UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ACTS 17 APOLOGETICS, et al.,

Plaintiffs,

v.

CITY OF DEARBORN, et al.,

Defendants.
_____/

Case No. 11-cv-10700

HONORABLE STEPHEN J. MURPHY, III

ORDER DENYING CITY DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT (docket no. 36)

Dr. Nabeel Qureshi, David Wood, and Paul Rezkalla ("Plaintiffs") are members of Acts 17 Apologetics, an organization that "seeks to convert Muslims to Christianity through discussion, debate, and dialogue." Compl. ¶ 9. On June 18, 2010,[1] they attended the Arab International Festival ("Festival") in Dearborn, Michigan (the "City"), with the intent of engaging Muslim attendees in conversation about the merits of Christianity and Islam. They brought video recording equipment with them to document their activities. A few hours after they arrived, City of Dearborn Police Department ("DPD") officers arrested Plaintiffs for violating the City's "breach of peace" ordinance, based on a festival worker's claim that Plaintiffs threatened his safety. A state district court judge found the police had probable cause to arrest Plaintiffs, and bound them over for trial. A jury acquitted Plaintiffs of the charges.

[1] The complaint also describes an incident that took place on June 20, 2010, which is not relevant to the facts of the present motion.

After their acquittal, Wood, Qureshi, Rezkalla, and Acts 17 filed this action against the City and nineteen individuals who work for it in various capacities[2] (collectively, the "City Defendants"), as well as two officials from the Arab-American Chamber of Commerce,[3] which stages the Festival. Plaintiffs' twelve-count complaint alleges violations of the First, Fourth, and Fourteenth Amendments of the federal constitution, as well as a conspiracy to violate these rights, pursuant to 42 U.S.C. § 1983; and state-law claims of defamation, assault, battery, and intentional infliction of emotional distress.

The City Defendants now move for partial judgment on the pleadings under Civil Rule 12(c), or, in the alternative, for partial summary judgment under Civil Rule 56(a), with respect to the June 18 incident. Their argument is based on the doctrine of collateral estoppel, or issue preclusion. Since the state district court already determined there was probable cause to arrest and try Plaintiffs, the City Defendants argue, Plaintiffs are foreclosed from relitigating the issue. Plaintiffs respond that the probable-cause issue they are raising in this case is not identical because they are challenging the veracity of the City's submissions to the state district court. Plaintiffs also argue that they were not given a "full and fair" opportunity to contest probable cause in the state district court.

The Court held a hearing on the City Defendants' motion on December 13, 2011. After taking the motion under consideration, the Court agrees with Plaintiffs that the state district court's adjudication of the probable cause issue does not preclude the Court from reexamining it here. Accordingly, the motion will be denied.

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[2] The City officials named include Mayor John B. O'Reilly; Chief of Police Ronald Haddad; Police Officers Jeffrey Mrowka, Brina Kapanowski, Justin Smith, Andrew Ballard, Jarod Micallef, Mark Matteocci, A. Fawaz, R. Gafford, and nine "John Doe" police officers.

[3] The persons named are Fay Beydoun, Executive Director; and Norma Haidous, Special Events Coordinator and Executive Assistant.

STANDARD OF REVIEW

The standard of review for a Civil Rule 12(c) motion is identical to that used on a Civil Rule 12(b)(6) motion. *Fritz v. Charter Tp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). Therefore, the Court should only grant a Civil Rule 12(c) motion if the allegations are not "sufficient 'to raise a right to relief above the speculative level,' and to 'state a claim for relief that is plausible on its face.'" *Henley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (internal citation omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). In evaluating the motion, the Court presumes the truth of all well-pled factual assertions. *Bishop v. Lucent Techs.*, 520 F.3d 516, 519 (6th Cir. 2006). Moreover, it must draw every reasonable inference in favor of the non-moving party. *Dubay v. Wells*, 506 F.3d 422, 427 (6th Cir. 2007). But "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the element of a cause of action will not do.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 555).

The complaint and pleadings make extensive reference to outside materials, including video clips, court documents, and police reports. But these are virtually the same materials the state district court examined when it made the probable cause ruling that is the subject of this motion. The Court finds that all of the materials the parties have discussed in their briefs "are integral to the complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Ashland v. Oppenheimer & Co.*, 648 F.3d 461, 467 (6th Cir. 2011). Therefore, it may well discuss these materials without necessarily converting the motion into one for summary judgment under Civil Rule 56. *Id.*

BACKGROUND

I. Acts 17's Activities at the 2009 Festival

Acts 17 first captured the attention of City authorities at the 2009 Festival. Wood and Qureshi held conversations with workers at festival booths promoting Islam and staged public, moderated debates with Muslims on the merits of Christianity. Compl. ¶¶ 84–86. Mary Jo Sharp, another member of the group, filmed their activities. Compl. ¶ 88. According to Plaintiffs, on June 21 — the third day Acts 17 members attended the festival — Norma Haidous, a special events coordinator for the American Arab Chamber of Commerce, began harassing Wood, Qureshi, and Sharp. She allegedly tried to entrap Wood in a violation of the festival's "Literature Distribution Policy," and asked Sharp to stop filming a conversation between Qureshi and an individual operating a booth promoting Islam. Compl. ¶¶ 87–89. Eventually, a security guard caught Qureshi handing a pamphlet given to him at the booth to another festival-goer, which led to Qureshi, Wood, and Sharp being "physically forced" out of the Festival by security personnel. Compl. ¶ 95–96. Plaintiffs claim that Qureshi actually had the pamphlet "snatched" from him by a Festival attendee who conspired with a security worker to create a pretext for removing Plaintiffs from the Festival. *Id.* As security personnel were "forcing" them out, Plaintiffs called Jeffrey Mrowka, a Dearborn police officer, for assistance. Compl. ¶ 97. He arranged for a police escort for Plaintiffs out of the festival without further harassment by security. *Id.*

Plaintiffs publicized this encounter in a series of YouTube videos that paint an unflattering portrait of the Festival and the City. Compl. ¶ 103; *see also* Special Report: Sharia Comes to Dearborn, Michigan, *Answering Muslims*, July 1, 2009, http://www.answeringmuslims.com/2009/07/special-report-sharia-comes-to-dearborn.html. The videos prompted an outcry from the City's civic and religious leaders. *See* Response

to Acts 17 Apologetics' "Special Report: Shari'a in the United States" by Concerned Followers of Jesus in Dearborn, October 20, 2009, http://www.fairlanealliance.org/downloads/letter_concerning_acts_17.pdf (criticizing Acts 17 for "present[ing] a contrived and false image of the actual situation here on the ground in Dearborn" on behalf of a group of Christian ministers recruited to discuss the issue by the City); Background on Arab Fest Arrests, *City of Dearborn Homepage*, http://www.cityofdearborn.org/government/city-services/public-information/press-releases/441-arab-fest-response (claiming videos were "a distortion of [Acts 17's] experience and a misrepresentation of the Dearborn Arab International Festival"). Plaintiffs claim that Mayor John B. O'Reilly and numerous city officials made false statements about the Plaintiffs, promoted other Christian missionaries who attended the Festival in an effort to cast the Plaintiffs as radicals, and coordinated much of the public criticism of their activities. Compl. ¶¶ 112–27.

II. Encounter at the 2010 Arab Festival

When the Plaintiffs returned to the Festival on June 18, 2010, they came with a fair amount of notoriety. They claim the City Defendants received false "tips" prior to the Festival that Acts 17 would attempt to "invade" the festival. Compl. ¶ 155. When they did arrive, Qureshi, Wood, and Rezkalla[4] roamed the Festival and filmed themselves with handheld cameras. Compl. ¶ 156. Their intent was "to document their missionary activities . . . and . . . the general atmosphere of the festival for Christians." *Id.* Qureshi carried a microphone to conduct man-on-the-street interviews. Compl. ¶ 157. Although many DPD officers and Festival security guards saw the Plaintiffs, neither group made an effort to stop Plaintiffs from engaging in these activities. Compl. ¶ 166. Festival officials were soon aware

[4] Nageen Mayel filmed the Plaintiffs at a distance to provide further corroboration of Acts 17's story in case the police bothered them. The complaint originally named her as a plaintiff, but she withdrew from the action prior to the filing of the present motion.

of the Plaintiffs' presence, and other Christian ministers attending the Festival overheard Festival personnel discussing a "need to get rid of [the Plaintiffs]" and "conspiring" to have them removed. Compl. ¶¶ 170–71. When these ministers called Mrowka, the police officer coordinating security at the event, to complain, he became "angry and dismissed their concerns, taking no further action." Compl. ¶¶ 173–77.

Luke Campbell, a Christian minister not affiliated with Acts 17, approached the three men after they had been roaming the Festival for an hour or so. Compl. ¶ 179. Campbell told Plaintiffs that Roger Williams, a Festival security volunteer, had prevented him from passing out a Bible tract earlier that day. *Id.* Qureshi asked Campbell if he would like to describe his experience in an interview. Compl. ¶ 180. Campbell agreed. *Id.* At the end of the interview, Williams saw the Plaintiffs and Campbell conversing, approached them, and told Campbell, "I knew you were with [the Plaintiffs]." Compl. ¶ 183. After a brief and unremarkable exchange, the Plaintiffs ended the interview and walked away from Williams and Campbell. Compl. ¶ 185.

After wandering for several minutes, Qureshi, Wood, and Rezkalla noticed that Campbell and Williams were still talking to each other. Compl. ¶ 186; Video of Williams, Pls.' Resp Ex. E (on file with the Court). Plaintiffs approached, standing in a loose circle around Campbell and Williams, with their cameras rolling. *Id.* Qureshi asked Campbell if "everything was alright" and if Williams was "'messing' with him again." *Id.* Campbell assured Plaintiffs that nothing was wrong, and Plaintiffs started to walk away. *Id.* They had not gotten far when Williams said to them, "You don't have to worry about me messing with him, you have to worry about me messing with you, all right." *Id.*

When Plaintiffs turned around to ask Williams what he meant by this, Williams had started talking to security personnel on his walkie-talkie. Compl. ¶ 187–88. Plaintiffs asked

Williams for an explanation of what they had done, narrated the actions he was taking, and filmed the entire exchange. *Id.* Williams started walking away from Plaintiffs several times, only to return and confront them, and he claimed he would offer an explanation as to what Plaintiffs had done wrong if they would turn off the video camera. Compl. ¶¶ 190–91. Plaintiffs offered to do so, but do not appear to have actually complied with his request, and Williams left without explaining the matter any further. Compl. ¶ 192.

After leaving Plaintiffs behind, Williams and Amal Alslami, another festival worker, went to the DPD command trailer at the Festival and spoke to Mrowka and Brian Kapanowski, another DPD officer. Compl. ¶ 202. According to the arrest reports, Williams told the police that he had been surrounded by the Plaintiffs and pestered with questions while being videotaped, despite requests that they stop. *Id.*; Op. & Order Denying Mots. for Bill of Particulars and for Dismissal 5 [hereinafter "District Court Order"], Sept. 13, 2010, ECF No. 36-3. He believed that Plaintiffs were attempting to corner him and make him feel uncomfortable. Compl. ¶ 202. Mrowka sent Kapanowski and Brian Smith, another officer, into the Festival grounds to make a further inquiry. Compl. ¶ 207.

The officers found Qureshi in the main tent area conversing with a small crowd of Muslim youths who had seen Acts 17's videos about the 2009 Festival, with Rezkalla and Wood filming the scene. Compl. ¶¶ 219–27; Video of "Last 17 Minutes," Pls.' Resp. Ex. G (on file with the Court). Without using vulgar language or threats, Qureshi defended Acts 17's previous work and his Christian beliefs from the crowd's pointed, and occasionally hostile, questions. Compl. ¶¶ 224, 227 The police report prepared by Mrowka described the scene this way:

> [Plaintiffs] actions caused a crowd to gather and become agitated. The weather conditions, hot and humid temperatures, fueled an already agitated crowd. This was evident by the crowds yelling profanities and repreated calls to security and

> police on the behavior of [Plaintiffs]. When uniform[ed] officers were present Qureshi was yelling into the crowd further inciting the crowd.

Mrowka Police Rep. 1, June 18, 2010, ECF No. 36-4. This description reflects one possible interpretation of the scene, but it is also argumentative. For instance, one could say Qureshi was "yelling" at the crowd, but one reviewing the video evidence could also say he was simply raising his voice to be heard over the crowd talking to him, or, to use his word, feeling the natural effects of "adrenaline."

Based on Williams' accusations and their own observations, the officers decided to arrest Plaintiffs. Compl. ¶ 228. DPD officers also seized the cameras as an incident to the arrest, and later received search warrants to copy their contents. *Id.* Qureshi and Rezkalla offered to show the video to the police at the time of their arrest in an effort to prove they had done nothing wrong, but the officers refused the offer. Compl. ¶ 263. Plaintiffs spent a night in jail and were released on bond the following day. Compl. ¶ 268.

After the Festivals, both Plaintiffs and the City Defendants resumed their media offensive. Plaintiffs released another series of YouTube videos showing what happened to them at the Festival, and accused the City of imposing de facto *sharia*[5] law by silencing their missionary efforts. *See, e.g.*, Arab Festival 2010: Arrested for being Christian Preachers in Dearborn, June 19, 2010, http://www.youtube.com/watch?v=8FXDAaiT6os. City Mayor John B. O'Reilly responded in an open letter published on the City's website, accusing Plaintiffs of "aggressively engaging passers-by in confrontational debate when they were arrested," bypassing lawful methods of spreading their message at the Festival

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[5] "Sharia" is "the body of formally established sacred law in Islam based primarily on Allah's commandments found in the Koran and revealed through the [practices] of Muhammad, governing in theory not only religious matters but regulating as well political, economic, civil, criminal, ethical, social, and domestic affairs in Muslim countries, and commonly in practice being supplemented by the customary law of a region." *Webster's Third New International Dictionary* 2088 (1961).

that were available to them, and "misrepresent[ing] facts in order to further their mission of raising funds through emotional response." Letter from Mayor O'Reilly, July 9, 2010, http://www.cityofdearborn.org/images/stories/PDF/Government/Mayor/mayorletter07-09-2010.pdf.

III. Plaintiffs' Criminal Proceedings

Prosecutors formally arraigned Plaintiffs on July 12, 2010, for violations of the City's "breach of peace"[6] ordinance. Plaintiffs sought dismissal of the charges in a "Motion for Bill of Particulars and for Dismissal" during their arraignment in state district court. The district court judge held a lengthy hearing on the matter on August 30, 2010. *See* Dist. Ct. Mot. Hr'g Tr., ECF No. 36-5. No witnesses testified. The district court judge had access to the video recording of the incidents leading up to the arrest, as well as to police reports the officers at the Festival had prepared. In a written order ("State Court Order"), the district court denied Plaintiffs' motion and bound them over for trial. No one appears to dispute that Plaintiffs had no avenue of appeal from this decision.

The State Court Order stated its rationale for upholding the arrest as follows:

> [b]ased upon the record presented at this point in the proceedings . . . it is not contested that officers of the Dearborn police department received a complaint from a festival volunteer, [Williams], alleging he had been 'surrounded' by the defendants against his will, that he was pestered and badgered with questions while being videotaped in spite of his requests that they stop, and that he felt

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[6] The ordinance provides:

> Any person who shall make or assist in making any noise, disturbance, trouble or improper diversion, or any rout or riot, by which the peace and good order of the city are disturbed, shall be guilty of a breach of the peace, and disorderly conduct.

Dearborn, Mich. Code of Ordinances § 14-131 (1996). This ordinance "refers" to Mich. Comp. Laws § 750.170, which prohibits "mak[ing] or excit[ing] any disturbance or contention . . . in any street."

> extremely uncomfortable and thought he could not leave although he attempted to several times.
>
> *Based on Williams' complaint*, the officers had "reasonable cause to believe a misdemeanor . . . [had] been committed."

State Court Order 5 (emphasis added) (quoting Mich. Comp. Laws § 764.15). This complaint, coupled with Williams' identification of the Plaintiffs at the place of their arrest, was sufficient, in the district court's view, to justify the arrest. *Id.* The district court ascribed little, if any, weight to the Plaintiffs' stated purpose of engaging in journalism and evangelization, or to the longstanding feud between Plaintiffs and the City Defendants, holding that such considerations went to the state of mind of the officers and were not relevant to the probable cause calculus. *Id.* at 5–6.

The district court's treatment of the video evidence Plaintiffs submitted to contest probable cause is confusing. At the August 30 hearing, the district court judge stated that he had "look[ed] at the cited portions" of the video evidence. Dist. Ct. Tr. 4:20–24. But in his denial of the Plaintiffs' motions, the judge reasoned that "with or without the video and audio recordings proffered by [Plaintiffs], the question of whether [Plaintiffs] actually engaged in the conduct alleged by Williams so as to hinder or impede his movement or otherwise rise to the level of disturbing the peace is owned by the jury as a question of fact." State Court Order at 6. The district court judge appeared to conclude that the video evidence was relevant only to proving the charges against Plaintiffs at trial, and not to the probable cause analysis.

Plaintiffs' criminal trial began on September 20, 2010, in the state district court. Compl. ¶ 327. After a four-day trial, the jury unanimously acquitted Plaintiffs of the "breach of peace" charges. Compl. ¶ 335. The video evidence proved to be crucial to the Plaintiffs' case. For instance, after being shown the videos, Police Chief Ronald Haddad agreed with

a statement by Plaintiffs' counsel that "none of the activity . . . on the video clips serves as the basis for them being arrested for breach of the peace." Haddad Trial Tr. 149:20–24, ECF No. 41-3. When shown the video of Williams' encounter with the Plaintiffs, Mrowka testifed that the incident was *not* the basis of the arrests. Mrowka Trial Tr. 204:16–21, ECF No. 41-4.

DISCUSSION

I. Are Plaintiffs' Claims That the City Defendants Lacked Probable Cause to Arrest Precluded?

A. Legal Standard

Federal courts turn to state law to determine the preclusive effect of a prior ruling from that state. *Ohio ex rel. Boggs v. City of Cleveland*, 655 F.3d 516, 519 (6th Cir. 2011). In Michigan, a prior ruling is entitled to preclusive effect under the following conditions:

> (1) A question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment;
>
> (2) The same parties . . . had a full [and fair] opportunity to litigate the issue; and
>
> (3) Mutuality of estoppel.

Gilbert v. Ferry, 413 F.3d 578, 580–81 (6th Cir. 2005) (quoting *Monat v. State Farm Ins. Co.*, 469 Mich. 679, 681 (2004)). When collateral estoppel is asserted defensively, as the City Defendants have done here, the mutuality element drops out. *Id.*

The City Defendants rely on the longstanding rule that when criminal defendants avail themselves of an opportunity to contest probable cause in a preliminary examination, that proceeding is generally given preclusive effect. *See, e.g.*, *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987) (“[W]here the state affords an opportunity for an accused to contest probable cause at a preliminary hearing and the accused does so, a finding of probable cause by the examining magistrate or state judge should foreclose relitigation of

that finding in a subsequent § 1983 action."), *overruled on other grounds*, *Frantz v. Vill. of Bradford*, 245 F.3d 869 (6th Cir. 2002) . Plaintiffs attack this argument in two ways. First, they argue that the Sixth Circuit does permit relitigation of a probable cause determination when the veracity, rather than the sufficiency, of the assertions that supported the state court's finding are challenged. Second, they claim that the pretrial proceeding in state court is not entitled to preclusive consequences because it was not a "full and fair" adjudication of the issue.

B. Plaintiffs' Complaint Plausibly Attacked Veracity of Police Statements

Plaintiffs' first argument is derived from *Darrah v. City of Oak Park*, 255 F.3d 301 (6th Cir. 2001). In *Darrah*, a police officer arrested a protestor after an officer claimed he witnessed the protestor tugging on his gun belt while he performing crowd control at a union protest. *Darrah*, 255 F.3d at 304. The trial court determined there was probable cause to try her on charges of obstructing a police officer, but a jury acquitted her. *Id.* at 305. She sued the city in federal court for malicious prosecution. *Id.* The city successfully convinced the district court to dismiss the claim on collateral estoppel grounds, pursuant to *Coogan*, but the Sixth Circuit reversed. The panel ruled that issue preclusion did not apply because the plaintiff was arguing that "the officers misstated material facts in order to establish probable cause at the state level," which was distinguishable from merely contesting "whether probable cause exists." *Id.* at 311. The rule has been reaffirmed in numerous subsequent cases. *See, e.g.*, *Sykes v. Anderson*, 625 F.3d 294, 301–02, 310–311, & n.8 (6th Cir. 2010) (denying preclusive effect to state probable cause determination because defendant police officers' stated grounds for arresting plaintiffs for robbery contained "several flagrant misrepresentations, exaggerations, and omissions of evidence" of their own making); *Hinchman v. Moore*, 312 F.3d 198, 203 (6th Cir. 2002)

(permitting relitigation of state court's determination that police had probable cause to arrest her in dispute where defendant police officers claimed plaintiff assaulted them with her automobile, while plaintiff denied any wrongdoing).

The Court finds that *Darrah* applies in this case, as well. Had the Plaintiffs accused the City Defendants of doing nothing more than acting on a good-faith tip from a security guard that was subsequently proven false, the Court might reach a different conclusion. But Plaintiffs allege here more than innocent mistakes. They claim to have direct evidence that the DPD was at least aware of a plot by Festival personnel to drum up grounds for "get[ting] rid of" the Plaintiffs. Compl. ¶ 171–175 (claiming that George Saieg and Charles Neusch overheard comments by Festival organizers who wished to arrest Plaintiffs, and called the police to complain, only to be rebuffed). It is a reasonable inference from their allegation that the Defendants knew Williams' complaint was pretextual. Therefore, Plaintiffs have met their pleading burden at this stage of the case.[7] The indirect evidence of this conspiracy that was developed in state court and is already a part of the record in this case — including the videos and the testimony given by DPD officers at their trial — elevates their accusations above the threshold of plausibility required to survive a Civil Rule 12(c) challenge. The Court concludes the collateral estoppel bar that would typically prevent Plaintiffs' claims from moving forward does not stand in their way in this case.

C. State District Court's Determination Was Not "Full and Fair"

It would be sufficient for the Court to stop here, since *Darrah* is the law of the circuit and resolves the question presented. Nonetheless, the Court observes that application of

[7] The City Defendants' reliance on *Peet v. City of Detroit*, 502 F.3d 557 (6th Cir. 2007) is misplaced because that case arose in the summary judgment context. After discovery, this Court, too, may conclude that Plaintiffs "[have] not shown that the state judge relied on false information to determine that probable cause existed." *Peet* 502 F.3d at 566. But at this stage, the Court must accept the Plaintiffs' well-pled allegations as true.

Darrah is particularly appropriate in *this* case. Some Sixth Circuit opinions criticize *Darrah* on the grounds that it allows plaintiff to take "a second bite at the probable-cause apple, a result that is diametrically opposed to the collateral-estoppel concept." *Hinchman*, 312 F.3d at 203. This criticism — which is not without force — is largely based on the presumption that the criminal defendant will be afforded an opportunity to attack the credibility of complaining witnesses in the preliminary examination. *Id.* (noting the problems with permitting relitigation of probable cause when plaintiff "was free to cross-examine the two defendants and to take the stand herself in an effort to discredit their testimony" at her preliminary hearing).

But Plaintiffs were not afforded such an opportunity in this case. The district judge appears to have presumed the police reports submitted were truthful, and staked his probable cause determination on that presumption. Plaintiffs had no opportunity to either cross-examine the officers or take the stand themselves to contest the reports. Moreover, the district judge ruled that these reports gave rise to probable cause "with or without the video and audio recordings proffered by the defense." State Court Order at 6. It is a fair inference from this comment that the district court judge did not consider the relevant videos in making his determination of probable cause.

In this sense, Plaintiffs' second argument — that they were not accorded a "full and fair" opportunity to litigate probable cause in the district court — more precisely describes why their first argument is meritorious. Federal courts "should look to the factors set forth in the [Second Restatement of Judgments]" to determine whether a prior Michigan proceeding was a "full and fair" adjudication of an issue. *Monat*, 469 Mich. at 685 n.2 (listing these factors). The Restatement takes into account, among other things, a party's inability to appeal the decision, differences in the quality or extensiveness of the procedures

that would be used in the subsequent proceeding, and "[o]ther compelling circumstances" that may make relitigation appropriate. *Id.*

The hearing conducted in the state district court was not a "preliminary hearing" like the one the Sixth Circuit addressed in *Coogan*. The district court had no duty to "examine the complainant and the witnesses in support of the prosecution, on oath," as is required when probable cause for a felony arrest is being challenged. Mich. Comp. Laws § 766.4. Therefore, Plaintiffs lacked the ability to undermine the evidence that supported their arrest. Moreover, Plaintiffs had no right to appeal the district court's ruling on probable cause prior to trial. Finally, the district court was inattentive to the effect Plaintiffs' claims of First Amendment protection might have on the probable cause determination. State Court Order at 6 ("Whether the content of the defendants' speech at any given time is . . . relevant . . . is not an issue the court is required to pass upon at this juncture . . . ."). The Sixth Circuit has warned on previous occasions that Michigan's "breach of peace" statute is prone to such abuse. *See Leonard v. Robinson*, 477 F.3d 347, 360–61 (6th Cir. 2007) (rejecting district court's dismissal of § 1983 false imprisonment claims because there was a material question of fact as to whether plaintiff was merely engaging in protected First Amendment activity, as opposed to creating a threat to public safety, when he was arrested under Michigan's "breach of peace" statute at a public meeting). Accordingly, the Court will deny the City Defendants' motion for the Court to give preclusive effect to the district court's probable cause determination.

II. City Defendants' Other Contentions

Plaintiffs' Fourth Amendment claims for false imprisonment, malicious prosecution, and illegal seizure of their video equipment, as well as their claims of a conspiracy to violate their civil rights under § 1983, are all predicated on findings that there was no probable

cause to arrest them. The Defendants moved to dismiss these claims in the hopes that the Court would give preclusive effect to the state district court's probable cause ruling. They also sought qualified immunity and dismissal of the City as a defendant on the grounds that Plaintiffs could prove no underlying violation of federal constitutional rights. Because the Court finds that state district court's judgment is not to be given preclusive effect, and the City Defendants have not challenged the adequacy of Plaintiffs' complaint on any other ground, the Court will deny the motion to grant judgment on the pleadings on these claims at this time.

A final loose end remains. One of Plaintiffs' arguments in response to the City Defendants' motion was that collateral estoppel would not prevent Plaintiffs from continuing to assert their selective prosecution or enforcement claims under the Equal Protection Clause of the Fourteenth Amendment. The City Defendants opposed that argument by attacking the Plaintiffs' prima facie case of selective prosecution or enforcement instead of answering their contention that a "full and fair" resolution of probable cause would not prevent that claim from going forward. The Court expresses no opinion on whether the City Defendants are correct, but an argument in a responsive pleading was not the proper way to raise the point. The Court will deny the motion to dismiss these claims, and permit the City Defendants to reassert the arguments made in their reply brief at the summary judgment stage, when Plaintiffs will have a fuller opportunity to oppose them.

ORDER

WHEREFORE, it is hereby **ORDERED** that the City Defendants' motion for partial judgment on the pleadings or, in the alternative, motion for partial summary judgment (docket no. 36) is **DENIED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: February 7, 2012

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on February 7, 2012, by electronic and/or ordinary mail.

Carol Cohron
Case Manager