocks the conscience" test for substantive due process claims brought pursuant to Article I, § 9 of the Iowa Constitution. *See Lennette*, 975 N.W.2d at 393; *Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 554 (Iowa 2019). Venckus also contends that because Detective Rich did not engage in "split-second or immediate" decision-making, the shocks the conscience standard should be relaxed. His suggestion is contrary to the court of appeals' analysis in *Al-Jurf v. Scot-Conner, No. 10-1227*, 2011 WL 1584366, at *7 (Iowa Ct. App. April 27, 2011), where that court specifically rejected that a more lenient standard should apply in substantive due process claims where there is not "split second" decision-making.

Venckus's substantive due process claim is meritless, in any event. He classifies his claim as a "reckless investigation" claim, which Iowa courts have never recognized. Venckus cites one Iowa case that mentions a reckless investigation claim. *See Sheeler v. Nevada Comm. Sch. Dist.*, No. 17-1275, 2018 WL 3655090 (Iowa Ct. App. Aug. 1, 2018). In *Sheeler*, the court of appeals

observed "Sheeler cites no Iowa case law supporting a violation based on failure to investigate . . . ." before dismissing the plaintiff's failure to investigate claim under the Iowa Constitution. *Id.* at *3.

Moreover, whether conduct is conscience-shocking is a question of law and Venckus failed to generate facts of any conscience-shocking behavior. *Stockley v. Joyce*, 963 F.3d 809, 818 (8th Cir. 2020). It is undisputed that this was an awful, violent crime, and that the DNA evidence against Venckus was regarded by the prosecutors as compelling. Venckus's alleged exculpatory evidence and theories were made known to the prosecutors, who rejected them. The jury acquitted him. But the success of a criminal defense does not render the prosecution itself conscience-shocking. The undisputed facts here simply illustrate the criminal justice process at work. *See Wendt*, 971 F.3d at 823 (affirming summary judgment dismissal of reckless investigation claim and stating "Defendants may not be held liable merely for aggressively investigating the crime, believing witnesses, following leads, and discounting those pieces of evidence that do not fit with the evidence at the scene of the crime."); *Blazek v. City of Nevada*, 939 N.W.2d 123, 2019 WL 3711358, at *5 (Iowa Ct. App. Aug. 7, 2019) (applying shocks the conscience standard to plaintiff's Iowa constitutional tort claim and finding as a matter of law officers' conduct not conscience-shocking). Venckus's repetitive, conclusory insistence that the evidence he put forth was "overwhelming" evidence

of his innocence does not generate a jury question. "Conclusory allegations of recklessness will not suffice." *Walz v. Randall*, 2 F.4th 1091, 1105 (8th Cir. 2021) (affirming grant of summary judgment on plaintiff's reckless investigation claim related to a dismissed sexual assault charge where plaintiff claimed deputies should have interviewed more people and approached the victim's story with more suspicion); *Hawkins v. Gage Cnty.*, 759 F.3d 951, 957 (8th Cir. 2014) (same).

Finally, *Venckus* cites two cases that do not support his claim. In *Wilson v. Lawrence County*, the Eighth Circuit allowed a reckless investigation claim where there was no "independent physical or circumstantial evidence linking Wilson to the crime, or corroborating his confession." 260 F.3d 946, 950 (8th Cir. 2001). In Venckus's case there was a great deal of physical evidence. And in *Akins v. Epperly*, the Eighth Circuit rejected the plaintiff's substantive due process claim because even with the plaintiff's alleged errors and inconsistencies in the investigation, there was no "conscience-shocking reckless or intentional conduct." 588 F.3d 1178, 1182 (8th Cir. 2009). The district court's ruling dismissing Venckus's substantive due process claim should be affirmed.

V. THE DISTRICT COURT CORRECTLY RULED JUDICIAL PROCESS IMMUNITY BARS ALL OF VENCKUS'S CLAIMS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly

ruled "if Plaintiff has stated viable causes of action, Defendants would be entitled to judicial process immunity." (App. I, p. 652).

B. Merits

"Absolute immunity extends to police officer functions falling within the scope of the judicial process immunity, e.g., testifying as an ordinary witness. . . . As discussed above, this is true whether the claims arise under common law or under the state constitution." *Venckus*, 930 N.W.2d at 806. The Iowa Supreme Court found the following actions by the prosecutors in Venckus's criminal case were entitled to absolute immunity: initiating the case and continuing the prosecution; strategic and discretionary decisions regarding the prosecution; decisions regarding entering into a plea agreement with Markley in exchange for Markley's testimony against Venckus; decisions about whether to call Markley as a witness; decisions to "shop around" for an expert; and evaluation of Venckus's alibi evidence. *Id.* at 804-06.

On remand Venckus did nothing to differentiate his claims against Rich from his failed claims against the prosecutors. The "wrongs" he alleges occurred happened in last 5 ½ months of a criminal prosecution that took over two years. His primary allegation of "malice" by Rich is that the prosecutors entered the plea deal with Markley. Venckus's amended petition reveals that the claims against the prosecutors were simply relabeled and alleged against Rich, but remain the actions

of an advocate, not an investigator (continuing to seek to "convict"; approving a plea; evaluating expert witnesses). (App. I, pp. 23-24).

Venckus has conceded that there was probable cause for Rich to file his criminal complaint, and instead his allegations relate to Rich remaining a stalwart *ordinary* witness against him during the criminal prosecution.[6] *Minor v. State*, 819 N.W.2d 383, 399 (Iowa 2012) (absolute immunity protected social worker from liability for affidavit filed after a CINA proceeding was initiated). He unabashedly seeks to impose liability on Rich and the City based on Rich's deposition and trial testimony—functions of a police officer as an ordinary witness that are clearly shielded by absolute immunity.

Absolute immunity requires this Court to consider the impact that exposure to liability would have upon the judicial process, and whether absolute immunity will "free the judicial process from the harassment and intimidation associated with litigation." *Id*. at 394. Venckus's allegations against Rich and the City are an attack on the judicial process itself. He concedes there was probable cause to charge him, but then attacks the mechanism of the criminal process by alleging his opponents should have given up based on his demands. The adversarial process

[6] Venckus he has waived any claim against Rich as a "complaining witness." A "complaining witness" is a party who "procured an arrest and initiated a criminal proceeding . . . setting the wheels of government in motion by instigating legal action." *Rehberg v. Paulk*, 566 U.S. 356, 370-71, 132 S.Ct. 1497, 182 L.Ed.2d 593

does not yield to demands; it requires a testing of evidence and the due process of law. In this case the independence of prosecutors is at stake, as Venckus attacks (albeit, through the strawman of a police investigator) core prosecutorial functions. The independence of witnesses is also at stake, as Venckus attacks Rich in his continued role as a witness against him. The district court properly dismissed his claims pursuant to judicial process immunity.

VI. THE DISTRICT COURT CORRECTLY RULED DISCRETIONARY FUNCTION IMMUNITY BARS ALL OF VENCKUS'S CLAIMS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly ruled Rich and the City were entitled to discretionary function immunity against Venckus's claims. (App. I, pp. 652-653).

B. Merits

Venckus misstates the law regarding the applicability of the Iowa Municipal Tort Claims Act (IMTCA) to intentional tort claims and Iowa constitutional tort claims. *Thomas v. Gavin*, 838 N.W.2d 518 (Iowa 2013) did not hold that the immunities set forth within the IMTCA do not apply to intentional tort claims brought against municipal defendants. *Thomas* only held that municipal

---

(2012) (cited with approval in *Minor v. State*, 819 N.W.2d 383, 395—96 (Iowa 2012)). Venckus concedes Rich did no wrong by charging him with sexual assault.

defendants are not immunized against intentional tort claims pursuant to the Iowa Tort Claims Act in Chapter 669 just because they are enforcing state law. *Id.* at 527. The *Thomas* court even explicitly recognized the applicability of the IMTCA's due care immunity in that case. *Id.* at 524.

Venckus does not address the merits of the district court's discretionary immunity ruling. But the way law enforcement carries out an investigation is a classic function involving an official's discretionary decision-making. For this very reason, Iowa refuses to recognize a negligent investigation claim. *Smith*, 324 N.W.2d at 301. The federal caselaw on "reckless investigation" claims affirms that "courts are particularly ill-suited to second-guess determinations about 'whether a particular lead warrants [further] investigation.'" *Saidu v. City of Des Moines, Iowa*, 791 F. Appx. 626, 628 (8th Cir. 2019). As the district court pointed out, Rich carried on an active investigation that lasted nearly a year before Venckus was even charged, and it included multiple forensic examinations of people, a crime scene investigation, multiple warrants, interviews, a polygraph examination, and copious DNA testing and re-testing. But Venckus's claim is even weaker than a negligent investigation claim. He attempts to impose liability upon Rich for not performing post-arrest acts to derail a properly initiated and ongoing prosecution that prosecutors independently believed in.

Further, Rich also had no obligation to believe Venckus's claim that he was in Chicago at the times he said he was or that his blanket was the real reason his DNA was on and inside the victim. "[I]nnocent explanations—even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect." *District of Columbia v. Wesby*, 583 U.S. ----, 138 S.Ct. 577, 592, 199 L.Ed.2d 453 (2018). The prosecution had an opposing theory of the case that was rooted in physical evidence. It was a matter of discretion for Rich, who, after learning of the DNA evidence identifying Venckus's sperm and non-sperm DNA on multiple places on and inside of the victim, reasonably did not believe Venckus's transfer theory or alibi defense.

VII. THE DISTRICT COURT CORRECTLY RULED CHAPTER 670 IMMUNITIES BAR ALL OF VENCKUS'S CLAIMS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly ruled Rich and the City were entitled to statutory immunity against Venckus's claims pursuant to Iowa Code § 670.4(1)(d) (immunity based on operation of rule or statute) and § 670.4(1)(j) (immunity based on third-party control). (App. I, p. 653).

B. Merits

Venckus contends Rich cannot be immune from his malicious prosecution claim because "the prosecutor ultimately decides whether to dismiss charges." (Venckus Proof Brief, p. 71). This is a concession. As Defendants have always argued, Rich had no power to dismiss the prosecution, and Rich is immune based on operation of Iowa law against Venckus's "continued" malicious prosecution claim and constitutional tort claims. *See* Iowa R. Crim. P. 2.33(1); Iowa Code § 801.4(12) and § 801.4(13).

And as previously outlined Venckus failed to put forth any genuine material fact in support of his purported claim that Rich had any control over how the prosecution of Venckus proceeded. *Cf. Gordon*, 356 N.W.2d at 563 (reversing denial of directed verdict on intentional interference with business advantage claim against police officers who testified in a license suspension case, because the "exercise of independent judgment by the licensing authorities breaks the chain of causation between the officers' allegedly false statements and Gordon's loss of business expectancies."); *Garang*, 2 F.4th at 1123 (where it was clear that the county attorneys had evaluated the evidence, made decisions about how to proceed with charges, and the police had no authority over the handling of criminal charges, it was "clear from the record" that plaintiff had sued the wrong parties).

Rich could not, and did not, control the prosecution, and is therefore immune pursuant to Section 670.4(1)(j).

VIII. THE DISTRICT COURT CORRECTLY RULED IOWA CODE SECTION 670.4A QUALIFIED IMMUNITY BARS VENCKUS'S CLAIMS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly ruled Rich and the City were entitled to qualified immunity under Iowa Code Section 670.4A(1)(a)-(b). (App. I, pp. 653-654).

B. Merits

Venckus never reaches the merits of the district court's statutory qualified immunity ruling. Rather, he attacks the validity of Chapter 670 qualified immunity, arguing it cannot apply retroactively and is unconstitutional. Both arguments should be rejected.

1. Statutory Qualified Immunity Applies

a. The Correct Temporal Application of Iowa Code Section 670.4A Requires Its Application in This Case Because the Events of Legal Consequence Relate to Adjudicatory Conduct, Not the Underlying Incident

Under the test stated in *Hrbek v. State*, 958 N.W.2d 779 (Iowa 2021) the conduct regulated by Section 670.4A(1)—the court's application of the statutory qualified immunity test in Section 670.4A to a pending claim—is adjudicative, will

occur in the future, and is not impermissibly retroactive. The Iowa Supreme Court has recognized that determining whether a statute applies "retrospectively, prospectively, or both is simply a question regarding the correct temporal application of a statute." *Hrbek*, 958 N.W.2d at 782. In *Hrbek* the statute at issue was enacted in 2019, 22 years after the petitioner filed his post-conviction relief application and while that action was pending. *Id.* at 783. The statute prevented the petitioner from filing pro se supplemental briefs. *Id.* at 782. The petitioner alleged the 2019 statute could not apply "retroactively" to his pending postconviction relief action because he had a vested right in filing pro se briefs at the time he filed his original postconviction relief action. *Id.* The Court rejected this argument, finding that the conduct the statute regulated, the filing of briefs, would occur during the ongoing adjudicative process, and therefore, did not involve "a retrospective application of the statute within any common-sense understanding of the term 'retrospective.'" *Id.* at 783.

Hrbek controls this case. The conduct that Iowa Code Section 670.4A regulates is the court's adjudicative review of whether a claim is legally cognizable under Chapter 670. *See* Iowa Code § 670.4A(1). And the legal review is simply for whether a plaintiff's claim was *clearly established* under Iowa law. Of course, for a viable claim to exist at all under Chapter 670, there must be a recognized "right, privilege, or immunity" pled by the plaintiff.

This adjudicative requirement is factually prospective, not retrospective, in that it occurs after the filing of a lawsuit and is a legal test applied by the court. The qualified immunity statute regulates *the litigation process* related to past conduct of government employees, not past conduct itself or a plaintiff's *rights*. Qualified immunity "is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated." *Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). If litigation arises, the doctrine is meant to weed out insubstantial claims against government officials. *Id*. Qualified immunity regulates pretrial matters such as discovery, as well, since "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Id.* at 526. (quotation omitted)

These are all concerns that arise in the future, not the past. In *Hrbek* the Supreme Court collected cases illustrating a "prospective application of current law." *See Combs v. Comm'r of Soc. Sec.*, 459 F.3d 640, 648–49 (6th Cir. 2006) ("[T]he regulatory change had no retroactive effect because the presumption defined by the listing is a rule of adjudication and therefore has its effect on claims at the time of adjudication."); *United States v. Nunemacher*, 362 F.3d 682, 685–86 (10th Cir. 2004) (new standard of appellate review applied notwithstanding that it was adopted after the proceedings in the trial court were concluded); *United States v. Mallon*, 345 F.3d 943, 946 (7th Cir. 2003) (same); *United States v. Holloman*,

765 F. Supp.2d 1087, 1091 (C.D. Ill. 2011) ("[T]he relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of a mandatory minimum is a sentencing factor, not an element of the offense. Accordingly, the application of the [Fair Sentencing Act] is the prospective application of current law, not a retroactive exercise.") (emphasis omitted)).

The district court correctly ruled the new qualified immunity applies because the conduct regulated by the statute is adjudicatory and occurs in the future, not the past.

b. Venckus Has No "Vested Rights" in a Specific Qualified Immunity Formulation

Venckus's claim he has a vested property right that prohibits the constitutional application of Iowa Code Section 670.4A is flawed. He has no vested right in the continuance of a specific formulation of the qualified immunity defense to municipal tort claims. *Cf. Baldwin v. City of Waterloo*, 372 N.W.2d 486, 492 (Iowa 1985) ("Plaintiff had no vested right in a particular result of this litigation or in the continuation of the principle of unlimited joint and several liability."). In *Baldwin*, the Supreme Court applied the statutory version of joint and several liability from the newly enacted Iowa Code Chapter 668 to the plaintiff's pending lawsuit and held there was no violation of the plaintiff's substantive due process rights. *Id.*

Likewise, in this case, the statutory qualified immunity defense does not impact the substance of Venckus's claim, which was—and still is—based upon his alleged violations of the Iowa Constitution and Iowa common law. A court deciding whether his claim is "clearly established" under Iowa law so as to avoid the application of statutory qualified immunity is the "legal machinery" at work. Contrast this to the case cited by Venckus, *Thorp v. Casey's General Stores, Inc*., 446 N.W.2d 457 (Iowa 1989), which involved the legislature's substantive amendment to Iowa Code § 123.92 (dram shop liability) to eliminate the branch of statutory liability for the "selling or giving" of beer. *Thorp*, 446 N.W.2d at 460. That amendment destroyed the plaintiff's claim entirely. *Id.*

2. Venckus Fails to Carry His Burden of Proof to Establish Iowa Code Section 670.4A Is Unconstitutional

Venckus argues that "[t]he Iowa legislature is acting outside the scope of its authority in attempting to define the meaning of the Iowa Constitution." (Venckus Proof Brief, p. 75). The legislature has the right to regulate constitutional damage claims, and nothing about the qualified immunity provision in Section 670.4A "overrules" *Baldwin I.* In fact, the statute itself explicitly states that "This section shall apply in addition to any other statutory or common law immunity." Iowa Code § 670.4A(5). Further, there is nothing in Iowa Code § 670.4A that even refers to the Iowa Constitution, much less attempts to define its meaning.

The Iowa Supreme Court recently reviewed the separation-of-powers doctrine in *State v. Thompson*, 954 N.W.2d 402 (Iowa 2021). In *Thompson* a criminal defendant claimed the legislature's statutory enactment prohibiting pro se supplemental briefs was unconstitutional as a violation of the separation of powers because it invaded the province of the courts to exercise the judicial power to provide for the fair and impartial administration of justice. *Id.* at 409. The Supreme Court found no violation of the separation of powers in *Thompson* because "the constitutional text reserves the legislative department authority to regulate the practice and procedure in all Iowa courts . . . ." *Id.* at 412 (citing Iowa Const. Art. V, § 4). It noted further that although the judicial department can make rules of practice and procedure, "the legislative department continues to legislate on the topics of who can participate in judicial proceedings, what information or evidence can be present in judicial proceedings, and what information or evidence can be considered in judicial proceedings." *Id.* at 413.

In *Wagner* the Supreme Court likewise specifically acknowledged the legislature's right to regulate constitutional tort claims. *Wagner*, 952 N.W.2d at 847. Iowa Code § 670.4A regulates damage claims against municipalities and municipal officials in several ways, one of which is qualified immunity. Iowa Code §§ 670.4A(3), (4). It is the province of the legislature, not the courts, to

determine whether and under what circumstances municipalities are subject to tort liability. *Boyer*, 256 Iowa at 347, 127 N.W.2d at 612.

Venckus concedes that application of Iowa Code § 670.4A's qualified immunity standard "may" prevent him from obtaining a remedy—but he does not contend that the qualified immunity statute *eliminates* his potential remedies. (Venckus Proof Brief, p. 77). Just because Venckus cannot meet the regulatory strictures the Iowa legislature has set forth does not mean an adequate remedy is unavailable to him. It just means his claims are not strong enough to survive qualified immunity. And his claims are not strong enough. Iowa law has never recognized his theories of liability—"continued" malicious prosecution, negligent investigation, or reckless investigation, much less make them clearly established.

Venckus does not meet his heavy burden to prove Iowa Code § 670.4A(1) is unconstitutional.

IX. THE DISTRICT COURT CORRECTLY RULED RICH IS ENTITLED TO *BALDWIN* QUALIFIED IMMUNITY ON VENCKUS'S PURPORTED IOWA CONSTITUTIONAL TORT CLAIMS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly ruled Rich and the City were entitled to *Baldwin* qualified immunity. (App. I, p. 654).

B. Merits

Venckus provides no substantive argument that goes to the issue of whether Rich acted with due care. He rests on his prior arguments. But the *Baldwin* analysis requires more—that Rich both violated the Iowa Constitution, and that in committing a violation, he acted without due care. *Baldwin I*, 915 N.W.2d at 281. The district court catalogued the actions taken by Rich that established due care: obtaining forensic evidence against Venckus; investigating for a year after the crime; investigating the alibi; and findings by the district court establishing probable cause. (App. I, p. 654). Venckus fails to recognize this distinction and provides no argument against *Baldwin* immunity. He also provides no authority in support of his claim that the district court erred in granting Rich qualified immunity, and his argument is therefore waived. Iowa R. App. P. 6.903(2)(g)(3).

X. THE DISTRICT COURT CORRECTLY RULED VENCKUS'S CLAIMS WERE UNTIMELY FILED AND ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Preservation of Error and Scope and Standard of Review

Rich and the City agree with Venckus error is preserved on this issue and regarding the proper scope and standard of review. The district court correctly ruled Venckus's claims are all time-barred by Iowa Code § 670.5. (App. I, p. 654).

B. Merits

Rich charged Venckus on January 24, 2014. Trial occurred in September 2016. Venckus filed this lawsuit on March 15, 2018. And Venckus's position on when he suffered an injury for the purpose of applying Iowa Code § 670.5's two-year statute of limitations has shifted like sand throughout this lawsuit. The City contends the statute of limitations for Venckus's claims began to run when Venckus was charged on January 24, 2014. But even if Venckus's theory that the statute of limitations began later were accepted, Venckus never established a genuine issue of material fact regarding the date of his alleged injury.

Without ever identifying any discrete act or specific date, Venckus stated during discovery that generally his rights were violated "from March 15, 2016 through the last day of the trial that began on September 7, 2016." (App. II, pp. 212-213). He then claimed during summary judgment that his injury occurred "sometime between April 1, 2016 and when [Rich] testified at trial in September 2016 . . . ." (Plaintiff's Summary Judgment Brief, p. 80). Then, he argued that his injury occurred on the date he was acquitted, September 21, 2016, an argument he abandoned on appeal. (Plaintiff's Summary Judgment Brief, p. 82). Now he asks this Court, as he did the district court, to find that his injury date was "sometime" within a 5½ month period leading up to his criminal trial. (Venckus Proof Brief, p 82). The district court rightfully rejected this invitation, finding that Venckus

"failed to identify any specific evidentiary fact showing the existence of a genuine issue of material fact on the question of whether his claims were brought in a timely manner." (App. I, p. 654).

Venckus has never offered a piece of evidence that would support his contention that Rich believed probable cause dissipated during the fateful 5½ months, and there were criminal court rulings from this very timeframe finding probable cause existed and the case against him should proceed. Many of the "wrongs" that Venckus complains of regarding the continued prosecution also fall outside of the statute of limitations, including the allegedly inadequate investigation by Rich and the Google drive's "overwhelming" evidence establishing his innocence.

Venckus alleges that if his arrest and charging date triggered the statute of limitations on his claims, there could be no *Brady* claims or "unjustifiable continuation of prosecutions" claims. *See Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). His argument is confusing. A *Brady* claim is not actionable until an accused is tried and convicted because the injury is the conviction, and the "wrongful" act (concealing evidence) is unknown to the accused. *See Livers v. Schenck*, 700 F.3d 340, 359 (8th Cir. 2012) ("Assuming appellants failed to disclose exculpatory evidence, there was no *Brady* violation because [appellees] were not convicted."). And Venckus fails to cite any

"unjustifiable continuation of prosecution" case that would have been barred by the statute of limitations in Iowa Code § 670.5. That may be because Iowa law does not recognize such claims. But even if it did, nothing prevented Venckus from filing this lawsuit before his criminal trial concluded. If his complaint was that probable cause was lacking for the ongoing prosecution, then the outcome of the criminal trial would have no relevance as probable cause was allegedly lacking throughout the prosecution. Even at his bond hearing on January 30, 2014, Venckus's family claimed that he was in Chicago when the crime occurred. (Exh. O (1/304 Order as to Bond Modification); Exh. Q (Deputy David Stanton Narrative, 1/31/14)).

Venckus's lawsuit was filed over two years too late. The district court correctly ruled that he failed to produce any genuine issue of material fact establishing an injury that occurred within two years of the date he filed this lawsuit on March 15, 2018.

CONCLUSION

There are many lines of analysis to this winding case, but all boil down to the same principle. Our system of justice depends upon the judicial process remaining free from intimidation and harassment. This means that while law enforcement can and absolutely should be held liable when they abuse their role in the criminal process, they should not be punished for simply playing their part. Venckus's

lawsuit lacks legal merit and presents no genuine issue of material fact for a jury, and the district court's dismissal should be affirmed.

REQUEST FOR ORAL ARGUMENT

Defendants request oral argument in this matter.

Respectfully submitted,

/s/ Elizabeth J. Craig
Elizabeth J. Craig ATM520022
Assistant City Attorney

/s/ Jennifer L. Schwickerath
Jennifer L. Schwickerath ATM520023
Assistant City Attorney
410 E. Washington Street
Iowa City, IA 52240
(319) 356-5030
icattorney@iowa-city.org
ATTORNEYS FOR ANDREW RICH and CITY OF IOWA CITY

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

> This brief contains 13,957 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:

> This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 pt. Times New Roman.

/s/ Elizabeth Craig
Elizabeth Craig

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that Defendants-Appellees' Final Brief was filed with the Clerk of the Iowa Supreme Court and served on all counsel of record by using the EDMS filing system.

/s/ Elizabeth Craig
Elizabeth Craig

CERTIFICATE OF COST

The undersigned certifies that there was no cost associated with the production of this Final Brief.

/s/ Elizabeth Craig
Elizabeth Craig