UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC, Plaintiff, v. DELTA COUNTY AND LAUREN WICKMAN, Defendants.	))) 2:20 cv-00113) Hon. Robert J. Jonker)))

FIRST AMENDED COMPLAINT FOR CONSTITUTIONAL VIOLATIONS, DECLARATORY RELIEF, AND RELIANCE ON JURY DEMAND ALREADY FILED

Plaintiff Kurtis Kobasic ("Plaintiff"), by and through his attorney, Celeste M. Dunn, PLC, states for his First Amended Complaint as follows:

1. This is a civil action arising under 42 U.S.C. § 1983 and common law avenues of recovery for deprivations of Plaintiff's constitutional rights against Defendants and conversion.

2. Plaintiff also seeks a declaratory judgment that a state court order to euthanize his dog are void because he is an owner of the dog Turbo and was not a party to an action against Turbo.

3. Plaintiff also seeks preliminary and permanent injunctive relief to prevent the dog at issue's pre-mature euthanasia while these claims are pending.

JURISDICTION

4. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331,

1367(a), 1341 and 2201.

VENUE

5. Venue is proper under 28 U.S.C. § 1391(b).

6. The incidents that give rise to this suit all occurred in Escanaba, which is situated in Delta County, Michigan.

7. Defendant Delta County is an agency of a political subdivision of the State of Michigan acting under color of State law, and is a person for purposes of a 42 U.S.C. § 1983 action. Its employee and attorney, Lauren Wickman, was at all pertinent times, acting under color of State law, and is the complaining witness and made certain attestations pursuant to the former MCR 2.114 (now MCR 1.109) to certain facts and circumstances that were not within her personal knowledge in an underlying case, *In re Turbo*.

COLOR OF STATE LAW

8. At all times relevant herein, Defendants acted under color of state law.

FACTUAL BACKGROUND

9. On June 30, 2017, Plaintiff co-owned with non-party Valerie Kobasic ("Valerie Kobasic") a dog named "Turbo."

10. Turbo was purchased by Plaintiff's girlfriend.

11. On June 30, 2017, it was alleged that dog Turbo killed another dog that was on a tie out. No evidence was presented that the deceased dog was on its owner's property or otherwise under its owner's control at the time of the alleged incident as is

required under Michigan law. The owner of the deceased dog was not present. Defendant Lauren Wickman attested to the Complaint, attesting to allegations not within her personal knowledge.

12. Prior to Delta County, through its employee Lauren Wickman, filing the action, upon information and belief, the City of Escanaba denied a warrant request and did not pursue any claims against Valerie Kobasic nor Plaintiff nor dog Turbo.

13. During trial, Lauren Wickman, presented testimony from a ten year old witness who testified:

> The Court: Mr. Bennett [the 10 year old] did you- -did you see one of the dogs biting the other one?
> The Witness: I think so your Honor.
> The Court: What do you mean you think so?
> The Witness: I think I saw but I can't exactly remember.
> The Court: Okay. Fair Enough. What do you mean when you said that the one dog- the orange dog- was eating the other dog? What was that about?
> The Witness: It-it looked like it was eating the other dog, but- I wasn't really sure.

Trial Testimony, page 15.

14. Lauren Wickman presented a veterinarian and elicited testimony, admittedly, beyond the expert's expertise. The veterinarian, Dr. Laskaska, testified to Turbo being dangerous but then admitted "[b]ehavior is not really my area of expertise. However, it's always a dangerous situation when one dog is confined and the other one isn't." Trial Testimony, page 31. The veterinarian never met dog Turbo.

15. Officer Meyette testified that dog Turbo was "not vicious." Trial Testimony, page 35.

16. Defendant Lauren Wickman, in her sworn complaint, pled two allegations against dog Turbo, one cause of action pursuant to MCL 287.286a and the other pursuant to MCL 287.322. Defendant Lauren Wickman utilized a Michigan Supreme Court Form which doesn't follow the law, and on appeal, Defendant Lauren Wickman admitted as much in regards to MCL 287.286a.

17. Both MCL 287.286a and MCL 287.321, *et seq*., require that all owners be served. MCL 287.286a falls within the Dog Law and owner is defined as: "'[o]wner' when applied to the proprietorship of a dog means every person having a right of property in the dog, and every person who keeps or harbors the dog or has it in his care, and every person who permits the dog to remain on or about any premises occupied by him." MCL 287.321 defines "owner" as "a person who owns or harbors a dog or other animal." The summons must be issued to the owners under both statutes.

18. Both MCL 287.286a and MCL 287.322 require that a complaint be "sworn" prior to jurisdiction vesting. On July 10, 2017, Defendant Lauren Wickman attested under oath that Turbo was a dangerous animal and she did not have the requisite personal knowledge in which to make that attestation. The attestation was governed, at the time, by the former MCR 2.114(D) which required that the signature of the party "constitutes certification by the signer that: (1) he or she has read the document; (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law...." Violation of this rule subjects the signer to sanctions, which may include costs and

attorney fees. MCR 2.114(E). Upon information and belief, Lauren Wickman never investigated the ownership of dog Turbo. Despite this, she attested to the ownership, and the Complaint was filed in the District Court in Escanaba, Michigan. Plaintiff was not a named party.

19. As a co-owner, Plaintiff is a necessary party in any proceeding affecting Turbo because Turbo is Plaintiff's property. MCR 2.205.

20. The show cause hearing was held, Valerie Kobasic, the only owner named proceeded *in pro per*. Valerie Kobasic was provided ten days trial notice from the time she was served with the Complaint and Summons on July 18, 2017 to the actual trial date of July 28, 2017. Valerie Kobasic was not able to secure an attorney nor was she provided any factual basis of the Complaint except for an attached police report. The district court judge ordered dog Turbo to be destroyed. A stay of proceedings followed.

21. An appeal was filed and the matter affirmed by the Escanaba Circuit Court judge sitting as the appellate court on an appeal of right. Two applications for leave have been filed with the Michigan Court of Appeals denying the application in a two to one vote and the Michigan Supreme Court denying leave.

22. Plaintiff's ownership has not been adjudicated nor included in any of the prior hearings.

23. Valerie Kobasic also did not know applicable law, which would have been persuasive in defending against the State's request to kill Turbo. She did not know proper objections.

24. On December 23, 2019, Plaintiff's counsel sent a letter to Escanaba County via both its counsel Lauren Wickmen and the Board of Commissioners notifying them that proceeding without service upon Plaintiff rendered any order void. MCR 2.205; MCL 287.286a; MCL 287.322. Adjudication of property without joinder of such necessary parties is void. *Reinecke v. Sheehy*, 47 Mich. App. 250, 255 (1973) (judgment void against party not served); *Markstrom v. United States Steel Corporation*, 182 Mich. App. 570, 574 (1989), *rev'd on other grounds*, 437 Mich. 936 (1991) (settlement not binding on owner not joined as necessary party).

25. Plaintiff, in the December 23, 2019 letter, also included Turbo's Rabies Vaccination Certificate which was in his name and identified him, Kurtis Kobasic, as the owner. No response to the December 9, 2019 letter was received. Exhibit A, December 9, 2019 Letter and Exhibit B, Vaccination Certificate. Under Michigan law, the owner vaccinates the dog.

26. Defendants are on notice of Plaintiff's ownership interest and, originally, woefully ignored same; additionally, the original attestation failed to properly investigate and secure all owners. When acting under color of state law, they are bound to follow and abide by Plaintiff's constitutional rights.

27. Defendant Delta County has since acknowledged Plaintiff's ownership interest but is still denying Plaintiff's constitutional rights; Delta County has represented that they don't want to provide Plaintiff due process as a new trial may jeopardize their case.

28. Defendant Lauren Wickman is not immune from this suit as it is a civil action, not a criminal proceeding. brought by animal control or investigating officers.

29. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. Sect. 1983.

COUNT I
VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983 AND FOURTH AMENDMENT

30. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

31. The Fourth Amendment of the United States Constitution, U.S. Const. amend. IV, prohibits the government from unreasonably seizing or destroying or seizing a citizen's property. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

32. "[T]here is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized." *Brown v. Battle Creek Police Department,* 844 F.3d 556, 566 (6th Cir. 2016). Owners of dogs, even alleged dangerous ones, are still entitled to constitutional and fourth amendment protections. *Smith v Detroit*, *et al*, Sixth Circuit Court of Appeals 17-1907, October 15, 2018.

33. "The destruction of property by state officials poses as much of a threat, if not more, to people's right to be 'secure . . . in their effects' as does the physical taking of them." *Fuller v. Vines*, 36 F.3d 65, 68 (9th Cir. 1994), overruled on other grounds, *Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (citation omitted).

34. "The killing of [a] dog is a destruction recognized as a seizure under the Fourth Amendment" and can constitute a cognizable claim under § 1983. *Id.*

35. Dogs are more than just a personal effect. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose,* 402 F.3d 962, 975 (9th Cir. 2005) (holding that defendant police's shooting of plaintiff's dogs was an unreasonable seizure).

36. The emotional attachment to a family's dog is not comparable to a possessory interest in furniture. *Id*.

37. Indeed, Plaintiff's Fourth Amendment interests involved are substantial because "the bond between a dog owner and his pet can be strong and enduring," and Plaintiff thinks of Turbo "in terms of an emotional relationship, rather than a property relationship." *Altman v. City of High Point, N.C.*, 330 F.3d 194, 205 (4th Cir. 2003). Plaintiff utilizes dog Turbo for emotional support.

38. Defendants' acts described herein were objectively unreasonable. Defendants' orders were achieved without all owners as respondents. Every order achieved is void as all property owners were not included in the case. There is no order that allows the seizure of this property against Plaintiff.

39. Defendant Delta County continues to pursue euthanasia despite its

knowledge and acknowledgement of Plaintiff's ownership interest.

40. Indeed, Defendant's acts described herein both individually and collectively were and are intentional, grossly negligent, and/or amount to reckless or callous indifference to Plaintiffs' constitutional rights.

41. Both Defendant Delta County and Defendant Lauren Wickman's actions were unreasonable under the totality of the circumstances and therefore constituted an unreasonable seizure under the Fourth Amendment. Their positions and Fourth Amendment violations continue to this day.

42. No governmental interest justifies the intrusion involved in this case.

43. The right to possess a dog is clearly established. *Lesher v. Reed*, 12 F.3d 148, 150-51 (8th Cir. 1994).

44. As a direct and proximate cause of Defendants' unlawful seizure of Turbo, Plaintiff has suffered and continues to suffer damages, including mental pain and anguish that flow naturally from the constitutional violations. *Moreno v. Hughes*, 2016 U.S. Dist. 5697 (E.D. Mich. Jan. 19, 2016) (holding that mental anguish and suffering damages are recoverable under the Civil Rights Act where police officers violate the Fourth Amendment by unreasonably shooting plaintiffs' dog).

Compensatory Damages

45. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

46. Defendants' actions were:

Reckless;

Showed and show callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

47. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

48. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT II
VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983 AND FOURTEENTH AMENDMENT
PROCEDURAL DUE PROCESS

49. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

50. The Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty or property, without due process of law." U.S. Const. amend.

XIV, sect. 1, cl. 3.

51. To establish a procedural due process claim under 42 U.S.C. Sect. 1983, a plaintiff must show that (1) it had a life, liberty, or property interest protected by the Due Process Clause; (2) it was deprived of this protected interest; and (3) the state did not afford it adequate procedural rights. See *Daily Servs., LLC v. Valentino*, 756 F.2d 893, 904 (CA6 2014).

52. Plaintiff has a protected property interest in his dog Turbo. MCL 287.286a; MCL 287.321, *et seq., Brown*, *supra*., *Smith*, *supra*.

53. Plaintiff's protected property interest in his dog Turbo has been, and is being, denied due to the void order, restraint on property, and continued quest for permanent destruction without Plaintiff being provided process.

54. Defendants held a hearing and pursued a case without Plaintiff. Defendant Lauren Wickman attested under oath as to the ownership never making the requisite inquiry. Plaintiff, even now, has continued to protect his Procedural Due Process Rights which Defendant Delta County continues to fight to deprive him of same. There is no adequate post-deprivation remedy.

55. Therefore, Plaintiff has a constitutionally protected interest that is being affected as a direct and proximate cause of Defendants' actions of achieving orders without him included as Respondent, nor allowing him to exert his due process rights when he asked to do so; Defendant Delta County continues to violate Plaintiff's procedural due process, which they admitted as such and that the motivation was for

strategic purposes. As a direct and proximate cause of Defendants' actions, Plaintiff has been and continues to be damaged.

Compensatory Damages

56. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

57. Defendant's actions were:

Reckless;

Showed callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

58. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

59. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT III
VIOLATION OF CIVIL RIGHTS
42 U.S.C. § 1983 AND FOURTEENTH AMENDMENT
SUBSTANTIVE DUE PROCESS AS TO DEFENDANT DELTA COUNTY

60. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

61. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can "deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, sect. 1, cl.3.

62. The substantive component of the Due Process Clause prohibits government from taking action that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *United States v Salerno*, 481 U.S. 739, 746 (1987).

63. Plaintiff has a protected property interest in his dog Turbo.

64. Defendants have been on notice of Plaintiff's property interest, and Defendant Delta County has admitted that Plaintiff is an owner.

65. Defendant Delta County's position shocks the conscience and interferes with Plaintiff's deeply-rooted property rights as they continue every day to violate his rights as outlined in the General Allegations and each of the Counts of this Complaint, which are incorporated into this Paragraph by reference.

66. There is no compelling governmental interest achieved by the continual denial of due process nor is there any rational basis to deprive Plaintiff of his property interest without affording him due process.

67. In the alternative, pursuing euthanization without due process is not reasonably related to a legitimate governmental interest.

68. Defendant Delta County's actions are a direct and proximate cause of the violation of substantive due process. As a direct and proximate cause of these actions, Plaintiff has been damaged.

Compensatory Damages

69. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

70. Defendant's actions were:

Reckless;

Showed callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

71. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

72. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for

reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT IV

POLICY AND CUSTOM LIABILITY

73. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

74. Defendant Delta County is and was aware of Plaintiff's Kurtis Kobasic's ownership interests.

75. Defendant Delta County had been informed, again, on, or about December 9, 2019 via letter from Mr. Kurtis Kobasic's counsel. Defendant Delta County's counsel, Lauren Wickman, was informed.

76. Defendant Delta County proceeded and continues to proceed with its case despite its scienter of the unadjudicated ownership interest.

77. Defendant Delta County's action and inaction demonstrate its policy of failing to recognize constitutionally protected property ownership rights that are clearly outlined in the federal system and in the Federal Sixth Circuit Court of Appeals.

78. Defendant Delta County's policy and custom violates both the 4th Amendment and 14th Amendment of the U.S. Constitution.

79. As a direct and proximate cause of Defendant Delta County's policy and custom, Plaintiff's constitutional rights have been and continue to be violated and have

caused Plaintiff to be damaged.

Compensatory Damages

80. Under 42 U.S.C. § 1983 Plaintiff is entitled to an award of compensatory damages.

Punitive Damages

81. Defendant's actions were:

Reckless;

Showed callous indifference toward the rights of Plaintiff; and

Were taken in the face of a perceived risk that the actions would violate federal law.

82. Plaintiff is entitled to an award of punitive damages against Defendant, in order to punish them and to deter others.

Attorney's Fees

83. Under 42 U.S.C. § 1988 if Plaintiff is the prevailing party in this litigation, then he will be entitled to receive an award of reasonable attorney's fees, non-taxable expenses and costs.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT V

DECLARATORY AND INJUNCTIVE RELIEF

84. Plaintiff re-alleges all of the preceding paragraphs as if set forth fully herein.

85. M.C.R. 2.205 provides that: "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests."

86. Adjudication of property without joinder of such necessary parties is void. *Reinecke v. Sheehy*, 47 Mich. App. 250, 255 (1973) (judgment void against party not served); *Markstrom v. United States Steel Corporation*, 182 Mich. App. 570, 574 (1989), *rev'd on other grounds*, 437 Mich. 936 (1991) (settlement not binding on owner not joined as necessary party).

87. Plaintiff was not been joined in this case, which was a violation of M.C.R. 2.205, M.C.L. 287.286a and M.C.L. 287.321. Defendant has made no attempts to rectify their constitutional violations. Defendant admits that it wants to proceed without Plaintiff as Defendant may strategic problems.

88. Because of, *inter alia*, the failure to join Plaintiff Kurtis Kobasic as a necessary party, any and all orders in the case against Turbo are void. *Reinecke*, 47 Mich. App. at 255.

89. The order to euthanize must be enjoined on a temporary and permanent basis otherwise irreparable harm will occur.

WHEREFORE, Plaintiff requests the declaratory relief describe herein, compensatory damages in a fair and reasonable amount, for punitive damages, for reasonable attorney's fees, for and non-taxable expenses, for costs, and Plaintiff prays for such other relief as may be just under the circumstances and consistent with the purpose of 42 U.S.C. § 1983.

COUNT VI
CONVERSION

90. Plaintiff repeats his prior allegations.

91. "Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Thoma v. Tracy Motor Sales, Inc.,* 360 Mich. 434, 438, 104 N.W.2d 360 (1960)(quoting *Nelson & Witt v. Texas Co.,* 256 Mich 65, 70)).

92. Defendant's void orders achieved without Plaintiff served is a distinct act of dominion wrongfully exerted over Plaintiffs' dog in denial of or inconsistent with his rights.

WHEREFORE, Plaintiff requests relief under applicable law or in equity, including, without limitation, a judgment and an award of statutory treble damages and all reasonable costs, interest and attorney fees. M.C.L. § 600.2919a.

RELIANCE ON ORIGINAL DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demanded trial by jury in this action of all issues so triable contemporaneous with filing its original Complaint and relies on that Jury Demand.

Respectfully submitted,

CELESTE M. DUNN, PLC

By: /s/ Celeste M. Dunn

_____

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August 3, 2020

EXHIBIT A

December 9, 2019

Ms. Lauren Wickman, Esq.
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via e-mail lwickman@deltacountymi.org

Delta County Board of Commissioners
310 Ludington Street
Escanaba, Michigan 49829

Re: People of the State of Michigan v Valerie Kobasic, Turbo the Dog

Dear Ms. Wickman and Delta County Board of Commissioners:

I represent, Kurtis Kobasic, as an owner of Dog Turbo. Delta County, through its prosecutor and assistant prosecutor, Ms. Lauren Wickman is attempting to destroy a dog named Turbo, owned, in part by Valerie Kobasic without serving and including in the suit Mr. Kurtis Kobasic, also owner of dog Turbo. Without the proper owners sued as a part of the civil proceeding, any order to euthanize dog Turbo is void and in violation of MCL 287.286a and MCL 287.321, *et seq*.

As Delta County is well aware, MCR 2.205, Necessary Joinder of Parties, states:

> (A) Necessary Joinder. Subject to the provisions of subrule (B) and MCR 3.501, persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.

Ms. Wickman did not join my client, which was required. Prior attempts to adjudicate jointly held property have historically and consistently been held void. *Reinecke v Sheehy*, 47 Mich App 250; 209 NW2d 460 (1973) (see below); *In re Cain Estate*, 147 Mich App 615, 382 NW2d 829 (1985) (decedent and his uncle had joint bank account, the Court held that the uncle was a necessary party to probate of deceased's will); *Markstrom v United States Steel Corporation*, 182 Mich App 570, 452 NW2d 820 (1989) (in trespass action, settlement not binding because one of five land owners was not party to settlement agreement and was not joined as necessary party under court rule). I attach a copy of a Huron County opinion regarding an alleged dangerous animal wherein the court ruled that the case must be dismissed as not all owners were served (wife served and husband not, case dismissed approximately 9 months later). *People v Schubach*, 19-195-GZ. (Exhibit 1)

In *Reinecke*, Mr. and Mrs. Reinecke were co-owners of land but only Mr. Reinecke was

served with the complaint in a forfeiture action. At trial, Mrs. Reinecke was called as a witness and she testified that only her husband was served with the summons and complaint although she obviously knew the case was proceeding. The Court of Appeals held: "From this testimony and the summons indicating on its face that only Clinton Reinecke was served with the complaint, we must conclude that no service was made on Josephene Reinecke personally and the district court did not squire proper jurisdiction....[t]he forfeiture judgment against the property held in tenancy by the entireties is, therefore, void." (Exhibit 2).

Any proceedings that result in taking the dog that do not include the owner would amount to Fifth and Fourteenth Amendment takings and violative of the U.S. Constitution as well as violate Michigan law. The Sixth Circuit held in *Smith v Detroit, et al*, Sixth Circuit Court of Appeals 17-1907, October 15, 2018, that "[i]t is settled in [Michigan] that dogs have value, and are the property of the owner as much as any other animal which one may have or keep." *Id.*, at 6, citing *Ten Hopen v Walker*, 55 NW 657, 658 (Mich. 1893). "By guaranteeing process to dog owners before their unlicensed dogs are killed, Michigan law makes clear that the owners retain a possessory interest in their dogs." *Id.*, at 8. In *Smith*, the police described the dogs as "vicious" which was insufficient to negate constitutional protections and due process. *Id.*

Here, it is clear that both MCL 287.321 (the statute Ms. Wickman has proceeded under) and MCR 2.205 require the owners be served. Although Ms. Wickman's arguments pursuant to MCL 287.286a were abandon, the Dog Law of 1919, likewise defines owner to include Mr. Kurtis Kobasic. I am enclosing one piece of evidence of his ownership interest, as illustration, but not limitation. (Exhibit 2).

Mr. Kobasic is willing to settle this matter with a dismissal of the order to euthanize with prejudice and without costs, and mutual releases of claims. This offer is open until Thursday December 11, 2019.

Very truly yours,

DAVID DRAPER

DIRECT: (313) 885-6800
E-MAIL: david@thedraperfirm.com

Enclosure
cc: Client (w/enclosure)

EXHIBIT B

RABIES VACCINATION CERTIFICATE

Owner's Name & Address Print - use ball point pen or type

PRINT LAST, FIRST	TELEPHONE
Kobasic Kurtis	(906) 420-0894
NO. STREET CITY STATE	ZIP
1823 1st Ave. South Escanaba, MI	49829
Patient Name: Turbo	RABIES TAG NUMBER 2659

SPECIES	SEX	AGE	SIZE	PREDOMINENT BREED	COLORS
Canine	M	9 months old (1yr)	58.8 lbs	Chow Chow	Rust
(If OTHER, please specify)					

DATE VACCINATED	PRODUCER	SIGNATURE
01/04/2016	Merial	[signature]
VACCINATION EXPIRES	1yr/3yr License Vaccine	ADDRESS
01/03/2017	1 Year	Best Friends Veterinary Clinic N16836 Bellefeuil Lane, D-3 Wilson, MI 49896 (906) 630-1429
	VACC. SERIAL (LOT) NUMBER 1215410A	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

v

DELTA COUNTY and LAUREN WICKMAN,

Defendants.
_____/

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

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_____/

DEFEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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ISSUES PRESENTED

I. WHETHER PLAINTIFF IS ENTITLED TO THE "EXTRAORDINARY REMEDY" OF A PRELIMINARY INJUNCTION WHERE HE HAS NOT DEMONSTRATED A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS OR THAT THE INJUNCTION SERVES THE PUBLIC INTEREST?

Plaintiff answers "yes.

Defendants answer "no."

STATEMENT OF FACTS

Introduction.

Plaintiff Kurtis Kobasic brings this civil rights lawsuit against Delta County Chief Assistant Prosecutor Lauren Wickman and Delta County asserting violations of his Fourth and Fourteenth Amendment rights arising out of the state court proceedings and subsequent determination that his dog is dangerous and must be euthanized. At the eleventh hour, Plaintiff seeks a preliminary injunction enjoining the enforcement of a state-court September 1, 2020 order to euthanize his dog. That order requires euthanasia by September 22, 2020.

A preliminary injunction in this matter is unwarranted because Plaintiff cannot demonstrate a substantial likelihood of success on the merits of his claim as set forth in Defendants' pending motion to dismiss. **(ECF No. 9, PageID.60-91).** Moreover, because Plaintiff's dog has been determined to be dangerous by the state court, requiring destruction of the dog by statute, a preliminary injunction does not serve the public interest. Further, issuance of the requested injunction will only harm the public because the dog has continued to run loose, presenting a danger to the public. **(Exhibit 1, Case Reports).**

Substantive Facts.

In 2017, it was determined that non-party Valerie Kobasic's dog, "Turbo," killed another dog in Escanaba, Michigan. **(ECF No. 5, PageID.34, ¶ 11).** After proceedings in state district court, and appeals filed by Ms. Kobasic in circuit court, the Michigan Court of Appeals, and the Michigan Supreme Court, "Turbo" was deemed dangerous and ordered to be destroyed. **(ECF No. 5, PageID.37, ¶¶ 20-21; ECF No. 901, PageID.93-109).**

In a last-ditch effort to save the dog, Plaintiff Kurtis Kobasic, son of Valerie Kobasic, now

claims years later that he was a "co-owner" of "Turbo" and that he was never given notice of any proceedings to destroy the dog. **(ECF No. 5, PageID.34, ¶ 9).** In 2020, Plaintiff attempted to intervene in the state court matter as a nonparty and his motion was denied. **(ECF No. 9-2, PageID.148).**

Plaintiff has had ample opportunities to argue his case in state court and has failed. Plaintiff's complaint and his eleventh-hour request for a preliminary injunction are nothing more than an attempt to delay the destruction of a dog that has already been deemed legally dangerous. Because this matter is improper, frivolous, and should be dismissed as set forth in Defendants' pending motion to dismiss **(ECF No. 9, PageID.60-92)**, and the dog poses a continuing danger to the public, the "extraordinary remedy" of a preliminary injunction should not be granted.

ARGUMENT

I. The Standard for Preliminary Injunctive Relief.

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Plaintiff bears the burden of demonstrating entitlement to preliminary injunctive relief and the burden is substantial. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Such relief will only be granted where "the movant carriers his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002).

When considering a motion for preliminary injunction, courts balance the following factors" (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm without the injunction; (3) whether the issuance of the

injunction will cause substantial harm to others; and (4) whether the public interest is served by issuance of the injunction. *Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 538 (6th Cir. 2007). "These factors are not prerequisites, but are factors that are to be balanced against each other." *Overstreet*, 305 F.3d at 573.

"The proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. Plaintiff must do more than just "create a jury issue," and persuade the court that it has a likelihood of succeeding on the merits of his claims. *Id.* "This is because the preliminary injunction is an extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied only in limited circumstances which clearly demand it." *Id.*

Significantly, although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Medical Examiners*, 225 F.3d 620, 625 (6th Cir. 2000). Moreover, "[w]hen a party seeks a preliminary injunction on the basis of a potential constitutional violation, the likelihood of success on the merits often will be the determinative factor." *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012). Because Plaintiff cannot demonstrate a likelihood of success on the merits, his motion for a preliminary injunction fails.

II. Plaintiff Is Not Entitled to Preliminary Injunctive Relief.

A. Plaintiff Has Not Shown a Strong Likelihood of Success on the Merits.

Plaintiff cannot demonstrate a likelihood of success on the merits of his claims as set forth in detail in the arguments in Defendants' pending motion to dismiss. **(ECF No. 9, PageID.60-91).** Defendants incorporate the arguments set forth in their motion to dismiss in this brief. First,

Plaintiff ignores the fundamental jurisdictional issues that preclude his claims in this court. Second, Plaintiff cannot prevail on the merits of his constitutional claims.

1. This Court Lacks Jurisdiction to Grant the Requested Relief.

Plaintiff cannot prevail because this Court cannot grant the relief he seeks. First, Plaintiff's claims are barred in part by the *Rooker-Feldman* doctrine. "The *Rooker-Feldman* doctrine bars lower federal courts from conducting appellate review of final state-court judgments because 28 U.S.C. § 1257 vests sole jurisdiction to review such claims in the Supreme Court." *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012). This doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 289 (2005).

The doctrine also applies to a person in privity with the "state court loser." *McCormick v. Braverman*, 451 F.3d 382, 396 (6th Cir. 2006). Parties are in "privity" when they are "so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair v. Michigan*, 470 Mich. 105, 122; 680 N.W.2d 386 (2004). Privity requires a "substantial identity of interest and a working functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation." *Id.*

Though Plaintiff was not named as a party in the state court action, he was certainly in privity with his mother Valerie Kobasic who was a party to the state court action. Plaintiff alleges that he "co-owned" "Turbo" with Valerie. **(ECF No. 5, PageID.34, ¶ 9).** On this basis, Valerie has already represented the same legal right that Plaintiff is trying to assert in the present litigation. Plaintiff and Valerie, as alleged co-owners of "Turbo" would share an identity of interests and the

same legal right to "Turbo."

To determine whether *Rooker-Feldman* bars a claim, courts look to the "source of the injury the plaintiff alleges in the federal complaint." *McCormick*, 451 F.3d at 393. If the source of the plaintiff's injury is the state-court judgment itself, then *Rooker-Feldman* applies. *Id.* "If there is some other source of injury, such as a third party's actions, then the plaintiff asserts an independent claim." *Lawrence v. Welch*, 531 F.3d 364, 368-69 (6th Cir. 2008).

Roch v. Humane Society of Bedford County, 134 Fed. Appx. 68, 71 (6th Cir. 2005) is illustrative. In that case, the Sixth Circuit concluded that the *Rooker-Feldman* doctrine barred the plaintiffs' § 1983 claims for unlawful seizure and unlawful taking arising out of a state court decision to allow the County to remove/euthanize their dogs on the basis that they were using a federal forum to attack the state court's judgment.

Like *Roch*, Plaintiff seeks to use a federal forum to attack the state court's judgment. The source of Plaintiff's alleged injuries is the underlying state court judgment ordering euthanasia. Plaintiff expressly "seeks declaratory judgment that a state court order to euthanize his dog are (sic) void" and "seeks preliminary and permanent injunctive relief to prevent the dog at issue's pre-mature euthanasia while these claims are pending." **(ECF No. 5, PageID.33, ¶¶ 2-3).** Plaintiff further alleges that "[t]he order to euthanize must be enjoined on a temporary and permanent basis otherwise irreparable harm will occur." **(ECF No. 5, PageID.49, ¶ 89).**

Plaintiff also complains of several injuries for which the source is the state court order. Specifically, Plaintiff complains of an allegedly "unlawful seizure" of "Turbo" by the "void" order in the state court case. **(ECF No. 5, PageID.40-41, ¶¶ 38, 44).** Plaintiff also complains that his "protected property interest in his dog 'Turbo" has been, and is being, denied due to the void order,

restraint on property, and continued quest for permanent destruction without . . . being provided process." **(ECF No. 5, PageID.43, ¶ 53).** Plaintiff also complains that Defendants' "void orders achieved without Plaintiff served is a distinct act of dominion wrongfully exerted over" his dog. Thus, these allegations are barred by the *Rooker-Feldman* doctrine.

Second, this Court should abstain from hearing Plaintiff's claims. Under the doctrine of *Younger* abstention, a federal court must decline to interfere with pending state or civil criminal proceedings when important state interests are involved. *Younger v. Harris*, 401 U.S. 37 (1971); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

A federal court's abstention under *Younger* is appropriate when: (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to litigate the plaintiff's federal constitutional claim. *Middlesex*, 457 U.S. at 432. All three prongs are met in this case.

The first *Younger* criterion is met. The Sixth Circuit has held that "if a state [judicial] proceeding is pending at the time the action is filed in federal court, the first criteria for *Younger* abstention is satisfied" *Fed. Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 969 (6th Cir. 1991). As of the date of Plaintiff's Amended Complaint, a state judicial proceeding was still pending in the 94th District for the County of Delta regarding "turbo."

The second *Younger* criterion is met. The state has an interest in eliminating the risk of harm presented by a dangerous animal and in enforcing its dangerous animal law to serve the public health and safety. See *Goodwin v. County of Summit, Ohio*, 45 F. Supp. 3d 692, 700 (N.D. Ohio 2014)(stating that important state interests "include[ ] enforcement of local or municipal ordinances relating to health, safety, and welfare of its citizens"); *Carroll v. City of Mount*

Clemens, 139 F.3d 1072, 1075 (6th Cir. 1998)(finding enforcement of housing ordnances enacted for health and safety purposes sufficiently important.

The third *Younger* criterion is met. The "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims . . . ." *Moore v. Sims*, 442 U.S. 415, 425, 430 (1979). Courts presume that state courts are able to protect the interests of a federal plaintiff. *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Accordingly, "[u]nless state law clearly bars the imposition of the constitutional claims," abstention is appropriate. *Sims*, 442 U.S. at 425.

The state district court proceedings afford Plaintiff an adequate opportunity for him to raise constitutional claims. In fact, Plaintiff filed a motion to intervene in the district court action which explicitly raised his constitutional claims. **(ECF No. 9-2, PageID.111-148).** Plaintiff always had an opportunity to file a motion to intervene, but due to his own unreasonable delay, chose to file almost three years after the case was initiated. Plaintiff even attended the trial court's hearing as clearly indicated by the hearing transcript, so his excuse for not attempting to intervene earlier is baseless. **(ECF No. 9-3, PageID.150-199; ECF No. 9-4, PageID.200-249).**

Further, Plaintiff's privy, Valerie is a party to the district court proceedings, shared the same interest, and could have raised the same constitutional claims. In fact, Valerie also raised due process claims in the state court proceeding. On this basis, the Court should abstain from hearing Plaintiff's claims under the *Younger* abstention doctrine.

For the same reasons, Plaintiff's claims are barred by the doctrine of res judicata and collateral estoppel as set forth in Defendants' motion to dismiss. **(ECF No. 9, PageID.60-91).**

2. Plaintiff Cannot Show a Likelihood of Success on the Merits of His Claims.

Even apart from the fundamental jurisdictional and abstention issues, Plaintiff cannot show a strong likelihood of success on the merits of his claims.

a. Plaintiff's Claims Are Barred By Prosecutorial Immunity.

Plaintiff cannot prevail on his constitutional claims against Prosecutor Wickman because she is entitled to absolute sovereign and prosecutorial immunity. First, Prosecutor Wickman is entitled to Eleventh Amendment immunity. "The Eleventh Amendment bars § 1983 suits against a state, its agencies, and its officials sued in their official capacities for damages." *Cady v. Arenac County*, 574 F.3d 334, 342 (6th Cir. 2009). Under Michigan law, county prosecuting attorneys are acting as agents of the state when they being prosecution based on state statutes. *Id.* at 343.

Second, Prosecutor Wickman is entitled to absolute prosecutorial immunity. Prosecutors generally "enjoy absolute immunity from civil liability for actions performed within the scope of their prosecutorial duties." *Hugger v. Bogen*, 503 Fed. Appx. 455, 459-60 (6th Cir. 2012). The Supreme Court uses a "functional approach" for determining whether a prosecutor "is acting within the scope of [her] duties as a prosecutor and when [she] is merely giving legal advice or investigating." *Howell v. Sanders*, 668 F.3d 344, 349 (6th Cir. 2012).

The key inquiry is "how closely related . . . the prosecutor's challenged activity [is] to [her] role as an advocate intimately associated with the judicial phase of the criminal process." Id. at 340-50. The prosecutor's "decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution'" and are protected. *Ireland v. Tunis*, 113 F.3d 1435, 1446 (6th Cir. 1997). Furthermore, "[p]rosecutorial immunity extends to claims regarding the evaluation of evidence and the determination of probable cause." *Hugger*,

503 Fed. Appx. at 460.

Prosecutorial immunity has also been extended to civil proceedings. In *Cooper v. Parrish*, 203 F.3d 937 (6th Cir. 2000), state prosecutors were entitled to prosecutorial immunity for their actions in preparing and filing public nuisance and civil forfeiture complaints. Prosecutors are protected by absolute immunity "when their duties are functionally analogous to that of a prosecutor's, regardless of whether those duties are performed in the course of a civil or criminal action." *Id.* As long as "the prosecutors were functioning in an enforcement role and acting as advocates of the state in initiating and prosecuting judicial proceedings, they are entitled to an absolute immunity defense." *Id.*

In the present case, Plaintiff complains of Prosecutor' Wickman's various actions in initiating and prosecuting the action against Valerie under MCL 287.286a and MCL 287.322. **(ECF No. 5, PageID.35-36, 38, ¶¶ 12-14, 16-18, 26).** It cannot be disputed that in each of these actions cited by Plaintiff, Prosecutor Wickman was functioning in an enforcement role and acting as an advocate for the state. Thus, she is entitled to absolute prosecutorial immunity.

b. Plaintiff's Claims Are Barred by Qualified Immunity.

In addition to absolute immunity, Prosecutor Wickman is entitled to qualified immunity. "[G]overnment officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). When "a defendant raises qualified immunity as a defense, the plaintiff bears the burden of demonstrating that the defendant is not entitled to qualified immunity." *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009).

The question of a defendant's qualified immunity invokes a two-pronged inquiry. First. "a court must decide whether the facts that the plaintiff has alleged or shown make up a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Second, "the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Id.* Plaintiff cannot demonstrate the violation of any clearly established constitutional right by Prosecutor Wickman. On this basis, Plaintiff cannot show a substantial likelihood of success on the merits of his claims.

Fourth Amendment

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Contrary to Plaintiff's allegations, any alleged seizure of "Turbo" is not "unreasonable." To determine whether a seizure of a dog is reasonable, "a court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interest alleged to justify the intrusion and determine whether the totality of the circumstances justified the particular sort of seizure." *Brown*, 844 F.3d at 568. "A seizure becomes unlawful when it is more intrusive than necessary." *Id.*

"Turbo's" potential destruction is not an unreasonable seizure because it is actually required by Michigan statute. MCL 287.322(3) states that "[a]fter a hearing, the magistrate or court *shall* order the destruction of the animal, at the expense of the owner, if the animal is found to

be a dangerous animal that caused serious injury or death to a person or a dog." (Emphasis Added). The district court has already determined that "Turbo is a dangerous animal that caused the death of a dog" and thus, destruction is required under MCL 287.322. That decision was appealed all the way to the Michigan Supreme Court without success.

Further, this statute implicates a significant government interest in protecting the public health and safety. See *Embassy Realty Investments, Inc. v. City of Cleveland*, 572 Fed. Appx. 339, 345 (6th Cir. 2014)(destruction of property designated as a public nuisance as a result of nuisance proceedings is not an "unreasonable" seizure). Thus, the potential destruction of "Turbo" is a "reasonable" seizure to protect the public health and safety. Thus, Plaintiff cannot show a violation of the Fourth Amendment.

Fourteenth Amendment- Procedural Due Process

The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. Due process generally "requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens*, 411 F.3d 697, 707-08 (6th Cir. 2005).

"To establish a procedural due process claim, a plaintiff must show (1) the existence of a protected property interest at issue, (2) a deprivation of that protected property interest, and (3) that he or she was not afforded adequate procedures." *Paterek v. Village of Armada*, 801 F.3d 630, 649 (6th Cir. 2015).

Plaintiff cannot establish that he was not afforded adequate procedures. Due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Plaintiff cannot establish that he did not have notice of the action. "Notice mailed to a person's home generally satisfies due process." *Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599, 602 (6th Cir. 2015). Further, Michigan law provides the process for notifying owners of unlicensed dogs of the proceedings:

> (1) A district court magistrate or the district or common pleas court shall issue a summons . . . to show cause why a dog should not be killed, upon a sworn complaint that any of the following exist:
>
> (a) After January 10 and before June 15 in each year a dog over 6 months old is running at large unaccompanied by its owner or is engaged in lawful hunting and is not under the reasonable control of its owner without a license attached to the collar of the dog.
>
> (b) A dog, licensed or unlicensed, has destroyed property or habitually causes damage by trespassing on the property of a person who is not the owner.
>
> (c) A dog, licensed or unlicensed, has attacked or bitten a person.
>
> (d) A dog has shown vicious habits or has molested a person when lawfully on the public highway.
>
> (e) A dog duly licensed and wearing a license tag has run at large contrary to this act.

MCL 287.286a.

Plaintiff alleges that Defendants initiated such a summons which was served on "co-owner" Valerie Kobasic. **(ECF No. 5, PageID.37, ¶20).** Valerie Kobasic has represented in the state court action that Plaintiff lived with her. **(ECF No. 9-4, PageID.231).** Thus, notice of the action was mailed to Plaintiff's home. This is sufficient notice.

To the extent that Plaintiff asserts that Defendants failed to follow state law procedures for notice **(ECF No. 5, PageID.36-37, ¶¶ 17-20)** in support of his due process claim, this is

insufficient to state a such a claim. See, e.g., *Bills v. Henderson*, 631 F.2d 1287, 1299 (6th Cir. 1980)(even where a state statute diagrams a procedure for depriving a citizen of a property right, a deviation from that procedure may not necessarily be viewed as a constitutional violation); *Purisch v. Tennessee Tech. Univ.*, 76 F.3d 1414, 1423 (6th Cir. 1996)("[v]iolation of a state's formal procedure, however, does not in and of itself implicate constitutional due process concerns").

Further, Plaintiff's allegations make clear that he had actual notice of the proceedings, which defeats his due process claim. See *Hroch v. Omaha*, 4 F.3d 693, 696 (8th Cir. 1993)("Because [the plaintiff] had actual notice that the City intended to condemn all buildings on the premises, there was no procedural due process violation"); *Roberts v. Girder*, 237 F.Supp.3d 548, 555 (E.D. Ky. 2017)("due process may be satisfied by actual notice of the decision to demolish the property and the consequences for the failure to timely challenge the determination"). Plaintiff clearly had notice of the proceedings because he was present at the hearing in the district court matter as evidenced by the transcript. **(ECF No. 9-4, PageID.239)**. On this basis, Plaintiff cannot allege that he was not afforded notice of the action.

Plaintiff also cannot estan;osj that he did not have an opportunity to be heard. "[A] predeprivation hearing of some sort is generally required to satisfy the dictates of due process." *Leary v. Daeschner*, 228 F.3d 728, 742 (6th Cir. 2000). Plaintiff had ample opportunity to be heard. Plaintiff's allegations make clear that a pre-deprivation hearing was held in this case. **(ECF No. 5, PageID.37, 43, ¶¶20, 22, 54).** In fact, Plaintiff attended the hearing as indicated by the hearing transcript. **(ECF No. 9-4, PageID.239).**

Further opportunities to be heard were provided on appeal. Plaintiff alleges that the matter

was appealed all the way to the Michigan Supreme Court. **(ECF No. 5, PageID.37, ¶ 21).** Notably, Plaintiff himself had the opportunity to be heard even though he was a non-party because he always had the opportunity to intervene in that action. This is evidenced by his very tardy motion to intervene that was ultimately denied. **(ECF No. 9-2, PageID.111-148).** Nothing prevented Plaintiff from filing such a motion earlier in the proceedings.

Fourteenth Amendment-Substantive Due Process

The Due Process Clause also offers substantive protection. "Substantive due process prevents the government from engaging in conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Prater v. City of Burnside*, 289 F.3d 417, 431 (6th Cir. 2002). The Sixth Circuit has "identified substantive due-process claims as falling into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that shock the conscience." *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 861 (6th Cir. 2012).

"To state a cognizable substantive due process claim, the plaintiff must allege conduct intended to injure in some way unjustifiable by any government interest and that is conscience-shocking in nature." *Mitchell v. McNeil*, 487 F.3d 374, 377 (6th Cir. 2007). "What seems to be required is an intentional infliction of injury . . . or some other governmental action that is arbitrary in the constitutional sense." *Stemler v. City of Florence*, 126 F.3d 856, 869 (6th Cir. 1997). "Conduct shocks the conscience if it violates the decencies of civilized conduct." *Range v. Douglas*, 763 F.3d 573, 589 (6th Cir. 2014).

Plaintiff makes conclusory allegations that the "County's position shocks the conscience . . ." **(ECF No. 5, PageID.45, ¶ 65; ECF No. 13, PageID.275)** but provides no factual allegations or assertions to support that conclusion. Plaintiff has not alleged any conduct intended to injure him

that shocks the conscience. On this basis, Plaintiff is not likely to prevail on a substantive due process claim.

Further, "[w]here a particular [a]mendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that [a]mendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim." *Albright v. Oliver*, 510 U.S. 266, 266 (1994). Indeed, the Fourth Amendment, not substantive due process, provides the standard for analyzing claims involving unreasonable searches or seizures. *Graham v. Connor*, 490 U.S. 386, 395 (1989). If such an amendment exists, the substantive due process claim is properly dismissed. *Heike v. Guevara*, 519 F. App'x 911, 923 (6th Cir. 2013).

Plaintiff pleads that Defendants unreasonably seized the dog. **(ECF No. 5, PageID.40-41 ¶¶ 38, 41, 44).** The Fourth Amendment provides the explicit textual source of constitutional protection. Not the generalized notion of substantive due process. On this basis also, Plaintiff is not likely to prevail on his substantive due process claim.

c. Plaintiff Cannot Establish *Monell* Liability Against the County.

Plaintiff also has not shown a strong likelihood of success on his *Monell* claim against Delta County. A municipal entity cannot be held liable under a "respondeat superior" theory for the actions of its officers. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 691 (1978). Instead, a municipality may only be liable "if the governmental body itself 'subjects' a person to a deprivation of rights or 'causes' a person 'to be subjected' to such deprivation. *Connick v. Thompson*, 563 U.S. 51, 60 (2011).

The constitutional violation must result from an official policy and the "plaintiff must

demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged and must demonstrate a causal link between the municipality's action and the constitutional violation. *Alman v. Reed*, 703 F.3d 887, 903 (6th Cir. 2003).

A plaintiff has four ways of proving the existence of an unconstitutional policy or custom: (1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with official decision making authority; (3) a policy of inadequate training or supervision, and (4) a custom of tolerance or acquiescence of federal rights violations. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005).

Plaintiff alleges that Delta County has a "policy of failing to recognize property ownership rights that are clearly outlined in the federal system and in the Federal 6th Circuit Court of Appeals" which Plaintiff alleges "violates both the 4th Amendment and the 14th Amendment of the U.S. Constitution." **(ECF No. 5, PageID.47, ¶¶ 77-78).** But Plaintiff has not identified any official policy of the County of failing to recognize property ownership rights.

To the extent Plaintiff attempts to allege that the County has a "custom" of failing to recognize property ownership rights, he has failed to do so. A custom of tolerance to violations of constitutional rights also requires a showing that there was a pattern of deliberate indifference to similar instances. *Burgess v. Fisher*, 735 F.3d 462, 478 (6th Cir. 2013); *Thomas, supra* at 433. Plaintiff "can present evidence showing that the municipality possessed actual knowledge indicating a deficiency with the existing policy . . . such as where there have been recurring violations." *Heyerman v. County of Calhoun*, 680 F.3d 642, 648 (6th Cir. 2012). "Otherwise, the plaintiff must show that the need to act should have been plainly obvious to the policymakers who, nevertheless, are deliberately indifferent to the need." *Id.*

Plaintiff has not alleged or otherwise shown that there have been any similar instances of constitutional violations that resulted from the County's failure to recognize property ownership rights in dog cases. Thus, Plaintiff is not likely to prevail on the merits of this claim.

d. Plaintiff's State Law Claims Are Barred by Governmental Immunity.

Delta County is also entitled to governmental immunity against Plaintiff's state law conversion claim. Immunity against state-law claims is analyzed in accordance with Michigan governmental immunity law. *Smith v. County of Lenawee*, 600 F.3d 686, 690 (6th Cir. 2010); *Younes v. Pellerito*, 739 F.3d 885, 888 (6th Cir. 2014).

"Governmental immunity is not an affirmative defense proffered by governmental defendants, but rather is a characteristic of government; therefore "a party suing a unit of government must plead in avoidance of governmental immunity." *Mack v Detroit*, 467 Mich. 186, 203; 649 NW2d 47 (2002). "To be effective, such pleading must state a claim that fits within a statutory exception to immunity or include facts that indicate the action at issue was outside the exercise of a governmental function." *Id.*

"[A] governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). A governmental agency "can only be subject to suit if a plaintiff's case falls within a statutory exception to that immunity." *Id.* at 201. "[T]he immunity of governmental agencies is *broad*, and the statutory exceptions are to be *narrowly* construed." *Pohutski v. City of Allen Park*, 465 Mich. 675, 689; 641 N.W.2d 219 (2002)(Emphasis in Original).

The GTLA defines a "governmental agency" to include "a political subdivision." MCL 691.1401(a). A "political subdivision" means a "county." MCL 691.1401(e). Thus, as a

"governmental agency" the County has governmental immunity when "engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). In this context, a "governmental function" is defined to include any "activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b).

Like immunity itself, governmental function "is to be broadly construed." *Maskery v. Board of Regents of Univ. of Mich.*, 468 Mich. 609, 613-14; 664 N.W.2d 165 (2003). Activity as a governmental function must be determined by the general activity and not the specific conduct involved at the time of the tort." *NL Ventures VI Farmington, LLC v City of Livonia*, 314 Mich. App 222, 224; 886 N.W.2d 772 (2015).

It cannot be disputed that the operation of a prosecutor's office is an activity that is expressly authorized by law and thus, a "governmental function." Thus, Delta County is entitled to governmental immunity against Plaintiff's state law tort claim.

Prosecutor Wickman enjoys general immunity as a governmental employee. Governmental employees acting within the scope of their authority and in the course of their employment are immune from tort liability unless (1) their conduct rises to the level of "gross negligence" that is the one, most immediate and direct cause of injury to the plaintiff, MCL 691.1407(2) or (2) their conduct constitutes an "intentional tort" done without good faith or with malice. *Odom v. Wayne County*, 482 Mich. 459, 479-80; 760 N.W.2d 217 (2008). Plaintiff has not alleged facts against Wickman that could establish either.

"Gross negligence" is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). Gross negligence "has been characterized as a willful disregard of safety measures and a singular disregard for substantial

risks." *Oliver v Smith,* 290 Mich. App. 678, 685 (2010). Facts showing no more than ordinary negligence do not satisfy this statutory definition. *Maiden v Rozwood,* 461 Mich. 109; 122-123 (1999). Wickman's conduct as alleged by Plaintiff set forth above does not rise to the level of "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Plaintiff asserts a claim of "conversion" which is an intentional tort. See *Magley v. M & W Incorporated*, 325 Mich. App. 307, 314-15; 926 N.W2d 1 (2018). But Plaintiff has failed to allege facts that Wickman acted with "malice" or without "good faith." A lack of good faith is "malicious intent, capricious action or corrupt conduct or willful and corrupt misconduct." *Odom*, 482 Mich. at 474. "[W]illful and wanton misconduct is made out only if the conduct alleged shows an intent to harm, or, if not that, such indifference as to whether harm will result as to be the equivalent of a willingness that it does." *Id.* at 475.

Wickman's conduct as alleged by Plaintiff does not rise to the level of malice or a lack of good faith. Plaintiff has not alleged any conduct by Wickman that showed an intent to harm or such indifference as to whether harm will result as to be the equivalent to willingness that it does. Wickman is entitled to governmental immunity from Plaintiff's conversion claim. For this reason, Plaintiff has not shown that he is likely to prevail on the merits of his conversion claim.

e. Plaintiff Cannot Establish a Conversion Claim.

Even apart from immunity, Plaintiff has not shown a likelihood of success on his conversion claim. "Conversion, both at common law and under the statute, is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Aroma Wines & Equip. Inc. v. Columbian Ditrib. Servs., Inc.*, 303 Mich. App. 441, 447; 844 N.W.2d 727 (2013). A defendant's actions are lawful if it has a

"legal right" to the property. *Magley*, 325 Mich. at 315 (citing *Gibbons v. Farwell*, 63 Mich. 344, 349; 29 N.W. 855 (1886)).

Plaintiff alleges that the state court orders are "a distinct act of dominion wrongfully But exerted over [his] dog in denial of or inconsistent with his rights." **(ECF No. 5, PageID.50, ¶ 91).** Plaintiff has not established that any of the orders constitute a "distinct act of dominion wrongfully exerted over" In fact, the alleged "seizure" of "Turbo," pursuant to court orders, is lawful and required by Michigan law. Further, as set forth above, there is no due process violation to invalidate the state court orders.

B. Issuance of the Injunction Will Cause Substantial Harm to Others and Does Not Serve the Public Interest.

The public interest also weighs heavily in favor of denying the preliminary injunction. Contrary to Plaintiff's assertions **(ECF No. 13, PageID.279-280)**, the issuance of the requested injunction will not only cause substantial harm to Defendants but it will also harm the residents of Delta County by allowing "Turbo" to pose a continuing threat to the public health and safety.

First, as set forth above, the state court has already determined that "Turbo is a dangerous animal that caused the death of a dog" and thus, destruction is required under MCL 287.311. Enjoining the enforcement of this statute would not serve the public interest in the public's health and safety. See ***Cornell v. City of Cleveland***, No. 1:06-cv-526, 2006 WL 8447841 at *1 (N.D. Ohio, 2006)("Any injunction against public officials, charged with the enforcement of public safety regulations, would cause substantial harm to others and would not serve the public interest").

Moreover, there have also been further incidents of "Turbo" running loose. **(Exhibit 1, Case Reports).** In fact, the most recent incident of "Turbo" getting loose was August 13, 2020. *Id.*

On this basis, "Turbo" remains a continuing threat to the public health and safety. "When a dog leaves the control of his owner and runs at large in a public space, the government interest in controlling the animal and preventing [harm to citizens] waxes dramatically, while the private interest correspondingly wanes." *Preston v. City of St. Clair Shores*, No. 14-cv-12751 2015 WL 12516687 at *4 (E.D. Mich. 2015)(quoting *Altman v. City of High Point, N.C.*, 300 F.3d 194, 205 (4th Cir. 2003)). Indeed, an "unleashed, uncontrolled, and unsupervised . . . dog ceases to become simply a personal effect and takes on the nature of a public nuisance." *Id.* Issuance of the requested injunction will allow the opportunity for further instances in which "Turbo" can run loose and injure a person or another dog again. Thus, the issuance of the requested injunction cannot serve the public interest.

CONCLUSION AND RELIEF REQUESTED

Plaintiff has not demonstrated a strong likelihood of success on the merits of his claims. Nor can Plaintiff demonstrate that the injunction serves the public interest. "Turbo" presents a danger to the public and despite that danger has been permitted to run loose in public. Plaintiff has not demonstrated that he is entitled to the "extraordinary remedy" of a preliminary injunction. Plaintiff's motion for a preliminary injunction should be denied.

Dated: September 21, 2020

CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

vs.

DELTA COUNTY and
LAUREN WICKMAN,

Defendants.

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

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DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56

NOW COME Defendants Delta County and Lauren Wickman, by and through their attorneys, CUMMINGS, McCLOREY, DAVIS & ACHO, P.L.C., by Gregory R. Grant, and hereby asks this Court for summary judgment under Fed. R. Civ. P. 56 against the remaining claims

of the Plaintiff's "First Amended Complaint" **(ECF No. 5, Pg ID 33-51)** for the reasons set forth in the accompanying brief.

Dated: September 28, 2021

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BRIEF IN SUPPORT OF
DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT
UNDER FED. R. CIV. P. 56

*****ORAL ARGUMENT REQUESTED*****

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QUESTIONS PRESENTED

I. IS THIS COURT PRECLUDED FROM EXERCISING JURISDICTION OVER THIS CASE, WHEREIN PLAINTIFF KOBASIC'S CLAIMS ARE PREDICATED UPON HIS CONTENTION THAT A 2017 STATE-COURT JUDGMENT IS "VOID" AND UNENFORCEABLE?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

II. DO RES JUDICATA AND COLLATERAL ESTOPPEL FROM PRIOR STATE-COURT PROCEEDINGS PRECLUDE PLAINTIFF KOBASIC FROM LITIGATING HIS CLAIMS AND THEIR UNDERLYING ELEMENTS IN THIS CASE?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

III. ARE PLAINTIFF KOBASIC'S CLAIMS AGAINST THE DEFENDANTS BARRED BY "SOVEREIGN IMMUNITY"?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

IV. ARE PLAINTIFF KOBASIC'S CLAIMS AGAINST DEFENDANT WICKMAN ALSO DEFEATED BY BOTH "ABSOLUTE" AND "QUALIFIED" IMMUNITY?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

V. ARE PLAINTIFF KOBASIC'S CLAIMS AGAINST DELTA COUNTY DEFEATED BY THE ABSENCE OF ANY CAUSAL CONNECTION BETWEEN A "POLICY" OF DELTA COUNTY AND THE ALLEGED INJURY TO PLAINTIFF KOBASIC?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

VI. EVEN APART FROM ANY JURISDICTIONAL BAR, PRECLUSIONS OR IMMUNITIES, DO PLIANTIFF KOBASIC'S CLAIMS FAIL IN THEIR SUBSTANCE?

Plaintiff Kobasic will answer: "No."

Defendants Delta County and Lauren Wickman answer: "Yes."

STATEMENT OF FACTS

Introduction.

Plaintiff, Kurtis Kobasic, claims that he has been denied "due process" (i.e., notice and joinder as a party) in proceedings to euthanize a dog of which he claims to be a co-owner with his mother, Valerie Kobasic. Yet, despite actual notice of (and attendance at) the July 28, 2017, "show cause" hearing that resulted in the court order directing that the dog be euthanized, Plaintiff Kobasic did not move to intervene in the euthanization case until June 12, 2020 - - at which time intervention was "*denied due to its untimeliness and failure to provide satisfactory excuse for the delay in bringing the motion.*" **(Ex L: Order Denying Motion to Intervene).**

Significantly, Plaintiff Kobasic had been present at the original euthanization "show cause" hearing on July 28, 2017, where Valerie Kobasic acknowledged to the state court that *she* was the owner of the dog. Yet Plaintiff Kobasic made no effort to assert his supposed co-ownership until three years later, after Valerie Kobasic had exhausted her appellate options against the euthanization judgment.

Plaintiff Kobasic seeks to have the state court judgment declared "*void*" and "*enjoined.*" Such *de facto* appellate review of the state court judgment is outside the jurisdiction of this Court.

Substantive Facts.

The dog at the center of this case is "Turbo," a "*[r]ed Chinese Chow.*" **(Ex N: Kurtis Kobasic Dep., p. 12).** Plaintiff Kurtis Kobasic has not denied that Turbo killed the dog belonging to a neighbor - - nor has he produced any evidence to do so.

For her part, Valerie Kobasic acknowledged the incident. She testified at the show cause hearing that she "*would undo it if I could.*" **(Ex C: Show Cause Hearing Transcript, pp. 5-6).**

Valerie wrote a letter of apology to Pippin's owners, explaining that "*[i]t broke my heart that this whole thing happened.*" **(Ex M: Valerie Kobasic Dep., p. 21)**.

Plaintiff Kobasic has questioned whether the neighbor's dog was on the neighbor's property at the time of Turbo's fatal attack, so as to bring Turbo within the scope of Michigan's "dangerous animal" statute, M.C.L. 287.322. But again, he offers no evidence. The only evidence in this regard is a set of police photographs introduced at the July 28, 2017, show cause hearing that led to the order for Turbo to be euthanized. **(Ex A: Madelinski Report with Photographs; Ex C: Show Cause Transcript, pp. 20-21)**. These photographs, from a police report by Detective Brian Madelinski, show the deceased dog ("Pippin") still tethered to the front of his owner's home. **(Ex A: Madelinski Report with Photographs, photo pages)**. Det. Madelinski testified to the accuracy of his photographs. **(Ex C: Show Cause Hearing Transcript, p. 21)**.

Plaintiff Kobasic claims not to remember whether Turbo had run at large previously. **(Ex N: Kurtis Kobasic Dep., pp. 33-34, 46)**. But Valerie Kobasic has acknowledged that Turbo had been at large in the neighborhood more than once. **(Ex M: Valerie Kobasic Dep., pp. 12-13)**. Indeed, at the show cause hearing, Valerie Kobasic called her daughter, Kaylee Mary Kobasic, as a witness. Kaylee testified to having "*been one of the people called to go get him [Turbo]*" on at least *five* occasions that Turbo had gotten loose. **(Ex C: Show Cause Hearing Transcript, pp. 71-73)**.

Valerie Kobasic specifically acknowledged that Turbo got loose on the day that Pippen was killed. Valerie returned home from work on the day of the attack to discover Turbo "*across the street*" from her house. **(Ex C: Show Cause Hearing Transcript, p. 79; Ex M: Valerie Kobasic Dep., pp. 19, 23)**. Because Valerie was at work and Kurtis was not home, Valerie has no idea how Turbo got out. **(Ex C: Show Cause Hearing Transcript, p. 81)**. Moreover, Valerie

acknowledges that Turbo was not properly licensed on the date of the incident. His license "*was expired*" and "*six months out of date,*" because Valerie "*didn't go and get it renewed.*" **(Ex C: Show Cause Hearing Transcript, pp. 85, 93)**.

Having retrieved Turbo, Valerie (*who was employed by the City of Escanaba Public Safety Department*), received a telephone call from her supervisor directing her to bring Turbo to the Department because he had killed the neighbor's dog. **(Ex C: Show Cause Hearing Transcript, pp. 78-80)**. She voluntarily walked Turbo to the Department on a leash, where she was directed to take him to the dog pound. **(Ex C: Show Cause Hearing Transcript, p. 81)**.

Investigating the incident that day, Detective Madelinski had been told by a witness, Matthew Bennett, that an orange colored Chow dog had been running loose and had become involved in an altercation with a small black dog - - wherein the Chow ultimately appeared to be eating the smaller dog. **(Ex A: Madelinski Report, p. 2)**. Bennett directed Detective Madelinski to the house where the Chow lived. **(Ex A: Madelinski Report, p. 2)**.

At the show cause hearing, Bennett testified again that the dogs had been involved in a "*tackle*" in which the larger orange dog appeared to attack and then eat the smaller black dog. **(Ex C: Show Cause Hearing Transcript, pp. 10-16)**. Bennett recognized the larger dog as a "*Chow*" and had "*seen it wandering around the town lots of times.*" **(Ex C: Show Cause Hearing Transcript, pp. 10-11)**.

Plaintiff Kobasic has questioned the propriety of Bennett as a child witness. But Bennett's accounts are consistent. Moreover, the judge at the show cause hearing did the standard inquiry regarding Bennett's understanding of truthfulness - - which Valerie Kobasic acknowledged as satisfactory **(Ex C: Show Cause Hearing Transcript, pp. 8-9)**.

More importantly, Valerie Kobasic offered no evidence at the hearing to contradict Bennett's account. Nor has Kurtis Kobasic offered any contrary evidence in the present case.

Plaintiff Kurtis Kobasic's claims are all predicated upon the prosecutor in the euthanization case, Defendant Lauren Wickman, not having sent Plaintiff Kobasic notice of the proceedings. Referencing M.C.L. 287.286a and M.C.L. 287.321 et seq., Plaintiff Kobasic asserts that he is a statutory owner of the dog. **(ECF No. 5, Pg ID 36, Complaint, ¶ 17)**. Kobasic asserts that notice to all such "owners" is statutorily required. Kobasic specifically condemns Defendant Wickman for not having "*investigated the ownership of dog Turbo*" yet having "*attested*" to Valerie Kobasic being Turbo's owner. **(ECF No. 5, Pg ID 36-37, First Amended Complaint, ¶ 18)**.

It is not disputed that Wickman filed the Complaint identifying Turbo as a dangerous animal and requesting a summons for Valerie Kobasic "*to appear in court and show cause why the animal should not be destroyed.*" **(Ex B: Complaint and Summons Regarding Dangerous Animal)**. But nowhere in the one-page Complaint does Wickman make any attestation regarding ownership. The only statements of "fact" in the Complaint are that "*Turbo was running unaccompanied*" and "*attacked and killed another dog*," i.e., Turbo "*caused serious injury or death to a person or a dog*" in violation of M.C.L. 287.322. **(Ex B: Complaint and Summons Regarding Dangerous Animal)**. *These* are facts that Valerie Kobasic has *conceded* - - and that Kurtis Kobasic has never offered any evidence to dispute.

Rather than state any other "fact," Wickman simply referenced the report of Detective Madelinski, #17-3926, which made clear on its face that Madelinski was the investigator and author. **(Ex B: Complaint and Summons Regarding Dangerous Animal; Ex A: Madelinski Report)**. It is *Madelinski's report*, not the Complaint, that identifies Valerie Kobasic as "*the owner*

of the orange Chow." **(Ex A: Madelinski Report, p. 2)**. The Complaint signed by Wickman never makes such a statement, much less "attests" to it.

Prosecutor Wickman did not even identify Valerie Kobasic as the owner at the show cause hearing. Kobasic herself told the Court at the outset:

> I'd like to tell you that *my dog* got out while I was at work. And my son was on the lake - - and we've have no idea how he got out of the house. And I am so sorry that this happened. And I have apologized and if I could undo it I would do. If I could fix it I would.
>
> **(Ex C: Show Cause Hearing Transcript, pp. 5-6, *emphasis added*)**.

It was the *state district court judge* who finally asked Valerie Kobasic whether she was "*the owner*" of Turbo - - to which Valerie Kobasic responded, "*Yes, I am.*" **(Ex C: Show Cause Hearing Transcript, p. 78)**. Valerie then described that she purchased Turbo in 2015 - - making no mention of Kurtis Kobasic in this regard. **(Ex C: Show Cause Hearing Transcript, p. 78)**.

Valerie did testify that Kurtis was living with her at her residence at the time, such that he would be occupying the same premises as Turbo. **(Ex C: Show Cause Hearing Transcript, p. 82)**. But there is no evidence in the record that Prosecutor Wickman knew of Kurtis or his residency at the time she filed the Complaint or at any time before Valerie Kobasic's testimony at the hearing.

As explained by Wickman, "*I did not do any investigation.*" **(Ex O : Wickman Dep., p. 66)**. In her words, "*[m]y role as a prosecutor is not to investigate*." **(Ex O: Wickman Dep., p. 31)**. "*That is the role of law enforcement*." **(Ex O: Wickman Dep., p. 31)**. Wickman "*do[es] not go out to the scene or interview witnesses*." **(Ex O: Wickman Dep., p. 31)**. She relies "*on the investigating officers to do so*." **(Ex O: Wickman Dep., p. 31)**. This includes any

investigation with regard to any question about "ownership" of a dog. **(Ex O: Wickman Dep., p. 20)**.

Accordingly, Wickman brought the prosecution against Turbo based upon "*the information that was provided . . . to us by the City of Escanaba Department of Public Safety*." **(Ex O: Wickman Dep., p. 5)**. She "*reviewed the police report and relied on the Escanaba Public Safety investigation*." **(Ex O: Wickman Dep., p. 10)**. Seeing the photos taken by Detective Madelinski, she decided that "*the police report itself*" provided "*enough information for me to rely on*." **(Ex O: Wickman Dep., pp. 19, 23)**. She signed the Complaint by express reference to Madelinski's report, #17-3926. **(Ex B: Complaint and Summons Regarding Dangerous Animal)**.

As Wickman also points out, her signature was notarized, but not sworn under oath. **(Ex O: Wickman Dep., p. 6)**. In her mind, "*we did not view it as we were testifying or vouching for the information in that report*" but, rather, "*we were relying on the information provided in the report by the investigating officers*." **(Ex O: Wickman Dep., p. 30)**. Again, there is no statement in the Complaint attesting to Valerie Kobasic being the "owner" of Turbo *or* to Valerie Kobasic being the only "owner" of Turbo.

To the extent that discovery in this case later revealed other incident reports of the Escanaba Public Safety Department suggesting that Kurtis Kobasic had an ownership interest in Turbo, it is the unrebutted testimony of Wickman that she never saw these other reports until after signing the Complaint to initiate the euthanization case. **(Ex O: Wickman Dep., pp. 16, 45-46)**. In Wickman's words, "*[b]ased on the investigation that was provided to me prior to the filing of that Complaint, Valerie Kobasic was the owner*." **(Ex O: Wickman Dep., p. 61)**.

Moreover, Wickman points out that ownership is not determined by what any police report may say. **(Ex O: Wickman Dep., p. 44)**. Rather, it is a legal conclusion that is to be resolved by

the court - - and Wickman still contests Plaintiff Kurtis Kobasic's claim to ownership. **(Ex O: Wickman Dep., pp. 27, 61, 66)**.

Significantly, Plaintiff Kurtis Kobasic was fully aware of the July 28, 2017, show cause hearing, because he was told about it by Valerie Kobasic. **(Ex N: Kurtis Kobasic Dep., pp. 38-39)**. As shown by the transcript and acknowledged by Kurtis, he spoke up from the gallery during Valerie's testimony. **(Ex C: Show Cause Hearing Transcript, p. 90; Ex N: Kurtis Kobasic Dep., p. 44)**. Yet, despite Kurtis being there, Valerie never called him as a witness - - even though she had called her daughter Kaylee. Valerie has acknowledged that "*I could have called anybody.*" **(Ex M: Valerie Kobasic Dep., p. 23)**. But she never called Kurtis as a witness or ever suggested that he had any role in the purchase or ownership of Turbo - - even though she herself specifically testified regarding both.

The state district court issued it's written "*Decision and Order*" on August 11, 2017. Based upon the evidence presented, the state district court judge made the finding that "*Valerie Kobasic owned Turbo*" and that Turbo "*without a license . . . ran at large unaccompanied by its owner*" and "*killed another dog named Pippen*" that was leashed on nearby property. **(Ex D: Decision and Order, p. 1)**. Acknowledging that Valerie Kobasic had presented testimony that Turbo was not aggressive, the judge found that "*Turbo has a history of running at large*" and the judge was "*not comforted by Ms. Kobasic's assurances that Turbo will never run at large again.*" **(Ex D: Decision and Order, p. 2)**. Finding that Turbo had violated both M.C.L. 287.286a (*running at large without his owner and without a license*) and M.C.L. 287.322 ("*caused the death of a dog*"), the judge ordered that Turbo be euthanized. **(Ex D: Decision and Order, p. 3)**.

Valerie Kobasic appealed to the state circuit court, which issued an eleven page decision affirming the state district court order. **(Ex E: Circuit Court Opinion and Order, 7/13/18)**.

Valerie applied for leave to appeal to the Michigan Court of Appeals, which was denied. **(Ex F: COA Order Denying Application, 4/11/19; Ex G: COA Order Denying Reconsideration, 5/28/19)**. She then applied for appeal to the Michigan Supreme Court, which was also denied. **(Ex H: S. Ct. Order Denying Application, 10/29/19; Ex I: S. Ct. Order Denying Reconsideration, 2/4/20)**.

It was not until four months after the final Supreme Court order - - two years and ten months after the district court ordered that Turbo be euthanized - - that Plaintiff Kobasic filed his motion seeking to intervene in the case, by asserting his supposed ownership of Turbo. **(Ex J: Kobasic Motion to Intervene)**. The state district court denied this motion "*due to its untimeliness and failure to provide satisfactory excuse for the delay in bringing the motion.*" **(Ex L: Order Denying Motion to Intervene)**.

As the state district court judge observed, "*the chronology of events is important,*" and "*I find it very concerning that an owner who is present for proceedings that would potentially dispose of his dog, would chose to remain silent during the whole process,*" until "*the 11th hour, after all the appellate remedies are exhausted.*" **(Ex K: Motion to Intervene Transcript, 7/22/20, pp. 18, 22)**. The judge also highlighted the testimony from the show cause hearing in which Valerie Kobasic identified herself as Turbo's owner. **(Ex K: Motion to Intervene Transcript, pp. 23-26)**.

In this Court, Plaintiff Kobasic now belatedly seeks to justify his ordinate delay by claiming that he was not aware "*of his legal rights regarding Turbo*" until December 2019. But even then he never explains why he, as a supposed owner, did not seek to learn his rights earlier or why it still took another six months after he allegedly heard of his "rights" in December 2019 before his attempt to intervene in June 2020.

Earlier in this litigation, Defendants Delta County and Lauren Wickman sought dismissal under Fed. R. Civ. P. 12(b)(1) and (6). **(ECF No. 9, Pg ID 60-92, Motion and Brief Seeking Dismissal)**. By order of November 18, 2020, this Court dismissed Plaintiff Kobasic's "*substantive due process*" claim (Count III) and his state-law claim for "*conversion*" (Count VI). **(ECF No. 28, Pg ID 468, Order, 11/18/20)**. It remains the position of the Defendants that Plaintiff Kobasic's remaining claims for unlawful "*seizure*" under the Fourth Amendment (Count I), "*procedural due process*" under the Fourteenth Amendment (Count II), "*municipal liability*" (Count IV) and *declaratory/injunctive relief* (Count V) are unsustainable.

It is the most fundamental position of Defendants Delta County and Lauren Wickman that this Court is barred by the ***Rooker-Feldman*** doctrine from exercising jurisdiction over Plaintiff Kobasic's case. Regardless of label, Plaintiff Kobasic's claims are all predicated upon the assertion that the state district court judgment to euthanize Turbo should be reviewed and declared "*void*." **(ECF No. 5, Pg ID 33, 49, First Amended Complaint, ¶¶ 2, 89)**.

Moreover, even if this Court has jurisdiction, the state-court rulings also present both *res judicata* and collateral estoppel bars to Plaintiff Kobasic's claims in the present case.

It is the further position of Delta County and Defendant Wickman that they both have sovereign immunity against Plaintiff Kobasic's claims, with Defendant Wickman being entitled to prosecutorial and qualified immunities as well. The claims presented by Plaintiff Kobasic also fail substantively.

STANDARD OF REVIEW

Summary judgment should be granted "where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The mere existence of *some* alleged factual dispute between the parties will defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-8 (1986), *emphasis in original*. While the court must view the facts in the light most favorable to the non-moving party, the court is not obligated to treat "a naked assertion" as establishing any "fact." ***Wysong v. City of Heath***, 260 Fed. Appx. 848, 857 (6th Cir. 2008).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF KOBASIC'S CASE.

In their original motion seeking dismissal under Fed. R. Civ. P. 12(b)(1) and (6), Defendants Delta County and Lauren Wickman argued that this Court lacked subject matter jurisdiction by force of the ***Rooker-Feldman*** doctrine. **(ECF No. 9, Pg ID 70-73, Defendants' Rule 12 Brief, pp. 3-5)**. This Court's order of November 18, 2020 denied dismissal on this ground, without explanation. **(ECF No. 28, Pg ID 468, Order, 11/18/20)**. But the ***Rooker-Feldman*** doctrine manifestly applies to bar Plaintiff Kobasic's case.

The ***Rooker-Feldman*** doctrine recognizes that federal district courts do not have appellate jurisdiction over state court judgments. ***RLR Investments, LLC v. City of Pigeon Forge, Tenn.***, 4 F.4th 380, 385 (6th Cir. 2021). The doctrine bars "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the [federal] district court proceedings commenced and inviting district court review and rejection of those judgments." ***Id.***, at 387. The doctrine bars not only named parties to the state-court proceedings from seeking federal review, but also bars such attempts by persons having "privity" with the loser in the prior state-court case. ***McCormick v. Braverman***, 451 F.3d 382, 396 (6th Cir. 2006).

Under Michigan law, "[t]o be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." ***Adair v. Michigan***, 470 Mich. 105, 122, 680 N.W.2d 386, 396 (2004) (discussing *res judicata*), accord ***Au Sable River Trading Post, LLC v. Dovetail Solutions, Inc.***, 874 F.3d 271, 274 (6th Cir. 2017). In particular, privity encompasses "mutual or successive relationships to the same right of property where such an identification of interest of one person with another as to represent the same legal right." ***Sloan v. City of Madison Heights***, 425 Mich. 288, 295, 389 N.W.2d 418, 422 (1986). See

also ***Saylor v. United States***, 315 F.3d 664, 668-9 (6th Cir. 2003) (privity by way of successive interests in property).

The foundational factual predicate for Plaintiff Kurtis Kobasic's claims is his supposed status as a co-owner of Turbo with Valerie Kobasic. Assuming he is such a co-owner, he stands in privity with Valerie Kobasic, because they hold a "mutual" relationship to the same property (i.e., Turbo). Therefore, he is bound by the ***Rooker-Feldman*** doctrine.

All of Plaintiff Kobasic's claims - - those seeking damages, and those seeking declaratory/injunctive relief - - rest upon this proposition that the state district court order to euthanize Turbo is "*void*" as an improper seizure of Plaintiff Kobasic's property interest in Turbo without proper notice. Thus, Plaintiff Kobasic falls within the "narrow" application of ***Rooker-Feldman*** - - i.e, Plaintiff Kobasic is a state-court loser (*by privity with Valerie Kobasic*), who is complaining of injury caused by a state court judgment rendered before he filed the present case and inviting "review and rejection" of the state-court judgment. This is precisely the type of case barred by the ***Rooker-Feldman*** doctrine.

This is exemplified by the Sixth Circuit's decision in ***Hall v. Callahan***, 727 F.3d 450 (6th Cir. 2013). In the ***Hall*** case, the "Plaintiffs sought declaratory relief to void [a state court] judgment and also injunctive relief to prevent Defendants from enforcing [that] judgment." ***Hall***, 727 F.3d at 453. In that circumstance, the Sixth Circuit held the ***Rooker-Feldman*** doctrine to bar the district court from exercising jurisdiction over the case. ***Id.***, at 453-4.

Plaintiff Kobasic seeks the same relief as the plaintiffs in ***Hall***. His case should likewise be dismissed. This Court lacks subject matter jurisdiction over it.

II. RES JUDICATA AND COLLATERAL ESTOPPEL PRECLUDE PLAINTIFF KOBASIC'S CLAIMS.

In federal case law, the label "res judicata" encompasses two distinct preclusion concepts: "issue preclusion" (also known as collateral estoppel) and "claim preclusion." ***Migra v. Warren City School Dist. Bd. of Education***, 465 U.S. 75, 77 (1984) at n. 1, ***Taylor v. Sturgell***, 553 U.S. 880, 892 (2008). "[A] federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." ***Migra***, 465 U.S. at 81.

The state district court litigation regarding Turbo resulted in a final judgment for Turbo's destruction. That judgment was affirmed on appeal. Under the controlling Michigan law, that judgment precludes Plaintiff Kobasic from litigating in this case the claims he presents and the factual assertions upon which those claims are based.

A. Plaintiff Kobasic's claims are barred by res judicata.

Michigan follows "a broad approach to the doctrine of res judicata" which "bars not only claims already litigated but also every claim arising from the same transaction that the parties, exercising reasonable diligence could have raised but did not." ***Adair v. Michigan***, 470 Mich. 105, 121, 680 N.W.2d 386, 396 (2004), ***Ludwig v. Township of Van Buren***, 682 F.3d 457, 460 (6th Cir. 2012). Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been resolved in the first." ***Adair***, 470 Mich. at 121, 680 N.W.2d at 396.

The state district court case involving Turbo was decided on its merits, resulting in the order that Turbo be euthanized. As described above, Plaintiff Kobasic is in privity with Valerie Kobasic, who litigated the prior case. Thus, both the first and second criteria for application of *res judicata* against Plaintiff Kobasic's claims are satisfied.

The third criteria is satisfied as well. The existence and/or significance of Kurtis Kobasic's supposed "ownership" interest in Turbo could have been raised and resolved in the state-court case.

Plaintiff Kobasic's remaining claims allege unlawful "seizure" under the Fourth Amendment (Count I), denial of "procedural due process" under the Fourteenth Amendment (Count II), municipal liability under federal law (Count IV) and declaratory/injunctive relief against a judgment that is supposedly "void" for failure to join a "necessary party" under the Michigan Court Rules (Count V). It cannot be disputed that Michigan courts hear and resolve such claims. ***Novelties, Inc. v. City of Berkley***, 259 Mich. App. 1, 23-4, 672 N.W.2d 351, 364-5 (2003) (*Fourth Amendment claim for seizure of fireworks*), ***York v. Civil Service Commission***, 263 Mich. App. 694, 702-4, 689 N.W.2d 533, 539-40 (2004) (*procedural due process under the Fourteenth Amendment*), ***Johnson v. Vanderkooi***, 502 Mich. 751, 762-776, 918 N.W.2d 785, 792-9 (2018) (*municipal liability under federal law*), ***Gordon Food Service, Inc. v. Grand Rapids Material Handling Co.***, 183 Mich. App. 241, 454 N.W.2d 137 (1989) (*necessary joinder under Michigan law*).

All of the claims raised by Plaintiff Kobasic could have been raised and resolved in the prior state-court litigation regarding Turbo.[1] Because the claims now asserted by Plaintiff Kobasic could have been asserted by his privy, Valerie Kobasic, in the state-court litigation, Plaintiff Kobasic is precluded by *res judicata* from asserting those claims in this Court.

B. Plaintiff Kobasic's factual assertions are barred by collateral estoppel.

[1] This is also true of Plaintiff Kobasic's already-dismissed claims for "substantive due process" under the Fourteenth Amendment, ***People v. DeJonge***, 179 Mich. App. 225, 238, 449 N.W.2d 899, 905 (1989) and "conversion," ***Aroma Wines & Equipment, Inc. v. Columbian Distribution Services, Inc.***, 497 Mich. 337, 871 N.W.2d 136 (2015).

"Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." ***Leahy v. Orion Township***, 269 Mich. App. 527, 530, 711 N.W.2d 438, 441 (2006). Traditionally, the doctrine also required "mutuality of estoppel," but this has been abolished in the context where collateral estoppel is asserted defensively. ***Monat v. State Farm Ins. Co.***, 469 Mich. 679, 691-2, 677 N.W.2d 843, 850-1 (2004).

Plaintiff Kobasic claims are predicated on his contention that the prior state-court judgment is "void" for denial of due process, such that he should be afforded the opportunity to litigate the underlying issue of Turbo being a dangerous animal. But Plaintiff Kobasic's privy, Valerie Kobasic, already litigated due process arguments and the dangerousness of Turbo in the state district court and on appeal in the state circuit court. **(Ex C: Show Cause Hearing Transcript, e.g., pp. 82-84, 88; Ex E: Circuit Court Appellate Opinion, pp. 2-7 [*due process*] and pp. 8-10 [*dangerousness*])**. Both courts ruled against Valerie on these issues. Such resolution applies against Plaintiff Kobasic as Valerie's privy. He cannot relitigate those issues in this Court.

III. PLAINTIFF KOBASIC'S CLAIMS AGAINST BOTH DEFENDANTS ARE BARRED BY "SOVEREIGN IMMUNITY."

The States retain their pre-Constitution sovereign immunity, except to the extent that such immunity was surrendered under the expressed terms of the Constitution itself. ***Alden v. Maine***, 527 U.S. 706, 713, 715 (1999), ***Idaho v. Coeur d'Alene Tribe of Idaho***, 521 U.S. 261, 267 (1997). The Eleventh Amendment was adopted to confirm this reality. ***Hess v. Port Authority Trans-Hudson Corp.***, 513 U.S. 30, 39-40 (1994). "Unless a State consents to be sued, and enjoys

immunity from private lawsuits seeking damages." ***Ermold v. Davis***, 936 F.3d 429, 433 (6th Cir. 2019).

"[B]ecause lawsuits against state officials in their official capacity equate to lawsuits against the State itself, . . . sovereign immunity shields state officials as well." ***Id.*** Although the doctrine does not extend to counties or county officials *per se*, "when acting on a particular issue or in a particular area, a local government official or entity may serve as an alter ego or arm of the state and, in that capacity, it may receive Eleventh Amendment protection." ***Brent v. Wayne County Department of Human Services***, 901 F.3d 656, 681 (6th Cir. 2018).

The Sixth Circuit has already addressed sovereign immunity with regard to a county prosecutor in Michigan. In ***Cady v. Arenac County***, 574 F.3d 334 (6th Cir. 2009), the court held that Michigan's county prosecutors act as an agent of the State of Michigan when bringing actions to enforce penalties under state statutes. ***Id.***, at 343. The Michigan Court of Appeals has agreed. ***Crawford v. County of St. Clair***, No. 301413, 2012 WL 1060614, at *2 (Mich. Ct. App. March 29, 2012).

There can be no dispute that an action brought by a county prosecutor under M.C.L. 287.286a and M.C.L. 287.322 is brought to enforce Michigan's statutory law as enacted by the State's Legislature. The euthanization proceedings regarding Turbo have *not* been pursued by reference to any *county* ordinance but, rather, only by reference to the State statutes. Therefore, Defendant Wickman was acting as an agent of the State, and both Delta County and Wickman in official capacity have sovereign immunity against Plaintiff Kobasic's claims.

Two further points are critical in this regard.

First, Defendant Wickman has been sued *only* in her "official capacity." Neither the original Complaint filed by Plaintiff Kobasic **(ECF No. 1, Pg ID 1-16, Complaint)** nor the First

Amended Complaint **(ECF No. 5, Pg ID 33-51, First Amended Complaint)** make any reference to Wickman in her "individual" or "personal" capacity.

For decades, the Sixth Circuit enforced a presumption that an official was sued only in their "official capacity," absent expressed notice to the contrary in the Complaint. ***Northcott v. Plunkett***, 42 Fed. Appx. 795, 796 (6th Cir. 2002), citing ***Wells v. Brown***, 891 F.2d 591 (6th Cir. 1989). The blanket presumption has been replaced with a "course of proceedings" analysis. ***Moore v. City of Harriman***, 272 F.3d 789, 773-4 (6th Cir. 2001). But nothing in the "course of proceedings" in the present case has afforded any specific notice that Plaintiff Kobasic is asserting claims against Wickman in "individual" or "personal" capacity. Indeed, failure to make such designation in two successive complaints only confirms that no "individual"/"personal" capacity claim has been asserted. Therefore, sovereign immunity is a complete defense to Wickman in this case, just as it is for Delta County itself.

Second, Plaintiff Kobasic's demand for declaratory/injunctive relief does not escape sovereign immunity. The doctrine of ***Ex parte Young***, 209 U.S. 123 (1908) "allows plaintiffs to bring claims for prospective relief against state officials sued in their official capacity to prevent future federal constitutional or statutory violations," ***Boler v. Early***, 865 F.3d 391, 412 (6th Cir. 2017). But Plaintiff Kobasic's claim falls outside the scope of this doctrine.

Regardless of how a plaintiff's claims are labeled or characterized by a complaint, invocation of ***Ex parte Young*** will be rejected if the relief sought is "in reality" retroactive or monetary in nature. ***Michigan Corrections Organization v. Michigan Department of Corrections***, 774 F.3d 895, 905 (6th Cir. 2014). The ***Ex parte Young*** doctrine does not extend to "retroactive relief." ***Boler***, 865 at 412, ***Green v. Mansour***, 474 U.S. 64, 68 (1985).

Plaintiff Kobasic's demand for declaratory/injunctive relief is manifestly retroactive. Kobasic seeks declaration that the 2017 judgment of the state district court is "*void*" and, on that basis, he demands an injunction against its enforcement. This falls outside the limits of ***Ex parte Young***.

The ***Green*** case is particularly instructive. The ***Green*** plaintiffs were recipients of federal aid to families with dependent children, who claimed that the State of Michigan had wrongly calculated the amount of their benefits. They sought a declaratory judgment that the State's past calculations had been unlawful. The Supreme Court held such declaration to be prohibited by the Eleventh Amendment. As explained by the Court:

> There is a dispute about the lawfulness of the respondent's past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of the petitioners. . . . [T]he issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.
>
> ***Green***, 474 U.S. at 73.

Plaintiff Kobasic seeks the declaration that the state district court order for the euthanization of Turbo is "void" and unenforceable as a consequence of *past actions* by Defendant Wickman that allegedly violate of the Fourth and Fourteenth Amendments. This is precisely the sort of retroactive relief that was rejected by the Supreme Court in ***Green***.

In short, the sovereign immunity recognized by the Eleventh Amendment defeats all of Plaintiff Kobasic's claims against Delta County and Defendant Wickman. Therefore, the Defendants are entitled to summary judgment in their favor against Plaintiff Kobasic's claims.

IV. EVEN ASSUMING *ARGUENDO* THAT PLAINTIFF KOBASIC PRESENTS "INDIVIDUAL CAPACITY" CLAIMS

AGAINST DEFENDANT WICKMAN, SHE REMAINS IMMUNE.

A. Defendant Wickman has absolute prosecutor immunity.

A prosecuting attorney has "absolute immunity for the initiation and pursuit of a criminal prosecution." ***Buckley v. Fitzsimmons***, 509 U.S. 259, 269 (1993). In particular, "[a] prosecutor's decision to file a criminal complaint and seek an arrest warrant and the presentation of these materials to a judicial officer falls squarely within the aegis of prosecutorial immunity." ***Ireland v. Tunis***, 113 F.3d 1435, 1446 (6th Cir. 1997).

This immunity is not confined to criminal prosecutions. Prosecutors are also absolutely immune for alleged constitutional violations when pursuing a civil action, "as long as the prosecutors were functioning in an enforcement role and acting as advocates for the state in initiating and prosecuting judicial proceedings." ***Cooper v. Parrish***, 203 F.3d 937, 947 (6th Cir. 2000).

Carried over from the common law, this immunity applies against suits for "malicious prosecution" and "defamation," and extends to "the knowing use of false testimony before a grand jury in trial." ***Burns v. Reed***, 500 U.S. 478, 485 (1991). Even suppression of exculpatory evidence in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963) falls within the scope of this "absolute immunity." ***Koubriti v. Convertino***, 593 F.3d 459, 470 (6th Cir. 2010).

The fact that a plaintiff "ascribes impure and malicious motives to the prosecutor is of no consequence, for the absolute immunity provides complete protection from judicial scrutiny of the motives of the prosecutor's actions." ***Ireland***, 113 F.3d at 1447. A prosecutor retains absolute immunity even if acting in a malicious conspiracy with others to harm the person targeted by the

prosecution. ***Grant v. Hollenbach***, 870 F.3d 1135, 1138 (6th Cir. 1989), ***Lomaz v. Hennosy***, 151 F.3d 493, 498-9 (6th Cir. 1997) at n. 7.

Defendant Wickman initiated the proceedings for the euthanization of Turbo by filing a Complaint under state statutes prescribing penalties for dogs running at large and causing injury or death to another dog. The owner of such a dog is subject to criminal prosecution. M.C.L. 287.286 (*misdemeanor*), M.C.L. 287.323 (*felony*). But even if this Court deems the action specifically seeking the destruction of Turbo to be "civil," prosecutor immunity still applies for the benefit of Defendant Wickman, as just described. ***Cooper***, 203 F.3d at 947.

In response to the Defendant's previous Rule 12 motion, Plaintiff Kobasic argued that Defendant Wickman lost her immunity when she supposedly "*attested to facts*" in the Complaint "*that Turbo was a dangerous animal and that all the owners were identified.*" **(ECF No. 14, Pg ID 344, Plaintiff's Response to Motion, p. 20)**. But review of the Complaint shows that Wickman did *not* attest that Turbo "was a dangerous animal" or that "all the owners were identified." The Complaint states only that Turbo "*attacked and killed another dog*" - - which neither Valerie Kobasic nor Plaintiff Kurtis Kobasic has ever denied or rebutted.

Furthermore, Wickman never made any statement regarding the ownership of Turbo. Rather, she specifically deferred to the report of Officer Madelinski. That report states only that "*Valerie Kobasic . . . is the owner of the orange Chow*," which was Valerie's own testimony to the state district court judge upon his direct questioning. **(Ex C: Show Cause Hearing Transcript, p. 78)**.

Moreover, absolute prosecutor immunity is not lost when a prosecutor files - - even under oath - - a complaint in which the prosecutor does not claim personal knowledge of the factual allegations. ***Drake v. Howland***, 463 Fed. Appx. 523, 526 (6th Cir. 2012). In ***Howland***, the

prosecutor swore to the allegations of a criminal complaint "upon information and belief." ***Id.*** Defendant Wickman did nothing more when she referenced Madelinski's report. Wickman never claimed personal knowledge. Detective Madelinski's report clearly identifies Madelinski as its author.

Even assuming Plaintiff Kobasic's allegations regarding co-ownership of Turbo to be true, failure by Wickman to send notice to "all" of the supposed "owners" of Turbo is simply part of initiating the case. Wickman has absolute immunity for such actions. Therefore, Wickman has immunity against Plaintiff Kobasic's claims.

B. Defendant Wickman has qualified immunity.

"[G]overnmental officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). In this context, a right is clearly established only where existing case law precedents demonstrate the existence of the right to be "beyond debate" such that "every reasonable official would have understood that what he is doing violates that right." ***Mullenix v. Luna***, 577 U.S. 7, 11-12 (2015).

It is understood that the Constitution protects against deprivation of property without due process of law under both the Fifth and Fourteenth Amendments. For purposes of qualified immunity analysis, however, the Supreme Court has emphasized that courts must not define "clearly established law" at "a high level of generality" but, rather, must focus on whether the "*particular*" conduct at issue is established to be violative of law. ***Mullenix***, 577 U.S. at 12, ***District of Columbia v. Wesby***, 583 U.S. ___, 138 S. Ct. 577, 590 (2018).

Plaintiff Kobasic emphasizes that the Michigan statutes define "owner" broadly to include persons who merely care for or harbor a dog. M.C.L. 287.261(2)(c) and M.C.L. 287.321(c). But the statutes under which proceedings were pursued against Turbo, M.C.L. 287.286a and M.C.L. 287.322 speak only of a summons to "the owner" in the singular, not to "every" owner or "any and all" owners. M.C.L. 287.286a, M.C.L. 287.322.

Moreover, there is no evidence to rebut the testimony of Wickman that her only knowledge regarding the ownership of Turbo at the time she filed the Complaint was the specific report of Detective Madelinski identifying Valerie Kobasic as the owner. Nothing said at the show cause hearing would alter this understanding. Valerie Kobasic herself repeatedly identified Turbo as "*my dog.*" **(Ex C: Show Cause Hearing Transcript, pp. 5-6, 98-99)**. When asked by the judge if she was "*the owner of a dog - - Turbo[?],*" answered "*Yes, I am.*" **(Ex C: Show Cause Hearing Transcript, pp. 78-79)**.

There is no "clearly established" law that would have told Wickman, that she could not initiate and pursue proceedings to have Turbo euthanized based upon the identification of ownership provided by Detective Madelinski and confirmed by Valerie Kobasic herself. Nothing in Michigan or federal law require any additional investigation by the prosecutor.

In the absence of any clearly established law (or any demonstrable factual knowledge) to warn Defendant Wickman that she would violate the law by commencing proceedings regarding Turbo by reference to Valerie Kobasic alone, Wickman has qualified immunity against Plaintiff Kobasic's claims. Therefore she is entitled to summary judgment.

V. DELTA COUNTY HAS NO LIABILITIY UNDER FEDERAL LAW, BECAUSE NONE OF THE ALLEGEDLY UNLAWFUL ACTIONS RESULTED FROM ANY "POLICY" OF DELTA COUNTY.

In recognizing the potential liability of local government units under 42 U.S.C. §1983, the Supreme Court conditioned liability upon injury having arisen from the adoption of a policy by "that body's officers." ***Monell v. Dept. of Social Services of City of New York***, 436 U.S. 658, 690 (1978). "[M]unicipal liability must rest upon a direct causal connection between the policies or customs of the [municipality] and the constitutional injury to the plaintiff. ***Gray v. City of Detroit***, 399 F.3d 612, 617 (6th Cir. 2005), see also ***City of Canton, Ohio v. Harris***, 489 U.S. 378, 385 (1989). As the Supreme Court has reiterated:

> In short, a municipality can be sued under §1983, but it cannot be held liable unless a *municipal* policy or custom caused the constitutional injury.
>
> ***Leatherman v. Tarrant County Narcotics Intelligence Task Force and Coordination Unit***, 507 U.S. 163, 166 (1993), *emphasis added.*

It is the burden of Plaintiff Kobasic to present evidence to (1) identify the *municipal* policy or custom, (2) to connect that policy *to the municipality* (i.e., Delta county), and (3) to show that Kobasic's particular injury was incurred due to the execution of *that* policy." ***Vereecke v. Huron Valley School Dist.***, 609 F.3d 392, 403 (6th Cir. 2010).

The record confirms that state court proceedings of which Plaintiff Kobasic complains were an enforcement of state statutory law, not of any ordinance of Delta County. The County is not responsible for those statutes.

Likewise, the County is not responsible for Prosecutor Wickman's enforcement of those state statutory provisions. As described above, a prosecutor acts as an agent of the State of Michigan, not his or her county, when pursuing judicial enforcement of state statutes. Although Michigan counties are obligated to provide funding for prosecutors, the county prosecutor is otherwise a constitutional officer, who is independently elected and not answerable to the county. Mich. Const. art. VII, §4.

Furthermore, governmental entities are not liable for the professional judgments and actions of licensed attorneys. This is exemplified by the Supreme Court decision in ***Connick v. Thompson***, 563 U.S. 51 (2011). In that case, the court refused to hold even the prosecutor's office itself liable for alleged ***Brady*** violations. The court observed that attorneys have specific legal training and professional responsibility obligations upon which the governmental entity employing them can rely. See ***Connick***, 563 U.S. at 64-7.

Even assuming arguendo that Defendant Wickman erred in the legal proceedings involving Turbo (whether in terms of notice or otherwise), it is not the responsibility or even within the authority of Delta County to oversee the professional conduct of Wickman or to control her legal judgments.

Because no policy of Delta County caused the actions that Plaintiff Kobasic alleges to have been unlawful, Delta County cannot be held liable for any claim brought under 42 U.S.C. §1983. The County is entitled to summary judgment against Plaintiff Kobasic's claims.

VI. EVEN APART FROM ANY JURISDICTIONAL BAR, PRECLUSIONS OR IMMUNITIES, PLAINTIFF KOBASIC'S CLAIMS FAIL.

A. The record defeats Plaintiff Kobasic's Fourth Amendment "seizure" claim.

There can be no dispute that the Fourth Amendment protects against unlawful seizure of an animal from its owner without probable cause. ***United Pet Supply, Inc. v. City of Chattanooga, Tenn.***, 768 F.3d 464, 489 (6th Cir. 2014). In the present case, however, no such seizure occurred.

As described above, Valerie Kobasic returned home from work on the day of the incident involving Pippen (June 30, 2017) to find Turbo loose "[a]cross the street" from her house. **(Ex C: Show Cause Hearing Transcript, pp. 78-79)**. She then received a call from her supervisor asking her to bring Turbo to the Escanaba Department of Public Safety **(Ex C: Show Cause Hearing**

Transcript, p. 79). She voluntarily walked Turbo to the department and turned him over to the dog pound. **(Ex : Show Cause Hearing Transcript, pp. 79-81)**.

It has been established by the Sixth Circuit that a dog is not "seized" when an owner voluntarily turns the dog over to government authorities in response to allegations of a legal violation involving the animal. ***Hardrick v. City of Detroit, MI***, 876 F.3d 238, 245-6 (6th Cir. 2017), ***King v. Montgomery County, Tenn.***, 797 Fed. Appx. 949, 956 (6th Cir. 2020). No "seizure" ever occurred for purposes of the Fourth Amendment.

Certainly there was no seizure by Defendant Wickman. There is no evidence that she knew anything about the incident on the day it occurred or when Valerie Kobasic surrendered Turbo. She did not sign the Complaint until July 10, 2017. **(Ex B: Complaint and Summons Regarding Dangerous Animal)**.

Moreover, on the record before the Court, the existence of probable cause for a seizure of Turbo is fully established. An "eyewitness identification" is sufficient to establish probable cause for a seizure, absent an "apparent reason" for the officer to think the eyewitness was lying or mistaken. ***Ahlers v. Schebil***, 188 F.3d 365, 370 (6th Cir. 1999). Matthew Bennett identified Turbo as the dog responsible for killing Pippen, and there was no reason for Detective Madelinski to doubt Bennett's account. Valerie Kobasic did not dispute or rebut Bennett's account at the show cause hearing. Plaintiff Kobasic fails to offer any rebutting evidence now.

It is also significant to remember that the Fourth Amendment does not preclude all seizures of property. In precludes "only unreasonable ones." ***Williams v. Maurer***, 9 F.4th 416, 432 (6th Cir. 2021). "Exigent circumstances" can justify an immediate interference with property rights. ***Id.*** A dog posing risk of harm to others is among such exigent circumstances. ***Hardrick***, 876 F.3d at 245 (*a "menacing" dog moving "in and out of the yard at will"*). Valerie Kobasic has conceded

that Turbo was loose at the time of injury to Pippen and had a history of escaping the Kobasic's yard. Therefore, exigent circumstances existed to justify an immediate seizure.

In the circumstances of the present case, Delta County, and particularly Defendant Wickman, cannot be deemed to have ever "seized" Turbo at all. But even if they did so, such seizure was not unlawful. Therefore, Plaintiff Kobasic cannot sustain his Fourth Amendment seizure claim against the Defendants, and the Defendants are entitled to summary judgment in their favor.

B. The record defeats Plaintiff Kobasic's Fourteenth Amendment "procedural due process" claim.

The Fourteenth Amendment protects against deprivations of property by governmental authorities "without due process of law." This invokes a two part inquiry. First, the court must determine whether the plaintiff has a property interest that entitles the plaintiff to do process protection. ***Leary v. Daeschner***, 228 F.3d 729, 741 (6th Cir. 2000). Second, if a plaintiff has such an interest, the court "must then determine 'what process is due.'" ***Id.***, at 742.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." ***Mathews v. Eldridge***, 424 U.S. 319, 333 (1976). But due process is "flexible and contextual in nature, calling for such procedural protections as the particular situation demands." ***Sickles v. Campbell County, Ky.***, 501 F.3d 726, 730 (6th Cir. 2007). As aptly stated by the First Circuit, due process "is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation." ***Gorman v. University of Rhode Island***, 837 F.2d 7, 12 (1988).

Even assuming Plaintiff Kurtis Kobasic is a co-owner of Turbo, his interest is no different than that of Valerie Kobasic, who emphatically argued against Turbo's destruction at the show

cause hearing - - including the presentation of multiple witnesses (and even an expert, Dave Johnson, through whom Valerie obtained experimental testing of Turbo's behavior). **(Ex C: Show Cause Hearing Transcript, pp. 42-94)**. It is entirely speculative that Plaintiff Kobasic could have done better or that an attorney he might have hired would have had more success.

Moreover, despite being present at the hearing, Plaintiff Kobasic took no formal steps to intervene in the matter until almost three years later, having delayed such attempt by six additional months after supposedly being told for the first time about his rights in the matter.

Particularly given (1) the unrebutted evidence regarding the threat posed by Turbo, (2) Valerie Kobasic having identified herself as Turbo's owner and having rigorously advocated against his destruction, and (3) Plaintiff Kobasic having done nothing for nearly three years, it cannot be said that Plaintiff Kobasic was afforded any less "process" than was "due." Therefore, Plaintiff Kobasic's procedural due process claim fails, and summary judgment should be granted in favor of the Defendants against that claim.

C. The record defeats Plaintiff Kobasic's "policy and custom liability" claim.

As described above, there is no basis for Plaintiff Kobasic's "policy and custom liability" claim (Count IV) against Delta County. Turbo was not "seized" by the County but, rather, voluntarily surrendered by Valerie Kobasic on the basis of a violation of State law. The actual proceedings against Turbo were conducted by the Prosecutor's Office, through Assistant Prosecutor Wickman, as an agent of the State.

Nothing about which Plaintiff Kobasic complains - - either the supposed "seizure" of Turbo or the proceedings to have him euthanized - - resulted from any "policy or custom" of Delta County. Absent such basis for liability, Delta County is entitled to summary judgment in its favor against Plaintiff Kobasic's "policy and custom liability" claim. ***Vereecke***, 609 F.3d at 403.

D. The record defeats Plaintiff Kobasic's declaratory/injunctive relief claim.

Plaintiff Kobasic asserts as a separate "count" of his Complaint his demand for "declaratory and injunctive relief." But these are not substantive theories of liability or causes of action in their own right. Rather, they are "forms of relief." ***OverDrive, Inc. v. Open E-Book Forum***, 986 F.3d 954, 956 (6th Cir. 2021), ***Callahan v. Federal Bureau of Prisons***, 965 F.3d 5120, 525 (6th Cir. 2020), ***Weiner v. Clais and Co., Inc.***, 108 F.3d 86, 92 (6th Cir. 1997).

For the reasons described above, Plaintiff Kobasic is not entitled to any relief at all. In particular, this Court has no jurisdiction either to declare the prior state court judgment "void" or to enjoin enforcement of the euthanization order. ***Hall***, 727 F.3d at 453-4. Therefore, the Defendants are entitled to summary judgment against the declaratory/injunctive count of Plaintiff Kobasic's First Amended Complaint.

CONCLUSION AND RELIEF REQUESTED

For the reasons described above, Defendants Delta County and Lauren Wickman ask this Court for summary disposition in their favor under Fed. R. Civ. P. 56 against all of Plaintiff Kurtis Kobasic's claims in their entirety and with prejudice.

Dated: September 28, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

KURTIS KOBASIC,

Plaintiff,

v

DELTA COUNTY and LAUREN WICKMAN,

Defendants.
_____/

HONORABLE ROBERT J. JONKER
U.S. DISTRICT COURT JUDGE

FILE NO. 2:20-cv-113-RJJ-MV

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF GRAND TRAVERSE)

Laurie Robbins, being duly sworn, deposes and says that she served **DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT UNDER FED.R. CIV. P. 56; BRIEF IN SUPPORT OF DEFENDANTS' MOTION SEEKING SUMMARY JUDGMENT UNDER FED. R. CIV. P. 56 – ORAL ARGUMENT REQUESTED; EXHIBITS A-O;**

DEFENDANTS' CERTIFICATE OF NON-CONCURRENCE; DEFENDANTS' CERTIFICATE OF COMPLIANCE WITH W.D. MICH. L. CIV. R. 7.2(b)(ii) and PROOF OF SERVICE, on **September 28, 2021,** by the following methods:

VIA ECF FILING ONLY TO:

Celeste M. Dunn – ***celestemdunnplc@gmail.com***
Charles E. Dunn
CELESTE M. DUNN, PLC

Clerk of the Court
U.S. WESTERN DISTRICT COURT

VIA FIRST CLASS MAIL ONLY TO:

Honorable Robert J. Jonker
U.S. WESTERN DISTRICT COURT JUDGE
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Laurie Robbins

Laurie Robbins