IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 23-0560

LAURA MARIE OBERT

Plaintiff/Appellant,

vs.

STATE OF MONTANA, and CORY SWANSON, Broadwater County Attorney,

Defendants/Appellees,

and

MARTIN LAMBERT,

Defendant.

APPELLEES STATE OF MONTANA'S AND CORY SWANSON'S ANSWER BRIEF

Patricia Klanke
Kale Guldseth
DRAKE LAW FIRM, P.C.
111 N. Last Chance Gulch,
Suite 3J
Helena, MT 59601
Ph: (406) 495-8080
patricia@drakemt.com
kale@drakemt.com

Attorneys for Appellee

Kyle W. Nelson
Henry J.K. Tesar
GOETZ, GEDDES & GARDNER,
P.O. Box 6580
Bozeman, MT 59771-6580
Ph: 406-587-0618
knelson@goetzlawfirm.com
htesar@goetzlawfirm.com

Brian K. Gallik
GALLIK & BREMER, P.C.
P.O. Box 70
Bozeman, MT 59771-0070
Ph: (406) 404-1728
brian@galliklawfirm.com

Attorneys for Appellant

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a. Whether the District Court correctly dismissed Obert's breach of contract and breach of implied covenant of good faith claims against the State because they were brought outside the controlling one-year limitation period.

b. Whether the District Court correctly dismissed Obert's tortious bad faith claim against the State because she cannot establish a special relationship in the context of a deferred prosecution agreement, where she was represented by counsel.

c. Whether the District Court correctly dismissed Obert's due process claim against the State because Montana law does not entitle a criminal defendant to any specific pre-charge filing procedure.

d. Whether the District Court correctly dismissed Obert's malicious prosecution claim against Swanson because he referred her misconduct to the attorney general pursuant to his statutory duty as county attorney, and therefore is entitled to prosecutorial immunity.

STATEMENT OF THE CASE

Plaintiff Laura Obert ("Obert") filed her Amended Complaint on August 5, 2022, alleging that the State of Montana ("the State") breached a deferred prosecution agreement when it criminally prosecuted Obert in May 2020. Obert brings the following claims against the State: breach of contract (Count I); breach of the implied covenant of good faith and fair dealing (Count II); tortious bad faith (Count III); and violation of procedural due process (Count IV). In addition, Obert brings a sole claim against Broadwater County Attorney Cory Swanson for malicious prosecution (Count VI).

The State and Swanson filed a Rule 12(b)(6) Motion to Dismiss on January 3, 2023. Judge McMahon of the Montana First Judicial District Court for Lewis and Clark County granted the Motion to Dismiss, and dismissed all claims against the State and Swanson. Obert now appeals that decision to this Court.

Obert also brought claims against Martin Lambert, who was appointed as special attorney general in this matter. The District Court dismissed these claims following Lambert's Rule 12(c) Motion to Dismiss and request for judgment on the pleadings. Obert and Lambert settled while this appeal was pending.

STATEMENT OF FACTS

In September 2015, Defendant Cory Swanson, as Broadwater County Attorney, asked the Montana Department of Justice Division of Criminal Investigation ("DCI") to look into concerns that then-County Commissioner Laura Obert had received a salary in excess of what was statutorily allowed and had voted improperly on matters in which she or her husband had an interest. Appellant's Supp. App. 1, ¶ 8 (hereinafter, "Am. Compl.").

As a result of the DCI investigation, Obert entered a deferred prosecution agreement with Assistant Attorney General Brant Light in July 2016. Obert was represented by attorney Joe Seifert, who exchanged drafts with Light during active negotiations of the agreement. Am. Compl., ¶¶ 14, 16. In an email to DCI personnel, Light stated that he did not "believe any criminal charges were appropriate . . . when looking at the totality of the circumstances." Am. Compl., ¶ 18. Light also stated that he firmly believed that the deferred prosecution agreement "addresses the concerns of Broadwater County." *Id.* The deferred prosecution agreement encompassed two matters: accepting pay above her statutory salary; and failing to disclose possible conflicts of interest.

Pursuant to the 2016 deferred prosecution agreement, Obert agreed to repay Broadwater County for hourly wages worked that were in excess of her statutory salary as a Broadwater County Commissioner. Appellant's Supp. App. 1, p. 19-20 (Ex. A to Am. Compl.). In total, Obert owed $4,256.89, and paid the full amount on August 29, 2016. Am. Compl., ¶ 19; Appellant's Supp. App. 1, p. 22 (Ex. C to Am. Compl.). Obert also agreed to publicly disclose any possible conflicts of interest and to abstain from voting on any matters where a conflict existed, including matters where her husband served as a board member or executive director. Appellant's Supp. App. 1, p. 19-20. An exception to Obert's prohibition on voting where a present conflict of interest existed arose only if "the Board of County Commissioners is considering annual membership dues and/or funding for economic development for economic development within the annual budget as allowed by Federal Economic Development Agency and State Certified Regional Development requirements and/or for a board where Ms. Obert is a voting member," and Obert publicly disclosed the conflict. *Id*.

In 2018, Swanson contacted the Attorney General's office regarding his concerns that Obert had breached the deferred prosecution agreement. Am. Compl., ¶ 21. Gallatin County Attorney Martin Lambert was appointed as a special prosecutor for Broadwater County and Special Attorney

General. Am. Compl., ¶ 25. DCI initiated a second investigation. Am. Compl., ¶ 26. On May 21, 2020, following the investigation, Lambert filed an affidavit of probable cause and was granted leave to file an information including two counts: felony theft, based on the conduct underlying the 2016 deferred prosecution agreement; and misdemeanor official misconduct, based on actions related to the creation of the Wheatland Targeted Economic Development District ("TEDD") between 2018 and 2020. Am. Compl., ¶¶ 15-17, 33-37, 43, 47.

Obert filed motions to dismiss both counts of the information. Am. Compl., ¶ 54. A two-day evidentiary hearing was held, after which both charges were dismissed. *Id*. The District Court held that the felony theft charge was precluded by the deferred prosecution agreement. Am. Compl., ¶ 55. As to the misdemeanor official misconduct, the Court held that there was insufficient evidence from which a rational trier of fact could conclude that Obert had committed the offense. Am. Compl., ¶ 56. The District Court determined that Obert did not exceed her lawful authority in voting to create the TEDD. Supp. App. 2 at p. 15, ¶ 9. In addition, the District Court reasoned that Obert had not enjoyed any personal or financial advantage by voting to create the TEDD as her husband was merely the executive director of Montana Business Assistance Connection and was not entitled

to any distribution or profit from the creation of a TEDD. Supp. App. 2 at p. 15, ¶ 10.

Obert filed her complaint against the State of Montana alleging breach of contract and breach of the implied covenant of good faith and fair dealing on March 28, 2022. On August 5, 2022, she filed an Amended Complaint adding claims of tortious bad faith and violation of procedural due process against the State, and malicious prosecution against Swanson and Lambert.

STANDARD OF REVIEW

A district court's ruling on a motion to dismiss is reviewed de novo. *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 18, 359 Mont. 34, 249 P.3d 35. In consideration of a motion to dismiss under M. R. Civ. P. 12(b)(6), the complaint must be construed in the light most favorable to the plaintiff. *Puryer v. HSBC Bank USA, N.A.*, 2018 MT 124, ¶ 10, 391 Mont. 361, 419 P.3d 105. All non-conclusory allegations of fact stated in the complaint are taken as true. *Meyer v. Jacobsen*, 2022 MT 93, ¶ 4, 408 Mont. 369, 510 P.3d 52. A court is not required to take as true any allegations in the complaint that are legal conclusions. *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6. Dismissal is proper if the complaint either fails to state a cognizable legal theory for relief or states an

otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief. *Puryer*, ¶ 12.

SUMMARY OF THE ARGUMENT

The basis for the District Court's decision was legal in nature, rather than factual as Obert contends. The District Court did not make its decision based on its own resolution of the facts, but on legal determinations stemming from Obert's own allegations in her Amended Complaint. Simply put, the allegations in Obert's Amended Complaint do not amount to cognizable claims even when viewed in a light most favorable to Obert.

Obert has no claim for breach of contract or breach of the implied covenant of good faith and fair dealing because such claims are barred by the statute of limitations. Even if the claims for breach of contract and breach of implied covenant were not time-barred, Obert's remedy for breach of a deferred prosecution agreement is specific performance, not damages. Obert has already achieved her remedy of specific performance as the charges against her allegedly in violation of the deferred prosecution agreement have already been dismissed.

Obert cannot state a claim for tortious bad faith because no special relationship existed between her and the State. Specifically, Obert cannot establish that the parties were in "inherently unequal bargaining positions."

Story v. City of Bozeman, 242 Mont. 436, 451, 791 P.2d 767, 776 (1990). In fact, Obert was well-protected by her own representation who zealously challenged and enforced the State's performance surrounding the deferred prosecution agreement.

The State provided Obert with adequate due process. Obert was never entitled to a pre-deprivation hearing prior to filing the charges. Rather, Obert was entitled only to move to dismiss the charges, which she did successfully.

Swanson is entitled to absolute prosecutorial immunity. Obert cannot establish a claim for malicious prosecution as the District Court never entered a decision on the merits of the charges in Obert's favor, and Swanson acted in accordance with the required statutory duties of a county attorney. Obert therefore has no claim against him.

ARGUMENT

I. Obert's claims against the State for Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing are time-barred.

Obert brings claims against the State for breach of contract and breach of the implied covenant of good faith and fair dealing in Counts I and II, respectively, of her Amended Complaint. This District Court, relying

on § 18-1-402, MCA, found that Obert's contract claims are time-barred. Appellant's App. 1, p. 11.

This Court has previously recognized that plea agreements are "contracts and generally governed by contract principle." *Ronning v. Yellowstone Cnty.*, 2011 MT 79, ¶ 12, 360 Mont. 108, 253 P.3d 818 (citing *State v. Rardon*, 2005 MT 129, ¶ 18, 327 Mont. 228, 115 P.3d 182). Like a plea agreement, an agreement not to prosecute or to defer prosecution is also contractual in nature. *U.S. v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998).

The statute of limitations for a breach of contract runs from the time of the breach. *Miller v. Kleppen*, 2019 MT 83, ¶ 13, 395 Mont. 286, 438 P.3d 806. An action for breach of contract against the State of Montana, if no administrative procedures are specified by the contracting agency, must be brought within one year after the cause of action has arisen. Section 18-1-402, MCA; *Lutey Constr.-The Craftsman v. State*, 257 Mont. 387, 389-90, 851 P.2d 1037, 1038 (1993); *see also McDaniel v. State*, 2009 MT 159, ¶ 23, 350 Mont. 422, 208 P.3d 817 (analyzing State's alleged breach of plea agreement as public contract under Title 18). A breach of the implied covenant of good faith and fair dealing is a breach of the contract, and therefore is governed by the same statute of limitations. *Lutey Constr.*, 257

Mont. at 393-94; 851 P.2d at 1040-41 (citing *Story*, 242 Mont. at 450, 791 P.2d at 775).

Obert alleges in her Amended Complaint that the State breached the deferred prosecution agreement when it prosecuted her for theft. Am Compl., ¶ 61. The State's prosecution of Obert on the allegation of theft began on May 21, 2020, when Gallatin County Attorney Martin Lambert was granted leave to file an Information officially charging Obert. Am. Compl., ¶ 43. By Obert's own allegations, the commencement of prosecution via information constituted breach of both the contract and the implied covenant, and the breach therefore must have occurred on May 21, 2020. Applying the statute of limitations set forth in § 18-1-402, MCA, Obert must have filed her claims by May 21, 2021. She did not do so. Obert filed her original complaint on March 28, 2022, nearly a year after the statute of limitations had expired. Obert's contract claims accrued on the date of the alleged breach, May 21, 2020, and expired one year thereafter, pursuant to § 18-1-402, MCA. The District Court correctly found that Obert's contract claims are time barred.

a. McDonough does not address the accrual of an action for breach of contract and is inapplicable here.

Obert challenges the accrual date for when the one-year statute of limitations began to run. Even though her Amended Complaint alleges that

the breach occurred on May 21, 2020, Obert now urges this Court to adopt the approach in *McDonough*, in which the Supreme Court held that "a civil claim that challenges the integrity of criminal prosecutions does not begin to run until the underlying criminal case terminated in the plaintiff's favor." Appellant's Br. at 30 (citing *McDonough v. Smith*, ___ U.S. ___, 139 S. Ct. 2149, 2154-56 (2019)). Obert argues that the contract claim did not begin to accrue until March 30, 2021, when the dismissal of the charges against her became final.

McDonough is distinguishable from this case. *McDonough* addressed a civil tort claim, not a contract claim. McDonough presented a due process claim under 42 U.S.C. § 1983 in which he alleged the fabrication of evidence. The *McDonough* Court observed that the accrual of a § 1983 claim "is a question of federal law . . . conforming in general to common-law tort principles." 139 S. Ct. at 2155. Obert's reliance on *McDonough* in this case is in error as she seeks to apply federal tort law to a state contract law claim. As a question of federal law, the accrual date in *McDonough* for a federal tort does not apply to state contract law. Obert's contract claims in this case are not founded in federal law, but state law. *McDonough* therefore does not extend to Obert's contract claims.

The nature of the claims and their potential remedies is also important in distinguishing *McDonough* from the case at hand. As was the case in *McDonough*, plaintiffs may seek damages in tort after a termination of the underlying criminal case in plaintiff's favor. *Id.*, 139 S. Ct. at 2156-58. Contract claims, on the other hand, and specifically contract claims rooted in breach of a plea agreement, provide plaintiffs with a remedy of only recission or specific performance. *State v. Munoz*, 2001 MT 85, ¶¶ 13-18, 305 Mont. 139, 23 P.3d 922 (citing *Santobello v. New York*, 404 U.S. 257, 263, 92 S. Ct. 495, 499 (1971)). These remedies can be obtained within the criminal action itself, so applying equitable tolling to permit the filing of a separate contract action is neither logical nor necessary. Obert has already achieved the specific performance remedy available to her for her contract claims: the charges against her were dismissed. *McDonough* did not evaluate the tolling of claims for which the remedy had already been achieved.

Obert presents no precedent other than *McDonough*, which is distinguishable for the reasons stated above, that would lead this Court to deviate from the general principle that her contract claim accrued at the time of the alleged breach. The accrual date for Obert's contract claim therefore must be May 21, 2020.

b. Equitable tolling has no application here because Obert has already received the breach of contract remedy available to her.

Obert argues that even if the contract claims accrued on May 21, 2020, the doctrine of equitable tolling should apply. Obert cannot satisfy the threshold rationale and policy requirements to employ this doctrine.

Generally, a plaintiff must show a "reasonable and good faith pursuit of one of several possible remedies and then demonstrate the three criteria are met": (1) the defendant was notified timely within the statute of limitations by the filing of the first claim; (2) the defendant's ability to gather evidence for defense of the second claim was not prejudiced; and (3) the plaintiff reasonably and in good faith filed the second claim. *Lozeau v. GEICO Indem. Co.*, 2019 MT 136, ¶ 14, 350 Mont. 320, 207 P.3d 316. However, while this test is proper in cases involving alternative legal remedies, "the rationale behind the doctrine of equitable tolling serves broader purposes than merely those embodied by the test." *Schoof v. Nesbit*, 2014 MT 6, ¶ 34, 373 Mont. 226, 316 P.3d 831.

The policy behind the equitable tolling doctrine is to "avoid forfeitures and allow good faith litigants their day in court." *Brilz v. Metro Gen. Ins. Co.*, 2012 MT 184, ¶ 16, 366 Mont. 78, 285 P.3d 494 (citing *Addison v. State*,

578 P.2d 941, 945 (Cal. 1978)). The doctrine of equitable tolling should only be applied in "rare and exceptional circumstances." *Schoof,* ¶ 35 (quoting *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000)). For example, the doctrine should be applied when a defendant is "responsible for concealing the existence of the plaintiff's cause of action." *Id.* (quoting *Veltri v. Bldg. Serv. 32b-J Pension Fund*, 393 F.3d 318, 323 (2d Cir. 2004)).

This case is not one involving "alternative legal remedies." The remedies available for the breach of a plea agreement are rescission or specific performance. *Munoz*, ¶¶ 13-18 (citing *Santobello*, 404 U.S. at 263, 92 S. Ct. at 499). *See also United States v. Alexander*, 869 F.2d 91, 95 (2d Cir. 1989) (defendant may not seek damages for breach of plea agreement). Obert has already been heard in the underlying criminal case on her claim that the State charged her in violation of the deferred prosecution agreement. The District Court agreed with her and dismissed the claims against her.

Application of the statute of limitations to Obert's separate breach of contract claims would not create any forfeiture of remedies, as Obert has already brought her claim that the State breached its agreement before a court and has received all of the relief she is entitled to.

Lastly, Obert had the opportunity to file her initial complaint within the applicable statute of limitations. The District Court dismissed her charges on March 10, 2021, and the applicable one-year statute of limitations expired on May 21, 2021, one year from when the District Court granted leave to file the information. Between those two dates, over two months had passed and Obert failed to act. The doctrine of equitable tolling cannot be used as a safety net for Obert's failure to act.

II. The District Court correctly determined that Obert's claim for tort of bad faith in Count III must fail.

Obert alleges a claim for the tort of bad faith against the State in Count III of her Amended Complaint. The District Court properly dismissed Count III, as there was "no special relationship between Montana and Obert relative to the DPA." Appellant's App. 1 at 16. This ruling is not precluded by the doctrine of collateral estoppel, because the issues decided by Judge Menahan in his order dismissing the criminal charges and Judge McMahon in dismissing the civil action were not the same.

a. There is no special relationship to establish a bad faith tort claim.

In most cases, tort damages are not available for breaches of contract. *Story*, 242 Mont. at 450, 791 P.2d at 775. A bad faith tort claim may be available only in "exceptional circumstances" arising from

"contracts involving special relationships which are not otherwise controlled by specific statutory provisions." *Id*. A special relationship exists where:

> (1) the parties are in inherently unequal bargaining positions;
>
> (2) the motivation for entering the contract is a nonprofit motivation, i.e., to secure peace of mind, security, or future protection;
>
> (3) ordinary contract damages are not adequate because they do not require the party in the superior position to account for its actions and do not make the inferior party whole;
>
> (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and
>
> (5) the other party is aware of this vulnerability.

Id., 242 Mont. at 451, 791 P.2d at 776 (quoting *Wallis v. Superior Court*, 160 Cal. App. 3d 1109, 207 Cal. Rptr. 123, 129 (Cal. App. Ct. 1984)). All five elements must be present in order to demonstrate the existence of a special relationship. *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶ 15, 395 Mont. 432, 443 P.3d 369.

The central issue in deciding if a special relationship existed in this case turns on the first element: whether the parties are in inherently unequal bargaining positions. *Story*, 242 Mont. at 451, 791 P.2d at 776. Obert cannot establish that the parties were in inherently unequal bargaining positions, and therefore cannot demonstrate the existence of a special relationship. Unequal bargaining power exists in circumstances

where the more vulnerable party has "'no option but to sign the contract as defendant dictated.'" *Warrington*, ¶ 17 (quoting *Wallis*, 160 Cal. App. 3d at 1116). Insurance companies, for example, are generally in a superior bargaining position because "'the insured usually has no voice in the preparation of the insurance policy.'" *Stephens v. Safeco Ins. Co. of Am.*, 258 Mont. 142, 147, 852 P.2d 565, 568 (1993) (quoting *First Sec. Bank of Bozeman v. Goddard*, 181 Mont. 407, 419, 593 P.2d 1040, 1047 (1979)). Negotiation of a plea agreement, on the other hand, "presupposes fundamental fairness in the process of securing such an agreement." *State v. Bowley*, 282 Mont. 298, 311, 938 P.2d 592, 599 (1997).

Obert argues that she adequately pled facts to establish a special relationship existed between her and the State, and that the District Court improperly construed those allegations against her. Where the facts concerning the alleged existence of a special relationship are undisputed, however, as here, the existence of such relationship is a question of law. *Story*, 242 Mont. at 451, 791 P.2d at 776.

As alleged in the Amended Complaint, the deferred prosecution agreement was actively negotiated between the parties, and Obert did have a "voice in the preparation" of the agreement. *Stephens*, 258 Mont. at 147, 852 P.2d at 568. Obert was represented by counsel, Joe Seifert, who

exchanged drafts with the prosecutor, Assistant Attorney General Brant Light, during negotiations of the deferred prosecution agreement. Am. Compl., ¶¶ 14, 16. Further, the Amended Complaint alleges that Light did not "believe any criminal charges were appropriate . . . when looking at the totality of the circumstances," indicating that Obert was actually in a strong bargaining position in the negotiations. Am. Compl., ¶ 18. Obert had options other than signing the deferred prosecution agreement, where she alleges that even the prosecutor was reluctant to bring the charges. *Warrington*, ¶ 17.

The District Court correctly applied the facts alleged in the Amended Complaint in its analysis. The District Court noted that "[i]t is undisputed that [Obert] was represented by competent counsel during the DPA's negations." Appellant's App. 1 at 14. The District Court also found that, as an elected Broadwater County Commissioner at the time of signing the deferred prosecution agreement, Obert possessed "skills that required intellect and attention to detail such as reviewing, approving or rejecting potential contracts." *Id*. at 15. While Obert asserts that she did not specifically allege facts concerning her own intelligence, the Amended Complaint details her involvement with and consideration of complex contract matters in her role as a Commissioner. Am. Compl., ¶¶ 28-38. The

inference that she was competent to do so is not unfavorable to Obert. Lastly, Obert agreed to the contract, acknowledging that she "reviewed the terms of [the deferred prosecution agreement] and is entering [the deferred prosecution agreement] voluntarily and freely, and that she fully understands the terms and conditions of [the agreement]." Appellant's Supp. App. 1, Ex. A, at p. 2, ¶ 5.

Obert cannot dispute any of these facts in good faith. The District Court therefore made a determination as a matter of law, based upon the facts as alleged in the Amended Complaint. There was no special relationship between the parties that would support a cognizable bad faith tort claim.

b. Obert's collateral estoppel argument is misleading.

Obert argues that the District Court improperly rejected her allegation that the State engaged in bad faith by bringing charges it knew were resolved by the deferred prosecution agreement. She argues that the doctrine of collateral estoppel bars relitigating this issue because Judge Menahan concluded that Obert "complied with the terms of the agreement" and that the State is "now barred from pursuing its prosecution." Am Compl. at ¶ 55; Appellant's Supp. App. 2 at p. 13, ¶ 5.

This argument distracts from the key issue with Obert's bad faith tort claim. Judge McMahon's substantive ruling on the bad faith tort claim hinges on one key factor – that no special relationship existed. Judge Menahan, on the other hand, did not need to make any finding concerning the existence of a special relationship when addressing the motion to dismiss the criminal charges.

Although the finding that no special relationship existed was sufficient to support a dismissal of the bad faith tort claim without further analysis, Judge McMahon also found that Obert's failure to disclose possible conflicts of interest or abstaining from voting on matters in which she had an interest after reimbursing Broadwater County "would . . . be grounds for finding a breach of the DPA." Appellant's App. 1 at 15. As a result, such breach "would" provide the State with grounds to rescind the deferred prosecution agreement and Obert "would have no contractual right not to be prosecuted." *Id*. at 15-16.

This additional language regarding Obert's potential breach in Judge McMahon's order is dicta.[1] The language is hypothetical in nature and has no connection or impact on the determination that no special relationship

[1] This Court has recognized that dicta is "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 28, 354 Mont. 15, 23, 221 P.3d 666, 672.

existed. Judge McMahon explicitly concluded that "since there was no special relationship between Montana and Obert relative to the DPA, Count III is DISMISSED with prejudice as a matter of law." *Id*. at 16. Importantly, Judge McMahon cited only to the lack of special relationship for dismissal of the bad faith tort claim. This language proves that analysis on Obert's potential breach of the deferred prosecution agreement does not change the bad faith tort outcome and is "unnecessary." *Giacomelli*, ¶ 28. The Court therefore should disregard Obert's argument to reverse the District Court order based on the doctrine of collateral estoppel.

c. No Montana law permits a bad faith tort action for breach of a plea agreement

Although contract law is generally applied in the interpretation of plea agreements or deferred prosecution agreements, these types of agreements "are not conventional obligations." *McDaniel v. State*, 2009 MT 159, ¶ 66, 350 Mont. 422, 208 P.3d 817 (Rice, J., dissenting). Montana law has never recognized a bad faith tort claim for the breach of a plea agreement or pretrial diversion agreement, *see id.,* further indication that a special relationship is not found in these types of contracts. The right to counsel and other statutory and procedural safeguards designed to ensure the voluntariness of pleas serve to mitigate inequities in the bargaining process. *See, e.g.*, §§ 46-21-210, -212, MCA (mandating plea colloquy

advising defendant of rights and establishing factual basis for plea). Under contract law, when the State is alleged to have breached a plea agreement, the remedy is not civil damages, but either rescission or specific performance of the agreement. *Munoz*, ¶¶ 13-18. Criminal defendants should not be able to circumvent this established law by seeking tort damages instead.

Plea agreements and deferred prosecution agreements are not commercial contracts and are robustly covered by their own statutory provisions. Sections 46-16-130, 46-12-201 through -213, MCA. Montana's tort of bad faith, as established in *Story*, arose in the commercial context and applied commercial standards. *Story*, 242 Mont. at 451-52, 791 P.2d at 776 (standard of conduct is "honesty in fact and observance of reasonable *commercial* standards of fair dealing *in the trade*," noted to be the "same standard as applied to merchants under the Uniform Commercial Code" (emphasis added)). *Story* also expressly applied to contracts "not covered by a more specific statutory provision." *Id.*, 242 Mont. at 450, 791 P.2d at 775. To permit tort litigation for the breach of a plea agreement or pretrial diversion agreement would inhibit the use of such agreements because it would increase civil litigation and tort liability exposure. This is not the law, and it is poor public policy.

d. Recognizing a special relationship in this case is contrary to public policy and would have significant impacts on the future of plea agreements.

The State's power in criminal prosecutions is recognized in the rule of contract interpretation stating that plea agreements should be construed against the State. *See, e.g., United States v. De La Fuente*, 8 F.3d 1333, 1337-38 (9th Cir. 1993). The State's power does not give rise to a fiduciary-like relationship rendering it liable in tort to the persons it prosecutes—with whom it necessarily has an adverse relationship. A special relationship should be recognized only in situations where contract damages are inadequate; here, Obert is not even entitled to contract damages. Her remedies instead are specific performance or the opportunity to revoke her plea. It would be exceptionally disastrous public policy to permit every criminal defendant who has entered a plea agreement to sue the State of Montana for contract and tort damages.

III. The District Court did not err in dismissing Obert's procedural due process claim because Obert was given sufficient due process.

Obert brings claims for violations of procedural due process against the State in Count IV of her Amended Complaint. The District Court correctly found that Obert was not entitled to any specific pre-charge filing procedure, and specifically not entitled to "a hearing before her rights in the

[DPA] were deprived based on a preponderance of the evidence." Am Compl. at ¶ 83; Appellant's App. 1 at 17-18.

Obert alleges in her Amended Complaint that "it was settled law in May 2020 . . . that the State is not allowed to unilaterally nullify a deferred prosecution agreement." Am. Compl., ¶ 44. This allegation is not supported by a citation to any authority and need not be taken as true. In other words, Obert asserts that rather than filing an information supported by probable cause, the State was required to demonstrate by a preponderance of the evidence that the deferred prosecution agreement had been violated before it could resume the prosecution. *Id*., ¶ 45. Obert also claims that she was entitled to a hearing "based on the preponderance of the evidence, that [Obert] breached a deferred prosecution agreement before the agreement may be set aside." *Id.* Neither allegation is accurate.

Montana law is clear that a defendant is not entitled to any specific pre-filing procedure. *State v. Haller*, 2013 MT 199, ¶ 8, 371 Mont. 86, 306 P.3d 338. Ninth Circuit precedent, likewise, does not require pre-filing procedure. In 2017, the Ninth Circuit held that it had "never expressly addressed whether the government must seek a judicial finding of breach before indicting a defendant on charges barred by a plea agreement." *United States v. Placencia-Orozco*, 852 F.3d 910, 921 (9th Cir. 2017). The

Court noted that the defendant in that case had "pointed . . . to no statute or case law requiring the government to seek a preindictment finding of breach." *Id*. at 921-22. The Court concluded instead that:

> the proper way for a defendant to raise a prior plea agreement as a defense to a criminal charge is to move to dismiss that charge . . . . If the government thinks that the defendant has breached the plea agreement, such that it no longer applies, then it must proffer sufficient evidence to establish that breach by a preponderance of the evidence. . . . The matter need not be submitted to a jury, nor need it be decided before the indictment or information is filed.

Id. at 922-23.

This was indeed the procedure followed in this case. The Montana statute authorizing deferred prosecution or pretrial diversion agreements does not specifically address the procedure that must be followed if a defendant breaches the agreement. Section 46-16-130, MCA. Still, Obert was provided due process under the existing precedent. The State filed a motion for leave to file information based upon probable cause in accordance with § 46-11-201, MCA. Am Compl. at ¶ 54. The District Court then held an evidentiary hearing at which Obert had an opportunity to raise the deferred prosecution agreement as a defense to the charges against her, Obert did so, and obtained dismissal of the charges as a result. The termination of the criminal proceedings shows that she received effective process.

In her opening brief, Obert cites to multiple cases in an attempt to show that due process required a pre-deprivation hearing. However, none of the cases cited by Obert actually hold that a pre-charge judicial determination is required, and none are in the posture of a defendant suing the state in a civil proceeding. They are all criminal cases addressing the question of whether the conviction and sentence following the defendant's alleged breach of agreement should be affirmed. While some reversed on other bases, none found that due process was not satisfied by a post-indictment hearing. Notably, none are Montana law. *Castaneda*, 162 F.3d at 833 (district court erred in failing to grant motion to dismiss indictment where defendant had not actually breached agreement); *United States v. Meyer*, 157 F.3d 1067, 1077 (7th Cir. 1998) (post-indictment pretrial evidentiary hearing satisfied requirement for judicial determination of breach); *Cuero v. Cate*, 850 F.3d 1019 (9th Cir. 2017), *rev'd sub nom. Kernan v. Cuero*, 138 S. Ct. 4 (2017) (discussing choice of remedies between rescission or specific performance); *U.S. v. Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983) ("by dismissing the indictment the district court effectively enforced the agreement"); *U.S. v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981) (judicial determination of breach following defendant's post-sentencing motion to vacate adequate to satisfy due process); *State v.*

Marino, 674 P.2d 171, 175 (Wash. 1984) (due process satisfied where trial court held complete evidentiary hearing on motion to set aside termination of diversion agreement).

As such, these cases stand for the proposition that it is the proper role of the district court in a criminal proceeding to determine whether a plea agreement has been breached. Due process is satisfied when a court makes this determination on a motion to dismiss the charges. *U.S. v. Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986) (due process satisfied by post-indictment hearing); *Meyer*, 157 F.3d at 1077. A post-indictment hearing is what happened here, it is what happened in each of the cases cited by Obert, and it is all that is required by due process.

Obert alleges that the process provided was insufficient because she was required to retain attorneys to file the motion to dismiss, and was "forced to intervene" in the Broadwater Reporter's lawsuit against Broadwater County to access her booking photograph. Am. Compl., ¶¶ 52-53. Doing so was allegedly necessary for Obert to "defend her privacy interests" and keep the photograph from becoming public, Am. Compl., ¶ 53. However, Obert would also have had to retain counsel for a hearing on a pre-charge determination of breach, which would also have been a

matter of public record. Further, booking photographs are public criminal justice information. Section 44-5-103(13)(e)(ii), MCA.

The Court need not take as true the unsupported legal conclusion in Obert's Amended Complaint that she was entitled to a hearing prior to the State filing charges. Obert was never entitled to a pre-deprivation hearing. In addition, Obert pled facts that she was, in fact, given an evidentiary hearing on her motion to dismiss the charges against her. As a result, she was given sufficient due process. Obert therefore has no cognizable claim for a violation of her procedural due process.

IV. The District Court did not err in dismissing Obert's malicious prosecution claim as Swanson followed applicable law and did not "instigate" the prosecution of Obert

Obert alleges a claim for malicious prosecution against Swanson in Count V of her Amended Complaint. The District Court properly dismissed the claim against Swanson as Obert cannot establish a claim for malicious prosecution and further that Swanson complied with § 7-4-2718, MCA. Although not dispositive of the outcome of the motion to dismiss Obert's claims in Swanson's favor, the District Court erred in finding that the proceeding terminated on the merits in favor of Obert when the charges against Obert were dismissed in 2020.

A plaintiff asserting a claim of malicious prosecution must prove:

(1) that a judicial proceeding was commenced against the plaintiff;
(2) the defendant was responsible for instigating, prosecuting, or continuing a judicial proceeding;
(3) there was a lack of probable cause for the defendant's acts;
(4) the defendant was actuated by malice;
(5) the judicial proceeding terminated favorably for the plaintiff; and
(6) the plaintiff suffered damage.

Spoja v. White, 2014 MT 9, ¶ 12, 373 Mont. 269, 317 P.3d 153. Obert cannot establish these required elements.

a. Swanson acted pursuant to his statutory duty when providing information leading to the filing of the 2020 charges and is entitled to immunity.

Obert claims that she states sufficient allegations to establish that Swanson instigated the proceeding. Regardless, Obert still has no legally cognizable claim against Swanson. Prosecutorial immunity is an established immunity against civil liability. *Renenger v. State*, 2018 MT 228, ¶ 9, 392 Mont. 495, 426 P.3d 559. To determine whether a county attorney is entitled to immunity, courts look to the "nature of the function performed." *Renenger*, ¶ 9 (citing *Kalina v. Fletcher*, 522 U.S. 118, 127, 118 S. Ct. 502, 508 (1988)). A county attorney is absolutely immune when acting within the scope of their duties and performing traditional prosecutorial functions. *Renenger*, ¶ 11; *Rosenthal v. Cnty. of Madison*, 2007 MT 277, ¶ 29, 339

Mont. 419, 170 P.3d 493. The duties of a county attorney are defined statutorily. *Ronek v. Gallatin Cnty.*, 227 Mont. 514, 518, 740 P.2d 1115, 1117 (1987).

Section 7-4-2718, MCA, enacted in 2017, provides that "[i]f a county attorney receives a complaint concerning official misconduct . . . of a local government public officer . . . the county attorney shall refer the complaint and any relevant evidence for the attorney general's review." The Amended Complaint alleges that "[i]n August 2018, Swanson initiated a series of communications with the Attorney General's Office demanding that [Obert] be criminally prosecuted." Am. Comp., ¶ 21. In 2018, referring evidence of official misconduct to the Attorney General was a mandatory statutory duty of the office of county attorney, pursuant to § 7-4-2718, MCA. Swanson is entitled to absolute immunity. The claim of malicious prosecution should also be dismissed as to the charge of official misconduct in the 2020 information.

b. The State's prosecution of Obert was not resolved in her favor on the merits.

The favorable termination element does not require an affirmative finding of innocence, but the termination "'must reflect on the merits of the underlying action.'" *Plouffe v. Mont. Dep't of Pub. Health & Human Servs.*,

2002 MT 64, ¶ 34, 309 Mont. 184, 45 P.3d 10 (quoting *Sacco v. High Country Indep. Press*, 271 Mont. 209, 245, 896 P.2d 411, 432 (1995)). A proceeding that terminates indecisively because of a settlement or plea agreement does not meet the requirements of a cause of action for malicious prosecution, as it does not reflect on the merits. *Vehrs v. Piquette*, 210 Mont. 386, 392, 684 P.2d 476, 479 (1984). *See also, e.g., Bell Lumber Co v. Graham*, 219 P. 777 (Colo. 1923) (termination resulting from compromise or agreement is not considered a favorable termination).

The 2016 official misconduct allegation cannot form the basis of a malicious prosecution claim, as it was never charged. While the 2020 information included a charge of official misconduct, that charge was based on actions taken in 2018 or later.

The felony theft charged in 2020 was the exact same charge first alleged in 2016 and included in the deferred prosecution agreement. When it was dismissed in 2020, the dismissal was not based upon a determination on the merits of whether Obert had actually engaged in theft, but because the District Court determined that the charge had been resolved by the deferred prosecution agreement. Am. Compl., ¶ 55. The felony theft charge therefore did not terminate favorably for Obert, because it terminated indecisively in a settlement. *See Vehrs*, 210 at 392, 684 P.2d

at 479. The only allegation that was actually charged and actually dismissed on the merits was the 2020 misdemeanor official misconduct charge. Am. Compl., ¶ 56. Obert's claims of malicious prosecution should be dismissed as to all other allegations or charges, because Obert has failed to establish the elements of this claim.

The District Court made a determination based on a surface-level analysis of what it means to be considered a favorable termination. In sum, the District Court appeared to make its "favorable" determination based on whether Obert was entitled to protection under the deferred prosecution agreement. It completely overlooked the fundamental principles of what constitutes "favorable termination." Instead, the District Court cited to *Miller v. Watkins*, 200 Mont. 455, 463, 653 P.2d 126 (1982) (holding "dismissal for lack of speedy trial does reflect on the merits of a case and can be considered a termination in favor of [a party]") and *Sacco v. High Country Indep. Press*, 271 Mont. 209, 896 P.2d 411 (1995) (holding dismissal based on statute of limitations is considered a decision on the merits of a case).

Neither case analyzes whether the proceeding termination is based on a deferred prosecution agreement, or even a plea agreement. Nor does this case and appeal deal with the statute of limitations or speedy trial.

Neither case should therefore apply here. To the contrary, Swanson has provided precedent for this Court to determine that the dismissal of the charges against Obert, as a result of Judge Menahan's interpretation of the deferred prosecution agreement, does not reflect a decision on the merits. *Vehrs*, 210 Mont. at 392. Accordingly, the dismissal of the claims against Obert cannot be considered a favorable termination for her.

c. There was probable cause to charge Obert.

Again, Obert asserts that merely pleading the conclusory allegation that there was no probable cause to charge Obert defeats Swanson's prosecutorial immunity. She is mistaken. This Court has held that, when acting within the scope of their duties, "[a] criminal prosecutor is 'absolutely immune from civil liability' when performing the traditional functions of an advocate, 'regardless of negligence of lack of probable cause.'" *Renenger*, ¶ 10; *Rosenthal*, ¶ 29.

In other words, Swanson is still entitled to immunity even if no probable cause existed to charge Obert. In any event, Judge Menahan determined that probable cause existed when he granted the State's motion for leave to file the information on May 21, 2020. Obert must agree with this proposition, as her Amended Complaint alleges that "[t]he burden of proof to obtain leave to file a criminal Information only requires a

showing of 'probable cause. . .'" Am. Compl., ¶ 45. The probable cause requirement is also codified in § 46-11-201, MCA. Obert cannot now argue that no probable cause existed from a decision not now on appeal in front of this Court.

Obert also claims that the outright dismissal of criminal charges (as opposed to acquittal) is "prima facie proof there was no probable cause to bring the charges." Appellant's Br. at 27-28 (citing *Hill v. Wallin*, 2016 U.S. District LEXIS 176870 *15 (W.D. Wash. Dec. 21, 2016)); *Peasley v. Puget Sound Tug and Barge Co.*, 125 P.2d 681, 688 (Wash. 1942)). Importantly, as both cases are from Washington, neither case is binding on this Court. Obert provides no Montana source for such argument. To the contrary, this Court has recognized that, as a rule of thumb, a finding of probable cause to bring criminal charges is prima facie evidence of probable cause. *See Watkins v. Spring Creek Colony*, 188 Mont. 467, 469, 614 P.2d 508, 510 (1980).

Regardless, context here is important. To obtain leave to file an information, the motion (or application) must only contain an affidavit supported by evidence. Section 46-11-201(2), MCA. Judge Menahan was provided with the required documentation to grant the motion for leave. He was not afforded a two-day evidentiary hearing to determine probable

cause—nor should he be. Such a requirement would defeat the purposes of the fundamental criminal process. Judge Menahan, however, was provided a two-day evidentiary hearing to determine that the deferred prosecution agreement prevented the theft charges in Count 1 and that there was "insufficient evidence" to find that Obert committed the official misconduct in Count 2. Am. Compl., ¶ 55-56. To claim that this finding is "prima facie proof" that no probable cause existed is simply wrong, and ignores the evidence that Judge Menahan considered for each proceeding.

CONCLUSION

Based on the foregoing reasons, the Court should affirm the District Court's decision to dismiss claims for breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), tortious bad faith (Count III), and violation of procedural due process (Count IV) against the State. In addition, the Court should affirm the District Court's decision to dismiss the sole claim against Swanson for malicious prosecution (Count VI).

Dated: April 2, 2024.

DRAKE LAW FIRM, P.C.

BY: /s/ Kale Guldseth
Kale Guldseth

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont. R. App. P., I certify that the Appellee's State of Montana Answer Brief is double spaced, is a proportionately spaced 14-point Arial typeface, and contains 7,575 words.

/s/ Kale Guldseth
Drake Law Firm

CERTIFICATE OF SERVICE

I, Kale J. Guldseth, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-02-2024:

Calvin J. Stacey (Attorney)
P.O. Box 1139
Billings MT 59103
Representing: Martin D. Lambert
Service Method: eService

Kyle W. Nelson (Attorney)
PO Box 6580
Bozeman MT 59771
Representing: Laura Marie Obert
Service Method: eService

Henry Tesar (Attorney)
35 North Grand
Bozeman MT 59715
Representing: Laura Marie Obert
Service Method: eService

Brian K. Gallik (Attorney)
777 E. Main St., Ste. 203
PO Box 70
Bozeman MT 59771
Representing: Laura Marie Obert
Service Method: eService

Patricia Hope Klanke (Attorney)
111 N Last Chance Gulch Suite 3J
Helena MT 59601
Representing: State of Montana, Cory J. Swanson
Service Method: eService

Electronically signed by Angela Petrosky on behalf of Kale J. Guldseth
Dated: 04-02-2024