UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 09-6363
ELECTRONICALLY FILED

MICHAEL MARTIN,

Plaintiff-Appellant

v.

JOSEPH SCHUTZMAN; DAN GOODENOUGH, in their Individual and Official Capacities,

Defendants-Appellees

Appeal from the United States District Court
For the Eastern District of Kentucky at Covington
Civil Action No. 08-104
Hon. William O. Bertelsman

BRIEF FOR APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 25, Plaintiff-Appellant Michael Martin makes the following disclosures:

1. Are any of said parties a subsidiary or affiliate of a publicly owned corporation?

RESPONSE: No.

2. If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

RESPONSE: See the Response above.

If the answer is YES, list the identity of such corporation and the nature of the financial interest:

RESPONSE: See Response above.

/s/ Robert L. Abell
Robert L. Abell
Counsel for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully suggests that oral argument would be helpful to the Court in this case and requests that it be granted.

STATEMENT OF JURISDICTION

Michael Martin filed his complaint in the United States District Court for the Eastern District of Kentucky pleading claims pursuant to 42 U.S.C. § 1983 and Kentucky state law for malicious and retaliatory prosecution, as well as false arrest. (RE 1, Complaint). The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

On October 21, 2009, the court below entered an opinion and order, as well as a judgment, granting defendants' motion for summary judgment. (RE 34, Opinion and Order; RE 35, Judgment). Appellant timely filed his notice of appeal on November 4, 2009. (RE 36, Notice of Appeal). The district court's judgment is properly appealable to this court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether there are disputed issues of material fact as to the existence of probable cause for Martin's arrest and criminal prosecution.

2. Whether defendants can be liable for violation of Martin's Fourth Amendment rights.

3. Whether defendants, in their individual capacities, are entitled to qualified immunity.

4. Where the court below limited Martin's discovery to the issue of probable cause, whether the court below erred in granting defendants summary judgment in their official capacities.

STATEMENT OF THE CASE

Plaintiff Michael Martin asserted claims of malicious prosecution, retaliatory prosecution and false arrest against defendants, Joseph Schutzman and Dan Goodenough, two police officers, in their individual and official capacities. The claims arose because defendants caused Martin's unconstitutional arrest and criminal prosecution. The criminal charge against Martin was dismissed for lack of probable cause by a Kentucky state court.

STATEMENT OF FACTS

Plaintiff Michael Martin is a citizen of the City of Villa Hills, Kentucky and served on its City Council from January 2005 to January 2009.

Defendant Joseph Schutzman works as a detective for the Villa Hills police department for whom he has been employed since 1995. (RE 21, Joseph Schutzman depo. at 8).[1] In addition to this job as a police officer, Schutzman runs a private business known as Schutzman Inspection Services, LLC through which he performs building inspection and zoning services for the cities of Villa Hills, Bromley, Kentucky, and Ludlow, Kentucky. (*Id*. at 14).

In mid-2005, information came to Martin's attention leading him to suspect that Schutzman was "double-dipping"; more specifically, that Schutzman, at the same time that he was on the clock and being paid for supposedly working as a police officer for Villa Hills, was actually working and being paid for his work on

[1] "RE" is an abbreviation for record entry and correlates to the record entry number on the district court's docket sheet. "Depo." is an abbreviation for deposition.

his own private business, Schutzman Inspection Services. (RE 25-1, Plaintiff's Answers to Defendants' Interrogatories and Document Requests 1-25 at 1-3)(hereinafter referred to as "Plaintiff's Discovery Answers"). Martin shared his concerns to Mike Duncan, the city attorney, who advised him that further investigation was appropriate, especially given Martin's position as chairman of the city council's Administration committee. (*Id.* at 3). In an attempt to prevent any undue or unwarranted embarrassment to Schutzman, Martin had his sister, Cindy Koebbe, sign requests made pursuant to Kentucky's Open Records Act sent to Bromley and Ludlow regarding Schutzman's work for those cities as a building/zoning inspector. (*Id.).* Schutzman was outraged at these communications and contacted Koebbe on several occasions demanding that she contact him at the Villa Hills police department. (*Id.* at 6-10).

After receiving the information from Ludlow and Bromley, Martin relayed the information to the Villa Hills mayor, Mike Sadouskas, who, in essence, said he did not care if Schutzman was double-dipping. (*Id.* at 10-12). Sadouskas also informed Martin

that he had disclosed to Schutzman that Cindy Koebbe was Martin's sister. (*Id.* at 12).

Schutzman vowed revenge and wrote Koebbe in December 2006 asserting and threatening, among other things, as follows:

> This letter is in response to the actions caused by your letter to the City of Bromley. My name is Joe Schutzman. I am currently on a fact-finding mission, which will result in civil litigation for compensatory and punitive damages. … It is my intent to include only the individuals or parties who have assisted or engaged in this effort to financially and emotionally harm my family and myself.
>
> …
>
> These activities have continued. It has led to a great deal of turmoil for me in doing my jobs. It has negatively affected the atmosphere within my employment. …
>
> I intend to have these personal malicious attacks stopped. Several people are actively working together to harm my family, myself and business. I have met with counsel to review these actions and only intend on including those parties responsible. ….
>
> I have spoken to my employer about this correspondence. ……

(RE 1-2, Ex. A to Complaint).

Schutzman would receive his opportunity to inflict revenge in October 2007, when he was contacted with regard to the estate of Martin's mother, Marilyn Kuhl.

The Estate of Marilyn Kuhl, Martin's Mother

Martin's mother, Marilyn Kuhl, passed away in August 2003. He was a dutiful and attentive son, managed his mother's finances and looked after her affairs. Martin probated his mother's modest estate in Hamilton County (Ohio) Probate Court, seeing that notice was sent to all the siblings and making the required filings. (*See* RE 17-3, Hamilton County Probate Court case file filings for the Estate of Marilyn Kuhl). Although he had no legal obligation to do so, Martin himself paid off more than $29,000 in debts that his mother had outstanding at her death. (*See* RE 17-3 at pp. 30-35; RE 25-1, Plaintiff's Discovery Answers at 13-16). Kuhl's estate was functionally bankrupt, as its liabilities exceeded its assets, and, as a result of that and its modest size, the probate court issued an order on November 14, 2003, relieving it from formal administration. (RE 17-3 at 27). Notice of all probate court proceedings were sent to Martin's

siblings, who were the other beneficiaries of the estate. (*See* RE 17-3).

The genesis of this case is the child support arrearage of Charles Donald Martin, who has been and remains in arrears on his child support for now about 40 years. A 1972 Hamilton County, Ohio court order showed him in arrears greater than $18,000.00. (RE 18-3, Jeffrey Startzman depo. ex. 2). Some 37 years after entry of that judgment, the arrearage had not been retired and "[t]here is still an order in place for payments to be made." (RE 18, Jeffrey Startzman depo. at 9). A state agency, Hamilton County Jobs and Family Services (HCJFS), was involved in collecting and processing Charles Martin's payments toward satisfaction of his child support arrearage. Jeffrey Startzman, at all times pertinent to this case, was assistant director of HCJFS. (*Id*. at 5, 9). Records of these long, long overdue payments being made in 2009 were introduced as exhibits to the depositions of both Mike Martin and Jeffrey Startzman. (RE 19-7, Mike Martin depo. ex. E; RE 18-7, Startzman depo. ex. 6).

When Marilyn Kuhl passed away in 2003, there was a judgment by the Hamilton County Court of Common Pleas entered on February 19, 1999, reflecting Charles Martin's arrearage at $19,640. (RE 18, Startzman depo. at p. 10; RE 18-5, Startzman depo ex. 4). That judgment was redundant, because, as Startzman explained, "under Ohio law any arrearage owed in child support is by operation of law a judgment, whether or not it is formally reduced to a judgment by a motion." (RE 18, Startzman depo. at 10). Of course and as Startzman himself acknowledged, the unsatisfied judgment became an asset of Marilyn Kuhl's estate upon her passing. (*Id.* at 19).

It appears that Charles Martin remained intent on evading forever his responsibilities to financially support his children. It also appears that he learned sometime in 2005 of Kuhl's death, contacted Startzman and HCJFS and complained that he was still being obligated to meet the legal and moral obligations that he had shirked for decades – the support of his children. (RE 18, Startzman depo. at 12). Startzman and HCJFS jumped to action,

believing that Charles Martin's complaints raised a red flag. (*Id.*).[2]

After Charles Martin complained, Startzman reviewed online the probate court records for Marilyn Kuhl's estate, finding there the name and address of Mike Martin, the executor of the estate,[3] the names and addresses of Kuhl's other children,[4] as well as notice or waivers regarding notification of the estate's probate to all interested persons.[5] HCJFS also caused subpoenas to be issued and determined that checks issued after Kuhl's death had been negotiated. (RE 18, Startzman depo. at 14-16). These monies, the court below correctly observed, were at all times Martin's to claim and keep. (*See* RE 34, Opinion and Order at 1).

Although Startzman and HCJFS knew that Mike Martin was the executor of Kuhl's estate, knew that the child support

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[2] Over the course of 40 or so years there is little indication that HCJFS did much toward actually trying to collect from Charles Martin the owed child support. The judgment that was entered in 1999 was done at the instigation of a lawyer hired by Kuhl and/or her family. (RE 19, Mike Martin depo. at p. 42). This contrasts strikingly and distressingly with the attention Startzman gave Charles Martin's complaints.

[3] (*See* RE 17-3 at pp. 4-7, 10, 26-28).

[4] (RE 17-3 at p. 2).

[5] (RE 17-3).

judgment was an asset of the estate, knew Mike Martin's address, and knew that the checks toward satisfying the judgment were being sent to Mike Martin's address, neither Startzman nor anyone else with HCJFS ever attempted to contact Mike Martin. (RE 18, Startzman depo. at 14-16). Incredibly, Startzman stated that there was no need to contact Mike Martin. (*Id.* at 15). Instead, Startzman – for reasons that surpass common sense and without even attempting to contact Mike Martin or any of the other children/heirs -- passed the matter on to the Villa Hills police department for further investigation. (*Id.* at 13-16). Unfortunately for Martin, it there fell into Schutzman's hands.

Schutzman's Knowledge of Kuhl's Probate Estate

Schutzman assumed the investigation and interviewed Martin on November 2, 2007. During the course of the interview, Martin acknowledged his mother's death, informed Schutzman that he was executor of her estate, and that probate proceedings had occurred in Ohio. Martin informed Schutzman near the beginning of the interview that he understood that the child support judgment became part of the estate's assets. (RE 17-4,

Transcript of Interview of Martin by Schutzman at 4-5)(hereinafter "Schutzman-Martin Interview Transcript"). The transcript also reveals the following statements by Martin regarding his mother's estate:

> I'm also the executor of her estate. (RE 17-4, Schutzman-Martin Interview Transcript at 4).
>
> I was the executor of her estate[.]. (*Id.* at 17).

Martin also advised Schutzman that his mother's estate had been modest and its probate proceedings had been minimal. (*Id.*).

Also on November 2, 2007, Schutzman spoke with Startzman. (RE 18, Jeffrey Startzman depo. at p. 24; RE 18-8 Startzman depo. ex. 7). Schutzman informed Startzman that he had learned, during his interview of Martin, that Martin was executor of Kuhl's estate. (RE 18, Startzman depo. at p. 25). Nonetheless, according to notes taken by Startzman during his conversation with Schutzman, Schutzman stated that there was no estate for Kuhl in Hamilton County, that he thought none was ever opened and that Martin pocketed the money. (RE 18, Startzman depo. at p. 25; RE 18-8, Startzman depo. ex. 7). To highlight his motivation and interest in prosecuting Martin,

Schutzman told Startzman that Martin was a Villa Hills councilman. (RE 18, Startzman depo. at p. 28; RE 18-8, Startzman depo. ex. 7).

Startzman informed Schutzman that the estate of Marilyn Kuhl's had been probated in Ohio and closed. (RE 18, Startzman depo. at 32-33).

The only two sources that Schutzman consulted, Martin and Startzman, both told him of the probate court proceedings pertaining to Marilyn Kuhl's estate. Nonetheless, Schutzman misrepresented this knowledge in both his investigative report and file submitted to the Commonwealth Attorney's office and in his testimony to the Kenton District Court following initiation of Martin's unfounded criminal prosecution.

The Misrepresentations in Schutzman's Investigative File Regarding Kuhl's Estate and its Probate Proceedings

Schutzman prepared an investigative file regarding the matter with the expectation that the Commonwealth Attorney's office would rely on it as truthful. (RE 21-2, Schutzman depo. at

p. 89).[6] That investigative file begins with a narrative report regarding Kuhl's estate and its probate proceedings. It contains numerous outright falsehoods and misrepresentations including the following:

Misrepresentations in Schutzman's Investigative Report	**Information Provided by Martin and Startzman to Schutzman**
(1). "No notification was made to the courts of [Kuhl's] death." (RE 17-2, Investigative file at 1)	"I'm also the executor of her estate." (RE 17-4, Schutzman-Martin Interview Transcript at 4)
	"I was the executor of her estate[.]" (RE 17-4, Schutzman-Martin Interview Transcript at 4)
(2). "Mr. Martin stated the will was never probated because all of his mother's assets were in his name, including her home in Ohio." (RE 17-2, Investigative file at 2)	"I'm also the executor of her estate." (RE 17-4, Schutzman-Martin Interview Transcript at 4)
	"I was the executor of her estate[.]" (RE 17-4, Schutzman-Martin Interview Transcript at 4)
	"I was actually in joint survivorship on the home." (RE 17-4, Schutzman-

[6] Defendants submitted Schutzman's report and materials he claims were part of it as Ex. A to their motion for summary judgment. It is RE 17-2.

	Martin Interview Transcript at 16)
	"yes, it was probated." (RE 17-4, Schutzman-Martin Interview Transcript at 17)
(3). "A will [for Marilyn Kuhl] could not be located nor any evidence the estate was probated." (RE 17-2, Investigative file at 2)	Q: Did you ever tell Detective Schutzman that no probate court records regarding Marilyn Kuhl could be located? A: No, I wouldn't phrase it that way. (RE 18, Startzman depo. at 34)

Schutzman also misrepresented the following: "I asked if his family knew of his arraignments (sic). He said he was not sure." (*Id.*). The transcript of the interview shows that Martin did not say anything like this. (*See* RE 17-4, Schutzman-Martin Interview Transcript). Furthermore, he would not have said anything like this because, as the probate court records show that defendants submitted, full and complete notice of the probate proceedings was provided all his siblings in 2003, some four years earlier. (*See* RE 17-3).

Schutzman also attempted to blame Startzman with providing him with misinformation regarding the probate of

Kuhl's estate. These misrepresentations by Schutzman included the following:

Schutzman's Misrepresentations About What He Learned from Startzman	**Startzman's Testimony**
(1) Q. Did you ever make any effort to determine if in probate court in Ohio any proceedings had been initiated regarding Marilyn Kuhl? A. Yes, sir. Q. And what did you find? A. Mr. Startzman said that they could not locate any but he was sending me a packet of information for whatever case file, I don't recall a number, but it was A and it had a number after it, because the issue was, and this is where, it was from 19, if I'm not mistaken, it was from 1961. … (RE 21, Schutzman depo. at 37)	Q: Did you ever tell Detective Schutzman that no probate court records regarding Marilyn Kuhl could be located? A. No, I wouldn't phrase it that way. (RE 18, Startzman depo. at 34)
(2) "And I also think I asked where to find a copy of a will or any other pertinent information to that specific case number." (RE 21, Schutzman depo. at 38)	Q. Did Mr. Schutzman ever ask you where he could find a copy of a will for Marilyn Kuhl? A: I don't recollect that, no. … Q. Did Schutzman ever

	ask you where he could find any pertinent information regarding probate proceedings pertaining to Marilyn Kuhl? A. I don't believe so. I don't recollect that. And I don't have that in my notes. (RE 18, Startzman depo. at 35-36)

Schutzman also claims that Startzman referred him to what Schutzman claims he understood was the Hamilton County prosecutor's office regarding locating probate court records for Kuhl. (RE 21, Schutzman depo. at 43-44; RE 21-2, Schutzman depo. at pp. 52-54).[7] Not only does Startzman deny doing so but he affirms he would not have had to do so because Hamilton County, Ohio probate court records are and were then available on line and he had no need to refer Schutzman to Cade or anyone else regarding how to locate such records. (RE 18, Startzman depo. at pp. 35-37).

[7] Schutzman claimed that he eventually spoke with a Dan Cade and an Amy Emerson in the Hamilton County prosecutor's office. (RE 21, Schutzman depo. at 43-44). Cade was and is employed at the chief legal counsel for Startzman's agency, the Hamilton County Jobs and Family Services agency and Emerson was his administrative assistant. (RE 18, Startzman depo. at 37, 40).

Schutzman's Testimony About His Communications With The Commonwealth Attorney's Office

Schutzman's initial contact with the prosecutor's (Commonwealth Attorney) office regarding Martin was with investigator Wayne Wallace. (RE 21-2, Schutzman depo. at 60). Wallace identified a number of additional, follow-up investigative steps that he directed Schutzman to take and explained his rationale: "notoriously the biggest problem in the office was lackadaisical work." (RE 20, Wayne Wallace depo. at 25). Wallace advised Rob Sanders, the Commonwealth Attorney, of his instructions to Schutzman. (*Id*. at 25-26).

In a subsequent discussion about two weeks later, Schutzman indicated to Wallace that he had not completed the tasks earlier identified by Wallace. (*Id*. at 27, 30-32). Since Schutzman had not taken the reasonable and prudent steps previously outlined, Wallace determined that the case was not ready to request an arrest warrant. (*Id*. at 31-32). He told Schutzman to complete the tasks earlier identified, a direction with which Schutzman indicated his disagreement and displeasure. (*Id*. at 32).

Wallace also indicated that the investigation pertaining to Martin was not the first time he had found Schutzman less than diligent in completing a thorough investigation. (*Id.* at 35). Just as Martin initially suspected, Schutzman's double-dipping was interfering with his police work: Schutzman informed Wallace on a prior occasion that he was having difficulty concluding his police investigations because to the work he had going on as a building and zoning inspector. (*Id.*).

Neither Schutzman nor anyone else ever attempted to contact any of Martin's siblings regarding the monies. (RE 21-2, Schutzman depo. at 88; RE 18, Startzman depo. at 13, 16).

Schutzman disregarded and bypassed Wallace's well-founded objections to going forward. He signed a criminal complaint – the *sine qua non* for initiation of a criminal prosecution in Kentucky[8] -- charging Martin with a felony, forgery

[8] Under Kentucky law execution of a sworn criminal complaint is necessary before an arrest warrant can issue. Ky.R.Crim.Pro. 2.02; Ky.R.Crim.Pro. 2.04; *see* Abramson, 8 Kentucky Practice: Criminal Practice & Procedure § 1.1 at 2 ("The method of applying for a warrant requires the signing of a written document called a complaint."); *Id.* § 1.13 at 6 ("the complaint, a written document required to obtain a warrant, is an affidavit

in the second degree. (RE 21-4, Schutzman depo. ex. 2). There is no mention in Schutzman's criminal complaint of Kuhl's estate, Martin's status as its executor, that all the beneficiaries of her estate had received notice of the probate, that an order had been entered by the probate court dispensing with formal administration, the estate's entitlement to continue receiving the payments toward satisfaction of a judgment, Martin's continuing right to receive and negotiate the checks toward satisfaction of the judgment or Schutzman's inexcusable and wholly unexplained failure to even attempt to contact any of the parties that were supposedly being harmed. As Wallace noted, the commonwealth attorney's biggest problem "was notoriously … lackadaisical work." (RE 20, Wallace depo. at p. 25). That combined here with Schutzman's desire for revenge against Martin.

The Preliminary Hearing in Kenton District Court

A preliminary hearing on the felony charge against Martin initiated by Schutzman was held in several sessions in Kenton District Court. At a hearing on January 15, 2008, the Kenton

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which must allege, under oath, that a person has committed an offense in the essential facts constituting the offense charged.").

District Court accepted that Martin retained authority to negotiate the checks because he was the estate's executor and had been appointed its commissioner. (RE 25-3, Transcript of January 15, 2008 at 22-24). In response to the Commonwealth Attorney's complaints that Martin had not done a full accounting of all of the estate's debts and liabilities, the Kenton District Court explained "that's why you do dispensing with administration so you don't have to do that. That's the whole purpose of dispensing with the administration." (*Id.* at 32).

Schutzman misrepresented his knowledge of Kuhl's estate in his testimony before the Kenton District Court. In direct response to questions from the presiding judge, Hon. Douglas J. Grothaus, Schutzman denied any knowledge of Kuhl's estate:

> THE COURT [to Schutzman]: Okay. And was her estate probated? Was an estate opened up? Do you know?
>
> MS. SCOTT:[9] Your Honor, I would be prepared to call Mr. Len Rowekamp to testify to that effect.
>
> THE COURT: Well, do you know if there's ---

[9] Martin was represented in the Kenton District Court by Hon. Tasha Scott.

A: No, sir. (answer by Schutzman).

(RE 25-3, Transcript of Preliminary Hearing at 7).

On February 28, 2008, the court dismissed the charge against Martin for lack of probable cause. (RE 25-4, Kenton District Court docket order).

Schutzman is unaware of any evidence that could have or should have been presented to the Kenton District Court but was not. (RE 21, Schutzman depo. at 6). He has not learned of any evidence since the dismissal that he wishes could have been presented during the preliminary hearing. (*Id.* at 7). Schutzman believes that any and all evidence that could be presented in support of Schutzman's felony charge against Martin was presented at the preliminary hearing. (RE 21, Schutzman depo. at 7-8; RE 21-2, Schutzman depo. at 83). He has not been contacted about appearing before a grand jury as part of an effort by the Commonwealth Attorney to obtain an indictment. (*Id.* at 78-79).

The Role of Defendant Goodenough

Goodenough is the chief of the Villa Hills police department and claims full responsibility for the criminal charge that

Schutzman filed against Martin. (RE 22, Dan Goodenough depo. at 4, 20). Both Goodenough and Schutzman affirm that the decision to criminally charge Martin was a joint decision between Goodenough and Martin and represented the official position of the Villa Hills Police Department. (*Id.* at 20; RE 21-2, Schutzman depo. at 84-85). Goodenough, notwithstanding the dismissal of the unfounded charge by the Kenton District Court, continues to defend his decision to charge Martin. (RE 22, Goodenough depo. at 20).

Plaintiff's Complaint

Martin's complaint pleaded four claims: malicious prosecution, retaliatory prosecution and false arrests pursuant to 42 U.S.C. § 1983 (Counts I, II, IV) and malicious prosecution under Kentucky state law (Count III). (RE 1, Complaint). Defendants were sued in their official and individual capacities. (*Id.*).

The Discovery Limits Imposed by the Court Below

Following a telephonic hearing and the parties' submission of the parties, the court below entered a memorandum order

denying Martin's motion to compel discovery and limiting initial discovery to the issue of probable cause. (RE 8, Memorandum Order). The memorandum order notes defendants' concession that the discovery denied to Martin "could be relevant to plaintiff's claims and/or the determination of qualified immunity." (*Id.* at 2-3).

The Ruling by the Court Below

The district court began its analysis by observing that Martin was properly exonerated and completely innocent of the charge brought against him by defendants, noting that "it is clear that Mr. Martin is now, and has always been, entitled to the funds at issue." (RE 34, Opinion and Order at 1). Beyond that necessary and correct observation, the court below set forth an incomplete and inaccurate recitation of facts, one that presented a view of the facts most favorable to the moving parties, the defendants.

Despite the court below's recognition of Martin's complete innocence, it found that probable cause existed for Schutzman to bring the charge against Martin based on the following. First, Schutzman "learned that the plaintiff did not inform either

HCJFS or his father, from whom the money was being withheld, that his mother had died." (*Id.* at 8). Second, "Officer Schutzman learned that the plaintiff did not list the Judgment as an asset of the estate or seek to have the payee on the checks changed." (*Id.*). Third, Martin admitted that he had deposited the checks into his personal account "instead of an account established for the estate." (*Id.*). Fourth, the court below asserted that Martin had informed Schutzman "that he had a dysfunctional family, and that he originally took over his mom's finances, not because she was incompetent, but to stop her from helping his siblings." (*Id.*). These facts, court below asserted, support "a finding that an officer might reasonably suspect that the plaintiff was signing the checks and depositing the funds in his personal account in an effort to wrongfully keep the proceeds for himself." (*Id.*). The court below added that it was "highly significant that Mr. Martin did not advise Schutzman that he had advanced monies on behalf of the estate, for which he was repaying himself." (*Id.*).

The court below omitted and/or mischaracterized the misrepresentations that Schutzman made in his investigative

report regarding his interview with Martin. Instead of reciting Schutzman's affirmative misstatements and misrepresentations, the court below characterized them more as omissions, stating that "plaintiff argues that Schutzman should have stated in his affidavit that his mother's estate had been probated and that the plaintiff was the executor." (*Id.* at 9). Although the court below noted that Kuhl's estate was exempted from customary probate procedures because of its small size, it proceeded, nonetheless and paradoxically, to fault Martin for not following the customary procedures that the estate was exempted from including reciting that the judgment was an asset of the estate,[10] listing himself as a creditor of the estate and opening an estate bank account to process its affairs. (*Id.* at 10, n.5).

The court below disregarded and omitted Schutzman's testimony to the Kenton District Court that he knew nothing of Kuhl's probate estate. Furthermore, the court below failed to

[10] Martin did advise Schutzman in their November 2, 2007, interview that he understood the judgment to be an asset of the estate, (RE 17-4 at 4-5), a fact that Schutzman, of course, omitted from his investigative report and which the court below likewise omitted mention or consideration.

acknowledge the bases for the state court's ruling finding that there was no probable cause: that Martin was authorized to negotiate the checks and that the dispensation of formal administration entered by the Ohio probate court had eliminated the need to account fully the Kuhl estate's debts and liabilities.

The court below apparently found that the Commonwealth Attorney was solely and only responsible for the decision to prosecute Martin. (RE 34, Opinion and Order at 11). In making this finding, the court below disregarded that it was Schutzman who signed the criminal complaint charging Martin and that execution of a criminal complaint is the *sine qua non* of a criminal prosecution in Kentucky.[11] The court below also ignored and disregarded that Schutzman materially contributed to the initiation of criminal charges against Martin by providing the Commonwealth Attorney with an investigative file riddled with material misrepresentations and omissions. In contradiction to the requirement that the evidence at the summary judgment stage be construed in light most favorable to Martin, the

[11] *See* n. 8 *supra.*

nonmoving party, the court below asserted that "there is no evidence that [Schutzman] unduly influenced Commonwealth Attorney Sanders's decision" to prosecute Martin. (RE 34, Opinion and Order at 11, *citing Skousen v. Brighton High School,* 305 F.3d 520, 529 (6th Cir. 2002)).

Although Martin had been barred from conducting discovery with regard to the issues except probable cause by the court's prior memorandum order, (RE 8, Memorandum Order), the court below asserted that "no municipal policy was identified in evidence and the City of Villa Hills is further entitled to summary judgment for that reason." (*Id.* at 11).[12]

The court below then ruled that "defendants Schutzman and Goodenough in the alternative are entitled to qualified immunity," reasoning that "it would not be apparent to them that forwarding the investigative file to the plaintiff to the Commonwealth

[12] Martin's § 1983 claims against defendants in their official capacities are, as this Court has held, "the equivalent of a suit against the government entity." *Matthews v. Jones,* 35 F.3d 1046, 1049 (6th Cir. 1994). Although Martin did not mean the City of Villa Hills as a party-defendants, this ruling by the court below grants summary judgment to defendants on Martin's claims in their official capacities.

Attorney for his review and signing the complaint against the plaintiff violated the plaintiff's constitutional rights." (*Id.*).[13]

SUMMARY OF ARGUMENT

There are disputed issues of material fact regarding the existence of probable cause to support Martin's arrest and criminal prosecution. The existence of probable cause presents a fact issue for the jury. The court below ignored the material misrepresentations and omissions in Schutzman's investigative report and file and recited a factual view most favorable to the defendants. Accordingly, the grant of summary judgment to defendants was error and should be reversed.

In constitutional tort cases, this Court has recognized that a defendant is responsible for the natural consequences of his actions. Furthermore, this Court has recognized that a police officer who contributes to and participate in the process leading to an individual's arrest and criminal prosecution may be liable. The

[13] In the order limiting Martin's discovery to the issue of probable cause, the court below noted the relevancy of additional discovery sought by Martin, which the order denied, to the issue of qualified immunity and other issues. (RE 8, Memorandum Order at 2-3).

court below ignored these authorities in ruling that defendants could not be liable for Martin's unconstitutional arrest and criminal prosecution.

The court below erred in ruling that defendants were entitled to qualified immunity. First, the constitutional rights that Martin claims defendants violated were clearly established. Second, because there are disputed issues of material fact regarding the issue of probable cause, it was error to grant defendants qualified immunity. Third, the court below barred Martin from conducting discovery that defendants conceded was relevant to the issue of qualified immunity.

The court below erred in granting summary judgment on Martin's claims against defendants in their official capacities. The court below entered an order limiting Martin's discovery to the issue of probable cause. Having denied Martin opportunity to conduct discovery most pertinent to the official capacity claims, it was error for the court below to grant summary judgment.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir.1996). "Under Rule 56(c), summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (quoting Fed.R.Civ.P. 56(c)). "In deciding upon a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Nat'l Enters., Inc. v. Smith,* 114 F.3d 561, 563 (6th Cir.1997).

In a civil case raising Fourth Amendment issues, this Court applies a *de novo* standard of review. *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 597 (6th Cir. 1998).

"Because the doctrine of qualified immunity is a legal issue, its application by the district court is reviewed *de novo*." *Ahlers v. Schebil,* 188 F.3d 365, 369 (6th Cir.1999).

ARGUMENT

POINT 1

DISPUTED ISSUES OF MATERIAL FACT EXIST REGARDING THE EXISTENCE OF PROBABLE CAUSE TO CHARGE AND ARREST MARTIN

Probable cause is an element of each of Martin's claims. Because a reasonable jury could find that probable cause did not support Martin's arrest and criminal prosecution, the entry of summary judgment in defendants' favor was error. Accordingly, the court below should be reversed and the case remanded for further proceedings.

Probable cause is an element of Martin's claims for malicious prosecution and false arrest under 42 U.S.C. § 1983, retaliatory prosecution under § 1983 and malicious prosecution under Kentucky state law. While this Court's recent jurisprudence has not established definitively all the elements of a malicious prosecution claim brought under § 1983, the Court has repeatedly emphasized that the absence of probable cause is an element of the claim. *Barnes v. Wright,* 449 F.3d 709, 716 (6th Cir. 2006). The absence of probable cause is an element of a claim for false arrest

brought under § 1983. *Parsons v. City of Pontiac,* 533 F.3d 492, 500 (6th Cir. 2008). In *Hartman v. Moore,* 547 U.S. 250, 265-66 (2006), the Supreme Court ruled that the absence of probable cause was an element of a retaliatory prosecution claim brought under § 1983. Finally, the absence of probable cause is in element of a malicious prosecution claim brought under Kentucky state law. *Raine v. Drasin*, 621 S.W.2d 895, 899 (Ky. 1981).

The existence of probable cause in a § 1983 action is typically a fact issue for the jury. *Gregory v. City of Louisville,* 444 F.3d 725, 743 (6th Cir. 2006), *citing, United States v. Gaudin,* 515 U.S. 506 (1995). As this Court has said on more than one occasion, "the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." *Wilson v. Morgan,* 477 F.3d 326, 334 (6th Cir. 2007); *see also Fridley v. Horrighs,* 291 F.3d 867, 872 (6th Cir. 2002); *Gardenhire v. Schubert*, 205 F.3d 303, 315 (6th Cir. 2000).

In this case, Schutzman executed a sworn criminal complaint charging Martin with forgery, second-degree that both initiated a criminal prosecution against Martin and secured a

warrant for his arrest. Accordingly, we must examine whether probable cause supported that complaint and whether Schutzman may rely on the issuance of the warrant.

"'A police officer has probable cause only when he discovers reasonably reliable information that the suspect has committed a crime.'" *Parsons v. City of Pontiac,* 533 F.3d 492, 500 (6th Cir. 2008), *quoting Gardenhire v.* Schubert, 205 F.3d 303, 318 (6th Cir. 2000). "[I]n obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining" if probable cause exists. *Gardenhire,* 205 F.3d at 318. "Police officers may not 'make hasty, unsubstantiated arrests with impunity,' nor 'simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin the crime on someone.'" *Parsons,* 533 F.3d at 501, *quoting Ahlers v. Schebil,* 188 F.3d 365, 371-72 (6th Cir. 1999).

"Police officers cannot, in good faith, rely on a judicial determination of probable cause when that determination was

premised on an officer's own material misrepresentations to the court." *Gregory*, 444 F.3d at 758, *citing Yancey v. Carroll County,* 876 F.2d 1238, 1243 (6th Cir. 1989). "Such reliance is unreasonable, and detention of an individual pursuant to such deceptive practices violates the Fourth Amendment." *Gregory, supra, citing Hill v. McIntyre,* 884 F.2d 271, 275 (6th Cir. 1989). "An officer cannot rely on a judicial determination of probable cause if that officer knowingly makes false statements and omissions to the judge such that but for these falsities the judge would not have issued the warrant." *Yancey,* 876 F.2d at 1243.

"Falsifying facts to establish probable cause to arrest and prosecute an innocent person is of course patently unconstitutional." *Hinchman v. Moore,* 312 F.3d 198, 205-06 (6th Cir. 2002). When an affidavit contains false statements or material omissions, the question becomes whether, once a false statements or omitted and the omitted facts are inserted, the corrected affidavit is still sufficient to establish probable cause. *Hill*, 884 F.2d at 275.

An assertion is made with reckless disregard when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported. *Wilson v. Russo,* 212 F.3d 781, 788 (3rd Cir. 2000).[14] Omissions are made with reckless disregard if an officer withholds "a fact in his ken" that any reasonable person would have known is the kind of thing the judge would wish to know. *Wilson,* 212 F.3d at 788, *citing United States v. Jacobs,* 986 F.2d 1231, 1235 (8th Cir. 1993). This Court's decision in *Gregory v. City of Louisville,* 444 F.3d 725 (6th Cir. 2006), recognizes that a law enforcement officer has a duty both to prudently consider exculpatory information and not to misrepresent information uncovered in the course of an investigation.

[14] This Court cited *Russo* with approval in *Valikan v. Shaw,* 335 F.3d 509, 517 (6th Cir. 2003); *see also Peet v. City of Detroit,* 502 F.3d 557, 570 (6th Cir. 2007(Holschuh, D.J., concurring in part, dissenting in part); *Johnson v. Hayden,* 67 Fed.Appx. 319, 323 (6th Cir. 2003).

At the time Schutzman executed the criminal complaint he knew and recklessly withheld from the court at least the following material points:

- that Marilyn Kuhl's estate had been probated in Ohio, which both Martin and Startzman had told him (RE 17-4, Schutzman-Martin Interview Transcript at 17; RE 18, Startzman depo. at 32-33).

- that Martin was the executor of Kuhl's estate as Martin had informed him during their interview on November 2, 2007 (RE 17-4, Schutzman-Martin Interview Transcript at 4, 17)

- that Martin understood that the judgment for the child-support arrearage was an asset of the estate (RE 17-4, Schutzman-Martin Interview Transcript at 4-5)

- that he had not attempted to review any of the probate court records for Kuhl's estate and, in fact, had previously declared to Startzman that no probate court case for Kuhl existed (RE 18, Startzman depo. at 25; RE 18-8, Startzman depo. ex. 7)

- that he had misrepresented in his investigative report and file on which the Commonwealth Attorney was relying that no notification was made to the courts of Kuhl's death (*Compare* RE 17-2, Investigative file at 1; RE 17-4, Schutzman-Martin Interview Transcript at 4)

- that he had misrepresented in his investigative report and file on which the Commonwealth Attorney was relying that Martin had "stated the wheel was never probated because all of his mother's assets were in his name, including her home in Ohio." (*Compare* RE 17-2, Investigative file at 2; RE 17-4, Schutzman-Martin Interview Transcript at 4, 16-17)

- that he had misrepresented in his investigative report and file on which the Commonwealth Attorney was relying that "[a] will [for Marilyn Kuhl] could not be located nor any evidence the estate was probated." (*Compare* RE 17-2, Investigative file at 2; RE 18, Startzman depo. at 34)

- that he had never contacted nor even attempted to contact the supposed victims of Martin's purported crime, his siblings, who were the other beneficiaries to Kuhl's estate (RE 21-2, Schutzman depo. at 88)

Whether this information should have been disclosed to the court by Schutzman "is a question of materiality, and materiality determinations are the province of the jury when reasonable minds could differ." *Gregory*, 444 F.3d at 758, *citing Gaudin,* 515 U.S. at 512. A reasonable jury could find that Schutzman intentionally and wrongfully withheld this material information. First, the omissions and misrepresentations center upon a key element to a charge of forgery, second degree[15] under Kentucky

[15] Second degree forgery is defined by Ky.Rev.Stat. § 516.030, in pertinent part, as follows: "(1) A person is guilty of forgery in the second degree when, with the intent to defraud, deceived or injure another, he falsely makes, completes or alters a written instrument which is or purports to be or which is calculated to become or to represent when completed: (a) A deed, will, domicile, contract, assignment, commercial instrument, credit card or other instrument does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status[.]"

law: that Martin intended to defraud the other beneficiaries of Kuhl's estate, his siblings. In the absence of any information concerning the probate of Kuhl's estate and Martin's role as its executor, his pocketing of the money might reasonably suggest such an intent. However, the details and information provided to Schutzman by Martin and Startzman regarding Kuhl's estate, its probate, that the judgment on which the checks were being paid was an asset of the estate and Martin the estate executor, directly and forcefully undermine the suggestion. A jury could reasonably find this reality lead Schutzman to misrepresent in his investigative file and report the information he had regarding Kuhl's probate proceedings and to withhold them from the court. A reasonable jury could find that Schutzman knew the information was material and, in his desire to pin an unfounded criminal charge on Martin, misrepresented and withheld it.

Second, although both Martin and Startzman advised him of the Kuhl probate proceedings, Schutzman, in his testimony in the preliminary hearing before the Kenton District Court, disclaimed any and all knowledge that Kuhl's estate had been probated. (RE

25-3 Transcript of Preliminary Hearing at 7). Third, the same Kenton District Court judge that issued the arrest warrant later dismissed the criminal charge for lack of probable cause upon actual disclosure of Kuhl's probate court proceedings. It cannot reasonably be denied or argued that the disclosure to the judge of the probate court proceedings was material to the decision. Therefore, a reasonable jury could conclude that but for Schutzman's material misrepresentations and omissions no arrest warrant would have issued and Martin's criminal prosecution would have been rightfully quashed at its inception. Accordingly, in this instance a question for a jury to resolve is presented and summary judgment inappropriate. *Hill v. McIntyre, supra*; *Yancey v. Carroll County, supra.*

The court below's analysis of the accuracy of the information set forth in the criminal complaint/affidavit signed by Schutzman is flawed, because it represents a view of the evidence most favorable to defendants. First, the court below recited Schutzman's material misrepresentations and omissions from the criminal complaint very incompletely, mentioning only

Schutzman's omissions that Martin's mother's estate had been probated and that he was its executor. The court below failed to consider the following of Schutzman's material misrepresentations and omissions: (1) that Martin had informed Schutzman of his understanding that the judgment for the child-support arrearage was an asset of the estate; (2) that he had not attempted to review any of the probate records for Kuhl's estate and had previously declared to Startzman his belief that no probate case ever existed for Kuhl; (3) that he had misrepresented in his investigative report and file on which the Commonwealth Attorney relied that no notification was made to the courts of Kuhl's death; (4) that he had misrepresented in his investigative report and file on which the Commonwealth Attorney relied that Martin had "stated that the will was never probated because all of his mother's assets were in his name, including her home in Ohio"; (5) that he had misrepresented in his investigative report and file on which Commonwealth Attorney relied that "[a] will [for Marilyn Kuhl] could not be located nor any evidence the estate was probated"; and, (6) that he had never contacted nor even attempted to contact

the supposed victims of Martin's purported crimes, his siblings, who were the other beneficiaries to Kuhl's estate. By minimizing Schutzman's material misrepresentations and omissions from his criminal complaint/affidavit, the court below set forth a view of the evidence most favorable to defendants not Martin, the nonmoving party.

Second, Schutzman's affidavit and criminal complaint charges the crime of forgery, second degree, which requires an intent to deprive others of their property. The court below's assertion that inclusion in the criminal complaint of information that Martin's mother's estate had been probated and that he was the executor "alone would not have given Martin authority to deposit checks made payable to his mother into his personal account" misses the point. Martin did, in fact, possess authority to make these deposits, because the money, as both the probate court recognized and as, indeed, the court below recognized, was his all along. (RE 34, Opinion and Order at 1). Third, while the court below criticized and blamed Martin for what it viewed as Schutzman's confusion regarding the administration of Kuhl's

estate, the court below also recognized that the estate was exempt from formal administration because of its small size. (*Id.* at 10 n.5). In fact and as the Kenton District Court recognized, the probate court ordered dispensing with formal administration permitted Martin's actions, as any reasonable person not bent on pinning an unfounded criminal charge on Martin would have determined with prudent investigation. By minimizing Schutzman's obfuscations and misrepresentations, the court below failed to consider the totality of the circumstances and employed a view of the evidence most favorable to defendants.

The court below also mischaracterized proceedings in Kenton District Court. First, any confusion was not caused by Martin's failure to follow customary probate procedures, an assertion that the court below made that is directly contrary to its assertion that Kuhl's estate was exempted from ordinary probate procedures because of its small size. (RE 34, Opinion and Order at 10 n. 5). Schutzman caused an unfounded criminal prosecution of Martin by misrepresenting and obfuscating his knowledge of the Kuhl probate proceedings. Furthermore, any inclination of the

Kenton District Court to cite confusion, a jury could find, arose from Schutzman's testimony to that court that he knew nothing of Kuhl's estate. Second, the Kenton District Court dismissed the case because disclosure of Kuhl's probate proceedings, which Schutzman had not disclosed when obtaining the arrest warrant and initiating Martin's prosecution, that Martin had committed no crime. Again, the court below adopted a view of the evidence most favorable to defendants, which is improper at the summary judgment stage.

POINT 2

DEFENDANTS CAN BE LIABLE FOR MARTIN'S UNCONSTITUTIONAL ARREST AND PROSECUTION

The Supreme Court and this Court have recognized that, in constitutional tort cases, a defendant is responsible for the natural consequences of his actions. The court below's assertion that defendants are sheltered by the prosecutor from liability for the violation they caused of Martin's constitutional rights is contrary to the foregoing. Moreover, it is contrary to this Court's rulings that a police officer can be liable under § 1983 for an unconstitutional arrest and prosecution where he contributes to or

participates in the unconstitutional arrest and prosecution. Accordingly, the court below erred and should be reversed.

"In Constitutional tort cases, 'a man is responsible for the natural consequences of his actions.'" *Gregory v. City of Louisville*, 444 F.3d 725, 747 (6th Cir. 2006), *quoting, Monroe v. Pape,* 365 U.S. 167, 187 (1961). In *Gregory*, this Court found compelling illustration of this principle in the Supreme Court decision of *Malley v. Briggs,* 475 U.S. 335, 345 (1986),where the Supreme Court held that a police officer could be liable for false arrest even where a judge had issued a warrant authorizing the arrest. *See* 444 F.3d at 747. This Court, in turn, held in *Gregory* that a prosecutor's decision to use an unconstitutional identification at trial did not shield the police officer from liability under § 1983. *Id.* A police officer is not sheltered from liability for constitutional violations that he causes by the decisions of either judges or prosecutors. The court below ignored this principle and erred.

The natural consequences of Schutzman's actions, including the misrepresentations in his investigative report and file, ignoring Wallace's directions as to what he needed to do to

reasonably and prudently advance his investigation, and, ultimately, his signing of a criminal complaint, the necessary predicate, was Martin's' unconstitutional arrest and criminal prosecution. Accordingly and consistent with the principle that, in constitutional tort cases, a defendant is liable for the natural consequences of his actions, Schutzman, as well as Goodenough, can be held liable properly for the violations of Martin's constitutional rights that they caused.

The court below mistakenly applied *Skousen v. Brighton High School,* 305 F.3d 520, 529 (6th Cir. 2002), to excuse defendants from any liability for their actions. First, in *Skousen*, the defendant trooper merely turned in an investigative report, fingerprinted the accused plaintiff and testified at trial. This Court noted that "no evidence" indicated that the troopers report or testimony was in any way untruthful, inaccurate or incomplete. 305 F.3d at 529. The Court also noted that there was "no evidence that [the defendant trooper] made or even was consulted with regard to the decision to prosecute" the plaintiff. *Id.* Here, however, a jury can find that Schutzman materially contributed to

Martin's arrest and prosecution, because he signed a sworn criminal complaint initiating the prosecution, consulted with the Commonwealth Attorney and provided an investigative report and file on which the Commonwealth Attorney relied, which a jury can find contained material misrepresentations. Accordingly, the court below's reliance on *Skousen* was misplaced.

This Court has cautioned that *Skousen* cannot be read as broadly as the court below did here. In *Kinkus v. Village of Yorkville, Ohio,* it observed that "this [c]ourt has held that a police officer cannot be liable for Fourth Amendment malicious prosecution when he did not make the decision to bring charges, as long as the information he submitted to the prosecutor is truthful." 289 Fed.Appx. 86, 91 (6th Cir. 2008), *citing Skousen* and *McKinley v. City of Mansfield*, 404 F.3d 418 (6th Cir. 2005). In *McKinley,* this Court observed that "no evidence" suggested that the defendant "conspired with, influenced, or even participated in" the prosecutor's decision to charge and affirmed the district court's dismissal of a malicious prosecution claim.

Skousen, Kinkus and *McKinley* simply recognize that a police officer that merely provides full and truthful information and does not otherwise influence or participate in the decision to prosecute cannot be liable for malicious prosecution. Here, by contrast, a jury can find that Schutzman both provided untruthful information and affirmatively participated in initiation of Martin's unconstitutional arrest and prosecution by signing the criminal complaint. Accordingly, *Skousen* and the other cases above do not reach this case and the court below erred.

POINT 3

THE COURT BELOW ERRED IN RULING THAT SCHUTZMAN AND GOODENOUGH WERE ENTITLED TO QUALIFIED IMMUNITY

The court below erred in ruling that Schutzman and Goodenough were entitled to qualified immunity. First, the constitutional rights that Martin claims defendants violated were clearly established. Second, the disputed issues of material fact regarding the existence of probable cause discussed in Point 1 of this brief preclude the granting of qualified immunity to defendants. Third, the court below barred Martin from conducting

discovery relevant, as defendants conceded, to the issue of qualified immunity; having denied Martin opportunity to conduct discovery relevant to qualified immunity, it was error to grant summary judgment to defendants. Accordingly, the court below should be reversed.

Qualified immunity analysis involves three inquiries: (i) "whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred;" (ii) "whether the violation involved a clearly established constitutional right of which a reasonable person would have known;" and (iii) "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers v. Aey,* 319 F.3d 843, 848 (6th Cir.2003). Qualified immunity must be granted if the plaintiff cannot establish each of these elements. *Williams ex rel. Allen v. Cambridge Bd. of Educ.,* 370 F.3d 630, 636 (6th Cir.2004).

The Court has further advised that "[t]he ultimate burden of proof is on the plaintiff to show that the defendants are not

entitled to qualified immunity." *Rich v. City of Mayfield Heights,* 955 F.2d 1092, 1095 (6th Cir. 1992). Claims of qualified immunity are assessed on a fact-specific basis to ascertain whether the particular conduct of the defendant [public official] infringed a clearly established federal right of the plaintiff, and whether an objective reasonable official would have believed that his conduct was lawful under extant federal law. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Although the application of qualified immunity comprises a legal issue, summary judgment is inappropriate when conflicting evidence creates subordinate predicate factual questions which must be resolved by a fact finder at trial. *See Johnson v. Jones,* 515 U.S. 304, 313-15 (1995).

Martin's constitutional rights to be free of arrest and/or criminal prosecution in absence of probable cause were well-established long before 2007. In *Myers v. Potter,* 422 F.3d 347, 356-57 (6th Cir. 2005), this Court noted that the right to be free of arrest unsupported by probable cause had been well-established at least since 1979. This Court held in *Spurlock v. Satterfield,* 167 F.3d 995, 1006-07 (6th Cir. 1999), that a constitutional right

secured by the Fourth Amendment to be free from criminal prosecution unsupported by probable cause had been well-established no later than the mid-1990's. Martin's constitutional right against retaliatory prosecution was deemed well-established prior to this Court's decision in *Center for Bio-Ethical Reform v. City of Springboro,* 477 F.3d 807, 824-25 (6th Cir. 2007). Accordingly, the constitutional rights Martin claims were violated by defendants were well-established by 2007 and there is no basis for granting defendants qualified immunity on this basis.

This Court has recognized that it is error to grant qualified immunity to a defendant in a section 1983 case where there exist disputed issues of material fact. *Poe v. Haydon*, 853 F.2d 418, 425-26 (6th Cir. 1988), *cert. denied,* 488 U.S. 107 (1989). Here, as set forth in Point 1 of this brief, there are disputed issues of material fact as to the existence of probable cause that render summary judgment inappropriate. Accordingly, to the extent that the court below relied on its erroneous finding that probable cause supported Martin's arrest and criminal prosecution, it erred.

Therefore, Schutzman and Goodenough are not entitled to qualified immunity on this ground.

The defendants' actions in causing Martin's unconstitutional arrest and criminal prosecution were objectively unreasonable. "Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Dorsey v. Barber,* 517 F.3d 389, 400 (6th Cir. 2008). The record here shows that Schutzman knowingly constructed an investigative report and file that contained material misrepresentations concerning Kuhl's estate and Martin's disclosures to him during their interview. The record here shows that Schutzman did so with the intent that the prosecutor's office rely on those material misrepresentations as truthful. The record here shows that Schutzman disregarded Wallace's well-founded directions to conduct further investigation. The record here shows that Schutzman withheld material information in obtaining the arrest warrant. Finally, the record shows that Schutzman testified untruthfully at the preliminary hearing regarding his knowledge of Kuhl's probate case.

Accordingly, a jury can find that defendants' actions were objectively unreasonable.

Summary judgment on qualified immunity grounds was also improper, because Martin was barred by the court below from conducting discovery relevant to the issue of qualified immunity. Following a telephonic conference and submission by the parties of additional legal authority, the court below issued a memorandum order denying Martin's motion to compel discovery. (RE 8, Memorandum Order). The court below's memorandum order noted defendant's concession that the discovery information sought by Martin "could be relevant to plaintiff's claims and/or the determination of qualified immunity." (*Id.* at 2-3). This Court has ruled that it is inappropriate to grant summary judgment where the plaintiff has been denied fair and full opportunity to conduct relevant discovery. *Vance v. United States,* 90 F.3d 1145, 1148 (6th Cir. 1996); *White's Landing Fisheries v. Buchholzer,* 29 F.3d 229, 231-32 (6th Cir. 1994). Accordingly, the court below erred in granting qualified immunity to Schutzman and Goodenough.

POINT 4

SCHUTZMAN AND GOODENOUGH WERE NOT ENTITLED TO SUMMARY JUDGMENT IN THEIR OFFICIAL CAPACITY BECAUSE MARTIN WAS LIMITED IN HIS DISCOVERY TO THE ISSUE OF PROBABLE CAUSE

The court below also granted summary judgment to Schutzman and Goodenough in their official capacities. Martin was barred from conducting discovery relevant to this issue by the court below's order limiting discovery to the issue of probable cause. Because Martin was denied full and fair opportunity to conduct relevant discovery as to the liability of defendants in their official capacity, it was error for the court below to grant summary judgment. Accordingly, the court below should be reversed and the case remanded for discovery and further proceedings on these claims.

As noted under Point 3 of this brief, this Court has ruled that it is inappropriate to grant summary judgment where the plaintiff has been denied fair and full opportunity to conduct relevant discovery. *Vance v. United States, supra; White's Landing Fisheries, supra.* As also noted under Point 3 of this brief, Martin

was limited in his discovery to the issue of probable cause. (RE 8, Memorandum Order). As a result of that limitation, the record was necessarily sparse as to the issue of defendant's liability in their official capacities. Accordingly, the court below erred in granting Schutzman and Goodenough summary judgment as to Martin's claims in their official capacities. *Myers v. Potter,* 422 F.3d at 347-348 (reversing summary judgment on official capacity claims where plaintiff did not have opportunity to conduct discovery on issue). Therefore, the court below should be reversed in this case remanded for discovery on this issue and further proceedings.

CONCLUSION

For all the foregoing reasons, this Court should reverse the court below and remand this case for further proceedings.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Sixth Circuit's electronic filing system this 6th day of May 2010, that notice will be sent electronically by that system to All Counsel of Record.

/s/ Robert L. Abell
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CERTIFICATION OF COMPLIANCE PURSUANT TO FRAP 32(a)(7)(B)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 9,167 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 09-6363

MICHAEL MARTIN,

Plaintiff-Appellant

v.

JOSEPH SCHUTZMAN; DAN GOODENOUGH,
in their Individual and Official Capacities,

Defendants-Appellees

Appeal from the United States District Court
For the Eastern District of Kentucky at Covington
Civil Action No. 08-104
Hon. William O. Bertelsman

DESIGNATION OF DISTRICT COURT DOCUMENTS
PURSUANT TO 6 CIR. R. 30

Description of Documents	**Record Entry #**
Complaint	1
Judgment	35
Opinion and Order	34
Notice of Appeal	36

Counsel's Certification

I hereby certify that the foregoing documents are included in the district court's electronic record.

/s/ Robert L. Abell
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