UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH SAAD, Individually, ZIHRA SAAD, Individually,

Plaintiffs,

v.

CITY OF DEARBORN HEIGHTS, SCOTT KELLER, Individually and in his official capacity; CARRIE CATES, Individually and in her official capacity; RESERVE OFFICER NASON, Individually and in his official capacity; GREG GONDEK, Individually and in his official capacity; JERRY SKELTON, individually and in his official capacity; and JOHN DOE OFFICERS I-XXX, Individually and in their official capacities,

Defendants.

CASE N0: 2:11-cv-10103-SJM-MAR

HON. PATRICK J. DUGGAN
MAGISTRATE JUDGE MARK A. RANDON

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO FILE AN AMENDED COMPLAINT

_______________________________________/

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_______________________________________/

DEFENDANTS, CITY OF DEARBORN HEIGHTS, SCOTT KELLER, CARRIE CATES, OFFICER NASON, GREG GONDEK AND JERRY SKELTON request that this Honorable Court deny the present motion as each of the proposed amendments is futile. Additionally, the motion should be denied as Plaintiffs have unduly delayed seeking to amend the complaint, as the alleged facts upon which at least three of the proposed amendments were know to Plaintiffs prior to the filing of the present suit. Denial of the present motion is further support by the fact that the untimely addition of these futile claims will result in prejudice to the Defendants. In addition to the attached brief, Defendants state as follows in response to the present motion:

1. Defendants admit that Plaintiffs seek to add a claim of conspiracy against Officer Keller and Cates. The proposed amendment is futile as a of conspiracy claim between employees of the same employer is barred as a matter of law by this Intra-Corporate Conspiracy Doctrine.

2. Defendants admit that Plaintiffs seek to add a claim for an alleged Brady violation. Plaintiffs' were participants in the conversation recorded by the in-car video recorder. As such, Plaintiffs had first hand, personal knowledge of the facts/information which Plaintiffs allege was suppressed, thereby precluding, as a matter of law, any claim for a Brady violation. Also, in-car video, which is attached as an exhibit hereto, establishes that the facts/information allegedly suppressed do not contain any exculpatory evidence further precluding a claim for a Brady violation. (Ex. 1, Recordings)

3. Defendants admit that Plaintiffs seek to add a claim of perjury against Officer Keller based upon his prior testimony given under oath. Officer Keller is entitled to absolute immunity for any testimony he gave under oath during a judicial proceeding, including Plaintiffs criminal trial and the preliminary examination. As such, this claim is barred as a matter of law.

4. Defendants admit that Plaintiffs seek to add an additional Monell claim which is barred as a matter of law as the underlying alleged constitutional violations are not legally cognizable as discussed more fully in Defendants Brief.

5. Defendants deny that Plaintiffs reasonably sought concurrence in the present motion.

6. Therefore, because the proposed claims for conspiracy, Brady violation, perjury and Monell fails as matter of law, adding such claims to the present case would be futile and Plaintiffs' request to do so should be denied.

Respectfully Submitted,

s/Patrick R. Sturdy

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Dated: November 4, 2011

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH SAAD, Individually, ZIHRA SAAD, Individually,

Plaintiffs,

v.

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Defendants.

CASE N0: 2:11-cv-10103-SJM-MAR

HON. PATRICK J. DUGGAN
MAGISTRATE JUDGE MARK A. RANDON

BRIEF IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO FILE AN

______________________________________/

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556 U.S. 662 (2009).

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460 U.S. 325 (1983)

Bryant v. Kentucky,
490 F.2d 1273 (6th Cir. 1974)

Coe v. Bell,
161 F.3d 320 (6th Cir. 1998)

Ewolski v. City of Brunswick,
287 F.3d 492 (6th Cir. 2002)

Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ.,
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CONCISE STATEMENT OF ISSUE PRESENTED

WHETHER THE PLAINTIFFS' REQUEST TO AMEND THE COMPLAINT SHOULD BE DENIED BECAUSE THE PROPOSED AMENDMENTS ARE FUTILE, AND THE REQUEST TO ADD THE AMENDED CLAIMS DID NOT OCCUR UNTIL AFTER UNDUE DELAY, AND BECAUSE DEFENDANTS WILL BE PREJUDICE BY THE ADDITION OF CLAIMS AT THIS LATE DATE.

Plaintiffs: No.

Defendants: Yes.

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8.	Mills v. Lafler, Case No. 08-14778, 2011 U.S. Dist. LEXIS 70615 (E.D. Mich. June 30, 2011)
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13.	Weather Underground, Inc. v. Navigation Catalyst Sys., Case No. 09-10756, 2010 U.S. Dist. LEXIS 82547 (E.D. Mich. 2010)

STATEMENT OF THE CASE

The present motion should be denied as the proposed amendments to Plaintiffs' Complaint are futile, untimely and will result in prejudice to Defendants. The present action arises out of Plaintiffs' arrest for assault on a police officer, obstruction and resisting arrest. Plaintiffs' original complaint contains eighteen different claims against the City of Dearborn Heights and the individual police officers involved in Plaintiffs arrest. Plaintiffs seek to add four additional claims. However, the untimely proposed amendments are futile, and as such, the present motion should be denied.

Plaintiffs seeks to add a claim of conspiracy, alleging that Officers Keller and Cates, both employees of Dearborn Heights, conspired to fabricate false evidence against Plaintiffs. This claim is barred as a matter of law by the Intra-Corporate Conspiracy Doctrine, which precludes claims of conspiracy arising out of allegations that two employees from the same employer conspired to commit wrong doing. Plaintiffs also seek to add a claim for perjury against Officer Keller. This claim is barred as a matter of law as Officer Keller is entitled to absolute immunity for his testimony given under oath at the preliminary hearing and the criminal proceeding. Plaintiffs seeks to add a Brady claim on the basis that facts/information contain on an in-car video recording, recently produced in this civil action, was not turned over to Plaintiffs during their criminal prosecution. This claim is barred as a matter of law as Plaintiffs directly participated in the conversations recorded by the in-car videos. As a matter of law, because Plaintiffs have personal, first hand knowledge of the facts/information allegedly suppressed, no Brady claim exists. Furthermore, because the in-car videos contain no exculpatory evidence, no Brady violation can be substantiated. Finally, because the proposed Monell claim is based upon allegations which are entirely futile, Plaintiffs cannot as a matter of law establish liability against the City. Therefore, because the proposed amendments are

futile, the present motion should be denied.

Additionally, Plaintiffs have not given any explanation for their untimely delay in seeking to add the proposed amendments. Plaintiffs were certainly aware of the facts upon which they base the proposed amended claims prior to filing the original complaint in this matter. Therefore, Plaintiffs unexplained undue delay precludes the proposed amendment.

Finally, the present motion should be denied because the addition of the untimely, futile proposed amendments will result in prejudice to the Defendants.

ARGUMENT

Fed. R. Civ. P. 15 governs amendment to pleadings and requires a party seek leave of the court, or consent, prior to filing an amendment after a responsive pleading has been filed. The court's leave to file an amended pleading should only be given when "justice so requires it." In decided whether to grant leave, courts consider various factors include undue delay, bad faith or prejudice to the opposing party. Wade v. Knoxville Utils. Bd., 259 F.3d 452, 458 (6th Cir. 2001). Although Rule 15(a) indicates that although leave to amend shall be freely granted, "a party must act with diligence if it intends to take advantage of the Rule's liberality." U.S. v. Midwest Suspension & Brake, 49 F.3d 1197, 1202 (6th Cir. 1995). "The longer the period of unexplained delay, the less will be required of the nonmoving party in terms of a showing of prejudice." Phelps v. McClellan, 30 F.3d 658, 663 (6th Cir. 1994) (internal citations and quotations omitted).

Further, if a proposed amendment would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court may also disallow a proposed amendment on the ground that it would be futile. Thiokol Corp. v. Dept. of Treasury, 987 F.2d 376, 382 (6th Cir. 1993). A complaint does not meet the pleading requirements when it merely contains, "[t]hreadbare recitals of the elements of a cause

of action, supported by mere conclusory statements ..." Ashcroft v. Iqbal, 556 U.S. 662 (2009). "[E]ven though a complaint need not contain "detailed" factual allegations, its factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (6th Cir. 2007). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Ashcroft, 556 U.S. at 1950. In conducting this analysis, the Court may consider the pleadings, exhibits attached thereto, and documents referred to in the complaint that are central to the plaintiff's claims. *See* Greenberg v. Life Ins. Co. of Va., 177 F.3d 507, 514 (6th Cir. 1999).

In the present case, Plaintiffs seek to amend the complaint to add claims of Conspiracy (Count Nineteen) again Officers Keller and Cates; Prejury (Count Twenty) against Officer Keller; Brady Violation (Count Twenty-One) against Keller and Cates; and a Monell Claim (Count Twenty-Two) against the City of Dearborn Heights. Plaintiffs' request should be denied as the claims are without legal merit and the proposed amendments would therefore be futile. Plaintiff's undue delay in seeking the amendments, and the prejudice Defendants will suffer also support denial of the present motion.

I. THE PROPOSED AMENDMENTS ARE FUTILE.

A. Conspiracy Claim is not actionable against employees of the same employer.

Plaintiffs proposed claim of conspiracy (Count Nineteen) is futile as the claim is barred by the intra-corporate conspiracy doctrine. It is well established that there must be two or more persons

or entities to have a conspiracy. Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ., 926 F.2d. 505, 509 (6th Cir. 1991). The Sixth Circuit has held that an entity cannot conspire with its own agents or employees. United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d. 738, 753 (6th Cir. 2004). "The intra-corporate conspiracy doctrine holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. Simply put, under the doctrine, a corporation cannot conspire with its employees, ***and its employees, when acting within the scope of their employment, cannot conspire among themselves***." Denney v. City of Albany, 247 F.3d. 1172, 1170 (11th Cir. 2001)(citations omitted). The doctrine applies to public entities and its personnel. Id.

In Hull, the Plaintiffs alleged a conspiracy between school district superintendent, the executive director of the district and a school administrator, all of whom were employees or agents of the board. The Sixth Circuit affirmed the district court's grant of summary judgment as to the conspiracy claim. The court explained that "[s]ince all of the defendants are members of the same collective entity, there are not two separate people to form a conspiracy." Id. at 509.

In this case, the alleged conspirators identified by the Plaintiffs are all employees or agents of the City of Dearborn Heights. There is not two separate "people" to form a conspiracy. Accordingly, Plaintiffs' conspiracy claim is barred by the intra-corporate conspiracy doctrine.

Even though the Sixth Circuit cases applying the doctrine of intra-corporate conspiracy involved conspiracy claims brought under 42 U.S.C. §1985, the district courts within the Sixth Circuit have applied the doctrine to conspiracy claims under 42 U.S.C. §1983. *See* Audio Visual Equip. Supplies Inc. v. Township of Wayne, Case No. 06-10904, 2007 U.S. Dist. LEXIS 86941 (E.D. Mich. 2007)(Ex. 2); Turner v. Viviano, Case No. 04-CV-70509-DT, 2005 U.S. Dist. LEXIS

35119 (E.D. Mich. 2005)(Ex. 3). Michigan courts have also applied the intra-corporate conspiracy doctrine to bar state law claims. *See* Tropf v. Holzman, Case No. 257843, 2006 Mich App. LEXIS 131 (decided January 17, 2007)(Ex. 4).

Therefore, because Plaintiffs' proposed claim for conspiracy would be barred as a matter of law with by the doctrine of intra-corporate conspiracy, Plaintiff's request to add such a claim should be denied. In Count 19 of Plaintiffs' Proposed Amendment Complaint, Plaintiff seeks to recover under a theory of conspiracy, alleging that Officers Keller and Cates conspired to provide false information regarding Plaintiffs' criminal actions. Officer Keller and Cates are both employees of Dearborn Heights. As such, pursuant to the case law cited above, the intra-corporate conspiracy bars a claim of conspiracy in this case as a matter of law. Plaintiffs were well aware that such a claim is without legal merit as a similar claim was dismissed in the prior lawsuit. (Ex. 5, Order). Accordingly, because this claim is entirely frivolous, Plaintiffs' Motion to Amendment the Complaint should be denied.

B. Absolute immunity bars claims of perjury arising from testimony given under oath.

Additionally, Plaintiffs' proposed claim for prejury (Count Twenty) against Officer Keller is not legally cognizable as plead, and would be subject to dismissal. The claim is based upon testimony Officer Keller allegedly gave during the criminal prosecution of Plaintiffs. Essentially, Plaintiffs allege that because Officer Keller testified consistently with his written reports and that by doing so he committed perjury. Such a claim is not legally cognizable under 42 U.S.C. § 1983, and therefore because it would be subject to dismissal, Plaintiffs' request to add the claim is futile and should be denied. Macko v. Byron, 760 F.2d 95, 97 (6th Cir. 1985)("claim based on perjured

testimony [does] not sufficiently state a cause of action under 42 U.S.C. § 1983.")

Perjury is defined by Black's Law Dictionary, 7th Ed. p. 1160 as: "The act or an instance of a person's deliberately making material false or misleading statements **while under oath**." It is very well established that persons participating in judicial proceedings including judges, prosecutors and witnesses are entitled to absolute immunity from civil liability for claims arising from their testimony. Briscoe v. Lahue, 460 U.S. 325 (1983). The testimonial defense is available "no matter how gregious or perjurious that testimony was alleged to have been." Spurlock v. Satterfield, 167 F.3d 995, 1001 (6th Cir. 1999). Furthermore, "the mere fact that plaintiffs may allege a conspiracy to render false testimony, as opposed to simply alleging that one person testified falsely at trial, does not waive absolute testimonial immunity." Id. at 1001.

In Briscoe, plaintiffs were convicted after respondent police officers gave perjured testimony during the course of plaintiffs' criminal trials. Thereafter, the plaintiffs alleged that the police officers gave false testimony and, as a result, deprived the plaintiffs of their constitutional rights, pursuant to 42 U.S.C. §1983. Id. at 328. The Briscoe court held that dismissal of plaintiffs' complaint was proper because the court agreed with the lower court's finding that under § 1983, ***all witnesses, police officers as well as lay witnesses, were immune from civil liability based on their testimony in judicial proceedings***. The Supreme Court noted that legislative history did not support plaintiffs' contention that Congress had intended to provide damage remedies against police officers or any other witnesses. Furthermore, the Court found that public policy supported absolute immunity because the subjection of police officers to damages liability under § 1983 would undermine their contribution to the judicial process and the effective performance of their other public duties. The Court went on to note that the probable frequency of such suits would have likely imposed

significant burdens on the judicial system and on law enforcement resources. As Briscoe reasoned:

> In short, the common law provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process. It is equally clear that § 1983 does not authorize a damages claim against private witnesses on the one hand, or against judges or prosecutors in the performance of their respective duties on the other. When a police officer appears as a witness, he may reasonably be viewed as acting like any other witness sworn to tell the truth -- in which event he can make a strong claim to witness immunity; alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding. Nothing in the language of the statute suggests that such a witness belongs in a narrow, special category lacking protection against damages suits. Id. at 335-36
>
> * * *
>
> [O]ur 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.
>
> Moreover, to the extent that raditional 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 342-43 (emphasis added)

Thus, the Briscoe Court concluded, police officers are not only deserving of immunity from liability under § 1983 just like any other witness, but if anything the reasoning behind immunity for police officers is even greater than other witnesses since testifying is a regular part of their public duties. The detailed opinion in Briscoe goes a step further to explain why plaintiffs' concerns regarding false

testimony are outweighed by the policy considerations in favor of absolute immunity:

> There is, of course, the possibility that, despite the truthfinding safeguards of the judicial process, some defendants might indeed be unjustly convicted on the basis of knowingly false testimony by police officers. The absolute immunity for prosecutors recognized in Imbler bars one possible avenue of redress for such defendants. Similarly, in this case, the absolute witness immunity bars another possible path to recovery for these defendants. But we have recognized, again and again, that in some situations, ***the alternative of limiting the official's immunity would disserve the broader public interest.*** Id. at 345 (emphasis added).
>
> There is no reason to believe, however, that this risk is any greater than, or indeed as great as, the risk of an unjust conviction resulting from a misidentification or other unintentional mistake. ***There is no federal damages remedy for such innocent persons, or for those who are acquitted after undergoing the burdens of a criminal trial.*** Id. at 345, n31.

Accordingly, the Supreme Court in Briscoe affirmed the dismissal of plaintiffs' § 1983 action against the defendant officers, concluding:

> 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. The decision of the Court of Appeals [in favor of the testifying police officers] is affirmed. Id. at 345-46

More recently, in Heavrin v. Boeing Capital Corp., 246 F. Supp. 2d 728, 733 (W.D. Ky. 2003), the district court reasoned:

> Even assuming without deciding that Heavrin has a claim against the defendants for committing perjury, they escape liability because of the absolute nature of the judicial privilege. ***It is well settled that a witness who offers testimony, even if perjured, cannot be liable in a civil action for that testimony, as testimony in a judicial***

> ***proceeding is privileged as a matter of public policy.*** Id. (emphasis added) (*citing* Briscoe, 460 U.S. at 330 (holding that the judicial privilege bars a private cause of action under 42 U.S.C. § 1983 for perjured testimony of a police officer in court); Bryant v. Kentucky, 490 F.2d 1273, 1274 (6th Cir. 1974) (holding that a witness before a grand jury who provides false testimony is liable for a criminal action in perjury, but not for any civil action such as malicious prosecution since testimony in a judicial proceeding is privileged as a matter of public policy); Lawson v. Hensley, 712 S.W.2d 369, 370 (Ky. Ct. App. 1986) (observing that the law in Kentucky is the same as the general rule that a civil action for damages will not lie for perjury)).

Likewise, in Bryant v. Kentucky, plaintiff filed a civil rights action under 42 U.S.C. §§ 1983, 1985(3) for malicious prosecution against defendants, mayor and police officers, who were grand jury witnesses, alleging that there was a conspiracy to cause an indictment to be returned against her through their false testimony because she was an activist. 490 F.2d 1273, 1274 (6th Cir. 1974). The Bryant court affirmed summary judgment dismissing plaintiff activist's malicious prosecution action against the mayor and police officers. The Sixth Circuit in Bryant held that under state law, "a witness before a grand jury who provides false testimony is liable for a criminal action in perjury, ***but not for any civil action such as malicious prosecution since testimony in a judicial proceeding is privileged as a matter of public policy.***" Id. Accordingly, plaintiffs' conclusory allegations that defendants provided false information in the grand jury proceeding were insufficient to pursue a claim for malicious prosecution under §§ 1983, 1985(3) .

Instructively, in Jones v. Cannon, the Court held that the defendant detectives were "absolutely immune from a § 1983 civil action for [their] testimony, even if false, before the grand jury. . . .criminal trial, and during pre-trial depositions. "174 F.3d 1271, 1287 (11th Cir. Fla. 1999)(*citing* Briscoe, 460 U.S. 343 (1983)). In dismissing the plaintiff's claims, the court specifically cited Briscoe:

> Indeed, ***the Briscoe Court reasoned that absolute immunity is even more necessary for police officer witnesses than for lay witnesses.*** The reason is that, "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." If a police officer witness "could be made to answer in court each time a disgruntled defendant charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." ***That is why the Court emphatically rejected the notion that an exception to the doctrine of absolute immunity for witnesses should exist when a police officer is alleged to have committed perjury during a criminal trial.*** Id. (emphasis added) (*quoting* Briscoe, 460 U.S. at 341-45).

Significant to the case at bar, courts have dismissed malicious prosecution claims, explicitly based on the officers entitlement to absolute immunity for the officer's allegedly false testimony. The decision in Alderman v. McDermott, is illustrative to the case at bar since it specifically addressed a plaintiff's Fourth Amendment claim that officers used false testimony which lacked probable cause. Case No. 6:03-cv-41-Orl-22KRS, 2004 U.S. Dist. LEXIS 7526, 44-45 (M.D. Fla. 2004)(Ex. 6). In holding that defendant officers were entitled to absolute immunity on plaintiff's malicious prosecution claim, the Alderman court ruled:

> Also, since under the Plaintiff's version of the facts, the Defendant Officers offered false testimony to obtain a conviction on which they lacked even arguable probable cause, a jury could reasonably find a Fourth Amendment violation.
>
> However, because police officers are afforded absolute immunity from a § 1983 civil damages action predicated on false testimony, the Plaintiff's malicious prosecution claim necessarily fails. Concluding otherwise would require law enforcement officers to answer in court each time a disgruntled defendant charged them with perjury, diverting their resources "from the pressing duty of enforcing the criminal law."Id. at 44-45 (emphasis added) (quoting Jones, 174 F.3d at 1286 (recognizing that a detective was entitled to absolute immunity from a § 1983 civil damages action predicated on testimony given before a grand jury, in pre-trial depositions, and at trial, even if

it was false)).

> "As with any witness testifying under oath, the penalty for false testimony is the potential prosecution for perjury." Id. at 45 (*quoting* Scarbrough v. Myles, 245 F.3d 1299, 1305 (11th Cir. 2001))
>
> * * *
>
> "In § 1983 cases, absolute immunity is accorded to functions intimately associated with the judicial phase of the criminal process." This encompasses police testimony given in grand jury proceedings, pre-trial depositions, and criminal trials. ***In this instance, the Plaintiff's claim for malicious prosecution is predicated on allegedly false statements made in relation to functions intimately associated with the judicial phase of Mr. Alderman's criminal process. Accordingly, absolute immunity applies.*** Id. at 45, n98 (emphasis added) (*quoting* Scarbrough, 245 F.3d 1299 at 1305; and citing Jones, 174 F.3d 1271 at 1286).

In the case at hand, Plaintiffs' proposed amended complaint seeks to add a claim of perjury against Officer Keller, however, pursuant to the case law cited above, Officer Keller is entitled to absolute immunity for any testimony he may have given during the preliminary examination where sufficient probable cause was found to bind Joseph Saad over for trial, as well as for any testimony during the subsequent criminal trial. Therefore, because the claim of perjury is not legally cognizable, Plaintiffs request to add this claim would be futile and should be denied.

C. No Brady claim exists where the Plaintiff was aware of facts/information allegedly suppressed and/or where the facts/information allegedly suppressed are not exculpatory.

Plaintiffs' alleged Brady violation in proposed Count 21is futile. There is no general constitutional right to discovery in a criminal case. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977). While due process requires a prosecutor to disclose exculpatory evidence, *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *See also*, Kyles v. Whitley, 514 U.S. 419, 432-36 (1995); United

States v. Bagley, 473 U.S. 667, 682 (1985), it "does not require the government to create exculpatory material that does not exist." Stadler v. Curtin, 682 F. Supp. 2d 807 (E.D. Mich. 2010). Neither due process nor equal protection requires the police or the prosecution to search for exculpatory evidence. "[W]here there is a general request, or no request at all, for exculpatory evidence, suppression by the prosecutor of certain exculpatory evidence violates due process ***only where that evidence creates a reasonable doubt as to the guilt of the accused*** . . . ." Wagster v. Overberg, 560 F.2d 735, 740 (6th Cir. 1977)(Emphasis Added).

The Supreme Court has held that "[t]here are three components of ***a true Brady violation***: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 280 (1999). It is Plaintiffs' burden to establish each of these elements. Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000).

To be exculpatory evidence, the evidence when viewed in the context of the entire record, ***must create "a reasonable doubt that did not otherwise exist."*** United States v. Agurs, 427 U.S. 97, 112 (1976). The failure to disclose evidence is "material" and "prejudicial" to the defendant ***only when the evidence creates a reasonable probability of a different result***. O'Hara v. Brigano, 499 F.3d 492, 502 (6th Cir. 2007). Material evidence is that which is "so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce." United States v. Clark, 988 F.2d 1459, 1467 (6th Cir. 1993). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985); United States v. Mullins, 22 F.3d 1365, 1371 (6th Cir. 1994).

It is also well established that "[t]here is no Brady violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998) (internal quotations omitted); *See also*, Spirko v. Mitchell, 368 F.3d 603, 610 (6th Cir. 2004); Mahaday v. Cason, 367 F. Supp. 2d 1107, 1118 (E.D. Mich. 2005)(*citing* Carter v. Bell, 218 F. 3d 581, 601 (6th Cir.2000)). The Brady rule does not assist a plaintiff who was aware of essential facts that would have allowed him or her to take advantage of the exculpatory evidence at issue. Coleman v. Mitchell, 268 F. 3d 417, 438 (6th Cir. 2001).

In the present case, regardless of whether the in-car video or audio were provided during the criminal proceeding, Plaintiffs were present and participated in any conversation which occurred during the transport of Plaintiffs to the police station. Plaintiff therefore had first hand, personal knowledge of any statement, or lack of statement, made by Officer Keller or Officer Cates during the transport. United States v. Clark, 928 F.2d 733 (6th Cir. 1991)("No Brady violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information.'" citing, United States v. Grossman, 843 F.2d 78, 85 (2nd Cir. 1988)) As such, Plaintiffs were personally aware of the alleged facts/information they claim was not disclosed during the criminal proceedings. *See generally*, Thomason v. Ludwick, Case No. 2:09-11012, 2011 U.S. Dist. LEXIS 74679 (E.D. Mich. July 12, 2011)(Ex. 7); Mills v. Lafler, Case No. 08-14778, 2011 U.S. Dist. LEXIS 70615 (E.D. Mich. June 30, 2011)(Ex. 8)("Because the information [alleged exclupatory statements] was available to Petitioner from his own daughter, who testified in his behalf at trial, there was no Brady violation;") Kittrell v. Davis, Case No. 2:08-CV-11256, 2010 U.S. Dist.

LEXIS 117126 (E.D. Mich. November 3, 2010)(Ex. 9)("Petitioner was aware of his own statement to police and has not shown that such information was in the sole possession of the prosecution;") Wallace v. McQuiggin, Case No. 2:08-CV-13479, 2010 U.S. Dist. LEXIS 142801 (E.D. Mich. 2010)(Ex. 10)(Where petitioner was aware of fact contained in discovery sought, no Brady violation occrred when records containing information were not turned over). Therefore, as a matter of law, because Plaintiffs have personal, first hand knowledge of the facts/information they allege was not disclosed, they are unable to establish a Brady violation, and as such the claim would be futile.

Furthermore, a review of the in-car video/audio recordings shows that there exists no basis to conclude that anything said during this transport would have been favorable to Plaintiffs. Instead, the in-car video simply confirmed that Joseph Saad had been using a telephone to harass his neighbor. Therefore, as a matter of law, it cannot be said that there was no reasonable probability that the disclosure of the in-car video recording, of a conversation that Plaintiffs participated in, would have impacted the outcome of the trial. This is particularly true as Plaintiffs were not convicted. Plaintiffs have also not advanced any viable theory establishing how the in-car video would have been beneficial to their case. *See generally*, McClellan v. Rapelje, Case No. 2:09-CV-10617, 2010 U.S. Dist. LEXIS 134708 (E.D. Mich. November 15, 2010)(Ex.11); Carter v. Harry, Case No. 07-12211-BC, 2010 U.S. Dist. LEXIS 69766 (E.D. Mich. July 13, 2010)(Ex.12)(No Brady violation where Petitioner failed to offered any evidence or argument to demonstrate that any of undisclosed evidence contained exculpatory material.) Accordingly, because the in-car video recordings do not contain any exculpatory evidence, and because they would not have changed the results of the criminal prosecution, no Brady violation can be said to have occurred, and any allegation otherwise would be futile. Therefore, Plaintiff's request to add such a claim should be denied.

D. The absence of a constitutional violation bars a Monell claim.

Additionally, "[w]here, as here, a municipality's liability is alleged on the basis of the unconstitutional actions of its employees, it is necessary to show that the employees inflicted a constitutional harm." Ewolski v. City of Brunswick, 287 F.3d 492, 516 (6th Cir. 2002) (citations omitted). In other words, "there can be no municipal liability under section 1983 for [unconstitutional conduct] when no [constitutional violation] has actually occurred." Tucker v. City of Richmond, Ky., 388 F.3d 216, 224 (6th Cir. 2004); Los Angeles v. Heller, 475 U.S. 796, 799 (1986). Several Sixth Circuit opinions have echoed the ruling of Heller, stating that "[t]here can be no Monell municipal liability under § 1983 unless there is an underlying unconstitutional act." Wilson v. Morgan, 477 F.3d 326, 340 (6th Cir. 2007)("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.")(*quoting* Heller, 475 U.S. at 799). As the Sixth Circuit Court of Appeals held in Ewolski v. City of Brunswick, "[h]aving concluded that the [plaintiff] has not shown a genuine issue of material fact as to any of the asserted constitutional claims, we therefore conclude that the district court correctly dismissed the [plaintiff]'s municipal liability claims." 287 F.3d 492, 516 (6th Cir. 2002) (*citing* Heller, 475 U.S. at 799) ("Neither Monell . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."); *See also* Hancock v. Dodson, 958 F.2d 1367, 1376 (6th Cir. 1992) ("Because the only city police officer present committed no constitutional violation, the city cannot be held liable"); Bowman v. Corrections Corp. of America, 350 F.3d 537 (6th Cir. 2003). Accordingly, because the proposed amended claims against the individual Defendants are

futile, the proposed amended Monell claim predicated upon those futile claim would also be futile.. As such, Plaintiffs request to amend their complaint and add Count 22 should be denied.

II. THE UNDUE DELAY PRECLUDES THE PROPOSED AMENDMENTS.

Plaintiffs request to add the proposed additional claims should be denied as Plaintiffs have unduly delayed seeking the proposed amendments. On January 10, 2011, Plaintiffs filed an 18 count complaint seeking to recover for various alleged constitutional violations and state law claims arising from their arrest and subsequent criminal prosecution. Plaintiffs now seeks to add four additional counts which are entirely based upon Plaintiffs arrest and subsequent criminal prosecution. In other words, the proposed amendments are based upon the same operative facts as the original complaint, and upon the same facts of which Plaintiffs were aware when they filed the original complaint. Plaintiffs have failed to explain what new facts/information was discovered that supports their ten month delay in seeking to add claims based upon facts/information already known to Plaintiffs prior to the filing of the original complaint. Duggins v. Steak 'N Shake, Inc., 195 F.3d 828, 834 (6th Cir. 1999)(*noting*, "plaintiff was obviously aware of the basis of the claim for many months, especially since some underlying facts were made a part of the complaint.")

The recently produced in-car videos certainly contains no facts/information which reveals that Officers Keller and Cates conspired together to include false information within their police reports. Nor does the in-car video establish that Officer Keller testified under oath falsely during preliminary examination and/or the criminal trial. Also, nothing contain within the in-car video can be considered exculpatory evidence. Further, because Plaintiffs were participants in the conversations which occurred during the in-car video, Plaintiffs were aware of the facts/information

contained in the in-car video prior to the present lawsuit, and prior to the preliminary examination and criminal trial. Therefore, because there exists no newly discovered facts/information upon which their requested amendments are based, the requested amendments are the result of undue delay and the present motion should be denied. *See*, Weather Underground, Inc. v. Navigation Catalyst Sys., Case No. 09-10756, 2010 U.S. Dist. LEXIS 82547 (E.D. Mich. 2010)(Ex. 12)(Denying leave to file counter-claim when "[d]efendant certainly had access to the same information from the time the Complaint was filed.").

III. THE PREJUDICE SUFFERED BY DEFENDANTS PRECLUDES THE PROPOSED AMENDMENTS.

The present motion is also properly denied, as Defendants would be prejudiced by the addition of claims to the present case as the proposed amendments are an attempt to overhaul Plaintiff's overall theory of the case, which will require Defendants to conduct additional discovery. Leary v. Daeschner, 349 F.3d 888, 908 (6th Cir. 2003), Morse v. McWhorter, 290 F.3d 795, 801 (6th Cir. 2002).

In Serrano v. Cintas Corp., 271 F.R.D. 479, 485 (E.D. Mich. 2010), Judge Cox denied the EEOC's request to amend the complaint to add an additional claim. In addition to finding undue delay, the Judge Cox also found that amendment would be unwarranted based upon the prejudice caused by the proposed amendment. In finding prejudice exists, Judge Cox found that the request for leave was not brought until the eve of the close of discovery. Judge Cox then noted that while there exists similarities between the existing claims, and the proposed additional claim, there were difference between the claims which would require additional discovery to prepare a adequate defense. The result will be that discovery may have to be reopened thereby prejudicing the defendant.

Similar to Serrano, the Plaintiffs waiting until the eve of the close of discovery to seek leave to add the additional claims, which are based upon facts Plaintiffs were aware of when they filed the original complaint. The untimely filing will result in Defendants having to conduct additional discovery regarding these claims, and will cause further delay to the proceedings. Therefore, Defendants in this case, just like the defendants in Serrano, will suffer prejudice by the amendment. Accordingly, the present motion should be denied.

Respectfully Submitted,

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Dated: November 4, 2011

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: *Nemer N. Hadous, Esq. and Haytham Faraj, Esq.*, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: N/A.

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