IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 20-0055

RYAN JONES,

Appellant/Plaintiff

v.

MONTANA STATE UNIVERSITY,
a Unit of the Montana University System & Subdivision of the State of Montana

Appellee/Defendant

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, Montana, The Honorable John Brown Presiding.

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ISSUES PRESENTED

Did the district court err when it ruled MSU had the discretion to ignore substantive provisions in its employment contract with Dr. Jones that required an investigation into allegations of alleged research misconduct and then terminate Dr. Jones without any meaningful investigation?

Did the district court err in holding Dr. Jones did not have a protected property interest in his summer contract of employment when that contract made clear that MSU could not terminate the contract without cause and due process?

Did the district court err in holding Dr. Jones did not have a protected liberty interest in his reputation or that MSU was privileged in statements made by its agents that were demonstrably false and led to the termination of Dr. Jones' employment?

STATEMENT OF THE CASE

Dr. Ryan Jones ("Dr. Jones") was a tenure-track professor at Montana State University-Bozeman ("MSU"). MSU terminated that employment. Dr. Jones filed claims alleging breach of contract, violation of property and liberty interests and defamation. After discovery, the district court granted summary judgment in favor of MSU. Appendix [App.] A, J_001-027. Dr. Jones timely appealed. App. B, Case Register Report [CRR] 78, J-031.

STATEMENT OF MATERIAL FACTS

The "material facts" relied upon by the district court in its Order were incomplete, overlooked material facts or mischaracterized other material facts, which when applied to the law, requires reversal of the decision.

A. MSU Hires Dr. Jones as an Assistant Research Professor and Then Promotes him to Assistant Professor – A Tenure Track Position.

1. Dr. Jones received an Appointment Letter to be an Assistant Research Professor, effective March 1, 2013, in the Department of Microbiology and Immunology ("Department") at MSU. CRR 22, Ex. A ¶ 1.

2. On April 21, 2014, MSU promoted Dr. Jones to Assistant Professor. CRR 22, Ex. A, ¶ 3 & attached Ex. B & C; App. C at J-033-38. This position was "tenurable." *Id.*

3. On May 30, 2014, MSU sent Dr. Jones a "Letter of Appointment." Ex. B to Boyer Aff. [CRR 18]; App. C, J-038. The letter advised, in part:

> 1. While an employee of *you are subject to all institutional policies and procedures governing the conduct of employees*. All relevant University policies may be accessed at http://www.montana.ed/level2/policy.html.
>
> 2. The appointment is contingent upon successful performance…
>
> 3. This appointment may be terminated *for cause* at any time.
>
> 4. This appointment expires …at the end for the term specified …. No further notice relative to non-renewal will be given.

Id. (emphasis added).

B. The Policies Incorporated into Dr. Jones' Contracts of Employment.

4. The "institutional policies and procedures" incorporated into Dr. Jones' contracts included the Board of Regent's *Policy and Procedures Manual*, [App. F, J-065]; MSU's *Interim Faculty Personnel Policies* [App. D, J-039] and the *Research Misconduct Policy.* App. E, J-56.

5. MSU's "*Interim Faculty Personnel Policies*" provide in relevant part:

200.11 TENURABLE APPOINTMENTS.

"A tenurable appointment ...may lead to ...tenure. ... The appointee remains in probationary status until the appointment is terminated or tenured.... Unless [a] ... contract ... provides to the contrary, the contract term ...shall be the academic year. Regardless of the term ...no such person has, or shall acquire, a right to reappointment for more than an academic year."

* * *

200.13 REAPPOINTMENT AND NON-REAPPOINTMENT OF PROBATIONARY FACULTY.

(A) A tenurable appointee with probationary status ... has the right to serve the specified term of the appointment and may not be discharged without cause during that term."

(B) Reappointment of probationary employees shall be at the discretion of the Employer. . . .

* * *

600.00 ETHICAL AND PROFESSIONAL STANDARDS.

600.10 STANDARDS.

The faculty **and University Administration** are responsible for assuring the highest ethical and professional standards and behavior in:

* * *

(B) *working with faculty and staff*;

* * *

(E) *preventing conflicts of interest*,

* * *

(G) *conducting research and creative activity*. (**See Research Misconduct Policy**)

(H) *adhering to standards for biosafety* . . .

600.20 INVESTIGATIONS OF COMPLAINTS OF VIOLATIONS OF STANDARDS.

Complaints of alleged breaches of these standards **shall be investigated** using the procedures set forth in the **University's Research Misconduct Policy**, as general guidelines. The procedures may be adapted as necessary to consider a specific complaint.

* * *

1000.00 SANCTIONS, SUSPENSIONS, AND TERMINATIONS.

1000.10 SANCTIONS

Any faculty member may be subject to disciplinary sanctions....

1000.20 CAUSES FOR DISCIPLINE OR DISCHARGE.

The employer may discipline or discharge employees *for just cause and with due process,* which includes ...:

* * *

(H) violation of policies . . .

1100.00: GRIEVANCE PROCEDURE

The following grievance procedures apply to …tenure-track faculty....

1100.11a Types of Grievances.

Faculty may file a grievance as follows:

(A) Grievances concerning … failure to follow university policies regarding . . . the faculty member's terms and conditions of employment.

(B) Grievances alleging misapplication of policy, procedure, standards …..

5. MSU's *Research Misconduct Policy*, App. E, J_056, was incorporated into Dr. Jones' contract as part of the *Interim Faculty Personnel Policies. Id.,* § 600.20.

6. Contrary to the district court's Order, App.J_001, p. 16, ¶ 2, MSU's *Research Misconduct Policy* broadly **"[a]pplies to any research activity undertaken by faculty or staff**." App.J_057. "*In addition* to the research itself, this policy applies to *research training or activities related to research*, or training . . . ." *Id.*, ¶ 3.a (emphasis added).

7. However defined, "[c]omplaints of alleged breaches" of the professional standards applicable to faculty outlined in § 600.10 of the *Interim Faculty Personnel Policies* **"[s]hall be investigated using the procedures set forth in the University's *Research Misconduct Policy*, as general guidelines**. The

procedures may be adopted …to consider a specific complaint." *Id.*, § 600.20, App. J_051.

8. Use of the *Research Misconduct Policy's* investigative procedures as "general guidelines" does not alter the University's policy and corresponding duty that it ***"[s]hall take all reasonable steps to ensure an impartial and unbiased research misconduct proceeding to the maximum extent practicable***." *See also*, *id. at* § 100 ("It is the policy of Montana State University-Bozeman . . . to inquire into and, ***if necessary***, ***investigate and resolve*** *promptly and* ***fairly all instances of alleged or apparent misconduct."*** *Id.*, § 100, J_057 (emphasis added).

9. Fundamental to the foregoing policy is the appointment of an impartial inquirer or investigator. § 600 of the *Research Misconduct Policy states*:

> MSU shall take *all reasonable steps to ensure an impartial and unbiased research misconduct proceeding* to the maximum extent practicable. **MSU shall select those conducting the inquiry . . . on the basis of expertise . . . and** prior to selection the RIO [Research Integrity Officer] **shall screen them for any unresolved personal, professional or financial conflicts of interest with respondent,** . . . … or others involved in the matter. *Any such conflict which a reasonable person would consider to demonstrate potential bias shall disqualify the individual from selection."*

Id., at App. J_061 (emphasis added). The subject of the investigation "may request disqualification … [for] … personal bias, lack of independence, or other basis for disqualification...." *Id.*, ¶ 2.

10. Consistent with the policy of "***ensur[ing] an impartial and unbiased***

research misconduct proceeding," "MSU will provide . . . notice to . . . the respondent[]" and opportunities to be heard at multiple phases of the process. Thereafter, the employee receives notice of the initiation of an investigation (if pursued) and the ability to comment on the draft investigative report. *Id.*, §700. In short, the target of the proceeding receives notice and an opportunity to be heard at multiple stages of the proceeding.

11. MSU recognizes these policies are designed to protect the employment and reputation of the alleged wrongdoer. *Id.*, § 500, App. J_061.

C. The Process of Becoming a Tenured Professor in the Department of Microbiology.

12. Dr. Jones' occupied a "tenure track" position in the Department. CRR 53, Ex. V. The process of becoming a tenured professor is described at pages 10-14 of Dr. Jutila's deposition, Ex. V to CRR 53. During that time, and following tenure, professors are hired on year-to-year contracts. CRR 55, Ex. V, p. 31.

13. Dr. Jutila (Dr. Jones' supervisor and Department Head) testified that during his thirty (30) years at MSU he was unaware of a single Assistant Professor being terminated before the first step of tenure review. CRR 55, Ex. V. pp. 10 & 31. Dr. Jones was the first such professor. *Id.*, p. 31. *See also*, Ex. Z to CRR 53, at pp. 8-9.

D. Dr. Jones' First Performance Review and Renewal of His Contract.

14. After becoming an Assistant Professor, Dr. Jones taught classes, secured grants, published scientific papers and obtained positive reviews from his students. CRR 22, Aff. of Jones, ¶ 10.

15. In March 2015, Dr. Jones received his first review. He "met performance expectations." *Id.*, ¶ 11 & attached Ex. E.

16. MSU renewed Dr. Jones' contract with a start date of August 16, 2015 and an end date of May 15, 2016. Boyer Aff., CRR 18, ¶ 7 & Ex. D.

E. Dr. Jones Receives a Grant to Study Insects In Peru. Kirk Lubick, Director of the ORC, Advises Dr. Jones to Complete and Update His Biosafety Protocols and He Would "Help [him] Through The Process."

17. In December, 2015, Dr. Jones received a grant to study the bacteria of insects that spread disease in Peru. Ex. AD to CRR 53. His past work in Peru, involving collection and exportation of insects did not require permits. CRR 22, Ex. A, ¶ 23.

18. Kirk Lubick, Director of the ORC and MSU's Biosafety Officer, congratulated Dr. Jones and advised that "because of the nature of your research you will need to complete a biosafety protocol." Ex. 4 to CRR 55, copy attached as App. J_067. Dr. Jones asked what part of his work required biosafety protocol, as everything he collects was immediately killed. App. J_068. After a discussion with Mr. Lubick, Dr. Jones said "Thanks for the phone conversation, Kirk. I thought

this was all just for the laboratory component. Id. at J_67. Lubick responded: "I am happy to help you through the process." *Id.*

19. Dr. Jones finalized his plans to go to Peru in late February, and those Travel plans were approved by Dr. Jutila. Dr. Jones submitted his biosafety protocols to Mr. Lubick and the ORC. CRR 53, Ex. A, ¶ 24.

20. On February 25, 2016, the day before his departure to Peru, Lubick and Elizabeth Nicholas, also with the ORC, advised Dr. Jones that his previously submitted protocols needed to be "updated prior to leaving for [his] trip." Ex. W to CRR 53, p. 5; App. J_070. "[I]f I can get it by tomorrow at the very latest, I would appreciate it." *Id.* (emphasis added). She did not advise Dr. Jones that his updated protocols required approval by the biosafety committee before he left for Peru. *Id.*

21. Lubick responded to the same email: "Hi Ryan, If you have a few minutes today, I can stop by and we can work on this together to save time." *Id.*

22. Dr. Jones provided some of the requested information to Lubick, confirming that his graduate student who was traveling with him had completed his biosafety training. App J-073, Ex. AB to CRR 55. Lubick acknowledged receipt of the updated information and stated: "**Thanks Ryan. Have fun on your adventure.**" *Id.* (emphasis added).

23. Later that night, Dr. Jones supplied the remainder of the requested updates and left for Peru the next day with the knowledge and consent of the ORC

and its director, Mr. Lubick. *Id.* On this critical issue, and before Dr. Jones located Mr. Lubick's "Have fun on your adventure email," (which was never produced by MSU in discovery) Lubick testified:

> Q. [I]see on February 25th, Dr. Jones tells Elizabeth [with ORC] that he's planning on updating his protocol and … leaving the next day. . . for a five -week trip . . . . Do you see that?
>
> A. [LUBICK] Yes.
>
> Q. [Y]ou were copied on [Nicholas'] email … to Dr. Jones, saying:
>
> Ryan, I realize there's a lot to get done prior to leaving for five weeks. However your protocol must be updated prior to leaving for your trip. …
>
> Q. Is that a fair summary of what she said?
>
> A. Correct.
>
> Q. [S]he didn't tell him that he couldn't go . . . to Peru if he updated his protocol, even though it hadn't been reviewed; correct?
>
> A. Correct.
>
> Q. [Y]ou responded . . . five minutes later. . .: If you have a few minutes, I can stop by and we can work on this together to save time. Is that right?
>
> A. Yes.
>
> Q. [Y]ou didn't tell him he couldn't go to Peru the next day, even if the protocols hadn't been updated, correct?
>
> A. Correct.
>
> Q. And, in fact, he did get you his updated protocols . . . before he left for Peru.

A. I can't recall.

Q. **[I]n any event, there's nothing in there indicating that he had any knowledge that he couldn't go to Peru once the protocols were updated**?

A. **Correct**.

* * *

Q. **And I don't see any writing to Ryan advising him [don't start any work until its [protocol] been approved] in this case. Are you aware of any such instruction to him**?

A. **In these emails, no.**

Q. Do you recall telling him orally?

A. I don't know.

Lubick Depo. Ex. W to CRR 53 (emphasis added).

24. Lubick conceded no "alarm bells went off" in his head, from a bio-safety standpoint when Dr. Jones left for Peru with his blessing, but not that of the biosafety committee. CRR 55, Ex. W, p. 100. Dr. Walk, a colleague of Dr. Jones, testified if approved protocols were an issue, someone should have told Dr. Jones before he left for Peru. CRR 53, Ex. AA at pp. 21-22. However, Lubick, the Director of the ORC authorized his departure.

F. The IBC Rejects the Updated Protocol Submitted With Lubick's Help. Administration Appoints Lubick Who Prepares an Incomplete Report Casting Blame Solely On Dr. Jones Which Ultimately Leads to Dr. Jones' Termination on The Basis of Misinformation Provided By Lubick and Without Notice or An Opportunity to Be Heard.

25. On March 3, 2016, while Dr. Jones was in the jungle of Peru collecting insects, the biosafety committee rejected the updated protocol submitted by Dr. Jones (approved by Lubick). CRR 22, Ex. A, ¶ 26.

26. This led to the allegation that Dr. Jones breached research and professional standards § 600.10(G) (conducting research) and § 600.10(H) (adhering to standards for biosafety) set forth in the *Interim Faculty Personnel Policies*.

27. The allegations flowing from the Committee's rejection of the updated protocols triggered § 600.20 of the Interim Faculty Personnel Policies which requires investigations of alleged breaches of professional standards using the procedures set forth in the University's *Research Misconduct Policy*, as general guidelines. *See*, App. J_051, § 600.10; § 600.20.

28. Upon receipt of the allegation, Vice President Pera appointed Lubick to investigate Dr. Jones' departure to Peru without approved protocols and report back to President Cruzado and herself. CRR 53, Ex. W at pp. 100-106 & Ex. 11. Lubick at no time advised Pera or Cruzado that he authorized Dr. Jones' updated protocols and told him "to have fun on his adventure."

29. As Lubick and his office instructed Dr. Jones only that he needed to update his protocols before he left for Peru, assisted him with that process, approved the updated protocols, and then told him to "have fund on [his] adventure," Lubick had a conflict of interest. Contrary to the standards set forth in the Research

Misconduct Policy, § 600.10(E) of the *Interim Faculty Procedures*, Lubick was neither impartial or unbiased, and his subsequent actions demonstrated that conclusion – a material fact not mentioned by the district court.

30. On March 7, 2016, Lubick wrote to Cruzado and Pera to "[i]nform [them] of the events that led to the Institutional Biosafety Committee's (IBC) decision to . . . withhold approval of Dr. . . Jones' IBC protocol for his research . . . in Peru." App.J-077, ¶ 1. Lubick recounted a chronology starting in December 2015. He acknowledged Dr. Jones submitted his protocols on February 8, 2016 and "a preliminary biosafety review was conducted and sent to Dr. Jones on February 19, 2016." *Id.*, ¶ 3. He advised that Dr. Jones submitted an updated protocol on February 25 which was reviewed by the IBC on March 2. *Id.*, ¶ 4. The balance of his letter made no mention of the following facts, creating a false conclusion, all to cover his own rear end:

a. That he and his office (ORC) advised Dr. Jones on February 25 only that his "[p]rotocol must be **updated** prior to leaving for your trip;

b. That neither he or his office (ORC) ever advised Dr. Jones he couldn't go to Peru until the IBC reviewed and approved the updated protocols;

c. That he and his office (ORC) actively participated in the helping Dr. Jones update the protocols before Dr. Jones left for Peru;

d. That he and his office (ORC) accepted the updated protocols (described in March 7 letter to be "flippant" by a member of the IBC); or

e. That Lubick, as Director of ORC, upon receipt of the "flippant" protocols updated with his participation, told Dr. Jones to "have fun on [his] adventure."

31. Lubick also lied. In ¶ 2 of his letter, Lubick states: "[I]t was clearly communicated that IBC approval must be obtained for the proposed work." *Id.* The foregoing paragraph, and Lubick's testimony set forth in ¶ 23, *supra*, show this is false. His assertion in ¶ 4 of the March 7 letter that Dr. Jones was advised that his protocol would be reviewed by the IBC on March 3, and that all corrections needed to be addressed by February 25 makes no chronological sense and is inconsistent with his email to Dr. Jones that his protocols only needed to be updated by February 25, before his scheduled departure the next day.

32. Nevertheless, the district court concluded, in error, that Lubick's "[s]tatements concerning Dr. Jones' compliance with biosafety regulations certainly appear to be objectively accurate and far from disgracing. . . ." Order, App. J_025, p. 25, ¶ 2.

33. The foregoing material facts, and others were not shared by Lubick with those who later contributed to or made the decision to terminate Dr. Jones, including Dr. Potvin, who admitted she was unaware of the foregoing evidence and emails between Dr. Jones, Lubick and the ORC before she terminated his employment. *See*, CRR 53, Ex. Y at pp. 27-33.

34. Similarly, Dr. Jutila, the head of Dr. Jones' Department, who was also involved in the process leading to Dr. Jones' termination, was unaware of the foregoing evidence and email threads. CRR 53, Ex. V, p. 67.

35. Another material fact not mentioned by the district court, is that Dr. Jutila testified that he did not tell Dr. Jones that he needed the approval of his protocols in advance of his trip and that he admitted approving Dr. Jones' travel plans without biosafety approval of protocols. Erroneous assumptions by Dr. Pera and Dr. Potvin, about compliance with MSU's travel policies, which Dr. Jones also received no notice of, or an opportunity to be heard, also contributed to MSU's decision to terminate. CRR 53, Ex. Y, pp. 40-43; Ex. X, pp. 135-137.

36. The impact of Lubick's demonstrably false and inflammatory formation about Dr. Jones' departure circulated in the Department and formed the basis for his subsequent termination. For example, in an email from Dr. Potvin to Drs. Rae, Boyer and Jutila, she mistakenly alleged that as early as March 7, 2016, Dr. Jones "knew he needed the approvals in advance of the trip." CRR 53, Ex. Y, pp. 139-140. That is false, was never corrected by Lubick, and further evidence that the district court's conclusion that Lubick's statements were objectively accurate, was plain error.

37. Dr. Jutila did not contact Dr. Jones and advise him of the serious

allegations against him, nor did he advocate for determining what the facts actually were before taking action against Dr. Jones. *Id.*, pp. 141-143.

38. Dr. Boyer, one of Dr. Jones' supervisors, testified that if the allegations against Dr. Jones involved research misconduct, the *Research Misconduct Policy* applied. CRR 53, Ex. U, p. 91. Dr. Jutila testified this was a research issue. CRR 53, Ex. V, pp. 192-195, 202-204, 212-221. Dr. Pera believed the allegation against Dr. Jones was a violation of research policies. CRR 53, Ex. X at 115.

39. Dr. Boyer testified that he [Boyer] was unaware of any standards that governed Lubick's subsequent inquiry or investigation of Dr. Jones. CRR 53, Ex. U at pp. 56-57. He admitted it was unclear who among the administration was doing what, as it concerned Dr. Jones and the allegations of research misconduct. *Id.* at pp. 73-74.

40. As stated, MSU did not invoke its *Research Misconduct Policy* in response to the allegations against Dr. Jones, nor use it as a guideline. Instead, it tasked Lubick (who had a clear conflict of interest) with conducting the inquiry into why Dr. Jones left without approved protocols. Lubick later recommended following the Research Misconduct Policy, but that failed.

41. There is no evidence that Lubick advised Dr. Potvin, Dr. Pera, Dr. Jutila, Dr. Boyer and others, the substance of his and Ms. Nicholas's email communications with Dr. Jones in February, ¶ 23, *supra*, or that neither he or Ms.

Nicholas ever told Dr. Jones he could not travel to Peru and undertake his research without an approved protocol, but instead that he only needed to update those protocols before he left, which Dr. Jones did. *See*, CRR 53, Ex. V, p. 56 (Unaware that that no one told Dr. Jones he couldn't go to Peru without an approved protocol); CRR 53, Ex. W, pp. 77-80 (nothing indicating that Dr. Jones had any knowledge that he couldn't go to Peru once the protocols were updated (but still unapproved)); CRR 53, Ex. Y, pp. 29-33 (had not seen emails between ORC and Dr. Jones before Jones' departure for Peru). Again, material facts not mentioned by the district court as evidenced by its conclusion that Lubick's statements were "objectively accurate."

42. MSU thus failed to follow the most basic requirement of the Research Misconduct Policy (§ 600) and of fundamental due process: appointment an impartial inquirer or investigator, as Lubick was personally responsible for Dr. Jones leaving for Peru without approved protocols and never told anyone that fact.

43. MSU also failed to provide Dr. Jones with written notification of the results of Lubick's inquiry/investigation, another fundamental requirement of the *Research Misconduct Policy.* App. J_056, § 700.00. Nor did MSU provide Dr. Jones an opportunity to comment on Lubick's March 7 letter, as he never saw it. CR 53, Ex. Y, pp. 79-82. Nor was he interviewed by MSU as set forth in § 700.00.5, or allowed to review and comment on any subsequent letters that may qualify as investigative reports. *Id.* Since he was not allowed to review and comment on any

draft reports, his responses to the allegations could not have been provided to Dr. Potvin (or any other supervisor), as she admitted, before she terminated his employment.

44. The University's actions continued over the next several months with Lubick leading the charge and he never disclosed the truth. Dr. Jutila admitted he was unaware of Dr. Jones being provided an opportunity to rebut any of the charges against him before he was fired in June, 2016, although he concluded that providing Dr. Jones the chance to respond "might have been informative," but "[I] didn't pursue it." CRR 53, Ex. V, p. 175.

45. Dr. Jones was admittedly frustrated when he learned, for the first time while in Peru, that he could not conduct his research. However, upon his return the U.S., contrary to the selective evidence in the district court's Order, he substantially cooperated with the University, and material issues of fact existed on whether that cooperation was made known or accurately portrayed to his supervisors, as evidenced by the district court's finding, otherwise. CRR 53, Ex. U, pp. 72-75; Ex. V, pp. 150-152; Ex. Y, pp. 62-69.

46. Dr. Jones was evaluated by Dr. Jutila on April 13, 2016. That review stated that Dr. Jones met expectations (plus) of the University. App. J_084; Ex. 55 to CRR 53; CRR 53, Ex. Y, pp. 86-87. Under the heading "Additional Performance Issues," it stated: It is an expectation of all faculty that they follow required policies,

as a requirement of their position. The recent IBC issue concerning your research in Peru and any subsequent follow-up investigation will be of relevance to your review in 2016, but it did originate in 2015." *Id.*, at J_085 This review clearly advised Dr. Jones' that his job was not in immediate jeopardy, but the IBC issue would be subject to a future investigation and discussed the following year. Both statements were false.

47. In fact, prior to the April 13, 2016 review discussed in ¶ 46, Dr. Potvin and Dr. Jutila discussed providing Dr. Jones with a different evaluation. *See* App J_082; CRR 53, Exhibit AC. This draft evaluation, which was not shared with Dr. Jones and learned of only through discovery, stated in relevant part: "The recent disregard for following compliance requirements for conducting research, *which cannot be attributed to a lack of understanding of policy* is particularly egregious . . . ." *Id.* (emphasis added).

48. There was no disregard of policy and Dr. Jones did understand the policy, having been told by Lubick, the Director of the ORC, he only needed to update his protocols before leaving for Peru, which he did. This is, again, further evidence that the district court's conclusion that Lubick's statements, which flowed through to Administration, were NOT objectively accurate.

49. MSU elected not to discuss the draft review discussed in ¶ 47, supra, with Dr. Jones, which would have sparked a clarifying response by Dr. Jones (i.e.

the Director of Research Compliance approved the updated protocols and said "have fun on your adventure"). Instead, the University led Dr. Jones to believe that while the protocol issue would be discussed in the following annual review, after an investigation, his job was secure and he had improved from the year before, and thus "met expectations." *Id.*

50. In sum, the 2016 review objectively implied that he would continue to be employed and gave no indication his job was in jeopardy. CRR 53, Ex. Y, pp. 87-88; *Cf.*, CRR 53 Ex. V, pp. 178-85. The document itself discusses the possibility of an investigation by the university of the protocol issue, which would be addressed one year later, and as Dr. Potvin acknowledged, Dr. Jones was not advised of the existence or substance of the investigation that was ongoing and he was not given an opportunity to respond to any investigation prior to May, 2016, when Dr. Potvin advised Dr. Jones he was terminated, pursuant to the non-renewal provision of the policies applicable to his job. *Id.*, pp. 88-89.

51. Upon his return to the United States after learning the IBC rejected his updated protocols, Dr. Jones was advised that he needed to meet three (3) requirements to bring his research into compliance with University policies. Dr. Jones met all three requirements long before he was terminated. *See*, ¶ 52, below.

52. As stated, Boyer and Jutila thought the allegations against Dr. Jones were research issues, and that Dr. Jones fully complied with the requirements of the

Research Department following his return to the United States. CRR 53, Ex. U, pp. 72, 74-75, 77-80; Ex. V., pp. 56, 178-185, 192-193, 202-204; Ex. W, pp. 112-114, 126-132, 147, 151-154; Ex. C, pp. 125-127, 142-143; Ex. Y, pp. 61-65.

53. Dr. Boyer testified he believed Dr. Jones should have been given notice and an opportunity to be heard, and he didn't know why MSU "dropped the ball," as it was the "normal course[] to provide notice and an opportunity to be heard before adverse employment action. CRR 53, Ex. V, p. 63; Ex. Z, pp. 14-15; *Cf.* Ex. X at pp. 47-49 (MSU should follow its policies regarding employment); CRR, Ex. AA pp. 12, 25-27.

54. On May 10, 2016, Dr. Boyer and Dr. Jutila signed another contract for Dr. Jones' to teach during the 2016 summer session. CRR 18, Ex. E.

55. Mr. Lubick was then tasked with complying all documents concerning this matter and presenting it to various individuals, including Potvin, Pera, Jutila and Boyer.

56. Prior to undertaking this last task, Lubick recommended that the University implement the investigative procedures in the *Research Misconduct Policy*, which did not occur. CRR 53, Ex. W, pp. 45-51. He provided another summary with attached emails but again failed to provide the critical emails between himself, his office and Dr. Jones as set forth in ¶¶ 20-24, above, or advise Administration that the root of the issue stemmed from his instruction to Dr. Jones

to (1) update the protocols before leaving; (2) that he helped update those protocols; (3) accepted those protocols and told him to have fun on his trip; and (4) never told him, even though he was the Director of Research Compliance, IBC approval was required before leaving for Peru.

57. Based solely upon the work of Mr. Lubick, on May 25, 2016, Martha Potvin, Provost at MSU, drafted a letter providing "official notification that effective May 31, 2016, you [Dr. Jones] are being **terminated** within the probationary period. This action is taken pursuant to Policy 200.13 (B) of the Interim Faculty Personnel Policies of the Montana State University Personnel Policies." App. J_094. Dr. Jones was "relieved of [his] duties and responsibilities, effective immediately."

58. Dr. Boyer hand-delivered the letter to Dr. Jones. No reason for termination is provided in the letter.

59. At the time of his termination, Dr. Jones was employed under a contract for the summer session. CRR 63, As such he could be terminated only for cause, which required notice and an opportunity to be heard before termination under that contract. *Interim Faculty Personnel Policies*, § 200.13(a); and § 1000.20 (The employer may discipline or discharge employees for just cause and with due process [for] . . . violation of policies, failure to carry out responsibilities of a faculty member"). Contrary to the district court's order, *id.* at p. 5, ¶ 1, Dr. Jones was not fully paid for his summer contract. CRR 63, ¶¶ 6-7.

60. The termination of his employment violated § 600.20, as the "investigation" did not remotely comply with the general guidelines of the University's *Research Misconduct Policy*. As explained below, in ¶ 62, Dr. Potvin admitted she wanted to save the University from doing and investigation. However, the policies and procedures incorporated into his contract of employment required an investigation, which included (1) an unbiased investigator; and (2) notice and the opportunity to be heard. That did not happen. MSU's conduct breached the contract.

61. Dr. Potvin admitted Dr. Jones did not receive due process before his termination or notice of non-renewal:

Q. [D]id you ever discuss with him [Jones] personally any of the facts or allegations against him that led to the termination of his employment by you in May of 2016?

A. No.

Q. Did you provide any written notice to Dr. Jones in 2016 that you were considering terminating his employment?

A. No.

Q. Did Dr. Jones have an opportunity to tell you his side of the story before you terminated his employment?

A. No.

Q. Was it your decision to terminate his employment?

A. Yes.

CRR 53, Ex. Y, pp. 7, 8.

63. Dr. Potvin conceded that MSU conducted NO investigation, let alone one that relied upon § 600.20 as "general guidelines, testifying she wanted to "save the institution from doing an investigation and Ryan having to be judged by his peers in an investigation." CRR 53, Ex. Y, pp. 18-19.

64. Termination from a tenure track position, prior to formal review, has have an adverse impact on the professor's ability to secure future employment in that field. CRR 53, Ex. Z, p. 13.

65. Dr. Jones filed a grievance with respect to the University's conduct. CRR 22, Ex. A, ¶ 56; Ex. S. He asked the hearing be open to the public. *Id.*, ¶ 57. On August 31, 2016, the chairman of the grievance informed Dr. Jones that the hearing could be open to the public if Dr. Jones waived his right to privacy. *Id.* ¶ 58.

66. MSU responded to Dr. Jones' grievance and denied the grievance, without addressing any of the fundamental facts, relying solely on the basis that he was a "probationary" employee. *Id.*, ¶ 59.

67. On December 8, 2016, at the time and place for a hearing on his grievance, MSU canceled the hearing because a *Bozeman Daily Chronicle* reporter desired to report on the proceedings. CRR 22, Ex. A, ¶ 66.

70. Dr. Jones had waived his right to privacy and desired that the hearing be public. CRR 22, A, ¶ 67. The University refused to allow the hearing to go forward.

71. The district court noted that Dr. Jones obtained employment at a higher salary. However, Dr. Jones was unemployed for nineteen (19) months and MSU's actions caused him and his family to move to another town. CRR 59, Ex. A. ¶ 30. His new employment is not within the field he devoted over ten (10) years of his life studying. *Id.* He was effectively forced from his chosen profession. *Id.*

STANDARD OF REVIEW

This Court reviews summary judgment rulings *de novo*. *Davis v. Westphal*, 2017 MT 276, ¶9, 389 Mont. 251, 405 P.3d 73. Summary judgment is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). Material issues of fact are identified by looking to the substantive law that governs the claim. *Rosenthal v. County of Madison,* 2007 MT 277, ¶22, 339 Mont. 419, 170 P.3d 493. Whether a genuine issue of material fact exists or whether a party is entitled to judgment as a matter of law are conclusions of law subject to *de novo* review for correctness. *Davis,* ¶9.

Where the movant meets its burden of showing no genuine issues of material fact exist, the opposing party bears the burden of establishing an issue of material

fact. *Rosenthal,* ¶22. Disputed facts are material if they involve the elements of the cause of action or defense at issue to an extent that necessitates resolution of the issue by a trier of fact. *Motarie v. Northern Montana Joint Refuse Disposal Dist.,* (1995) 274 Mont. 239, 242, 907 P.2d 154, 156. The facts must be material, of a substantial nature, and not fanciful, frivolous, or conjectural. *Id.* All reasonable inferences are drawn in favor of the party opposing summary judgment. *Rosenthal,* ¶22; *Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, ¶15, 323 Mont. 295, 100 P.3d 137.

The construction or interpretation of a contract is a question of law. *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 33, 392 Mont. 139, ___ P.3d ___. Courts must give effect to the manifest intent of the parties as it existed at the time of contract formation. *Krajacich v. Great Falls Clinic, LP*, 2012 MT 82, ¶ 13, 364 Mont. 455, 276 P.3d 922. Whether an ambiguity exists in a contract presents a question of law. *Eschenbacher v. Anderson,* 2001 MT 206, P 21, 306 Mont. 321, P 21, 34 P.3d 87, P 21. "An ambiguity exists where the language of a contract, as a whole, reasonably is subject to two different interpretations." *Wurl v. Polson Sch. Dist. No. 23,* 2006 MT 8, ¶ 17, 330 Mont. 282, 127 P.3d 436.

If a contract is found to be ambiguous, it is to be interpreted "most strongly" against the party who drafted it. *Eschenbacher,* ¶24. "When a contract term is

ambiguous, interpretation of the term involves determining a question of fact regarding the intent of the parties to the contract." *Wurl*, ¶17.

Whether conduct by a party amounts to a material breach of the contract is a fact question, not suitable for summary judgment. 11 *Moore's Federal Practice*, § 56.25[1][a].

SUMMARY OF ARGUMENT

MSU terminated Dr. Ryan Jones' ("Dr. Jones") employment as a tenure-track professor. His employment was governed by a series of one-year contracts. Those contracts incorporated policies promulgated by MSU and the Board of Regent for investigating allegations of violating professional standards, conducting research and adhering to biosafety standards.

MSU alleged Dr. Jones violated professional, research and biosafety standards by traveling to Peru to gather insects before his updated protocols for that research were approved by MSU's Biosafety Committee. The uncontested material facts make clear, however, that MSU's Office of Research Compliance ("ORC") and its Director, Kirk Lubick, specifically advised Dr. Jones that he only needed to update his protocols through the ORC before traveling to Peru. The same facts make clear that ORC and Lubick helped Dr. Jones update those protocols, knowing he was leaving for Peru the next day, and told him to "have fun on [his] adventure." At no

point did Lubick or the ORC advise Dr. Jones he could not travel to Peru until updated protocols were formally approved by the Biosafety Committee.

When the University's biosafety committee (IBC) met several days after Dr. Jones left for Peru with the ORC's blessing, it rejected the updated protocols. Because Dr. Jones was, at that time, collecting insects in Peru without protocols approved by the IBC, it alleged Dr. Jones violated University standards. It instructed Lubick to inquire and report to Administration.

Lubick prepared a self-serving, incomplete and disparaging report that accused Dr. Jones of knowingly violating University standards by traveling to Peru without approved protocols. This was demonstrably false. It harmed Dr. Jones' reputation and led to his termination. The material facts made clear that Lubick failed to advise the administrative that (1) his office (ORC) told Dr. Jones he needed to only update his protocols before traveling to Peru; (2) his office never advised Dr. Jones that he needed biosafety committee approval before traveling to Peru; (3) he (Lubick) and ORC worked closely with and accepted Dr. Jones' updated protocols knowing he was leaving for Peru the next day; and (4) once in receipt of updated protocols, he told Dr. Jones to "have fun on [his] adventure."

From this foundation built upon Lubick's self-serving inquiry, deceit and non-disclosure, MSU terminated Dr. Jones' employment by terminating his summer contract of employment in mid-stream and not renewing his contract for the next

academic year. Discovery established the Administration did not know the role of Lubick and his office, as summarized above, in Dr. Jones' decision to go to Peru with updated protocols accepted by the ORC, but not yet approved by the IBC.

MSU breached the contract of employment when it failed to follow any semblance of its own contract when investigating the alleged breaches of professional and research standards, by failing to appoint an impartial investigator and failing to provide and notice and an opportunity to be heard before terminating his contract and, in the process, impaired his liberty and property interest in his summer contract by discharging him without notice or cause and in the process Mr. Lubick knowingly published false statements about Dr. Jones which were the reason for his termination.

Whether MSU's conduct breached the contract was a material issue of fact as was whether it violated his property interest in his summary contract by terminating him without notice or an opportunity to be heard. Also, contested issues of fact exist whether Lubick's statements which led to Dr. Jones' termination were privileged.

ARGUMENT

I. Material Issues of Fact Precluded Summary Judgment on Dr. Jones' Breach of Contract Claim.

Dr. Jones alleged that MSU breached his written contract of employment. Dr. Jones acknowledged he was employed by MSU under a one-year written contract of employment, supplemented by summer contracts of employment. However,

included within the terms of the contracts are the "*Interim Faculty Personnel Policies*" and MSU's "*Research Misconduct Policy,*" which applied to Dr. Jones and MSU. MSU failed to follow those policies before it terminated his employment. Therefore, as MSU failed to follow the contract, whether its conduct was a material breach of that contract, constituted a question of fact precluding entry of judgment on his breach of contract claim.

The district court, however, concluded that because Dr. Jones was hired under a one-year contract it was not required to follow the policies and procedures in the employment contract. Instead, the district court ruled that MSU had the discretion to simply not renew his contract, citing *Farris v. Hutchinson,* 254 Mont. 334, 838 P.2d 374 (1992), *Taley v. Flathead Valley Community College,* 259 Mont. 479, 857 P.2d 701 (1993). The district court's theory renders illusory the terms and conditions of the contracts and was in error.

In this case, and unlike the cases relied upon by the district court and MSU, we have incorporated by reference into the employment contract the "*Interim Faculty Personnel Policies*" and MSU's "*Research Misconduct Policy*" which informs the analysis of Dr. Jones' breach of contract claim. In addition, Dr. Jones was terminated during his summer contract and the policies and procedures require good cause and due process before a tenure track employee can be terminated during the course of his or her contract *Id.* at p. 3 (§ 200.13(A) (emphasis added).

Dr. Jones's employment was governed by a written contract of employment. The meaning of that contract, and whether MSU's conduct in investigating and terminating (or not renewing) Dr. Jones amounted to a "material breach" of the contract is in dispute and properly subject to jury review and determination.

MSU claims, and the district court found, that under the contract MSU can simply not renew Dr. Jones' contract with impunity. Dr. Jones argued that because the contract of employment incorporated by reference the *Interim Faculty Personnel Policies,* which in turn incorporated the *Research Misconduct Policies,* where (as here) there is an allegation of professional or research misconduct, before MSU may terminate, or not renew a contract based upon the allegations of misconduct, its decision must be informed by following the policies and procedures of the contract and if it did not, it (MSU) was (or may be) in material breach of the contract.

The first issue is the role of the *Interim Faculty Personnel* and *Research Misconduct Policies.* In *Wurl*, 2006 MT 8, 330 Mont. 282, 127 P.3d 436, this Court addressed a similar issue. There a school district employee's employment was governed by a written contract of one (1) year. *Id.*, ¶ 3. The contract, in turn, referred to a Master Agreement ("MA"). The parties disagreed on whether the employment contract incorporated the entirety of the MA by reference. *Id.*, ¶¶ 6, 7.

After discussing the standards of construction, set forth above, the Court concluded that the employment contract's language was clear and unambiguous and,

therefore, involved question of law rather than fact. It held, as a matter of law, that the MA was part of the contract of employment:

> [T]hus, the employment contract provides that, by signing the contract, Wurl assented to . . . all "other provisions" of the [Master Agreement] ....
>
> "In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Section 1-4-101, MCA. The employment contract clearly states that Wurl assented to "other provisions" of the MA. The phrase "other provisions" is not modified by any language limiting which MA provisions are included. . . .
>
> [W]e conclude that the employment contract clearly. . . incorporated the entirety of the MA--including the MA provisions relating to termination procedures--by reference. As a result, we further conclude that the District Court erred in granting summary judgment to the School District based on its conclusion that Wurl's employment with the School District was not governed by the MA.

Id., ¶¶ 19-21 (emphasis added).

Here, Dr. Jones' contract clearly and unambiguously incorporated the entirety of the *Interim Faculty Personnel Policies*. The University sent a "Letter of Appointment" to Dr. Jones for the position of Assistant Research Professor with a start date of July 1, 2014 and an end date of August 15, 2015. "The letter of hire specifies the initial terms, conditions and expectations of the position." The provisions applicable to his appointment expressly included the following:

> 1. While an employee of Montana State University, *you are subject to all institutional policies and procedures governing the conduct of employees*. All relevant University policies may be accessed at http://www.montana.ed/level2/policy.html.

See, Facts, *supra* ¶4.

The "institutional policies and procedures governing the conduct of employees" incorporates MSU's *Research Misconduct Policy*. Thus, those policies are part of Dr. Jones contract of employment and apply with to MSU. *See, Interim Faculty Personnel Policies*, § 600.10 ("The faculty and University Administration are responsible for assuring the highest ethical and professional standards and behavior in . . . working with faculty and staff . . . preventing conflicts of interest. . . ."); § 600.20 ("Complaints of alleged breaches of these standards shall be investigated using the procedures set forth in the University's Research Misconduct Policy as general guidelines. . . .")

Under § 600.10 of the *Interim Policies*, a faculty member "is responsible for assuring the highest ethical and professional standards and behavior in . . . (G) conducting research . .. (See Research Misconduct Policy) and (H) adhering to standards for bioasafety . . . ." Where, as here, a complaint alleges a breach of these standards, the policies incorporated into Dr. Jones' contract mandate MSU conduct an investigation using the *Research Misconduct Policy* as general guidelines. § 600.20. This provision of the contract is mandatory.

Here, there was a complaint made against Dr. Jones that he knowingly and intentionally failed to obtain approved protocols before leaving for Peru and thereafter engaged in research without approved protocols. These allegations

constituted alleged breaches of Sections 600.10 (G) and (H). Section 600.20 of those same policies required the University to investigate the alleged breaches "using the procedures set forth in the University's Research Misconduct Policy, as general guidelines." *Id.*, § 600.20.

MSU argued and the district court found, that notwithstanding its own contracts requiring investigations into research misconduct that use the Research Misconduct Policy as a "guideline," it retained discretion under the contract to simply ignore these sections of the contract and selectively choose what provisions of the contract it would follow. It claimed the discretion to not renew Dr. Jones' contract, even though the same contract required the University to investigate the allegations of research misconduct against Dr. Jones pursuant to the University's Research Misconduct Policy and even though the evidence makes clear, or at least material issues of fact exist, that the University terminated his employment and did not, as it claims, simply elect to not renew the contract.

While the University made limited inquiry into the allegations, a genuine issue of material facts exists whether it did so in violation of its own policies and procedures which are incorporated into Dr. Jones' contract of employment. Neither MSU nor the district court identified how MSU's investigation complied in any respect with the Research Misconduct Policy, or how it even served as a "guideline." An impartial investigator was not appointed. Dr. Jones did not see the initial report,

or any subsequent reports. He as not asked to and was never allowed to provide a response to the allegations. Dr. Potvin admitted she did not provide Dr. Jones with notice or an opportunity to be heard, as she wanted to save the University from having to do an investigation. *Material Facts, supra*, ¶ 63.

There is also uncontested evidence that the custom and practice at MSU tenure-track professors are not, absent financial reasons, terminated from their position prior to the first tenure review. In fact, Dr. Jutila testified that this is the first time in his 30 years with MSU that a professor was terminated before tenure review.

Dr. Jones' 2016 evaluation confirmed he met expectations and advised that in his next review, one year later, the issue of protocols would be considered, from which a reasonable inference can be drawn that it was not speculation that Dr. Jones would be hired for another year, At the very least it created a genuine issue of material fact which entitled Dr. Jones to have a jury decide these issues.

The language of the contract at issue states that a professor can be terminated for cause and the court concluded MSU's flawed investigation resulted in a recommendation for termination for cause. Order at 17. At the same time, the contract says that the University retains the right to not renew a contract of employment. If the University can simply release a professor accused of misconduct, what purpose is served by including as an element of the contract, a

provision that requires the University to provide the professor due process, particularly where the custom in the field is to retain professors through at least the tenure review process, absent financial exigency.

The district court concluded that even if MSU failed to properly investigate the allegations against Dr. Jones, whether the additional investigation would have altered its "discretionary decision" is speculative at best. The question is whether MSU breached the employment contract with its investigation and resulting decision to terminate for cause – a genuine issues of material fact. CRR 53, Ex. U, pp 39, 44, 56, 63-64, 91; Ex. V, pp. 81-84, 104, 140-143, 175, 178-185, 212-221; Ex. W, pp. 45-52, 145, 174; Ex. X, pp. 17, 20-21, 47-49, 52-55, 63-64, 132, 142, 195; Ex. Z, pp. 14-15; Ex. Y, pp. 7-11, 18-19, 21, 79-83, 86-88, 91-93, 95-100.

In sum, these are conflicting provisions in the same contract, coupled with the custom and practice of the University in not terminating or releasing a professor before their tenure review creates and ambiguity, whether its failure to follow the Research Misconduct Policy in light of the allegations against Dr. Jones, was a material breach of the contract, involves determining questions of fact, properly left to the jury.

Accordingly, the district court's Order granting Summary Judgment on Count I was in error and should be reversed.

II. Count II – Dr. Jones' Constitutional Claims.

The district court found that Dr. Jones could not claim a violation of his right to due process because he had only a subjective, and not an objective belief in continued employment. Order, p. 20. *See, Perry v. Sindermann*, 408 U.S. 593, 601, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Talley*, 259 Mont. 479, 486-488, 857 P.2d 701, 705-707 (1993).

The initial requirement for any due process claim is the existence, and government's deprivation of, a plaintiff's property or liberty interest. *Talley*, 259 Mont. 479, 488, 857 P.2d. 701, 706 (1993). Without such an interest, no right to due process accrues. *Id.* When a plaintiff has a property or liberty right, the Constitution requires a pre-termination hearing so that right is not "arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

Turning to Dr. Jones' summer contract of employment – not addressed by the district court -- which started on May 16, 2016 and ran through August 15, 2016, Dr. Jones had "the right to serve the specified term of the appointment and may not be discharged without cause during the that term." § 200.13(A) (emphasis added). The plain language of the contract, which incorporated MSU's policies and procedures as discussed above, established a protected property interest in his continued employment during the term of that contract.

If MSU believed it had cause to terminate Dr. Jones during the term of that contract, a fact issue for the jury, it was required to provide him with "due process" before termination of that employment: MSU "[m]ay discipline or discharge employees for just cause and with due process for various reasons, including those set forth in subsections (A) – (K). (emphasis added). Those same policies and procedures state that complaints of alleged breaches of conduct, such as the foregoing, "[s]hall be investigated using the procedures set forth in the *Research Misconduct Policy* as general guidelines." *Id.*, p. 19, § 600.20. However, MSU terminated Dr. Jones, during the term of that summer employment without due process and denied him his "right" to serve the remainder of the term of the contract.

In sum, Dr. Jones had an objectively reasonable of continuing his employment through the summer 2016 contract. His contract and incorporated policies make that clear, and he had the "right" to complete term, unless the University had "just cause" to terminate the employment, following "due process." He thus had a legitimate property interest in his employment and protection against the loss of that employment without due process.

With respect to the balance of his employment, although the evidence makes clear there was a "custom and practice" at least in Dr. Jones' department of not terminating a single professor prior to their tenure review, the 5th Circuit's decision, on qualified immunity grounds, that the federal district court's broader reading of

Supreme Court precedent has not taken root. Dr. Jones does not appeal the balance of his property interest claim, limiting it to the summer contract of employment, and relying upon his breach of contract claim for the balance.

Turning now to Dr. Jones' liberty interest claim, "A person's liberty interest is implicated if the government levels a charge against him that *impairs* his reputation for honesty or morality. . . . " *Guzman v. Shewry*, 552 F.3d 941, 955 (9th Cir. 2009), *as amended* (citation and internal quotation marks omitted). If the government, in the course of terminating a person's employment, publicly discloses stigmatizing information, the employee is entitled to a "name-clearing hearing." *Cox v. Roskelley*, 359 F.3d 1105, 1110 (9th Cir. 2004).

To establish "protected liberty interest at stake," a plaintiff must demonstrate that: "(1) the accuracy of the charge is contested, (2) there [was] some public disclosure of the charge, and (3) the charge [was] made in connection with the termination of employment . . ." *See Guzman,* 552 F.3d at 955 (citation and internal quotation marks omitted). Whether a defendant's statements rise to the level of stigmatizing a plaintiff is a question of fact. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1480 (9th Cir. 1996).

Here, § 500 of MSU's *Research Misconduct Policy* provides objective evidence of the reputational interests at stake when a professor is accused, as Dr. Jones was, of research misconduct. The material facts make clear that the accuracy

of the charges against Dr. Jones were contested as Lubick's letter to Cruzado and Pera clearly attacked Dr. Jones' reputation by accusing him, as evidenced by Potvin's later statements, of intentionally violating ethical and professional standards applicable to his profession.

Lubick, Potvin and other MSU employees admitted to the inaccuracy or absence of knowledge of facts associated with the allegations against Dr. Jones. Dr. Boyer admitted they "dropped the ball." Those allegations were also made in connection with the termination of his employment before his time for tenure review.

A question of fact exists whether the termination of Dr. Jones and the spreading of false information to multiple people within the Administration about his alleged misconduct, constitutes publication, or "some public disclosure" of the charge, as that fact alone is sufficiently stigmatizing, according to testimony of other University employees to implicate his liberty interest.

Questions of fact exist.

III. Defamation: Questions of Fact Exist Whether MSU Acted With Actual Malice And Whether Its Conduct was Privileged.

"Libel is a false and unprivileged publication by writing, printing, picture... or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injury a person in the person's occupation." MCA § 27-1-802

MSU recognizes that allegations of research misconduct or violation of professional standards can damage the faculty member in his or her occupation and thus sets forth a specific provision in its *Research Misconduct Policy* addressing reputation. *See*. § 500 ("Protection of Reputations").

Dr. Jones' defamation claims are rooted in the emails and reports prepared by Mr. Lubick, which are false and had "tendency to injure him in his occupation." In fact, they caused him to lose his job.

MSU and the district court cited to MCA §§ 27-1-804(1) and (3) and cases decided under that statute, as the basis for summary judgment on Dr. Jones' defamation claim. The citations are accurate, but fails to note that the privilege takes flight if evidence of actual malice exists in the context of those statements.

For the privilege to apply, the finder of fact must find that the statements are made in the "proper" discharge of an official duty, MCA § 27-1-804(1) or "without malice." MCA § 27-1-804(3). Where employment decisions are part of the government process, that does not make all statements made in the course of that official duty, "proper" or "privileged."

The *Interim Faculty Personnel policies*, itself, mandates that "University Administration" (likeLubick) are responsible for assuring the highest ethical and professional standards and behavior in working with faculty and staff and participating in University governance.

In *New York Times v. Sullivan*, 376 US 254, 11 L.Ed. 2d 686 (1964), the Court held that actual malice means the defamatory statement is made with knowledge that is was false, or with reckless disregard of whether it was false or not. *Id.* at 279. Actual malice can be established through circumstantial evidence.

Here, the district court was factually wrong in holding at page 25 of its Order that Lubick's comments were "objectively accurate" and "absolutely privileged." *Id.* Lubick's statements were false, tended to injure Dr. Jones in his profession, and published with knowledge that they were false or with reckless disregard for whether it was false or not.

MCA § 27-1-804(1) is also akin to the deliberative process privilege. That privilege exists to protect the "decision making of government agencies." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (collecting cases). The privilege takes flight, however, where as here there is evidence of deception by one department, headed by Lubick, and the complete failure to invoke the very policy designed to investigate and evaluate the allegations (*Research Misconduct Policy*) which recognizes the reputational interest of the individual subject to scrutiny and provides a forum to address those allegations prior an irrevocable decision of termination is made that forever ruins a person's career. If a plaintiff's cause of action is directed at the government's intent, like the deliberative process privilege, the privilege shall not apply. *Cf. Fares Pawn v. Ind.*, 2012 U.S. Dist. LEXIS 116310

*4 (S. D. Ind. 2012) (because cause of action for denial of Due Process and Equal Protection rights was directed at the defendants' intent, defendants could not use the[deliberative process] privilege as a shield against claims of governmental intent).

Lubick was an agent of MSU. He was acting within the scope of his employment. His knowledge that his statements were false or made with reckless disregard for the truth as well as his intent in dissemination of false and misleading emails that directly impacted Dr. Jones' in his employment (as evidenced by his subsequent termination) are issues of material fact.

CONCLUSION

Genuine issues of material fact precluded summary judgment. The Court's Order is properly reversed and remanded for trial.

Respectfully Submitted this 11th day of May, 2020.

By:_____
Brian K. Gallik

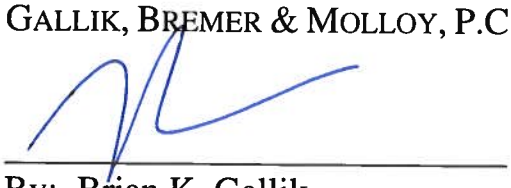
Attorneys for Plaintiff/Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words [9978], excluding the Table of Contents, the Table of Authorities, Certificate of Service and Certificate of Compliance, as calculated by Microsoft Word software.

Dated this 11th day of May, 2020.

GALLIK, BREMER & MOLLOY, P.C.



By: Brian K. Gallik

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CERTIFICATE OF SERVICE

I, Brian K. Gallik, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-11-2020:

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