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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 23-0664

IN THE SUPREME COURT FOR THE STATE OF MONTANA
Cause No. DA 23-0664

WALTER JOEY OVERSTREET,

Plaintiff/Appellant,

vs.

ERIC FETTERHOFF, in his official and individual Capacities, JOHN DOES 3-7, BARBARA WATSON, Individually and WATSON CRASH RECONSTRUCTION, LLC, MONTANA HIGHWAY PATROL, and PARK COUNTY MONTANA, a Political subdivision, BRUCE BECKER, individually And as Park County Attorney, SHANNAN PICCALO, Individually and as Deputy Park County Attorney, STATE OF MONTANA and KENDRA LASSITER, Individually and in her official capacity as Park County Attorney,

Defendants/Appellees.

APPELLANT'S BRIEF

APPEALED FROM THE AUGUST 22, 2023 ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ENTERED BY THE HON. BRENDA GILBERT, DISTRICT JUDGE

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ISSUE FOR REVIEW

WHETHER THE DISTRICT COURT ERRED WHEN IT DISMISSED PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO M.R.C.IV. P 12(B)(6) FOR FAILURE TO STATE A CLAIM WHEN IT FAILED TO TAKE ALL WELL PLEAD FACTS OF THE (SAC) AS TRUE.

STATEMENT OF THE CASE

This case arises out of the State and individual named Highway Patrol Trooper Fetterhoff and county attorney defendants, Becker and Piccolo's participation in the wrongful and malicious prosecution of the Plaintiff Walter "Joey" Overstreet for negligent homicide. Overstreet has alleged that the individual defendants and state of Montana participated in the following deceitful and malicious conduct related to his criminal case: 1) during the course of the prosecution for negligent homicide, they acted outside the scope of their employment as a state trooper and prosecutors. Specifically each participated in deliberately destroying and concealing the evidence and removing any record of the evidence existence from the discovery provided to Overstreet during that prosecution; and 2) deliberately and without probable cause prosecuted him for the offense of Negligent Homicide.

The State commenced the original criminal prosecution of Overstreet in late 2015 alleging that on December 13, 2015, Plaintiff was driving a pickup truck and was involved in an accident where one of the occupants of that vehicle died. The

State provided discovery in connection with prosecution and the case went to trial in August, 2017. The State did not have an expert and provided no mention of any evidence of a long brown hair removed from or photographed in the vehicle involved in the accident.

The jury was unable to reach a verdict based upon the hung jury and the Judge declared a mistrial. The State commenced a second prosecution, and the case went to trial in March, 2018. By then, the State had retained an expert (Barbara Watson who has resolved this matter with Plaintiff and is no longer a party) former Montana Highway Patrol Officer and crash reconstruction expert to assist the State with prosecution in this matter. Ms. Watson conducted an investigation and prepared a report related to that investigation. Though Ms. Watson located and photographed exculpatory evidence in connection with that prosecution (a long brown hair on the driver's side door of the vehicle Overstreet was accused to have been driving), this information and photographs of the evidence were curiously omitted from her final report. The report the State provided to Overstreet's counsel made no mention of the hair and did not include copies of the photographs of the exculpatory evidence. The report had been modified and sanitized prior to providing it to Overstreet's defense counsel.

Overstreet, went to the second trial in March, 2018 not having the benefit of this deliberately omitted evidence. During the trial, and for the first time, Trooper

Fetterhoff (a named defendant in this matter) testified that the State had located a long dark brown hair on the driver's side door of the vehicle. At the time of that testimony, the case had been pending for 2 ½ years, and this information had *never* been previously disclosed to Mr. Overstreet and/or his counsel. Barbara Watson also acknowledged that she had observed the vehicle during her crash reconstruction efforts and had observed the hair and had photographed the hair during the investigation. She provided this information to County Attorney Shannan Piccolo, however that information never made it to the final report and Fetterhoff did not preserve the hair. While Fetterhoff's testimony at trial and subsequent hearings was inconsistent (he testified that he preserved the hair in an evidence bag and then discarded it, but later stated that he did not preserve the evidence based upon advice of County Attorney Becker who told him just to throw it away). Either way, Fetterhoff destroyed the evidence after discussing its existence with the county attorney defendants.

After this testimony, the jury failed to reach a verdict and the Court declared a second mistrial. After that second 2018 trial, Bruce Becker, then Park County Attorney informed counsel for Mr. Overstreet that he did not intend to re-prosecute the matter. Based upon Mr. Becker's representations that the State was not seeking to re-try the matter, Plaintiff agreed to the release of the vehicle involved in the

accident. The State then filed a Motion to Dismiss without prejudice. The Court granted that Motion.

Thereafter, Kendra Lassiter took over as Park County Attorney. Despite Mr. Becker's representations that the case would not be retried, she referred the matter to the Attorney General's Office for review. The Attorney General's Office initiated a third prosecution on June 20, 2019. The defense objected based on Becker's previous representation that the State would not retry the matter and because Overstreet had relied upon that representation in releasing the vehicle from protected evidence storage.

During this third attempt at prosecution and because of the new trial testimony related to the long brown hair, Overstreet's counsel requested a full new copy of the discovery in the matter. The State resisted this effort and denied that the hair existed at all, however ultimately provided the discovery in late 2019. During that time frame, and despite the State's denial, Overstreet specifically requested that the long brown hair be sent to the Montana State Crime Lab for DNA testing. This was where Mr. Overstreet definitively learned that the hair had been carelessly thrown away and destroyed that all information regarding its existence had been sanitized from the case—including Barbara Watson's report. Sometime later in 2019, and for the first time, the State provided correspondence from Fetterhoff that he *threw the long brown hair in the garbage* as it had "no

evidentiary value to him." Fetterhoff claimed he spoke to the Park County Attorney who told him not to keep the hair.

In light of the State's deliberate actions of deliberately destroying and/or failing to maintain evidence (including both the long brown hair and the vehicle involved in the accident), Overstreet filed a Motion to Dismiss the third criminal prosecution. The District Court granted that Motion on May 20, 2020. Overstreet filed this civil action March 29, 2021 seeking to hold the State and individual defendants responsible for their deliberate actions.

The Court approved, and Overstreet filed his Second Amended Complaint (SAC) in this matter on or about January 30, 2023. A copy of the SAC is attached as Exhibit 2 hereto. Defendants collectively filed a Motion to Dismiss this matter pursuant to Rule 12(b)(6), M.R.Civ.P., arguing in essence that prosecutorial immunity barred this action. The District Court agreed and dismissed this matter by Order dated August 22, 2023.

In dismissing the matter, the District Court acknowledged that it was required to deem all allegations plead in Plaintiff's Complaint as true. However, contrary to those plead allegations, the District Court made a specific finding that Overstreet had alleged that the individual defendants were acting in the course and scope of their employment as county attorneys and state actors and therefore this action was barred based upon the doctrine of prosecutorial immunity.

In entering this Order, the District Court failed to acknowledge the well plead allegations set forth throughout the body of the SAC and specifically the allegations set forth on page 18, paragraph 191-193 that Fetterhoff, Becker's and Piccolo's actions "constitute an exception to prosecutorial immunity based upon their continued pursing of charges against Plaintiff without probable cause," and that Becker and Piccolo have a duty as lawyers licensed to practice law in the State of Montana, to Plaintiff to make a thorough investigation, to pursue truth and justice, to present their case with honesty under oath, to not destroy evidence, to now throw evidence into the garbage, and to charge individuals with offenses only when they have probable cause to do so." SAC, paragraphs 191-193.

STATEMENT OF FACTS

For purposes of avoiding duplicative recitation, the facts alleged in support of this action are set forth fully and completely in Exhibit 2, the SAC filed herein. These facts, pursuant to Rule 12(b)(6), M.R.Civ.P., and the following cases are deemed to be admitted as true for the District Court's consideration of the Motion to dismiss filed herein. While each and every plead fact is specific and germane to the claims in this matter, the following allegations set forth in at pages 14, ¶¶ 152-154, page 16, ¶¶ 175-176; page 17-18, ¶188-193; page 20, ¶¶ 204-206. These constitute the facts common to all counts and specifically identify that the State actors, Becker, Piccolo and Fetterhoff were acting outside the scope of their

respective authority, along with identifying the subversive and deceitful behaviors they exhibited in connection with the State prosecutions of Overstreet.

The only area where Overstreet pleads Piccolo and Becker were acting within the scope of their authority is in connection with the Negligence Claim at page 23, ¶225. However these allegations are not mutually exclusive and the District Court should have deemed both to be true.

Overstreet's only allegations with respect to Becker and Piccolo's employment status for Counts IV-VII are set forth in the facts common to all counts wherein Overstreet alleges they are acting outside the scope of their employment.

SUMMARY OF ARGUMENT

The District Court erred when it found that Overstreet failed to specifically plead that the State actors in this case were acting outside the scope of their employment for purposes of application of the doctrine of prosecutorial immunity. The District Court further erred when it opined that the State was likewise not liable for the individual defendants' actions based upon that doctrine of prosecutorial immunity. The district court further erred when it dismissed the well plead causes of action in Counts IV-on the basis of prosecutorial immunity.

Finally, the Statute of Limitations did not start to run in this matter until the final prosecution was commenced in at a minimum on June 20, 2019 and the new

discovery was supplied that included Watson's full report, photographs of the evidence and Fetterhoff's explanation that he "threw it in the garbage" at Becker's direction. Thus the District Court's determination that the Statute of Limitations had run was improper.

STANDARD OF REVIEW

This Court reviews a district court's ruling on a motion to dismiss pursuant to M.R.Civ.P. 12(b)(6) *de novo*. *Dickson v. Marino*, 2020 MT 196, ¶ 6, 400 Mont. 526, 469 P.3d 159. "A district court should not dismiss a complaint for failure to state a claim **unless it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief**." *Marshall v. Safeco Ins. Co.*, 2018 MT 45, ¶6, 390 Mont. 358, 413 P.3d 828, emphasis added. "A district court's determination that a complaint has failed to state a claim for which relief can be granted is a conclusion of law which this Court reviews for correctness." *Cossitt v. Flathead Indus*., 2018 MT 82, ¶7, 391 Mont. 156, 415 P.3d 486. Under Rule 12(b)(6), the court must take all well-pled factual assertions as true and view them in the light most favorable to the claimant, drawing all reasonable inferences in favor of the claim. *Anderson v. ReconTrust Company, N.A.,* 2017 MT 313, 390 Mont. 12, 407 P.3d 692. The Court should "construe the complaint in a light most favorable to the plaintiff, **deeming all factual allegations to be true.**" *Fellows v. Office of Water Comm'r*, 2012 MT 169, ¶11, 365 Mont.

540, 258 P.3d 448, emphasis added. This Court "will affirm the dismissal only if it finds that the plaintiff is not entitled to relief under any set of facts that could be proven in support of the claims." *Martin v. Artis*, 2012 MT 249, ¶8, 366 Mont. 513, 290 P.3d 687, *citing Fellows*, ¶11.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT GRANTED DEFENDANTS' RULE 12(b)(6) MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM.

In this case, Defendants collectively filed Motions to Dismiss this matter pursuant to Rule 12(b)(6), M.R.Civ. P. based on the following arguments:

1. The individual defendants named in this action are immune from liability pursuant to §2-9-305(5), MCA and thus the State is the only appropriate defendant herein;
2. The State has absolute prosecutorial immunity;
3. The named prosecutors have absolute prosecutorial immunity;
4. Plaintiff's claims are barred by the applicable statute of limitations;
5. Plaintiff's claims for Spoilation of Evidence, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and actual malice are barred by prosecutorial immunity;
6. Plaintiff's claims for Malicious Prosecution are barred against the State based upon prosecutorial immunity.

In sum, the Defendants argued that the State of Montana is the only properly named defendant and that the State, and all individually named defendants, are immune under §2-9-305, MCA. Based on that Motion, the district court granted the Motion to Dismiss. When it did so, the Court erred and this Court should reverse the dismissal and remand the matter to the District Court for additional proceedings.

A. RULE 12(b)(6) DISMISSALS ARE AN EXTREME REMEDY AND SHOULD NOT HAVE BEEN GRANTED IN THIS CASE BASED UPON THE WELL PLEAD ALLEGATIONS OF THE COMPLAINT.

Defendants filed a Motion to Dismiss the Plaintiff's Second Amended Complaint (SAC) in this matter for failure to State a Claim. Such a motion under Rule 12(b)(6) allows the district court to examine *only* whether "a claim has been adequately stated in the complaint." *Gebhardt v. D.A. Davidson & Co.,* 203 Mont. 384, 389, 661 P.2d 855, 857 (1983). As a result, the court is limited to an examination of the contents of the complaint in making its determination of adequacy. Additionally, the effect of a Rule 12(b)(6) motion to dismiss is that all the well-plead allegations in the complaint are admitted as true; therefore, it should not be dismissed "unless it appears beyond reasonable doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Gebhardt,* 203 Mont. at 389, 661 P.2d at 857-58 (citation omitted).

In this case, Plaintiff has provided specific and well plead allegations in his Complaint that he had fully incorporated in his original opposition to the Defendants' Motion to Dismiss. Based upon *Gebhart*, the district court was obligated to deem these allegations as "true" for purposes of the Motion. The district court failed to do so and as a result erred when it granted Defendants' Motion to Dismiss.

B. DEFENDANTS ARE NOT IMMUNE FROM THEIR ACTIONS IN THIS CASE AS THE ACTIONS ARE OUTSIDE THE SCOPE OF THEIR EMPLOYMENT. THE MOTION TO DISMISS MUST BE DENIED.

i. Fetterhoff, Becker and Piccolo are proper defendants because their negligent actions were outside the scope of their employment, or within their administrative capacity which is not protected by immunity.

a. County Attorneys.

For purposes of a 12(b)(6) Motion to Dismiss, the district court was obligated to take as true the allegations in the SAC, that the individual named county attorney defendants in this matter engaged in actions that were outside the scope of their prosecutorial acts and employment. Plaintiff specifically set this allegation forth in his SAC at page 18, ¶¶191-193 wherein he alleged that: ". . .Fetterhoff's . . ., Bruce Becker's and Shannan Piccolo's actions constitute an exception to prosecutorial immunity based upon their continued pursuing of charges against Plaintiff without probable cause;" "defendant's Fetterhoff, Becker

and Piccolo failed to make a thorough investigation, pursue the true and justice present their case with honestly under oath, to not destroy evidence, to no throw evidence into the garbage, and to charge individuals with offenses only when they have probable cause to do so."

In a similar matter, where defendant prosecutors were alleged to have acted outside the scope of their authority, *Smith on Behalf of Smith v. Butte-Silver Bow Cnty.,* 266 Mont. 1, 7, 878 P.2d 870, 873 (1994), this Court has found that: "[b]ecause the County Attorney was not acting within his prosecutorial capacity when he failed to advise the County Jail of information allegedly indicating Richard's suicidal tendency the District Court erred in concluding that the County and the State were entitled to prosecutorial immunity." Specifically, because the County Attorney was not acting within his "prosecutorial capacity" when he failed to advise the County Jail of information allegedly indicating Richard's suicidal tendency, this Court found that the District Court erred in concluding that the County and the State were entitled to prosecutorial immunity. *Id.* Prosecutorial capacity means whether the conduct occurred in the course of filing and maintaining criminal charges. *Id.* In this case, the district court failed to recognize the presumption in favor of the Plaintiff's allegations that the actions were not.

Notably, Overstreet's SAC further included allegations that when defendant/attorneys Becker and Piccolo instructed Trooper Fetterhoff to discard

instead of safeguard evidence (the long brown hair pulled from Overstreet's driver's door panel), they were acting outside their scope of employment and prosecutorial functions. When the attorney defendants intentionally omitted the photograph of the long brown hair from the discovery to Overstreet, they were acting outside their duties as prosecutors and are not immune to prosecution.

The County Attorney Defendants argued that their "decisions" to disclose or not disclose evidence was within their prosecutorial duties. This is a complete misrepresentation of the attorney's duties. Montana law is very clear that Prosecutors have an "affirmative" duty to disclose all evidence to an accused. §46-15-327, MCA. Prosecutors have a duty to preserve exculpatory evidence. Prosecutors are outside the scope of their duties when they take affirmative action to destroy exculpatory evidence. The defendant/attorneys' claims that destroying evidence is within their scope of employment is completely against the United States and Montana Constitutions, and certainly should never be protected by immunity.

Intentionally withholding evidence or destroying evidence, exculpatory or not, is clearly outside a prosecutor's capacity or function. A defendant has a Constitutional Right to Due Process and the right to a fair trial. U.S. Const. Amend. XIV; Mont. Const. art. II, § 17. As such, a defendant has a constitutional right to obtain exculpatory evidence and when the State suppresses such evidence, the

State violates the defendant's right to due process. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963).

Moreover, and independent of *Brady*, in Montana prosecutors have an affirmative statutory duty to disclose evidence to a defendant. *See State v. Stewart*, 2000 MT 379, ¶ 20, 303 Mont. 507, 16 P.3d 391. Section 46-15-322(1)(e), MCA, further requires that, upon request, the State make "all material or information that tends to mitigate or negate the defendant's guilt" available to the defendant for examination and reproduction.

Section 46-15-327, MCA, mandates a continuing duty of disclosure on the State as it obtains additional information. The State's duty of disclosure extends to impeachment evidence, which includes evidence tending to cast doubt on a witness's credibility. When Defendants Becker and Piccolo withheld evidence, they were acting outside their duties as prosecutors, stripping them of their immunity they desire to be shielded by.

Finally, this Court held in *State v. Torres*, 2021 MT 301, 498 P.3d 1256, that broad pretrial disclosure by the prosecution is required. It is not optional and is not subject to prosecutorial decisions to remove or exclude evidence from disclosure. The purpose of the statute is to provide notice and prevent surprise. *State v. Stewart*, 2000 MT 379, ¶ 22, 303 Mont. 507, 16 P.3d 391. The statute further mandates full disclosure of all the material and information within the prosecutor's

possession and control, regardless of whether the State believes it is inculpatory or exculpatory. *Weitzel*, ¶ 30; *State v. Licht*, 266 Mont. 123, 129, 879 P.2d 670, 673-74 (1994).

In this case, Overstreet was surprised by the revelation of hidden exculpatory evidence during a suppression hearing after a full jury trial had occurred which had resulted in a hung jury. The evidence, which consisted of a previously undisclosed long brown hair which had been photographed by Watson and collected by Fetterhoff, but was intentionally withheld by Becker and Piccolo from the discovery requested by Overstreet. This action is outside the scope of any prosecutorial function and therefore precludes Becker and Piccolo from claiming prosecutorial immunity. This was well plead in the SAC filed herein and should have been recognized by the Court, however was not.

Moreover, other negligent and malicious actions by Becker and Piccolo which were not within their prosecutorial functions include, but are not limited to, participating in the search of the vehicle, speaking to the crime lab regarding testing or non-testing of evidence, releasing the evidence from the State's custody, telling an officer to destroy or hide evidence, speaking with witnesses regarding exculpatory statements and not disclosing the statements (i.e. Brittany Austin saying Overstreet was not the driver after trial two), disobeying court orders, and failing to disclose the vehicle was never in a secured location when it was removed

from the accident scene. All of these acts were included as allegations in Overstreet's SAC which the Court should have deemed to be true, however did not.

Finally, the question of whether the function of the conduct at issue "occurred in the course of filing and maintaining criminal charges" is significant. *Kelman v. Losleben*, 894 P.2d 955, 957 (1995). A prosecutor's conduct in filing and maintaining criminal charges is entitled to absolute immunity, while "a prosecutor engaged in administrative duties is not entitled to immunity." *Id.* Investigatory functions that occurred prior to filing or maintaining criminal charges are not intimately involved in the judicial phase of the criminal process and are not given absolute immunity. *Id.* at 958. In this case, Becker and Piccolo engaged in personally investigating the case and withholding of evidence before the first, second, and third trials in this case. At some point after the second trial, Fetterhoff then threw the long brown hair in the trash. Fetterhoff testified to trial two that he had collected the long brown hair and put it into evidence. The continued negligence of the attorneys continued even after trial two. This was not discovered until the Motion to Dismiss Hearing for the third prosecution of Overstreet. The negligent actions by the attorneys continued even after the second mistrial.

b. Fetterhoff.

Defendant Fetterhoff did not specifically identify in Defendants' Motion to Dismiss why how he is immune from liability in this Case. He instead argues that he too, was acting within the scope of his employment. However, again the District Court failed to acknowledge the truth of the allegation in the SAC that Defendant Fetterhoff specifically and intentionally acted outside the scope of his employment when he either lied under oath or made the conscious decision to not produce evidence in his possession, and later threw away evidence after trial two. Defendant Fetterhoff acted outside the scope of his employment when he did not investigate the accident under the standards and policies of the State of Montana, Highway Patrol, and Park County, Montana.

The allegations included that Defendant Fetterhoff's actions, from the moment he arrived on the scene of this accident until his testimony under oath at the Motion to Dismiss Hearing for the third trial, were negligent, malicious, and outside the employment as a highway patrol officer, and he should not be protected by immunity. As a result, Plaintiff's claims against Defendant Fetterhoff should not have been dismissed, as provided by the law herein.

c. The State does not have absolute prosecutorial immunity.

The State argued, and the district court agreed that it can assert prosecutorial immunity to all claims because the State has absolute immunity. In other words,

the State seeks to "extend" Fetterhoff and the County Attorneys' immunity to itself. The State contends that prosecutorial immunity is not limited "to those circumstances where a prosecutor faces personal liability for prosecutorial conduct," but also extends to the prosecutor's governmental employer. In short, the State advances a theory of derivative immunity. *Cf. Lutheran Day Care v. Snohomish County,* 119 Wash.2d 91, 829 P.2d 746, 751 (1992) ("Any immunity the municipality might have is only derivative from or secondary to that individual [quasi-judicial] immunity [of its employees]." (emphasis omitted)).

One of the flaws in this theory, that the District Court failed to recognize is that the State seeks to "extend" prosecutorial immunity that the County Attorney himself would never be in a position to assert in the first place. The State contends repeatedly that the County Attorney enjoys immunity for suits arising out of a prosecutorial function. Yet while that may be true in other circumstances, it is irrelevant with respect to the specific claims alleged by Overstreet, —namely, the actions committed outside the prosecutorial functions or capacities. See *McDaniel v. State*, 2009 MT 159, ¶ 24, 350 Mont. 422, 431, 208 P.3d 817, 825.

In *Rosenthal v. County of Madison*, 2007 MT 277, 339 Mont. 419, 170 P.3d 493, this Court extended the doctrine of prosecutorial immunity to include county and state governments employing the prosecutors who find themselves named defendants in tort actions." However, as explained above, there being no possible

occasion for the prosecutor to assert prosecutorial immunity to Plaintiff's claims, there is no basis for the State to extend such immunity to itself. Rosenthal did not extend prosecutorial immunity to government agencies for actions by prosecutors outside their scope of employment. *Id.*

This Court has noted:

> Like judicial immunity, quasi-judicial immunity benefits the public—not the person being sued—by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences; also, like judicial immunity, quasi-judicial immunity extends only to acts within the scope of the actor's jurisdiction and with the authorization of law.... To be protected by quasi-judicial immunity, the person asserting the immunity must have acted in a quasi-judicial capacity. *Id.*

In this case it is clear Defendants Becker, Piccolo and Fetterhoff all acted outside their employment and cannot be shielded by prosecutorial immunity.

Furthermore, the United States Supreme Court has held that: (1) prosecutors' alleged misconduct, when endeavoring to determine whether the boot print at scene of crime had been left by suspect was investigatory, was administrative function rather than prosecutorial function, for which prosecutors were entitled to only qualified immunity, and (2) prosecutor's allegedly false statements, made during public announcement of indictment, were entitled to only qualified, and not absolute immunity from liability. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). The key is to determine the nature of the function performed, not the identity of the actor who performed it. *Id.*

In this case, like in *Buckley,* the prosecutors were acting not as advocates, but as investigators. Such activities were not immune from liability at common law. *Id.* If performed by police officers and detectives, such actions would be entitled to only qualified immunity; the same immunity applies to prosecutors performing those actions. Convening a grand jury to consider the evidence their work produced does not retroactively transform that work from the administrative into the prosecutorial. *Id.*

In *Buckley*, the United States Supreme Court found the prosecutor's statements to the media also are not entitled to absolute immunity. There was no common-law immunity for prosecutor's out-of-court statements to the press, and such comments have no functional tie to the judicial process just because they are made by a prosecutor. *Id.*

The United States Supreme Court further opined in *Buckley,* however, that prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police. *Id.* The Supreme Court held, providing legal advice to the police was not a function "closely associated with the judicial process." *Id.* The Defendants in this case go as far as to tell the court their decision to destroy evidence was within their duties as prosecutors. Such actions could not be considered part of the prosecutorial functions. Both the Montana and United States Constitutions command that all evidence be disclosed if it is materially pertinent to

the prosecution or the defense. In conclusion, the District Court erred when it found that the individual actors were immune from prosecution and extended that immunity to the State. This Court must reverse that Order.

d. Plaintiff's Claims for Malicious Prosecution should not have been dismissed because neither the State nor the Defendants are immune, and because the facts taken as true evidence support the elements of Malicious Prosecution.

Again, as stated above, the State, prosecutors and Fetterhoff are not immune to the allegations in support of the claim of Malicious Prosecution. As far as the argument Overstreet did not meet his burden of proof for the claim, this is misplaced. Again, the district court had the duty to take the well plead allegations of the SAC as true. Overstreet alleged specifically that the state actors, defendants Becker, Piccolo and Lassiter acted with actual malice in this case by hiding and/or destroying evidence. "A malicious prosecution begins in malice, without probable cause to believe the action can succeed, and finally ends in failure." *Plouffe v. Montana Dept. of Pub. Health and Human Servs.*, 45 P.3d 10, 14 (Mont. 2002). To prevail on a claim for malicious prosecution, the plaintiff must prove each of the following elements: (1) a judicial proceeding was commenced and prosecuted against the plaintiff; (2) the defendant was responsible for prosecuting or instigating that proceeding; (3) the defendant lacked probable cause; (4) the defendant was motivated by malice; (5) the judicial proceeding terminated in the plaintiff's favor; and (6) the plaintiff suffered damage. *Id.* Failure to establish

just one of these elements requires judgment for the defendant. *Id.* *Burgan v. Nixon,* No. CV 16-61-BLG-TJC, 2018 WL 4690797, (D. Mont. Sept. 28, 2018).

"A defendant acts with malice when he or she is motivated by 'a primary purpose other than that of bringing an offender to justice.'" *Plouffe*, 45 P.3d at 17. (internal citations omitted). Furthermore, where a prosecution is motivated by a private purpose, rather than the vindication of the law, Montana law presumes a malicious intent. *Id.* (quoting *Rickman v. Safeway Stores*, 227 P.2d 607, 610 (Mont. 1951)). In *Burgan,* Plaintiff alleged that Nixon and Rieger issued the citations to help their friend in his efforts to oust the Burgans from their easement. (*See e.g.* Doc. 56 at 20.) Taken as true, this constitutes a private purpose other than that of bringing the Burgans to justice, triggering a presumption of malicious intent. *Id.*

In addition, this Court has repeatedly held that "malice may be inferred when want of probable cause for the underlying action is proven by the facts." *Plouffe*, 45 P.3d. at 17. Judge Ostby previously found that the Burgans have sufficiently alleged the Citation was unsupported by probable cause. *Burgan v. Nixon,* No. CV 16-61-BLG-TJC, 2018 WL 4690797, (D. Mont. Sept. 28, 2018). That finding by the Court permitted the inference the malice was present as well. *Id.* In conclusion, the Court found, Burgan has sufficiently alleged that the prosecution against him was motivated by malice. *Id.*

In this case, two jury trials were held, and both times Mr. Overstreet was not convicted at trial. Those mistrials based on hung juries provide evidence, that the District Court had to take as true as it was set forth as an allegation in the SAC, that the State lacked probable cause for the charges. (See SAC, pg. 18, ¶¶191-193). Ultimately, the district court ultimately dismissed the third criminal prosecution due to the State's willful destruction of evidence and the failure to preserve the vehicle involved in the accident. The SAC contains allegations that the destruction of the evidence was ordered and condoned by Defendants Becker, Piccolo and Fetterhoff. As a result, these actions, clearly outside the scope of each Defendants' employment, and the never-ending changed testimony by Defendant Fetterhoff, show clearly each Defendant named herein acted with Malice. Such claims should not have been dismissed as the claim is based on evidence at trial for the finder of fact to determine.

Here the Defendants claim Plaintiff's well plead allegations did not support elements two and three of the claim for malicious prosecution. Those allegations deemed as true, show Defendants Becker, Piccolo and Fetterhoff, as investigator and prosecutors in the case, were responsible for the initiation of the prosecution. All three Defendants acted outside their scope of employment in many regards during the prosecution as some are described herein. That evidence meets the second element of malicious prosecution. Element three, "the Defendants lacked

probable cause" (not there was lack of probable cause for the defendants' acts, as claimed by Defendants).

As stated previously, two jury trials were held, and neither jury was able to convict Mr. Overstreet. Nothing short of a failure to obtain a conviction, and later a dismissal, is clear evidence the Defendants' lacked probable cause for the decision to continue to prosecute Mr. Overstreet. For all of these reasons, the District Court erred when it dismissed this claim.

e. Plaintiff's claims are not barred by the Statute of Limitations.

Defendants claimed, and the district court agreed, that the statute of limitation bars Plaintiff's claims. The court, in its Order, failed to Acknowledge the discovery rule. The discovery of the long brown hair being "thrown in the garbage" was not discovered until June 20, 2019, when the third prosecution commenced and Watson's full report (rather than the sanitized report) was produced with the photographs of the hair and Fetterhoff admitted that he had "thrown the evidence in the garbage." This was well within the three (3) year Statute of Limitations for the claims in this case. It was not known until that time that Fetterhoff said Defendant Becker told him to throw the hair away , that it had no evidentiary value. It was not known until the initiation of the third trial against Plaintiff, that Defendant Piccolo, who was responsible for taking care of getting discovery to Overstreet, had the photograph of the long brown hair and never

provided it to Plaintiff. Such breach of a clear duty is outside the scope of employment.

Generally, a claim accrues, and the limitations period begins to run, when all elements of the claim or cause of action exist, including damages. *Christian v. Adtlantic Richfield Co.* 2015 MT 255. At times, however, principles of fairness require us to recognize exceptions to this rule. *Id*.

The discovery rule constitutes an exception to this general principle, stating that if the facts constituting the claim are concealed or self-concealing in nature, or if the defendant has acted to prevent the injured party from discovering those facts, the period of limitations does not begin to run until the injured party has discovered, or in the exercise of due diligence should have discovered, both the injury and its cause. *Id.* Further, the statute of limitations pertaining to actions based on fraud specifically provides that such a claim does not accrue until discovery of the facts constituting the fraud. *Id*.

In *Textana, Inc. v. Klabzula Oil & Gas*, 2009 MT 401, this Court held, the statute of limitations is tolled only where the defendant has engaged in fraudulent concealment or affirmatively prevented the injured party from discovering that he or she has been injured. Fraudulent concealment consists of "the employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquisition of information disclosing a cause of action." *Id.*

Discovery serves to toll the statute of limitations only if fraudulent concealment has hindered a party from discovering a breach. *Id.* The statute of limitations runs from the time of discovery if there has been fraudulent concealment. *Id.* Nothing limits application of the fraudulent concealment tolling exception to § 27–2–102, MCA, "injury to person or property." This fraudulent concealment rule applies even in a breach of contract claim. *Id.*

Fraudulent concealment entails the employment of artifice, planned to prevent inquiry or escape investigation, and to mislead or hinder information acquisition. *Id.* The standard changes where a trust relationship exists, such as a fiduciary. *Id.* Mere silence or failure to reveal information in the presence of a duty to disclose can constitute fraudulent concealment sufficient to toll the statute of limitations. *Id.*

A trust or confidence relationship modifies the general rule that there must be some affirmative acts to prove fraudulent concealment. *Id.* Mere silence may suffice when a trust or confidence relationship exists between the parties. *Id.*

In *Ehrman v. Kaufman, Vidal, Hileman & Ramlow,* PC, 2010 MT 284, the Montana Supreme Court held that the statute of limitations does not begin to run until both the "discovery rule" and "accrual rule" are satisfied.

The discovery rule begins the statute of limitations when the plaintiff discovers or should have discovered the negligent act. *Id.* The statute of

limitations does not begin to run under the accrual rule until all elements of the claim have occurred. *Id*. Thus, "the statute of limitations in a legal malpractice action does not begin to run until the negligent act was, or should have been, discovered, *and* all elements of the legal claim, including damages, have occurred." *Id.*

It appears the long brown hair found on the driver's door by Defendant Fetterhoff may not have been provided to the Park County Attorney until January 3, 2018, when Watson released from her possession a CD with copies of the photographs of the hair she took on October 20, 2017, although the search was conducted on September 29, 2017. It was not until trial two that Overstreet even learned about the long brown hair being collected by Fetterhoff in the search of the vehicle, on the driver's door panel.

Overstreet had no idea the long brown hair had been intentionally destroyed and was no longer held in evidence until the Motion Hearing on Overstreet's Motion to Dismiss held on March 11, 2020. It was not until that time, Overstreet discovered the negligence and intentional tortious acts by the Defendants. March 11, 2020, was the date of discovery of the ongoing Negligence by all Defendants which began in 2015 through the dismissal of the criminal case with prejudice. As a result, the Statue of Limitations was tolled until that time.

It is clear the negligence of Fetterhoff, Becker and Piccolo were ongoing actions from the time of the accident in 2015 until the dismissal of the third trial initiated by the State. The three-year statute of limitations on the claims had not run, and therefore, the Defendant's Motion to Dismiss for violation of statute of limitations had no merit and the district erred when it relied upon this as a basis for its dismissal.

f. Actual Malice should not be dismissed.

To prevail on motion to dismiss for actual malice, the moving party is required to show "a complete absence of any evidence" which would justify submitting to the jury the issue of whether a party acted with actual malice. *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, 351 Mont. 464, 215 P.3d 649.

In other words, the moving party is required to show that Plaintiff failed to present sufficient evidence to satisfy the statutory elements of malice set forth in § 27–1–221, MCA:

> (2) A defendant is guilty of actual malice if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff and:
> (a) deliberately proceeds to act in conscious or intentional disregard of the high probability of injury to the plaintiff; or
> (b) deliberately proceeds to act with indifference to the high probability of injury to the plaintiff.

Again, the well plead allegations of the SAC support this claim for actual malice. The district court erred in dismissing this count and in failing to take those

allegations as true in its decision. This Court should reverse the decision on this count as well.

g. Emotional Distress Claim should not be dismissed.

Defendants' failure to acknowledge the claims of Intentional and negligent infliction of emotional distress are not limited to Overstreet's horrific experience of being prosecuted for a crime he did not commit, but the life altering changes that came as a result.

The SAC establishes that Plaintiff was told he killed his friend by Officer Fetterhoff when he was hospitalized. Plaintiff, after review of the vehicle, was able to see he was not the driver in the case. Plaintiff lost employment in the military as a result of the charges.

Plaintiff suffered severe emotional distress when he learned he did not kill his friend. Plaintiff at trial two then observed evidence the friend who passed away had injuries consistent with the driver of the vehicle at the time of the accident. Overstreet then discovered the horrific facts that Defendants Fetterhoff, Becker and Piccolo intentionally withheld and destroyed exculpatory evidence. This claim is not only supported by the charges against Mr. Overstreet but the actions of all Defendants and their malicious prosecution against him and the life altering changes it caused him as a result. The charges only initiated the claim, but

the intentional actions outside the scope of the typical prosecution are what drive this claim. Consequently, the claims of emotional distress should not be dismissed.

CONCLUSION

For the reasons set forth herein, the District Court erred when it dismissed this matter in full and when it failed to accept the allegations of the Plaintiff's Second Amended Complaint as true. As a result, this Court must reverse the district court and remand the matter for further proceedings.

Dated this 28th day of March, 2024.

/s/ Suzanne Marshall
Attorney for Plaintiff

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's opening brief contains 7,153 words completed using double spaced 14 point Roman Typeface proportionately spaced.

Dated this 28th day of March, 2024.

/s/ Suzanne Marshall
Attorney for Plaintiff