IN THE IOWA SUPREME COURT

No. 18-1280

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JOSHUA VENCKUS,

Plaintiff-Appellee,

v.

CITY OF IOWA CITY; ANDREW RICH; JOHNSON COUNTY, IOWA; ANNE LAHEY; NAEDA ELLIOTT; and DANA CHRISTIANSEN,

Defendants-Appellants.

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

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# FINAL BRIEF OF DEFENDANTS-APPELLANTS CITY OF IOWA CITY AND ANDREW RICH

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Eric Goers
Susan Dulek
Assistant City Attorneys
410 East 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 ..... 5

ROUTING STATEMENT ..... 17

STATEMENT OF THE CASE ..... 17

STATEMENT OF THE FACTS ..... 20

ARGUMENT ..... 22

I. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S MALICIOUS PROSECUTION CLAIM BECAUSE THERE IS NO DISPUTE THAT THE CHARGE AGAINST HIM WAS SUPPORTED BY PROBABLE CAUSE, AND THERE IS NO CAUSE OF ACTION RECOGNIZED IN IOWA AGAINST LAW ENFORCEMENT FOR A "CONTINUED" PROSECUTION ..... 22

A. The City Defendants Preserved Error. ..... 23
B. Scope and Standard of Appellate Review ..... 25
C. Argument ..... 25
1. The City Defendants Were Legally Incapable of Either Carrying Forward or Terminating the Prosecution. ..... 25
2. Venckus Attempts to Make a Back-Door Malicious Prosecution Claim Against the Prosecutors by Substituting a Law Enforcement Defendant, Thereby Evading Absolute Prosecutorial Immunity. ..... 27
3. Iowa Has Not Adopted Restatement (Second) of Torts §655, and Even if It Had, the District Court Erroneously Applied It. ..... 28
4. Rich Lost Control of the Case Upon Filing the Charge. ..... 32

II. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S *GODFREY* AND MUNICIPAL TORT CLAIMS AGAINST THE CITY DEFENDANTS AS BARRED BY ABSOLUTE IMMUNITY BECAUSE RICH, A POLICE INVESTIGATOR, IS ENTITLED TO ABSOLUTE IMMUNITY AGAINST CLAIMS MADE THAT ATTACK HIS ROLE AS A WITNESS FOR THE PROSECUTION. ..... 33

A. The City Defendants Preserved Error. ..... 33
B. Scope and Standard of Appellate Review ..... 34
C. Argument ..... 34

1. Absolute Immunity for Law Enforcement Witnesses in *Godfrey* Claims Should be Recognized. ..... 34
a. Common Law Recognizes the Importance of Absolute Immunity for Government Actors Performing Actions Integral to the Judicial Process, Like Ordinary Witnesses and Prosecutors. ..... 36
i. Ordinary Witnesses ..... 37
ii. Prosecutors ..... 41
b. Absolute Immunity for Law Enforcement Witnesses Is Well Established in §1983 Actions and Also Applied in *Bivens* Claims. ..... 42
c. The States That Allow Direct Constitutional Claims Recognize Absolute Immunity for Witnesses. ..... 46
2. Absolute Privilege Bars Venckus's IMTCA Claims Against Rich, Because Those Claims Also Revolve Around Rich's Role as a Prosecution Witness Following the Charge and Arrest. ..... 48
III. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S COMMON LAW TORT CLAIMS AND *GODFREY* CLAIMS AGAINST THE CITY DEFENDANTS AS TIME-BARRED UNDER THE IOWA MUNICIPAL TORT CLAIMS ACT. ..... 48
A. The City Defendants Preserved Error. ..... 48
B. Scope and Standard of Appellate Review ..... 49
C. Argument ..... 49
1. Venckus's IMTCA Claims Are Time-Barred under Iowa Code §670.5. ..... 50
a. Defamation ..... 53
b. Abuse of Process ..... 54
c. Malicious Prosecution ..... 56
2. Venckus's *Godfrey* Claims Are Also Time-Barred under Iowa Code §670.5. ..... 60
a. The Appropriate Statute of Limitations Is Determined by the "Actual Nature" of the Action. ..... 61
b. Claims under the IMTCA Are Analogous to *Godfrey* Claims, and a Two-Year Statute of Limitations Is Provided in Chapter 670. ..... 63

c. Statutes of Limitations in Other States That Recognize Direct Constitutional Claims. ..... 63

IV. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S *GODFREY* CLAIMS AS UNAVAILABLE BECAUSE THERE IS AN ADEQUATE STATUTORY REMEDY FOR HIS CLAIMS PROVIDED BY THE IOWA MUNICIPAL TORT CLAIMS ACT. ..... 65

A. The City Defendants Preserved Error. ..... 66
B. Scope and Standard of Appellate Review ..... 66
C. Argument ..... 67
1. Robust Remedies for Venckus's Iowa Constitutional Claims Are Available under the IMTCA. ..... 68
2. *Baldwin* Did Not Hold the IMTCA Does Not Provide Adequate Remedies for Constitutional Claims. ..... 70

CONCLUSION ..... 71

REQUEST FOR ORAL ARGUMENT ..... 71

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS 73

CERTIFICATE OF FILING AND SERVICE ..... 73

## TABLE OF AUTHORITIES

**Cases**

*Acuna v. Regents of University of California*,
56 Cal. App. 4th 639 (1997) ..... 64
*Baldwin v. City of Estherville*,
915 N.W.2d 259 (Iowa 2018) ..... *passim*
*Bates v. Hadden*,
No. 3:12-CV-00123-CFB, at *20 (S.D. Iowa Sept. 5, 2013) ..... 44
*Beck v. Phillips*,
685 N.W.2d 637 (Iowa 2004) ..... 37
*Beeck v. Kapalis*,
302 N.W.2d 90 (Iowa 1981) ..... 40
*Bird v. W.C.W.*,
868 S.W.2d 767 (Tex. 1994) ..... 47
*Bivens v. Six Unknown Federal Narcotics Agents*,
403 U.S. 388 (1971) ..... *passim*
*Briggs v. Goodwin*,
712 F.2d 1444 (D.C. Cir. 1983) ..... 43, 46
*Briscoe v. Lahue*,
460 U.S. 325 (1983) ..... *passim*
*Buszka v. Iowa City Cmty. Sch. Dist.*,
*11 2017 Iowa App. LEXIS 124 ..... 57
*Butz v. Economou*,
438 U.S. 478 (1978) ..... 46
*Carlson v. Green*,
446 U.S. 14 (1980) ..... 68, 69
*City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*,
617 N.W.2d 11 (Iowa 2000) ..... 51
*Clark v. Figge*,
181 N.W.2d 211 (Iowa 1970) ..... 61
*Comes v. Microsoft Corp.*,
646 N.W.2d 440 (Iowa 2002) ..... 25
*Couch v. Schultz*,
193 Mich. App. 292 (1992) ..... 47
*Curtis v. Bembenek*,
48 F.3d 281 (7th Cir. 1995) ..... 44
*Daloia v. Rose*,
849 F.2d 74 (2d Cir.) ..... 43

*De Lourdes Torres v Jones*,
26 N.Y.3d 742 (2016 Ct. of App.).....47
*Dobratz v. Krier*,
2011 Iowa App. LEXIS 1416, *11 (Iowa Ct. App.) .....56
*Doe v. New London Cmty. Sch. Dist.*,
848 N.W.2d 347 (Iowa 2014).....51
*Dowd v. New Richmond*,
137 Wis.2d 539 (1987) .....47
*Franklin Collection Serv. v. Kyle*,
955 So.2d 284 (Miss. 2007) .....47
*Fuller v. Local Union No. 106*,
567 N.W.2d 419 (Iowa 1997).....55
*Fullerton v. Florida Med. Ass'n, Inc.*,
938 So.2d 587 (Fla. Dist. Ct. App. 2006).....47
*Godfrey v. State of Iowa*,
898 N.W.2d 844 (Iowa 2017)..... *passim*
*Hannaway v. Deutsche Bank Nat'l Trust Co.*,
2011 U.S. Dist. LEXIS 24775 at *8 (W.D. Tx. 2011) .....64
*Heib v. Lehrkamp*,
704 N.W.2d 875 (S.D. 2005).....33
*Holt v. Castaneda*,
832 F.2d 123 (9th Cir. 1987) .....43
*Imbler v. Pachtman*,
424 U.S. 409 (1976) ..... 38, 41
*Johnson Cty. v. O'Connor*,
231 Iowa 1333, 4 N.W.2d 419 (Iowa 1942).....57
*Jones v. Coward*,
193 N.C. App. 231 (2008) .....47
*Kiner v. Reliance Ins. Co.*,
463 N.W.2d 9 (Iowa 1990).....53
*Kobrin v. Gastfriend*,
443 Mass. 327 (2005) .....47
*Limone v. United States*,
579 F.3d 79 (1st Cir. 2009) .....29
*Loigman v. Twp. Comm.*,
185 N.J. 566 (2006) .....47
*Macko v. Byron*,
760 F.2d 95 (6th Cir. 1985) .....43
*Mahoney & Hagberg v. Newgard*,
729 N.W.2d 302 (Minn. 2007) .....47

*Marrogi v. Howard*,
805 So.2d 1118 (La. 2002) ..... 46
*McFarland v. McFarland*,
No. C08-4047-MWB, 2011 U.S. Dist. LEXIS 106941, at *37 (N.D. Iowa Sep. 20, 2011) ..... 40
*McNall v. Frus*,
336 Ill. App.3d 904 (3rd Dist Ct. App. 2002) ..... 46
*Meier v. Senecaut*,
641 N.W.2d 532 (Iowa 2002) ..... 25, 33, 49, 66
*Minor v. State*,
819 N.W.2d 383 (Iowa 2012) ..... *passim*
*Mitchell v. City of Boston*,
130 F. Supp.2d 201 (D. Mass. 2001) ..... 30, 45
*Montana Bank, N.A. v. Ralph Meyers & So*n,
236 Mont. 236 (1989) ..... 47
*Moore v. McDonald*,
30 F.3d 616 (5th Cir. 1994) ..... 43
*Myers v. Bull*,
599 F.2d 863 (8th Cir. 1979), *cert. denied*, 444 U.S. 901 (1979) ..... 42
*Offen v. Brenner*,
402 Md. 191, 935 A.2d 719 (2007) ..... 46
*Penn v. Iowa State Bd. of Regents*,
577 N.W.2d 393 (Iowa 1998) ..... 55, 56
*Perkins v. Dall. Ctr.-Grimes Cmty. Sch. Dist.*,
727 N.W.2d 377 (Iowa 2007) ..... 58
*Petyan v. Ellis*,
200 Conn. 243 (1986) ..... 46
*Pierce v. Gilchrist*,
359 F.3d 1279 (10th Cir. 2004) ..... 29, 30, 31
*Ransom v. Leopold*,
183 Md. App. 570, 962 A.2d 1025 (2008) ..... 64
*Rehberg v. Paulk*,
566 U.S. 356 (2012) ..... *passim*
*Rivera v. Woodward Res. Ctr.*,
830 N.W.2d 724 (Iowa 2013) ..... 51, 57
*Robinson v. Home Fire & Marine Ins. Co.*,
242 Iowa 1120, 49 N.W.2d 521 (1951) ..... 39
*Ross v. Prince George's Cty.*,
Civil Action No. DKC 11-1984, 2012 U.S. Dist. LEXIS 82078, at *25-26 (D. Md. June 13, 2012) ..... 64

*Rucker v. Humboldt Cmty. Sch. Dist.*,
737 N.W.2d 292 (Iowa 2007) ..... 51, 57
*S.O. v. Carlisle Sch. Dist.*,
No. 07-2096, 2009 Iowa App. LEXIS 167, at *13-14 ..... 58
*San Filippo v. U.S. Trust Co.*,
737 F.2d 246 (2nd Cir. 1984) ..... 43
*Sanchez v. United States*,
49 F.3d 1329 (8th Cir. 1995) ..... 61
*Sandbulte v. Farm Bureau Mut. Ins. Co.*,
343 N.W.2d 457 (Iowa 1984) ..... 62
*Schoof v. Nesbit*,
316 P.3d 831 Mont. 226 (2014) ..... 64
*Silberg v. Anderson*,
50 Cal.3d 205 (1990) ..... 46
*Smith v. Hodges*,
199 S.W.3d 185 (Ky. Ct. App. 2005) ..... 47
*Spencer v. Spencer*,
479 N.W.2d 293 (Iowa 1991) ..... 39, 40, 48
*Staley v. Lingerfelt*,
134 N.C. App. 294 (1999) ..... 64
*State ex rel. Oklahoma Bar Ass'n v. Dobbs*,
2004 OK 46, 94 P.3d 31 (Okla. 2004) ..... 47
*Strength v. Hubert*,
854 F.2d 421 (11th Cir. 1988) ..... 43
*Vander Linden v. Crews*,
231 N.W.2d 904 (Iowa 1975) ..... 59
*Walsh v. Eberlein*,
560 P.2d 1249 (Ariz. Ct. App. 1977) ..... 32
*White v. Prince George's Cnty.*,
163 Md. App. 129, 877 A.2d 1129 (2005) ..... 64
*Williams v. Hepting*,
844 F.2d 138 (3d Cir.) ..... 43
*Wilson v. Garcia*,
471 U.S. 261 (1985) ..... 61, 65
*Wright v. Truman Road Enters., Inc.*,
443 S.W.2d 13 (Mo. Ct. App. 1969) ..... 47
*Young v. HealthPort Techs., Inc.*,
877 N.W.2d 124 (Iowa 2016) ..... 20

**Statutes**

§614.1, Code of Iowa ..... 54
§614.8, Code of Iowa ..... 51
Chapter 669, Code of Iowa ..... 20, 51, 57
Chapter 670, Code of Iowa ..... *passim*
§670.1, Code of Iowa ..... 63
§670.1(2), Code of Iowa ..... 51
§670.1(4), Code of Iowa ..... 68
§670.2, Code of Iowa ..... 50
§670.2(1), Code of Iowa ..... 50, 68
§670.2(2), Code of Iowa ..... 51
§670.5, Iowa Code ..... *passim*
§670.8, Code of Iowa ..... 51
§670.12, Code of Iowa ..... 63, 68
§709.3, Code of Iowa ..... 21
§801.4(12), Code of Iowa ..... 26, 32, 53
§801.4(13), Code of Iowa ..... 26, 32, 53
42 U.S.C. §1983 ..... 30

**Other Authorities**

Article I, §1, Iowa Constitution ..... 18, 60, 70
Article I, §6 and §9, Iowa Constitution ..... 18
Article I, §8, Iowa Constitution ..... 18, 60, 70
J.A. Bock, Annotation, When *Statute of Limitations* Begins to Run Against Action for *Abuse of Process*, 1 A.L.R.3d 953, 954 (1965 & Supp. 1997) ..... 56
*Prosser & Keeton on Torts* §114, §115 (5th ed. 1984) ..... 40
Restatement (Second) of Torts §§586-88 (1977) ..... 40
Restatement (Second) of Torts §588 ..... 40
Restatement (Second) of Torts §655 ..... 28, 29, 31

**Rules**

Rule 2.33(1), Iowa Rules of Criminal Procedure ..... 26, 32, 48
Rule 6.1101(2)(c), Iowa Rules of Appellate Procedure ..... 17

## STATEMENT OF ISSUES FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S MALICIOUS PROSECUTION CLAIM BECAUSE THERE IS NO DISPUTE THAT THE CHARGE AGAINST HIM WAS SUPPORTED BY PROBABLE CAUSE, AND THERE IS NO CAUSE OF ACTION RECOGNIZED IN IOWA AGAINST LAW ENFORCEMENT FOR A "CONTINUED" PROSECUTION.

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002)

§801.4(13), Code of Iowa

§801.4(12), Code of Iowa

Rule 233.(1), Iowa Rules of Criminal Procedure

Restatement (Second) of Torts §655

Limone v. United States, 579 F.3d 79 (1st Cir. 2009)

Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004)

Mitchell v. City of Boston, 130 F. Supp.2d 201 (D. Mass. 2001)

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Walsh v. Eberlein, 560 P.2d 1249 (Ariz. Ct. App. 1977)

Heib v. Lehrkamp, 704 N.W.2d 875 (S.D. 2005)

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Godfrey v. State of Iowa, 898 N.W.2d 844 (Iowa 2017)

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018)

Minor v. State, 819 N.W.2d 383 (Iowa 2012)

Beck v. Phillips, 685 N.W.2d 637 (Iowa 2004)

Rehberg v. Paulk, 566 U.S. 356 (2012)

Briscoe v. Lahue, 460 U.S. 325 (1983)

Imbler v. Pachtman, 424 U.S. 409 (1976)

Spencer v. Spencer, 479 N.W.2d 293 (Iowa 1991)

Robinson v. Home Fire & Marine Ins. Co., 242 Iowa 1120, 49 N.W.2d 521 (1951)

Restatement (Second) of Torts §§586-588 (1977)

W. Prosser & W. Keeton, *Prosser & Keeton on Torts* §114, §115 (5th ed. 1984)

Beeck v. Kapalis, 302 N.W.2d 90 (Iowa 1981)

McFarland v. McFarland, No. C08-4047-MWB, 2011 U.S. Dist. LEXIS 106941 (N.D. Iowa Sep. 20, 2011)

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)

Myers v. Bull, 599 F.2d 863 (8th Cir. 1979)

Moore v. McDonald, 30 F.3d 616 (5th Cir. 1994)

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988)

Daloia v. Rose, 849 F.2d 74 (2nd Cir.)

Williams v. Hepting, 844 F.2d 138 (3rd Cir.)

Holt v. Castaneda, 832 F.2d 123 (9th Cir. 1987)

Macko v. Byron, 760 F.2d 94 (6th Cir. 1985)

San Filippo v. U.S. Trust Co., 737 F.2d 246 (2nd Cir. 1984)

Briggs v. Goodwin, 712 F.2d 1444 (D.C. Cir. 1983)

Curtis v. Bembenek, 48 F.3d 281 (7th Cir. 1995)

Bates v. Hadden, No. 3:12-CV-00123-CFB (S.D. Iowa Sept. 5, 2013)

Mitchell v. Ploudre, No. 5:14-CV-05176, 2015 U.S. Dist. LEXIS 93317 (W.D. Ark. July 17, 2015)

Butz v. Economou, 438 U.S. 478 (1978)

Silberg v. Anderson, 50 Cal.3d 205 (1990)

McNall v. Frus, 336 Ill. App.3d 904 (3rd Dist. Ct. App. 2002)

Marrogi v. Howard, 805 So.2d 1118 (La. 2002)

Offen v. Brenner, 402 Md. 191, 935 A.2d 719 (2007)

Kobrin v. Gastfriend, 443 Mass. 327 (2005)

Couch v. Schultz, 193 Mich. App. 292 (1992)

Franklin Collection Serv. V. Kyle, 955 So.2d 284 (Miss. 2007)

Montana Bank, N.A. v. Ralph Meyers & Son, 236 Mont. 236 (1989)

Loigman v. Twp. Comm., 185 N.J. 566 (2006)

De Lourdes Torres v. Jones, 26 N.Y.3d 742 (2016 Ct. of App.)

Jones v. Coward, 193 N.C. App. 231 (2008)

Bird v. W.C.W., 868 S.W.2d 767 (Tex. 1994)

Dowd v. New Richmond, 137 Wis.2d 539 (1987)

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Smith v. Hodges, 199 S.W.3d 185 (Ky. Ct. App. 2005)

State ex. rel. Oklahoma Bar Ass'n v. Dobbs, 2004 OK 46, 94 P.3d 31 (Okla. 2004)

Wright v. Truman Road Enters., Inc., 443 S.W.2d 13 (Mo. Ct. App. 1969)

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Godfrey v. State of Iowa, 898 N.W.2d 844 (Iowa 2017)

§670.5, Code of Iowa

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)

Chapter 670, Code of Iowa

§670.2, Code of Iowa

§670.2(1), Code of Iowa

Rucker v. Humboldt Cmty. Sch. Dist., 737 N.W.2d 292 (Iowa 2007)

§670.1(2), Code of Iowa

§670.2(2), Code of Iowa

City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist., 617 N.W.2d 11 (Iowa 2000)

Rivera v. Woodward Res. Ctr., 830 N.W.2d 724 (Iowa 2013)

Chapter 669, Code of Iowa

Doe v. New London Cmty. Sch. Dist., 848 N.W.2d 347 (Iowa 2014)

§801.4(13), Code of Iowa

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Fuller v. Local Union No. 106, 567 N.W.2d 419 (Iowa 1997)

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Buszka v. Iowa City Cmty. Sch. Dist., *11 2017 Iowa App. LEXIS 124

Johnson Cty. v. O'Connor, 231 Iowa 1333, 4. N.W.2d 419 (Iowa 1942)

Perkins v. Dall. Ctr.- Grimes Cmty. Sch. Dist., 727 N.W.2d 377 (Iowa 2007)

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Sanchez v. United States, 49 F.3d 1329 (8th Cir. 1995)

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Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984)

Wilson v. Garcia, 471 U.S. 261 (1985)

§670.1, Code of Iowa

§670.12, Code of Iowa

Baldwin v. City of Estherville, 915 N.W.2d 259 (Iowa 2018)

Acuna v. Regents of University of California, 56 Cal. App. 4th 639 (1997)

Staley v. Lingerfelt, 134 N.C. App. 294 (1999)

Schoof v. Nesbit, 316 P.3d 831, 373 Mont. 226 (2014)

Hannaway v. Deutsche Bank Nat'l Trust Co., 2011 U.S. Dist. LEXIS 24775 (W.D. Tx. 2011)

Ross v. Prince George's Cty., Civil Action No. DKC 11-1984, 2012 U.S. Dist. LEXIS 82078 (D. Md. June 13, 2012)

Ransom v. Leopold, 183 Md. App. 570, 962 A.2d 1025 (2008)

White v. Prince George's Cnty., 163 Md. App. 129, 877 A.2d 1129 (2005)

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Godfrey v. State of Iowa, 898 N.W.2d 844 (Iowa 2017)

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Chapter 670, Code of Iowa

§670.2(1), Code of Iowa

§670.1(4), Code of Iowa

§670.12, Code of Iowa

Carlson v. Green, 446 U.S. 14 (1980)

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)

Article I, §1 and §8, Iowa Constitution

## ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because it involves issues of first impression concerning the availability of absolute immunity for police witnesses in direct Iowa constitutional tort claims; the statute of limitations applicable to direct Iowa constitutional tort claims against municipal employees and cities; whether the Iowa Municipal Tort Claims Act ("IMTCA") provides adequate statutory remedies that make Iowa direct constitutional claims unnecessary; and the existence of a cause of action for "continued prosecution" which is not currently recognized in Iowa law. Iowa R. App. P. 6.1101(2)(c).

## STATEMENT OF THE CASE

This is a case about a police officer who Plaintiff agrees had probable cause to charge him with rape because his DNA was on the victim's cervix. Plaintiff nonetheless alleges the officer should be liable for damages after the jury acquitted him. Why? Not because he withheld exculpatory evidence or lied, but because of how the case was prosecuted, a process over which he had no authority.

Plaintiff-Appellee Joshua Venckus filed a civil rights action against the City of Iowa City and Iowa City Police Investigator Andrew Rich (collectively "City Defendants"), Johnson County, and Johnson County Prosecutors Anne Lahey, Naeda Elliott, and Dana Christiansen (collectively "County Defendants"). (App. p. 34). Venckus makes novel municipal tort and direct Iowa constitutional tort claims

for police and prosecutorial civil liability. His claims are based on the Johnson County Attorney's Office criminal prosecution of him that resulted in a jury's acquittal from the charge of Second Degree Sexual Abuse. (App. p. 34). His municipal tort claims against the City Defendants are for defamation, abuse of process, and malicious prosecution. (App. p. 41). His Iowa constitutional claims are made pursuant to *Godfrey v. State of Iowa*, 898 N.W.2d 844 (Iowa 2017), and generally allege violation of the following:

> the right to freedom of movement and association as guaranteed by Article I, §1 of the Iowa Constitution; his right to liberty guaranteed by Article I, §1 of the Iowa Constitution; his right to due process, a fair trial, and equal protection guaranteed by Article I, §6 and §9 of the Iowa Constitution; and his right against unreasonable seizure guaranteed him by Article I, §8 of the Iowa Constitution.

(App. p. 41).

The City Defendants filed a pre-answer motion to dismiss all Venckus's claims. (App. p. 14). They argued his claims—both the IMTCA and *Godfrey* claims—were time-barred under Iowa Code §670.5 (2017); unavailable due to the doctrines of absolute privilege and immunity for police witnesses and prosecutorial immunity; failed as a matter of law under *Godfrey* because adequate remedies for Venckus's claims are found in the IMTCA; and because no cause of action exists in Iowa against a police officer for a malicious prosecution claim based on a "continued prosecution" where it is undisputed that the officer had probable cause to initiate the criminal charge.

Initially, the district court largely agreed with the City Defendants. (App. p. 65). It dismissed Venckus's defamation and abuse of process claims against the City Defendants as time-barred under Iowa Code §670.5. (App. pp. 67, 69). It dismissed his malicious prosecution claim to the extent it was based upon allegations occurring after Rich charged and arrested Venckus. (App. p. 70). It dismissed his Iowa constitutional claims entirely as "preempted by the IMTCA." (App. p. 74).

Thirty-four days later, in response to Venckus's Motion to Reconsider, the district court took the self-described "somewhat unusual step of fully reversing its previous decision . . . ." (App. p. 108). The district court reinstated all Venckus's claims against the City Defendants and against the County Defendants. *Id.*

The district court's self-reversal came shortly after the Iowa Supreme Court's decision in *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018). Venckus argued *Baldwin* was "directly applicable" because it allegedly (1) established that Investigator Rich is only entitled to qualified immunity, (2) "rejected the notion that Iowa Constitutional claims are unnecessary because of the existence of the IMTCA or ITCA[1]"; and (3) "the analysis in *Baldwin* would reject the use of the IMTCA as the applicable statute of limitations." (App. p. 87).

The City Defendants argued that because this case does not concern qualified immunity at this stage, *Baldwin* had little impact on the issues in this case, other than

[1] Iowa Tort Claims Act

reaffirming the importance of Iowa's common law in formulating the legal doctrines applicable to *Godfrey* claims, and acknowledging the importance of Iowa's tort claims acts, Iowa Code Chapters 669 and 670. (App. p. 94). The district court, though, determined "the better and more appropriate course under all the circumstances is to allow all claims to proceed for the time being." (App. p. 108). It cited to the portion of *Baldwin* setting forth the governmental immunities provided by the IMTCA and the ITCA and that part of the *Godfrey* opinion that allows direct constitutional claims in certain circumstances. (App. p. 108).

The City Defendants and County Defendants filed Applications for Appeal in Advance of Final Judgment and Request for Stay. (App. p. 110). The Iowa Supreme Court granted the City and County Defendants' applications for interlocutory appeal. (App. p. 207).

## STATEMENT OF THE FACTS

Since this appeal arises from the City Defendants' Motion to Dismiss, all well pleaded facts in Venckus's petition must be taken as true. *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 132 (Iowa 2016).

On February 16, 2013, a woman was assaulted and raped following a "Cowboys and Indians" theme party at Venckus's house in Iowa City. (App. pp. 35-36). The victim was extremely intoxicated and incapacitated by alcohol. (App. p. 35). She escaped Venckus's house after the assault and rape by running out the back

door. (App. p. 36). She ran directly to a stranger who was in the alley behind Venckus's house for help. (App. p. 36). DNA evidence was collected from her body. (App. p. 36).

Investigator Andrew Rich of the Iowa City Police Department was principally responsible for the investigation of this crime. (App. p. 37). The Iowa City police immediately identified one suspect, Ryan Markley, because officers found his wallet outside the house. (App. p. 36). Later, though, DNA testing from the victim's body returned the DNA profiles of *two* male suspects—Markley, and a second, unknown male. (App. p. 36). Investigator Rich began searching for a second perpetrator and sought out DNA samples from twenty males in attempt to find the unknown DNA contributor. (App. p. 37).

Venckus claimed he was in his hometown of Chicago when the rape and assault happened, from 02/15/2013 - 02/17/2013. (App. p. 35). Venckus's DNA matched the second, unknown DNA profile in the victim's body. (App. p. 36). Venckus's sperm was found in the victim's vagina, on her cervix. (App. p. 37). With this DNA evidence in hand, Investigator Rich arrested Venckus on January 24, 2014 for Sexual Abuse in the Second Degree in violation of Iowa Code §709.3. (App. p. 37).

"[A]fter Plaintiff's arrest, Plaintiff was prosecuted for the crime of Sexual Abuse in the Second Degree . . . ." (App. p. 38). "The prosecution was conducted

by the Johnson County Attorney's Office . . . ." (App. p. 38). Venckus presented an alibi defense, claiming he was in Chicago when the rape happened. (App. p. 39). Venckus's defense attorney provided the prosecution with Venckus's expert witness reports. (App. pp. 39-40). Venckus's expert witness opined that Venckus's sperm on the victim's cervix could be explained because it must have transferred from a blanket covering the victim that was "replete with Plaintiff's DNA." (App. pp. 35). The prosecution did not dismiss the charge based on Venckus's alibi claim or his expert's testimony. Instead, the prosecution presented its own evidence and relied on its own witnesses and took the case to trial. (App. p. 40).

A Johnson County jury acquitted Venckus in September 2016. (App. p. 40). Additional facts will be mentioned as necessary.

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S MALICIOUS PROSECUTION CLAIM BECAUSE THERE IS NO DISPUTE THAT THE CHARGE AGAINST HIM WAS SUPPORTED BY PROBABLE CAUSE, AND THERE IS NO CAUSE OF ACTION RECOGNIZED IN IOWA AGAINST LAW ENFORCEMENT FOR A "CONTINUED" PROSECUTION.

Venckus made clear in his resistance to the City Defendants' motion to dismiss that his malicious prosecution claim against the City Defendants is not premised upon Investigator Rich's *initiation* of a prosecution against him by filing a criminal charge. Rather, Venckus styles his malicious prosecution claim as a "continued prosecution" claim based upon "the failure of all defendants to refuse to

dismiss the criminal allegations against him when faced with overwhelming evidence of his innocence." (App. p. 44). For this reason, he contends it does not matter whether Rich had probable cause to charge him because it was "the decision to proceed with trial" that is the basis of his malicious prosecution claim. (App. p. 79).

There is no form of the tort of malicious prosecution recognized in Iowa against law enforcement for "the decision to proceed with trial." To allow such allegations to move forward conflates the roles of law enforcement and prosecutors, creating a back-door claim for malicious prosecution against law enforcement officers based upon a prosecutor's decision to take a case to trial—a decision for which prosecutors have absolute immunity and officers have no control. There is no reason such a tort should be allowed against law enforcement officers when it is not allowed against prosecutors—the policy reasons underlying this State's rejection of such apply with equal force.

**A. The City Defendants Preserved Error.**

The City Defendants initially moved to dismiss Venckus's malicious prosecution claim based on the statute of limitations. This argument relied on the legal predicate that Venckus's malicious prosecution claim was founded upon *the initiation of the prosecution, not its continuation*. In response to this argument, Venckus alleged his "complaint relates to the failure of all defendants to refuse to

dismiss the criminal allegations against him" and "it was not the arrest that was the injury; it was the continued effort to convict an innocent man . . . ." (App. p. 44). He argued it was Rich and the City's failure to dismiss the charges *after* the arrest-stating "the arrest may have been reasonable." The City replied that since Venckus failed to plead that probable cause was lacking for his arrest, "Venckus cannot establish one of the foundational elements to his malicious prosecution claim . . . ." (App. p. 64).

Clearly the issue was raised and decided when the district court originally held: "Plaintiff may only proceed against the City and Rich on the basis of actions that led up to the finding of probable cause for arrest, but may not claim against him for actions taken in the course of the prosecution itself." (App. p. 70).

Following the district court's initial order, Venckus moved the court to reconsider, arguing that there was a viable malicious prosecution cause of action for a "continued prosecution". (App. p. 78). In response, the City Defendants argued that, "[a]llowing Venckus's malicious prosecution claim to move forward in the face of his admission creates a back-door claim for malicious prosecution based upon prosecutorial actions, against a defendant who as a matter of law has no authority to conduct a criminal prosecution." (App. pp. 95-96). The district court, in response to these arguments, and in its order on reconsideration, reversed its original holding and stated, "Assuming that a malicious prosecution claim may lie in Iowa for actions

taken by police officers after the initiation of the case, the Court will allow the Plaintiff to proceed on its claim of malicious prosecution." (App. p. 105). Error is preserved because whether there is a recognizable "continued prosecution" claim was raised and decided. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.")

**B. Scope and Standard of Appellate Review**

Review of a district court's ruling on a motion to dismiss is for errors at law. *Id.* A motion to dismiss is properly granted when the petition shows no right of recovery under any state of the facts, considering the allegations in the petition in the light most favorable to the nonmoving party. *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 442 (Iowa 2002).

**C. Argument**

Venckus's malicious prosecution claim fails for many reasons.

**1. The City Defendants Were Legally Incapable of Either Carrying Forward or Terminating the Prosecution.**

First and foremost, under Iowa law only prosecutors can conduct prosecutions, and therefore Venckus faces a fatal causation problem when he alleges Rich is responsible for the "continued prosecution." "Prosecution" means the commencement, including the filing of a complaint, and *continuance* of a criminal proceeding, and pursuit of that proceeding to final judgment on behalf of the state or

other political subdivision. Iowa Code §801.4(13) (emphasis added). A prosecution is conducted by a prosecuting attorney, not a police investigator. *Id.* §801.4(12), §801.4(13).

Further, Rich and the City were legally prohibited from dismissing the prosecution—only the district court or prosecuting attorney could have done so. Iowa R. Crim. P. 2.33(1) ("The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefore being stated in the order and entered of record, *and no such prosecution shall be discontinued or abandoned in any other manner*.") (emphasis added)).

Therefore, the City Defendants were legally incapable of either carrying forward with or dismissing the prosecution once Rich filed the charge against Venckus—a charge Venckus admits was reasonable given the evidence against him at the time Rich filed. Venckus's amended petition recognizes this factual and legal predicate, but nonetheless casts blame on Rich for the "continued" prosecution. (App. p. 34 ("Anne Lahey, Naeda Elliott and Dana Christiansen are or were employees of the JCAO, and *were responsible for the prosecution of Joshua Venckus.*" (emphasis added)). Venckus's malicious prosecution claim is irreconcilable with Iowa law and the facts alleged in his own petition. City

Defendants did not have control of the prosecution once the charge was filed, and therefore Venckus cannot establish that they "continued" the prosecution.

**2. Venckus Attempts to Make a Back-Door Malicious Prosecution Claim Against the Prosecutors by Substituting a Law Enforcement Defendant, Thereby Evading Absolute Prosecutorial Immunity.**

Second, because the very nature of the "repeated" wrongs Venckus claims form the basis of his malicious prosecution claim are indisputably prosecutorial in nature, they should be made against the prosecutors, not Rich, a police investigator. (App. p. 38-41) (alleging *all defendants'* liability for the failure to review discovery provided by his attorney; the decision not to call a witness at trial; the negotiation of a plea agreement and the sentencing of Venckus's co-defendant; the selection of expert witnesses; the refusal to dismiss the charge and take Venckus's case to trial; the "effort to convict"; the prosecutors' filing of an ethics complaint against Venckus's attorney). However, there is no malicious prosecution claim against the prosecutors available. Indeed, despite the numerous and grave allegations against the prosecutors that their continued prosecution of Venckus was unjust and unfounded, Venckus makes no malicious prosecution claim against them.

Allowing Venckus's claim to proceed against Rich on his claimed theory of "the continued prosecution" creates a back-door malicious prosecution claim for a garden-variety prosecution resulting in acquittal—but against a defendant unable to conduct a prosecution and unprotected by prosecutorial immunity. There is no

causal link between the prosecutors' decisions to proceed and Rich's investigation or charge. Venckus never even alleged in his petition that Rich attempted to "pressure" or "press" the prosecutors to go forward, or that they yielded to any such pressure. To the contrary, Venckus alleged the prosecutors were *independently* motivated to continue the prosecution, going so far as to file an ethics complaint against Venckus's attorney "in order to distract [her] from preparing for trial or to force the withdrawal of said attorney." (App. p. 40).

Venckus's "continued prosecution" malicious prosecution claim amounts to little more than a malicious prosecution claim against prosecutors, but pressed vicariously against law enforcement. Since Iowa has rejected malicious prosecution claims against prosecutors, it should likewise reject a "continued" malicious prosecution claim against a law enforcement officer.

### 3. Iowa Has Not Adopted Restatement (Second) of Torts §655, and Even if It Had, the District Court Erroneously Applied It.

In allowing Venckus's malicious prosecution claim to move forward, the district court relied largely on the Restatement (Second) of Torts, §655. That section provides as follows:

> A private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings.

Restatement (Second) of Torts, §655. Comment b shows that this provision is inapplicable to Rich, given the allegations of the petition. It reads in pertinent part:

> The rule stated in this Section applies when the defendant has himself initiated criminal proceedings against another or procured their institution, upon probable cause and for a proper purpose, and *thereafter takes an active part in pressing the proceedings after he has discovered that there is no probable cause for them….* (emphasis added).

The petition does not allege that Rich discovered there was no probable cause; the allegation is that he did not press for dismissal by the prosecutors based on information Venckus gave him. The district court went on to cite two cases in support of its determination that Venckus's "continued prosecution" claim is potentially viable: *Limone v. United States*, 579 F.3d 79, 91 (1st Cir. 2009) and *Pierce v. Gilchrist*, 359 F.3d 1279, 1292 (10th Cir. 2004).

In *Limone*, the First Circuit recognized that the Massachusetts Supreme Judicial Court had "left open the possibility that an individual may be held liable for malicious prosecution if he pursues a prosecution after it has become clear to him that there is no probable cause to support it." 579 F.3d at 91. A claim for a "malicious continuation" may exist if there is a showing that there was "an insistence that the prosecution go forward even after it has become clear that probable cause is lacking." *Id*. The court ultimately held though, that even if FBI agents "propped up the state's case" that did not rise to the level required to be a "continuer" of the prosecution. *Id.* *Limone* cited *Mitchell v. City of Boston*, which rejected and

dismissed as a matter of law a 'continued prosecution' claim where the officer took a "proactive approach" by contacting the prosecutor with additional information "when it looked as if the case was in trouble . . . ." *Mitchell v. City of Boston*, 130 F. Supp.2d 201, 216 (D. Mass. 2001). Venckus does not allege these types of facts in his petition, only that "Defendants" moved forward with the prosecution (i.e., the prosecutors) despite Venckus's counsel's provision of discovery documents she alleged were exculpatory. (App. pp. 39-40).

The other case cited by the district court in support of a "continued prosecution" claim was *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). Like Venckus, the plaintiff in *Pierce* was accused of rape. *Id.* at 1284. The defendant was a forensic scientist who provided false forensic analysis linking the defendant's pubic hair samples to the crime scene. *Id.* at 1282. After the defendant was convicted and sentenced to 65 years in prison, new evidence emerged showing "none of the hairs taken from plaintiff's body exhibited the same microscopic characteristics as those found at the crime scene." *Id.* at 1283. The plaintiff filed an action pursuant to 42 U.S.C. §1983, and the federal district court looked to the common law of Oklahoma in devising a cause of action that fit the constitutional violation alleged. *Id.* at 1296. In reviewing a "continued prosecution" claim for malicious prosecution under Oklahoma law, the federal district court clearly focused on the *fraudulent* nature of her reports as informing and driving the ongoing

prosecution. *Id.* (the false reports became one of the inseparable bases for the charges against Pierce and the District Attorney's decision to proceed to trial).

The factual context of *Pierce* illuminates the error in the district court's analysis of a "malicious continuation" claim in this case. Venckus nowhere alleges that Investigator Rich took an "active part in continuing or procuring the continuation of criminal proceedings . . . ." *See*, Restatement (Second) of Torts §655. Rather, he alleges the prosecutors conducted the prosecution and allegedly had their own independent, bad motives to continue the prosecution. (App. pp. 40-41). Venckus certainly does not allege Rich fabricated evidence or withheld exculpatory evidence; rather, he alleges the prosecutors had all the exculpatory evidence Venckus's counsel provided on a Google drive, but ignored it. (App. p. 38). Venckus alleges only that Rich made statements in "court filings, court hearings, and a public trial." (App. p. 79). But the Restatement, which the district court held "persuasive," states that, "[i]t is not enough that [a defendant] appears as a witness against the accused either under subpoena or voluntarily, and thereby aids in the prosecution of the charges which he knows are groundless." *See* Restatement (Second) of Torts §655, cmt. c.

A cause of action for "continued prosecution" has not been recognized in Iowa. But even if it had been, and was modeled after the Restatement section followed by the district court, Venckus's claim would fail as a matter of law.

### 4. Rich Lost Control of the Case Upon Filing the Charge.

A fundamental problem with the district court's analysis in its ruling on the motion to reconsider is the following question it asks: "Once a charging decision has been made, assuming arguendo that there was probable cause for the arrest and for the initial filing of charges, whose responsibility is it to dismiss the case if that probable cause becomes unfounded." (App. p. 103). This "inquiry" is clearly answered by the Iowa Code and the Iowa Rules of Criminal Procedure: only a prosecutor or a court can decide to dismiss a case. Iowa Code §801.4(12), §801.4(13); Iowa R. Crim. P. 2.33(1).

A number of jurisdictions recognize that after an officer loses control of a case, and "a prosecuting attorney is left to judge the propriety of proceeding with the charge and acts on his own initiative in doing so," a malicious continuation claim will not lie. In *Walsh v. Eberlein*, 560 P.2d 1249, 1250 (Ariz. Ct. App. 1977), the plaintiff was arrested and charged with passing forged checks. The plaintiff claimed that even if probable cause existed for her arrest, the officer and City of Tucson could be held liable for malicious prosecution because the officer continued to participate in the prosecution. *Id.* at 1252. The court disagreed, pointing out that the prosecuting attorney had access to all the same evidence the officer had and "directed the prosecution" until its dismissal. *Id.* The court reversed the jury verdict and entered judgment for the defendant officer. *Id. See also, Heib v. Lehrkamp*, 704

N.W.2d 875 (S.D. 2005) (holding officer could not be held liable for continuing a prosecution where the officer provided prosecutors with the exculpatory evidence he had prior to trial).

## II. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S *GODFREY* AND MUNICIPAL TORT CLAIMS AGAINST THE CITY DEFENDANTS AS BARRED BY ABSOLUTE IMMUNITY BECAUSE RICH, A POLICE INVESTIGATOR, IS ENTITLED TO ABSOLUTE IMMUNITY AGAINST CLAIMS MADE THAT ATTACK HIS ROLE AS A WITNESS FOR THE PROSECUTION.

### A. The City Defendants Preserved Error.

In their pre-answer motion to dismiss, the City Defendants moved to dismiss Venckus's *Godfrey* and municipal tort claims as barred by the principle of absolute immunity. (App. pp. 16-17). Venckus resisted. (App. pp. 49-50). The district court initially held "to the extent [Investigator Rich] testified in the trial itself or participated in preparing for trial, for those actions he enjoys absolute immunity." (App. p. 70).

The district court reversed its decision in its order on Venckus's motion to reconsider, reserving immunity questions for once discovery is complete. (App. p. 102). Error is preserved. *Meier*,, 641 N.W.2d at 537.

### B. Scope and Standard of Appellate Review

City Defendants contend the district court erred by not dismissing Venckus's claims on the basis of absolute immunity. Review of a district court's ruling on a motion to dismiss is for errors at law. *Id.*

### C. Argument

It is an issue of first impression whether absolute immunity will be available in *Godfrey* claims, and what the formulation of such immunity will be. The City Defendants contend Rich is entitled to absolute witness immunity against Venckus's claims that Rich is liable for statements he made that were related to the County's prosecution of Venckus for Second Degree Sexual Abuse. Further, to the extent Venckus makes claims that Rich "prosecuted and persecuted" him, under a functional analysis of absolute immunity, Rich should be entitled to prosecutorial immunity in the same way a prosecutor would be.

In regard to Venckus's IMTCA claims, as a witness for the prosecution Rich has absolute immunity because Venckus's claims all revolve around Rich's role as a witness, not his role as an investigator. Iowa has a long history of recognizing immunity for witnesses due to their essential truth-telling role in our justice system.

#### 1. Absolute Immunity for Law Enforcement Witnesses in *Godfrey* Claims Should be Recognized.

In *Baldwin*, the Iowa Supreme Court recognized that "common law absolute immunities . . . could apply to state constitutional claims." *Baldwin*, 915 N.W.2d at

281. Iowa law, federal law, and the law of other states that recognize direct state constitutional claims support the application of absolute immunity for law enforcement witnesses in certain situations.

Preliminarily, though on appeal Venckus has reframed his claims as "failure to investigate" claims, the bottom line is that Venckus seeks to hold Rich liable for communications he had with prosecutors during judicial proceedings that followed the filing of charges. His claim is not for a failure in Rich's investigation, but rather, as he states, for a "continued prosecution" where the initial probable cause determination made by Rich allegedly dissipated. (App. p. 41). ("[P]laintiff has suffered damages from the continued criminal prosecution even though he was eventually acquitted.") Nowhere in Venckus's Amended Petition is "inadequate investigation" mentioned. (App. pp. 34-43). Further:

- Venckus's resistance to the City Defendants' application for interlocutory review cited Rich's trial testimony as evidence that he may be held civilly liable for the previous criminal proceedings. (App. p. 152).
- Venckus's motion to reconsider alleged Rich should be held liable for "systematic pressure to implicate" him "after the arrest and . . . all the way up to trial . . . ." (App. p. 78).
- Venckus's resistance to City Defendants' motion to dismiss argued the City Defendants should be held liable for "defamatory statements (whether oral or

in writing), including court filings, court hearings, and a public trial (published within and outside the courthouse) . . . ." (App. p. 49).

- In distilling his claim, Venckus alleged liability should be placed on the City Defendants for the "continued effort to persecute and prosecute him and the continued allegation that he was a rapist . . . right up to the time that the jury returned a verdict of not guilty." (App. p. 44).

These are the allegations that call out for the application of absolute witness immunity because none relate to Rich's investigation or charge, but rather to his role as a witness. *See* App. p. 77 ("Plaintiff is not critical of the original arrest as there was arguably probable cause to believe he had committed the crime . . . the evidence at that point could be reasonably misinterpreted by an unsuspecting investigator to justify the arrest."). Concerns about the integrity of the justice system itself underlie the concept of absolute witness immunity and support its adoption into Iowa constitutional claims.

**a. Common Law Recognizes the Importance of Absolute Immunity for Government Actors Performing Actions Integral to the Judicial Process, Like Ordinary Witnesses and Prosecutors.**

The Iowa Supreme Court has stated that it follows a "functional approach" when facing a question as to "whether a government official has absolute immunity from civil liability resulting from his or her acts . . . ." *Minor v. State*, 819 N.W.2d 383, 394 (Iowa 2012). This functional approach is intended to determine whether

the government official's actions "'fit within a common-law tradition of absolute immunity.'" *Id.* (*citing Beck v. Phillips*, 685 N.W.2d 637, 642 (Iowa 2004)). It is therefore not the identity of the government actor that controls, but rather the "nature of the function performed." *Minor*, 819 N.W.2d at 394. The Supreme Court stated in *Minor* that absolute immunity is only granted for those,

> Governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed with independence and without fear of consequences.

*Id.* (*quoting Rehberg v. Paulk*, 566 U.S. 356, 365 (2012)).

Further, "A government official may be entitled to absolute immunity where the official performs a function analogous to that of a government official who was immune at common law." *Id.* The court then examines whether absolute immunity for a particular official performing a particular function will "free the judicial process from the harassment and intimidation associated with litigation." *Id.* There are two common law functions that are relevant in this case: the role of an ordinary witness and the role of a prosecutor.

**i. Ordinary Witnesses**

While at common law "complaining witnesses" were not absolutely immune from civil liability, "ordinary witnesses" were immune "from any claim arising from their testimony." *Id.* In *Minor*, the Supreme Court relied heavily on federal caselaw set forth in *Rehberg* and *Briscoe v. Lahue*, 460 U.S. 325 (1983).

In *Briscoe*, the plaintiffs brought §1983 actions against police officers alleging that they provided false testimony during various criminal proceedings. The officers argued that they were entitled to absolute immunity as witnesses, and the Supreme Court agreed:

> But our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant. A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury.

*Id.* at 343.

> Moreover, to the extent that traditional reasons for witness immunity are less applicable to governmental witnesses, other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses. Subjecting government officials, such as police officers, to damages liability under §1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties.

*Id*. at 342-343.

> Section 1983 lawsuits against police officer witnesses, like lawsuits against prosecutors, "could be expected with some frequency." Cf. *Imbler* v. *Pachtman*, 424 U.S., at 425. Police officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses. As the files in this case show, even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources. *Briscoe,* at p. 343. In short, the rationale of our prior absolute immunity cases governs the disposition of this case. In 1871, common-law immunity for witnesses was well settled. The principles set forth in *Pierson* v. *Ray* to protect judges and in *Imbler*

> v. *Pachtman* to protect prosecutors also apply to witnesses, who perform a somewhat different function in the trial process but whose participation in bringing the litigation to a just -- or possibly unjust -- conclusion is equally indispensable.

*Id*. at p. 345-346.

In *Rehberg* an investigator testified before a grand jury and was sued by the person who was indicted. The Court ruled that the reasons set forth in *Briscoe* for granting trial witnesses absolute immunity were equally applicable to grand jury witnesses, both law enforcement as well as lay witnesses:

> Second, a police officer witness' potential liability, if conditioned on the exoneration of the accused, could influence decisions on appeal and collateral relief. 460 U.S., at 344, 103 S. Ct. 1108, 75 L. Ed. 2d 96. Needless to say, such decisions should not be influenced by the likelihood of a subsequent civil rights action. But the possibility that a decision favorable to the accused might subject a police officer witness to liability would create the "risk of injecting extraneous concerns" into appellate review and postconviction proceedings. *Ibid*. (quoting *Imbler*, *supra*, at 428, n. 27, 96 S. Ct. 984, 47 L. Ed.2d 128). In addition, law enforcement witnesses face the possibility of sanctions not applicable to lay witnesses, namely, loss of their jobs and other employment-related sanctions.

*Rehberg*, 566 U.S. at 369.

Under Iowa law, witness absolute immunity is often discussed in the context of common law defamation claims. "Iowa recognizes an absolute privilege (or immunity) from liability for defamation which takes place in a judicial proceeding." *Spencer v. Spencer*, 479 N.W.2d 293, 295 (Iowa 1991) *citing Robinson v. Home Fire & Marine Ins. Co.*, 242 Iowa 1120, 1124-1130, 49 N.W.2d 521, 524-27 (1951);

Restatement (Second) of Torts §§586-88 (1977); and W. Prosser & W. Keeton, *Prosser & Keeton on Torts* §114, §115 (5th ed. 1984). "A statement is privileged if made by one who has an interest in the subject matter to one who also has an interest in it or stands in such a relation that it is proper or reasonable for the writer to give the information." *Spencer*, 479 N.W.2d at 295. The statement must have some relation to the issues in the judicial proceeding. *Id.*

"The purpose of the absolute privilege is to encourage the open resolution of disputes by removing the cloud of later civil suits from statements made in judicial proceedings." *Id.* (*citing Beeck v. Kapalis*, 302 N.W.2d 90, 97 (Iowa 1981)).

The Iowa Supreme Court has cited with approval provisions of the Second Restatement of Torts, including §588, which recognize the application of an absolute privilege for witnesses in the context of communications made as part of a judicial proceeding. *See, Spencer*, 479 N.W.2d at 295 (citing Restatement (Second) of Torts §§586-88 (1977)); Restatement (Second) of Torts §588, cmt. a (1977) ("The function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation."). *See also, McFarland v. McFarland*, No. C08-4047-MWB, 2011 U.S. Dist. LEXIS 106941, at *37 (N.D. Iowa Sep. 20, 2011) (applying Iowa law and dismissing plaintiff's claims, which included defamation,

against witnesses who filed affidavits against him during divorce proceedings as barred by absolute immunity).

**ii. Prosecutors**

In *Minor* the Supreme Court recognized that historically, "prosecutors are entitled to absolute immunity from civil liability when they perform functions intimately associated with the judicial phase of the criminal process. *Minor*, 819 N.W.2d at 394 (*citing Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

In his Resistance to the City Defendants' Motion to Dismiss, Venckus amorphously argued that the fundamental nature of his complaint was "the failure of all defendants to refuse to dismiss the criminal allegations against him when presented with overwhelming evidence of his innocence" and the "continued effort to persecute and prosecute him . . . ." (App.p. 44).

His Amended Petition is focused on the post-charging phase of the prosecution, faulting all "defendants" for actions taken *after* the initiation of the prosecution. (App. pp. 38-41). These variously include the alleged failure to review discovery provided by his attorney on a Google drive allegedly proving his innocence; the decision not to call a witness at trial; the negotiation of a plea agreement and the sentencing of Venckus's co-defendant; the selection of expert witnesses; the refusal to dismiss the charge and proceed to trial; and the "effort to convict." (App. pp. 38-39).

The problem with these allegations, as applied against Rich, is that they are all within the province of the prosecutors, not a police investigator. Even Venckus places responsibility for the prosecution in the hands of the County prosecutors, stating "The prosecution was conducted by Johnson County Attorney's Office through the three employees, Ms. Lahey, Ms. Elliott and Mr. Christiansen." (App. p. 38). He stated that his claim is based not on, "events that occurred before the arrest," but rather, "his contention is that the wrongful conduct occurs after the arrest and before trial." (App. p. 82). On the other hand, Venckus admitted that he, "is not critical of the original arrest as there was arguably probable cause to believe he had committed the crime" since "the evidence at that point could be reasonably misinterpreted by an unsuspecting investigator to justify arrest." (App. p. 77).

Statements made, and actions committed, by Rich alleging he acted in a prosecutorial role are all entitled to absolute prosecutorial immunity. *Minor,* 819 N.W.2d at 394.

**b. Absolute Immunity for Law Enforcement Witnesses Is Well Established in §1983 Actions and Also Applied in *Bivens* Claims.**

"All witnesses in judicial proceedings are absolutely immune from section 1983 liability for allegedly perjurious testimony." *Myers v. Bull*, 599 F.2d 863, 866 (8th Cir. 1979), *cert. denied,* 444 U.S. 901 (1979). Absolute immunity applies for police witnesses just as it does for private witnesses. *See, Briscoe,*460 U.S. at 342-

46. "[A] trial witness has absolute immunity with respect to *any* claim based on the witness' testimony." *Rehberg*, 566 U.S. at 367 (emphasis in original) (*citing Briscoe,* 460 U.S. 325 at 332-33 (1983)). "[G]rand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any §1983 claim based on the witness' testimony." *Id*. at 375.

Further,

> The majority of the circuits have afforded absolute immunity to witnesses, including police officers, charged under §1983 for their allegedly perjurious testimony at various types of pretrial proceedings. *See Moore v. McDonald*, 30 F.3d 616, 619-20 (5th Cir. 1994) (deputy sheriff's testimony in criminal defendant's pretrial suppression hearing absolutely immune); *Strength v. Hubert*, 854 F.2d 421, 423-25 (11th Cir. 1988) (investigator for state attorney general's office entitled to absolute immunity regarding grand jury testimony); *Daloia v. Rose*, 849 F.2d 74, 75-76 (2nd Cir. 1988) (FBI agents and police officer entitled to absolute immunity for testimony at pretrial suppression hearing), *cert. denied*, 488 U.S. 898, 102 L. Ed.2d 231, 109 S. Ct. 242 (1988); *Williams v. Hepting*, 844 F.2d 138, 142-43 (3rd Cir. 1988) (prosecution witness who testified at preliminary hearing absolutely immune), *cert. denied*, 488 U.S. 851, 102 L. Ed.2d 107, 109 S. Ct. 135 (1988); *Holt v. Castaneda*, 832 F.2d 123, 125-27 (9th Cir. 1987) (police officer received absolute immunity for testimony during preliminary examination and a hearing on motion to quash search warrants), *cert. denied*, 485 U.S. 979, 99 L. Ed. 2d 486, 108 S. Ct. 1275 (1988); *Macko v. Byron*, 760 F.2d 95, 97 (6th Cir. 1985) (grand jury witnesses absolutely immune); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 254 (2nd Cir. 1984) (noting in dictum that immunity would be available to a grand jury witness), *cert. denied*, 470 U.S. 1035, 84 L. Ed. 2d 797, 105 S. Ct. 1408 (1985); *Briggs v. Goodwin*, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983) (federal prosecutor absolutely immune for sworn statement at a hearing on a motion during the grand jury phase of an investigation), *cert. denied*, 464 U.S. 1040, 79 L. Ed.2d 169, 104 S. Ct. 704 (1984);

*Curtis v. Bembenek*, 48 F.3d 281, 284-85 (7th Cir. 1995)[2]

The Supreme Court in *Rehberg* noted that the immunity granted to grand jury witnesses,

> may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other §1983 claim concerning the initiation or maintenance of a prosecution. Were it otherwise, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.

*Rehberg*, 566 U.S. at 369. (internal citations and quotations omitted).

Sound public policy supports absolute immunity for law enforcement witnesses. "When a witness is sued because of his testimony . . . 'the claims of the individual must yield to the dictates of public policy.'" *Id.* (quoting *Briscoe*, 460 U.S. at 332-33) (further internal quotation marks and citations omitted). The Court reasoned "[w]ithout absolute immunity for witnesses . . . the truth-seeking process at trial would be impaired" as witnesses, "'might be reluctant to come forward to testify'" or if the witness did testify, he, "'might be inclined to shade his testimony in favor of the potential plaintiff' for 'fear of subsequent liability.'" *Rehberg*, 566 U.S. at 367 (quoting *Briscoe*, 460 U.S. at 333). The *Rehberg* Court further reasoned that absolute immunity is necessary for a grand jury witness, like a trial witness,

[2] *See also, Bates v. Hadden*, No. 3:12-CV-00123-CFB, at *20 (S.D. Iowa Sept. 5, 2013) (recognizing depositions as among the "judicial proceedings" in which witness testimony is shielded by absolute civil liability).

because "[i]n both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence"; and in neither circumstance is the "deterrent of potential civil liability needed to prevent perjurious testimony" as "other sanctions—chiefly [a criminal] prosecution for perjury—provide[s] a sufficient deterrent." *Id.* (*citing Briscoe*, 460 U.S. at 342).

The *Rehberg* Court found no "reason to distinguish law enforcement witnesses from lay witnesses." *Id.* In support of its conclusion, the Court noted: (1) "[i]f police officer witnesses were routinely forced to defend against claims based on their testimony, their energy and attention would be diverted from the pressing duty of enforcing the criminal law"; *Id.* at 369 (internal quotation marks and citations omitted); (2) "a police officer witness' potential liability, if conditioned on the exoneration of the accused, could influence decisions on appeal and collateral relief"; *Id.* (citations omitted); and (3) "law enforcement witnesses face the possibility of sanctions not applicable to lay witnesses, namely, loss of their jobs and other employment-related sanctions." *Id.*

Because *Bivens* actions are "almost identical to an action under §1983, except that the former is maintained against federal officials, while the latter is against state officials," absolute immunity for law enforcement witnesses has also been recognized in *Bivens* claims. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *See, e.g.*, *Mitchell v. Ploudre*, No. 5:14-CV-05176, 2015 U.S. Dist.

LEXIS 93317, at *12 (W.D. Ark. July 17, 2015); *Briggs v. Goodwin*, 712 F.2d 1444, 1449 n. 33 (D.C. Cir. 1983) ("the Supreme Court has noted . . . that 'it would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under §1983 and suits brought directly under the Constitution against federal officials.'" (*citing Butz v. Economou*, 438 U.S. 478 (1978)).

A *Godfrey* claim is the new Iowa state equivalent to a *Bivens* action. The federal courts' reasoning applies with equal force to Iowa's new direct constitutional claims. This Court should therefore recognize the applicability of absolute immunity in this case. The wrongs complained of by Venckus all go to Rich's role as a police witness, and therefore should have been dismissed pursuant to the doctrine of absolute immunity.

**c. The States That Allow Direct Constitutional Claims Recognize Absolute Immunity for Witnesses.**

In *Godfrey* and *Baldwin*, the Court cited fourteen states "as recognizing direct damage actions under their state constitutions . . . ." *Godfrey*, 898 N.W.2d at 856 n. 2; *Baldwin*, 915 N.W.2d at 266. Notably all fourteen jurisdictions recognize absolute immunity for trial witnesses. *Silberg v. Anderson*, 50 Cal.3d 205, 213-14 (1990); *Petyan v. Ellis*, 200 Conn. 243, 245-46 (1986); *McNall v. Frus*, 336 Ill. App.3d 904, 906 (3rd Dist Ct. App. 2002); *Marrogi v. Howard*, 805 So.2d 1118, 1126 (La. 2002); *Offen v. Brenner*, 402 Md. 191, 199, 935 A.2d 719, 724 (2007);

*Kobrin v. Gastfriend*, 443 Mass. 327, 345 (2005); *Couch v. Schultz*, 193 Mich. App. 292, 294 (1992); *Franklin Collection Serv. v. Kyle*, 955 So.2d 284, 293 (Miss. 2007); *Montana Bank, N.A. v. Ralph Meyers & So*n, 236 Mont. 236 (1989); *Loigman v. Twp. Comm.*, 185 N.J. 566, 581-82 (2006); *De Lourdes Torres v Jones*, 26 N.Y.3d 742, 770 (2016 Ct. of App.); *Jones v. Coward*, 193 N.C. App. 231, 233 (2008); *Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994); and *Dowd v. New Richmond*, 137 Wis.2d 539, 558 (1987).

Additionally, many states without direct constitutional claims provide an absolute privilege for witnesses testifying in a judicial proceeding. *See, e.g., Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007); *Fullerton v. Florida Med. Ass'n, Inc.*, 938 So.2d 587, 592 (Fla. Dist. Ct. App. 2006); *Smith v. Hodges*, 199 S.W.3d 185, 193-94 (Ky. Ct. App. 2005); *State ex rel. Oklahoma Bar Ass'n v. Dobbs*, 2004 OK 46, 94 P.3d 31, 45 (Okla. 2004); *Wright v. Truman Road Enters., Inc.*, 443 S.W.2d 13, 15 (Mo. Ct. App. 1969).

There is no reason in law or policy to carve out an exception to witness immunity for constitutional claims. This Court should follow *Minor* and adopt the "functional approach" to absolute immunity in *Godfrey* claims. From there, Rich is immune as either an ordinary witness or pursuant to prosecutorial Immunity.

### 2. Absolute Privilege Bars Venckus's IMTCA Claims Against Rich, Because Those Claims Also Revolve Around Rich's Role as a Prosecution Witness Following the Charge and Arrest.

Rich is also immune from liability for the common law torts Venckus alleges were committed against him: defamation, malicious prosecution, and abuse of process. These torts are grounded in Rich's statements as a witness. *See, Spencer.* Venckus argued in his motion to reconsider that a factual issue regarding "what role the City defendants played" in the prosecution should have prevented dismissal of his claims. (App. p. 80). Venckus's allegation is that the City Defendants "pressed forward with reckless claims" against him. *Id.* However, Rich and the City were legally incapable of dismissing the prosecution—only the prosecutors or a court could have done so. *See,* Iowa R. Crim. P. 2.33(1). Moreover, Rich's statements as a witness are protected by absolute privilege. *Spencer* and *Minor.*

## III. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S COMMON LAW TORT CLAIMS AND *GODFREY* CLAIMS AGAINST THE CITY DEFENDANTS AS TIME-BARRED UNDER THE IOWA MUNICIPAL TORT CLAIMS ACT.

### A. The City Defendants Preserved Error.

In their pre-answer motion to dismiss, the City Defendants moved to dismiss Venckus's IMTCA and *Godfrey* claims as time-barred pursuant to Iowa Code §670.5. (App. pp. 17, 24). Venckus resisted. (App. pp. 47, 52). The district court initially "dismissed the defamation claim and the abuse of process claim" against the City Defendants as time-barred. (App. p. 69). It refused to dismiss the malicious

prosecution claim against the City Defendants based on statute of limitations, holding that the limitation period did not begin to run until Venckus's acquittal in September 2016. (App. p. 68).

The district court also held "to the extent IMTCA claims are the nearest statutory corollary to constitutional *Godfrey* claims, the Court believes that the jurisprudence linking the statute of limitations in §1983 claims to *Bivens* would apply by analogy." (App. p. 72). It did not dismiss Venckus's claims based on statute of limitations, but stated "a two year statute of limitations is most appropriate under the newly minted *Godfrey* claims." *Id.*

Over City Defendants' objection, the district court withdrew its rulings that Venckus's actions were time-barred in its Order on Motion to Reconsider. (App. p. 108).

Error is preserved. *Meier v. Senecaut*, 641 N.W.2d at 537.

**B. Scope and Standard of Appellate Review**

The district court erred by not dismissing Venckus's claims as time-barred. Review of a district court's ruling on a motion to dismiss is for errors at law. *Id.*

**C. Argument**

Venckus's common law claims against Rich and the City are barred by the two-year statute of limitation contained in Iowa Code §670.5 (2017). Rich is a police investigator; he was responsible for the investigation. He is not a prosecutor and did

not conduct the prosecution of Venckus. (App. pp. 34, 37, 38, 41). It is undisputed that Rich arrested Venckus with probable cause on January 24, 2014 and that "after Plaintiff's arrest Plaintiff was prosecuted for the crime of Sexual Abuse in the Second Degree" by the Johnson County Attorney's Office. (App. p. 38). Venckus's common law tort claims against Rich and the City were therefore time-barred after January 24, 2016 pursuant to Iowa Code §670.5, which sets forth a two-year statute of limitation for claims against municipalities and their employees. Venckus did not file his petition until March 15, 2018, over four years after the incident occurred. (App. p. 4).

Likewise, Venckus's Iowa constitutional claims against Rich and the City are also time-barred. Though *Godfrey* did not consider the statute of limitations applicable to such claims, Iowa Code §670.5 sets forth the applicable time limitation for analogous torts: two years from the date of injury.

**1. Venckus's IMTCA Claims Are Time-Barred under Iowa Code §670.5.**

The IMTCA, Iowa Code Chapter 670, governs Venckus's common law tort claims. *See,* Iowa Code §670.2 ("[E]very municipality is subject to liability for its torts and those of its officers and employees, acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."). Liability is imposed "except as otherwise provided in this chapter . . ." Iowa Code §670.2(1). The IMTCA provides the "exclusive remedy for torts

against municipalities and their employees." *Rucker v. Humboldt Cmty. Sch. Dist.*, 737 N.W.2d 292, 293 (Iowa 2007). Iowa City is a municipality within the meaning of the statute, and Rich is an employee. *See*, Iowa Code §670.1(2), §670.2(2). "Suits against the government may be maintained only to the extent immunity has been expressly waived by the legislature." *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 18 (Iowa 2000). Private citizens have the right to sue municipalities, "but only in the manner and to the extent to which consent has been given by the legislature." *Rivera v. Woodward Res. Ctr.*, 830 N.W.2d 724, 727 (Iowa 2013) (discussing Chapter 669 and state government).

The IMTCA contains a two-year statute of limitations for damage claims. Section 670.5 states as follows:

> Limitation of actions.
>
> Except as provided in section 614.8, **a person who claims damages from any municipality or any officer, employee or agent** of a municipality for or on account of any wrongful death, loss, or injury within the scope of section 670.2 or section 670.8 or under common law **shall commence an action therefor within two years after the alleged wrongful death, loss, or injury.** (emphasis added).

*See also, Doe v. New London Cmty. Sch. Dist.*, 848 N.W.2d 347, 351 (Iowa 2014) ("The IMTCA has a two-year statute of limitations . . . .") The statute of limitations under §670.5 therefore began running upon Venckus's alleged injury by the City Defendants: being charged with sexual abuse on January 24, 2014. *New London*, 848 N.W.2d at 352 ("Iowa Code section . . . 670.5 [is] a "statute of creation" where

the deadlines for giving notice or filing suit were triggered by the "injury." . . . [T]he IMTCA contains no term like "accrues" to give the statute "elasticity" for the court to consider when a cause of action 'accrues.'").

As pled by Venckus in his amended petition (emphasis added):

- Defendant City of **Iowa City is a governmental entity** and operates the Iowa City Police Department. (App. p. 34).
- Defendant Andrew **Rich** (herein "Rich") is a resident of Johnson County, Iowa and **was at all times relevant an employee of the city of Iowa City** Police Department (herein "police"), **employed as an Investigator**. (App. p. 34).
- "That **on January 24, 2014, Plaintiff was arrested on the following charges: Sexual Abuse in the Second Degree,** Class "B" Felony, in violation of Iowa Code § 709.3." (App. p. 37).
- "**The arrest was made by Defendant Rich** based on **an investigation for which he was principally responsible**." (App. p. 37).
- "**The prosecution was conducted by Johnson County Attorney's Office**." (App. p. 38).
- "That Plaintiff has suffered damages **from the continued criminal prosecution** even though he was eventually acquitted. . . ." (App. p. 41).

Venckus's common law claims against Rich and the City are barred, because any "injury" done to him by Rich's investigation occurred, at the latest, upon his arrest on January 24, 2014. The petition contains no specific post-arrest allegations directed at Rich or the City. As alleged by Venckus, the Johnson County Attorney's Office conducted the prosecution of Venckus, not Rich. "Prosecution" means the

commencement, including the filing of a complaint, and continuance of a criminal proceeding, and pursuit of that proceeding to final judgment on behalf of the state or other political subdivision. Iowa Code §801.4(13). A prosecution is conducted by a prosecuting attorney, not a police investigator. Iowa Code §801.4(12) and §801.4(13).

Venckus generally alleges Rich was part of the "continued prosecution" of him, and that this extended the statute of limitations. But any "injury" allegedly caused by *Rich* occurred on the date of arrest, and therefore Venckus's claims are time-barred under the IMTCA. Each cause of action is addressed in turn.

**a. Defamation**

The district court initially dismissed Venckus's defamation claim against the City Defendants. (App. p. 67). As correctly noted by the district court, the statute of limitations on a defamation claim runs from the time of last publication. *Kiner v. Reliance Ins. Co.*, 463 N.W.2d 9, 13 (Iowa 1990). The only specific publication alleged by Venckus in his Amended Petition was that Rich charged him with Second Degree Sexual Abuse in the criminal complaint, filed on January 24, 2014. (App. p. 37). Beyond that, statements made in judicial proceedings were held to be privileged. (App. p. 67).

Later, the district court changed its ruling in response to Venckus's motion to reconsider, ultimately holding there were fact issues regarding what "further

statements were made later in the prosecution of the case by the officers involved in the investigation . . . ." (App. p. 106). Nothing more had been alleged by Venckus that would qualify as "publication" warranting liability. In fact, he reiterated in his motion to reconsider that "further statements" alleged to be defamatory were statements made in "court filings, court hearings, and a public trial." (App. p. 79). Though the district court maintained its holdings that "there is a two-year statute of limitations on such a claim under Iowa Code §670.5 and that no continuing injury theory will apply" and that immunity could legally bar any claim, it changed its ruling without further explanation. The district court's reversal was in error; Venckus's defamation claim fails as a matter of law and should have been dismissed. The limitation period under Iowa Code §670.5 commenced on January 24, 2014 and expired on January 24, 2016. Venckus's defamation claim is therefore over two years too late.

**b. Abuse of Process**

The district court initially also correctly dismissed Venckus's abuse of process claim based on the two-year statute of limitations[3] and absolute immunity. (App. p. 69). It held "immunities pertaining to [Rich's] role as a witness would apply to

[3] The Court's initial order references Iowa Code §614.1 as the applicable statute of limitations for Venckus's abuse of process claim. However, there is no dispute amongst the parties that the applicable statute of limitations for the common law tort claims is found in the IMTCA at Iowa Code §670.5.

protect the police officers at that point in the proceeding and that the last actions they took before becoming witnesses for the prosecution would have become the charging decision." (App. p. 105).

The district court reversed itself in ruling on Venckus's motion to reconsider. (App. p. 106). There was no discussion by the district court in its ruling on Venckus's motion to reconsider regarding why his abuse of process claim against the City Defendants would not be time-barred. (App. p. 106). It acknowledged a two-year statute of limitations applied. *Id.* There is no state of facts, given the allegations in Venckus's petition—that could sustain an abuse of process claim against the City Defendants given the two-year statute of limitations in Iowa Code §670.5.

There are three elements to an abuse of process claim: (1) the use of a legal process; (2) in an improper or unauthorized manner; and (3) causing damage to the plaintiff. *Fuller v. Local Union No. 106*, 567 N.W.2d 419, 421-22 (Iowa 1997).

The statute of limitation on an abuse of process claim commences from "the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued." *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 400 (Iowa 1998) (dismissing plaintiff's abuse of process action as untimely, because the statute of limitation ran from the last act of abusing "process" and not from the date a petition for judicial review was dismissed)

(*quoting* J.A. Bock, Annotation, *When Statute of Limitations Begins to Run Against Action for Abuse of Process*, 1 A.L.R.3d 953, 954 (1965 & Supp. 1997)). "An actionable tort for abuse of process does not exist in Iowa unless there is some improper use of the process of the court." *Dobratz v. Krier*, 2011 Iowa App. LEXIS 1416, *11 (Iowa Ct. App.).

The last "legal process" Venckus alleges Rich engaged in was the filing of his charge against Venckus on January 24, 2014. (App. p. 37). Because more than two years have elapsed since that date, Venckus's abuse of process claim against Rich is time barred under Iowa Code §670.5. The district court erred in not dismissing Venckus's abuse of process claim on this basis.

**c. Malicious Prosecution**

The district court erroneously held that the Iowa Code §670.5 statute of limitations on Venckus's malicious prosecution claim against the City Defendants commenced upon his acquittal in September 2016, rather than upon the charging date of January 24, 2014. (App. p. 68).

Generally, a malicious prosecution claim "does not *accrue* until the proceedings upon which the action is based are terminated in favor of the defendant." *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 400 (Iowa 1998) (emphasis added). The criminal proceedings herein terminated in favor of Venckus in September 2016. However, tort claims made under the IMTCA are different when

it comes to statute of limitations; the statute begins to run upon the "injury" alleged, and there is no concept of accrual that applies. "Section 670.5 is a special limitation, to which the legislature has recently attended, specifically applicable to municipal tort claims. If the legislature had intended to include additional exceptions, it could have, but it did not." *Buszka v. Iowa City Cmty. Sch. Dist.*, *11 2017 Iowa App. LEXIS 124; *see also, Johnson Cty. v. O'Connor*, 231 Iowa 1333, 1336, 4 N.W.2d 419, 420 (Iowa 1942) (stating "special limitations prevail over a general limitation"). Even in cases of claims of sexual abuse or negligence by minor children delayed until after they reached the age of majority, the Iowa appellate courts have held there is no exception to the statute of limitations in the IMTCA. *See, Rucker v. Humboldt Cmt. Sch. Dist.*, 737 N.W.2d 292 (Iowa 2007) (negligent injury to minor); *Buszka v. Iowa City Cmt. Sch. Dist.*, 2017 Iowa App. LEXIS 124 (sexual abuse against minor).[4]

Private citizens have the right to sue municipalities, "but only in the manner and to the extent to which consent has been given by the legislature." *Rivera v. Woodward Res. Ctr.*, 830 N.W.2d 724, 727 (Iowa 2013) (discussing Chapter 669 and state government and explaining the "exclusive statute of limitations" under Chapter 669, the Iowa Tort Claims Act). Like Chapter 669, Chapter 670 is a partial

[4] The legislature specifically amended §670.5 in 2007 to allow for the tolling of claims for minors and those persons with mental illness.

abrogation of governmental immunity, and contains an "exclusive" statute of limitations. *Perkins v. Dall. Ctr.-Grimes Cmty. Sch. Dist.*, 727 N.W.2d 377, 378 (Iowa 2007) ("Suits against the government may be maintained only to the extent immunity has been expressly waived by the legislature. Iowa Code §670.5 provides a time period within which a plaintiff must file notice and bring suit against a municipal defendant . . . .") (quotation omitted).

Here, any "injury" done by Rich under §670.5 was the arrest and charging of Venckus with sexual abuse. Though a jury acquitted Venckus in September 2016, his alleged injury done by the City Defendants occurred in January 2014.

To save his claims against the City Defendants, Venckus sought to apply the "continuing tort" theory. The district court rejected that theory. The only actions specifically attributed to Rich and the City in Venckus's amended petition were Rich's charge and arrest of him, which occurred on January 24, 2014. This is a single overt act, from which damages potentially flowed. The Court of Appeals has distinguished between such an "overt act" and a "continuing violation":

> A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. Thus, where there is a *single overt act* from which subsequent damages may flow, *the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury.*

*S.O. v. Carlisle Sch. Dist.*, No. 07-2096, 2009 Iowa App. LEXIS 167, at *13-14 (affirming district court's determination that a teacher's ongoing failure to report

child abuse did not constitute a continuous wrong, and the two-year statute of limitations began to run on the first date of the failure to report) (emphasis in original).

Even in a malicious prosecution claim, there is no exception that expands the statute of limitations in Iowa Code §670.5 beyond the two-year period. The Supreme Court has said, "the principal basis of recovery in actions for malicious prosecution is mental anguish and suffering arising *from the wrongful charge and arrest . . .*" *Vander Linden v. Crews*, 231 N.W.2d 904, 907 (Iowa 1975) (emphasis added).

Venckus's amended petition did not specifically allege multiple wrongs by Rich, but rather "continued violations" in the form of various prosecutorial decisions which even Venckus alleged Rich did not have responsibility. (App. p. 34). ("Anne Lahey, Naeda Elliott and Dana Christiansen are or were employees of the JCAO, and were responsible for the prosecution of Joshua Venckus."). The very nature of the "repeated" wrongs Venckus claims are indisputably prosecutorial. (App. pp. 38-41). These acts are not "repeated" violations that Venckus can attribute to Rich to extend the statute of limitations.

Given Venckus's allegations and concessions, the district court erred in not dismissing his IMTCA claims against the City Defendants as time-barred under

Iowa Code §670.5. Venckus's claims against the City Defendants are over two years too late. They should be dismissed as a matter of law.

### 2. Venckus's *Godfrey* Claims Are Also Time-Barred under Iowa Code §670.5.

Venckus made the following claims under *Godfrey*:

| **Venckus Constitutional Claims**[5] | |
|---|---|
| **Iowa Constitutional Provision** | **Alleged Right Violated** |
| Article I, § 1 Rights of persons. | "Right to freedom of movement"<br>"Right to liberty" |
| Article I, § 6 Laws uniform. | "Right to equal protection" |
| Article I, § 9 Right of trial by jury—due process of law. | "Right to due process"<br>"Right to a fair trial" |
| Article I, § 8 Personal security. | "Right against unreasonable seizure" |

(App. p. 41).

The issue therefore presented is what statute of limitations governs Venckus's *Godfrey* claims against the City Defendants. The Iowa Supreme Court has not yet decided what statute of limitations will govern *Godfrey* claims.

The district court held that "to the extent that IMTCA claims are the nearest statutory corollary to constitutional *Godfrey* claims, the Court believes that the jurisprudence linking the statute of limitations in §1983 claims to *Bivens* would

[5] Preliminarily, claims under Article I, §1 and Article I, §8 were not explicitly recognized in *Godfrey*.

apply by analogy. The IMTCA has assisted in the analysis by including its own two year statute of limitations . . . ."[6] (App. p. 72). IMTCA provides the closest corollary to a *Godfrey* claim under Iowa law, and *Godfrey* claims should therefore be subject to the two-year statute of limitations contained in Chapter 670. *See*, Iowa Code §670.5 (2017). Therefore, Venckus's claims were time-barred as of January 24, 2016, which is two years from the date Rich charged him with sexual abuse.

**a. The Appropriate Statute of Limitations Is Determined by the "Actual Nature" of the Action.**

The Court should determine what the most analogous statute of limitations is under Iowa law in deciding the appropriate statute of limitations for *Godfrey* claims against municipalities and their employees. The Iowa Supreme Court has stated that "[i]n a given case, the appropriate statute of limitations is ascertained by determining the actual nature of the action." *Clark v. Figge*, 181 N.W.2d 211, 213 (Iowa 1970). Consequently, two questions arise when determining a statute of limitations: "what kind of action is this under Iowa law, and what statute of limitations applies to that sort of action?" *Id.* The result does not depend upon the elements of damages sought

[6] The Eighth Circuit established the statute of limitations for *Bivens* claims in *Sanchez v. United States*, 49 F.3d 1329 (8th Cir. 1995). There, it held that because a *Bivens* action "is almost identical to an action under section 1983," the same statute of limitations should apply for both. *Id.* at 1330. Like section 1983 actions, the statute of limitations in a *Bivens* action is therefore "governed by the statute of limitations for personal injury actions in the state in which the claim accrues." *Id.* (*citing Wilson v. Garcia*, 471 U.S. 261 (1985)).

for the claim. *Sandbulte v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457, 462 (Iowa 1984). "It is the nature of the right sued upon and not the elements of relief requested that governs the selection of the appropriate statutory period for the basic right." *Id.*

The Court must look to *Godfrey* itself to answer the first question, i.e., "what kind of action" a *Godfrey* claim is. The majority described the core of a *Godfrey* claim as being that "unconstitutional actions by governmental officials [which] could lead to compensatory and exemplary damages . . . ." *Godfrey*, 898 N.W.2d at 866. It further stated, in pertinent part:

> [a] constitutional violation is different from an ordinary dispute between two private parties . . . . When a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future.

*Id.* at 877.

In summary, "The focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights." *Id.* Three elements seem indispensable in defining the "nature" of the constitutional tort in *Godfrey*: (1) unconstitutional action by a government official; (2) compensation of the individual harmed by the unconstitutional conduct; and (3) deterrence of unconstitutional conduct in the future.

**b. Claims under the IMTCA Are Analogous to *Godfrey* Claims, and a Two-Year Statute of Limitations Is Provided in Chapter 670.**

Chapter 670 provides a statute of limitations that is directly analogous to a *Godfrey* claim in that it is specifically applicable to unconstitutional actions by municipal government actors that cause harm to a person's body, property, or rights. Iowa Code §670.1 provides as follows:

> As used in this chapter, the following terms shall have the following meanings:
>
> 4. **"Tort" means every civil wrong which results in wrongful death or injury to person or injury to property or injury to personal or property rights** and includes but is not restricted to actions based upon negligence; error or omission; nuisance; breach of duty, whether statutory or other duty or denial **or impairment of any right under any constitutional provision,** statute or rule of law.
>
> (emphasis added).

In an IMTCA action, the relief afforded Iowa Code §670.5 sets forth the two-year statute of limitations for any such tort. Deterrence for "constitutional torts" is also provided for in the IMTCA by imposing personal liability for punitive damages upon municipal officers and employees who are shown to have acted with actual malice or willful, wanton, and reckless misconduct. Iowa Code §670.12.

**c. Statutes of Limitations in Other States That Recognize Direct Constitutional Claims.**

In *Baldwin*, the Iowa Supreme Court collected the law of many states that "rely on their tort claims acts to demarcate the outer scope of constitutional damages liability." *Baldwin*, 915 at 268.

Five of the states, California, Texas, Montana, Maryland, and North Carolina, turn to their respective statutes of limitations for injuries to persons. *Acuna v. Regents of University of California*, 56 Cal. App. 4th 639, 645-46 (1997); *Staley v. Lingerfelt*, 134 N.C. App. 294 (1999); *Schoof v. Nesbit*, 316 P.3d 831, 373 Mont. 226 (2014); and *Hannaway v. Deutsche Bank Nat'l Trust Co*., 2011 U.S. Dist. LEXIS 24775 at *8 (W.D. Tx. 2011).

In Maryland, even statutory notice provisions apply to state constitutional claims. *Ross v. Prince George's Cty.*, Civil Action No. DKC 11-1984, 2012 U.S. Dist. LEXIS 82078, at *25-26 (D. Md. June 13, 2012) (applying notice provision from local tort claims act to state constitutional claims and citing *Ransom v. Leopold*, 183 Md. App. 570, 962 A.2d 1025 (2008) (upholding the circuit court's dismissal of several claims, including state constitutional torts, for failure to comply with the local government tort claims act); *White v. Prince George's Cnty.*, 163 Md. App. 129, 140-58, 877 A.2d 1129 (2005), *cert. denied*, 389 Md. 401, 885 A.2d 825 (2005)).

Consistent with these jurisdictions, and for the same policy reasons that the U.S. Supreme Court looks to state jurisdictions for the appropriate statute of limitations in §1983 claims, the Iowa Supreme Court should adopt §670.5 of the Iowa Code as the two-year time bar for *Godfrey* claims. In *Wilson v. Garcia*, the U.S. Supreme Court noted that there must be a time bar because memories of

witnesses fade and evidence is lost with the passage of time. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985). The Court then found that a tort action, a remedy to recover damages for personal injury, was most akin to the alleged civil rights violation at bar, namely the unlawful arrest and beating from a law enforcement officer. *Id.* at 276.

## IV. THE DISTRICT COURT ERRED BY FAILING TO DISMISS VENCKUS'S *GODFREY* CLAIMS AS UNAVAILABLE BECAUSE THERE IS AN ADEQUATE STATUTORY REMEDY FOR HIS CLAIMS PROVIDED BY THE IOWA MUNICIPAL TORT CLAIMS ACT.

The factual allegations in Venckus's Amended Petition support two sorts of legal claims against the City Defendants: common law claims under the IMTCA and direct Iowa constitutional claims. But *Godfrey* did not authorize *all* potential claims for damages under the Iowa Constitution. It only authorized those claims where "the legislature has not provided an adequate remedy." *Godfrey*, 898 N.W.2d at 880 (Cady, C.J. concurring in part and dissenting in part). The legislature has established an adequate remedy for Venckus through the IMTCA, which provides a damage remedy for all the wrongs alleged by Venckus—including potential punitive damages against Investigator Rich individually. The district court's original holding—that the IMTCA provided an adequate remedy for Venckus that barred his direct constitutional claims—was correct. The district court erred in reversing this holding and in failing to dismiss Venckus's *Godfrey* claims.

**A. The City Defendants Preserved Error.**

The City Defendants moved to dismiss Venckus's *Godfrey* claims in a Motion to Dismiss, and the district court initially held "the IMTCA is sufficient to remedy the Plaintiff's interests in this case and that resort to *Godfrey* is unnecessary and duplicative." (App. pp. 31, 73).

The district court, relying upon the *Baldwin v. Estherville* decision, then reversed its holding in its Order on Motion to Reconsider. (App. p. 107). The district court believed the *Baldwin* decision distinguished claims under the Iowa Tort Claims Act and the IMTCA from general constitutional claims, and stated "the IMTCA does not pre-empt the constitutional claims provided for in *Godfrey* . . . ." (App. p. 107). Error is therefore preserved on the issue of whether Venckus's *Godfrey* claims are unavailable because the IMTCA provides adequate remedies. *Meier v. Senecaut*, 641 N.W.2d at 537.

**B. Scope and Standard of Appellate Review**

The City Defendants contend the district court erred by not dismissing Venckus's *Godfrey* claims because the IMTCA provides adequate and robust remedies. Review of a district court's ruling on a motion to dismiss is for errors at law. *Id.* at 537.

**C. Argument**

*Godfrey* recognized that an independent constitutional claim under the Iowa Constitution exists only if the plaintiff can establish that there is not a remedy available to adequately vindicate her or his constitutional rights. *Godfrey*, 898 N.W.2d at 880. In *Godfrey*, the Iowa Supreme Court dismissed certain constitutional claims by plaintiff based upon the Iowa Constitution's equal protection principles because of the adequacy of the remedies for such claims available under the Iowa Civil Rights Act. *Id.* at 876, 880. The Court held that the Iowa Civil Rights Act provided the plaintiff an adequate and robust remedy to compensate him for the damages he allegedly suffered from discrimination based on sexual orientation. *Id.* 881. Therefore, it was "unnecessary to create a constitutional tort for these claims because adequate statutory remedies exist." *Id.*

Venckus's constitutional claims are all based upon his claim that he was damaged by being wrongly prosecuted for sexual abuse. (App. p. 41). The damages claimed for both his *Godfrey* claims and his common law claims against the City Defendants include: emotional distress damages; loss of reputation damages; economic loss due, and the expenses he incurred defending himself; "attorney's fees and expenses"; and "punitive damages against each Defendant." (App. pp. 41-42).

### 1. Robust Remedies for Venckus's Iowa Constitutional Claims Are Available under the IMTCA.

Robust remedies for *all* Venckus's claimed damages, including his constitutional claims, are available through his common law claims made pursuant to the IMTCA, Chapter 670. Chapter 670 imposes liability upon municipalities for its torts and those of its officers and employees. Iowa Code §670.2(1). "Tort" is broadly defined:

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

*Id.* §670.1(4).

The remedies available under the IMTCA are also broad. They include compensatory damages and even punitive damages against individual municipal officers or employees who acted with actual malice or committed willful, wanton and reckless misconduct. Iowa Code §670.12. A municipal employee may be held personally liable for punitive damages. *Id.*

The availability of punitive damages under the IMTCA is of special significance in determining the adequacy of the remedies available. Justice Cady presented a useful analysis of "adequate remedies" in *Godfrey*, analyzing the U.S. Supreme Court case *Carlson v. Green*, 446 U.S. 14 (1980). Justice Cady noted "[t]he

importance of punitive damages was an essential part of the United States Supreme Court's opinion" in *Carlson*. *Godfrey*, 898 N.W.2d at 880 (Cady, C.J., concurring and dissenting). In *Carlson* the Supreme Court held in that case that the Federal Tort Claims Act ("FTCA") did *not* provide an adequate remedy for plaintiff's due process, equal protection, and protection from cruel and unusual punishment rights because the FTCA barred punitive damages. Therefore, the FTCA was held "that much less effective than a *Bivens* action as a deterrent to unconstitutional acts." *Carlson*, 466 U.S. at 22. Additionally, the FTCA also did not allow a jury trial, while a *Bivens* action would[7]. *Id.* at 23.

In contrast, the IMTCA does allow for punitive damages against individual municipal employees whose behavior is egregious. The specter of personal liability for punitive damages is a strong deterrent to municipal government actors violating a citizen's constitutional rights. A jury trial is available. The full array of

[7] Appellants note that Venckus is seeking attorney fees incurred in his criminal action as compensatory damages, but also for attorney fees he incurs in this action. (App. p. 42). The unavailability of attorney fees in this action was raised in Appellants' Motion to Dismiss (App. pp. 17, 24, 30-31) and Reply to Venckus's Resistance to Motion to Dismiss (App. pp. 63-64) and confirmed by the district court's original order (App. p. 74). The matter was not addressed further in the Court's Order on Motion to Reconsider. In the event this Court does not dismiss the Amended Petition, all parties would benefit from knowing whether attorney fees from this action are available to Venckus. In his pleadings, Venckus made clear that he is not making a §1983 claim, and the weight of authority in federal *Bivens* actions dictates against attorney fee awards, so the City Defendants would ask that this Court rule that attorney fees are not available in this action. (App pp. 17, 24, 30-31).

compensatory damages available to Venckus for his alleged constitutional violations is also available under the IMTCA.

An independent *Godfrey* action is not necessary in this case. Plaintiff's constitutional claims should therefore be dismissed because an adequate, robust remedy exists under Chapter 670. In this case, there is no need for a "a parallel direct constitutional claim for money damages"—it only allows Venckus a duplicate damage remedy.

**2. *Baldwin* Did Not Hold the IMTCA Does Not Provide Adequate Remedies for Constitutional Claims.**

The district court reversed its holding that the IMTCA provides an adequate remedy for Venckus's claims based upon the *Baldwin* case. According to the court, *Baldwin* emphasized, "the various exceptions outlined in both the Iowa Tort Claims Act [hereafter ITCA] and the Iowa Municipal Tort Claims Act [hereafter IMTCA] as distinguishing those claims from general constitutional claims." (App. p. 107).

The question in *Baldwin* did not concern adequacy of remedies. *Baldwin* arose from the certified question asked by the federal district court: "Can a defendant raise a defense of qualified immunity to an individual's claim for damages for violation of Article I, §1 and §8 of the Iowa Constitution?" *Baldwin*, 915 N.W.2d at 259. The Supreme Court answered: "A defendant who pleads and proves as an affirmative defense that he or she exercised all due care to conform with the requirements of the law is entitled to qualified immunity . . . ." *Id.*

The question though, when it comes to the adequacy of remedies, is different. The *Godfrey* court explained as follows:

> The question of whether a statutory remedy might be adequate so as to avoid the need for a direct constitutional claim has nothing to do with legislative intent. It has everything to do with a judicial determination of whether the court should not allow a direct constitutional claim for damages to proceed because the court believes an established statutory remedy is sufficient to vindicate the constitutional interests of the people expressed in the civil liberties provisions of state constitutions.

*Godfrey*, 898 N.W.2d at 873.

The *Godfrey* majority determined there were sufficient remedies under the Iowa Civil Rights Act to vindicate *Godfrey's* claim of discrimination based on sexual orientation "even without punitive damages." *Id.* at 880.

Nothing in *Baldwin* answered the question of whether the IMTCA provides adequate remedies for Venckus's claims. The district court erred in finding *Baldwin* dispositive on this issue.

## CONCLUSION

For all the aforementioned reasons, the City Defendants ask the Court to dismiss the petition as against both City Defendants.

## REQUEST FOR ORAL ARGUMENT

The City Defendants request oral argument.

Respectfully submitted,

*/s/ Eric R. Goers*
Eric R. Goers AT0002835
Assistant City Attorney

*/s/ Susan Dulek*
Susan Dulek AT0002210
Assistant City Attorney
410 East Washington Street
Iowa City, IA 52240
(319) 356-5030
icattorney@iowa-city.org
ATTORNEYS FOR APPELLANTS
CITY OF IOWA CITY & ANDREW RICH

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*/s/ Eric R. Goers*
Eric R. Goers

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 16, 2019, I electronically filed the foregoing Final Brief of Defendants-Appellants with the Clerk of the Iowa Supreme Court by using the EDMS system.

I also certify that participants in this appeal are registered EDMS users and service of the foregoing Final Brief of Defendants-Appellants on counsel for Plaintiff-Appellee was accomplished by the EDMS system.

*/s/ Eric R. Goers*
Eric R. Goers