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

WALTER JOEY OVERSTREET,

Plaintiff and Appellant,

v.

ERICK FETTERHOFF in his official and individual capacities, and 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 PICCOLO, individually, and as Deputy Park County Attorney, STATE OF MONTANA, and KENDRA LASSITER, individually, and in her official capacity as Park County Attorney,

Defendants and Appellees.

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INTRODUCTION

This action presents a textbook case for the application of prosecutorial immunity because each claim is premised on some aspect of the preparation, filing, and prosecution of criminal charges against Appellant Walter Joey Overstreet. Even taking every factual allegation in Overstreet's Second Amended Complaint as true, the District Court correctly determined that each claim fails. The State of Montana is the only appropriate defendant and prosecutorial immunity is an absolute bar to all claims. In addition, Overstreet's negligence claim is barred by the statute of limitations, his spoliation of evidence claims are not cognizable with relation to the underlying criminal action and cannot be brought as first-party claims, he fails to meet at least two required elements of his malicious prosecution claim, this Court has already declined to recognize standing trial as a basis for emotional distress claims, and actual malice is not an independent cause of action. The District Court should be affirmed in full.

ISSUES FOR REVIEW

1. Whether the District Court correctly determined that the individually named public employee Defendants were immune from suit under Mont. Code Ann. § 2-9-305(5) where the State has acknowledged that they acted within the course and scope of their employment?

2. Whether the District Court correctly applied the doctrine of prosecutorial immunity to bar Plaintiff's claims related to the preparation, filing, and prosecution of his criminal case?

3. Whether the District Court correctly found that each count of the Second Amended Complaint was fatally flawed for other reasons?

STATEMENT OF THE CASE

On March 29, 2021, Appellant Walter "Joey" Overstreet filed his Verified Complaint and Demand for Jury Trial in the District Court, alleging malicious prosecution and related claims against Erick Fetterhoff and the Montana Highway Patrol; Barbara Watson and Watson Crash Reconstruction, LLC; Park County, Montana; and seven John Does (Doc. 1). Watson and Watson Crash Reconstruction were subsequently dismissed from the suit. On January 24, 2022, Overstreet filed his First Amended Complaint and Demand for Jury Trial, adding claims for, *inter alia*, spoliation of evidence and emotional distress (Doc. 45).

On January 30, 2023, Overstreet filed his Second Amended Complaint and Demand for Jury Trial ("SAC"), identifying two new defendants: Bruce Becker and Shannan Piccolo, the Park County Attorney and his deputy, respectively, at the time Overstreet was prosecuted (Doc. 96). On March 20, 2023, the State moved to dismiss the SAC pursuant to Mont. R. Civ. P. 12(b)(6) (Doc. 102), and Park County joined the motion (Doc. 105). On July 12, 2023, the Court granted

Overstreet's request to convert Defendant John Doe 1 to the State of Montana, and denied other amendment (Doc. 122). On August 22, 2023, the Court granted the motion to dismiss (Doc. 125), dismissing the SAC in its entirety and with prejudice on August 24, 2023 (Doc. 126).

On September 13, 2023, Overstreet filed a Notice of Appeal in the District Court (Doc. 128). On November 9, 2023, he filed his Notice of Appeal in this Court.

FACTUAL BACKGROUND

This case arises out of a single-vehicle crash on Highway 89 North in Park County, Montana around midnight of December 13, 2015 (Doc. 96 at ¶ 14). The vehicle belonged to Overstreet (Doc. 96 at ¶ 16). Of its six occupants, at least three were intoxicated to the point that they do not remember the crash. (Doc. 96 at ¶¶ 35, 38, 45). Five, including Overstreet, were injured in the crash and one, Rhiannon Wills, was killed (Doc. 96 at ¶¶ 24-29). Appellee Erick Fetterhoff of the Montana Highway Patrol was the primary investigator on the scene (Doc. 96 at ¶ 17). One of the surviving occupants of the vehicle told investigators that Overstreet had been driving at the time of the crash, and Overstreet himself told Fetterhoff that although he could not recall the crash, he must have been driving, because he never would have let someone else drive his truck (Doc. 96 at ¶¶ 42, 66-68).

Becker charged Overstreet with one count of negligent vehicular homicide and five counts of negligent vehicular assault (Doc. 96 at ¶¶ 69, 135-136).

The case went to trial twice in August 2017 and March 2018, both times ending with a hung jury (Doc. 96 at ¶¶ 86, 88, 101, 111). Before the second trial, the State and Park County hired Watson Crash Reconstruction to examine the vehicle (Doc. 96 at ¶ 91). During the second trial, Watson testified about a "long dark brown hair" she had found on the driver's side door of the vehicle during her search (Doc. 96 at ¶ 102). According to Overstreet, Watson's testimony was the first time he learned of this evidence (Doc. 96 at ¶ 151). However, by that time, the hair had already been disposed of (Doc. 96 at ¶ 123). After that trial again ended in a hung jury, the State charged Overstreet for a third time in June 2019 (Doc. 96 at ¶ 117). The charges were ultimately dismissed by the court (Doc. 96 at ¶ 183). These proceedings followed.

STANDARD OF REVIEW

The District Court dismissed the SAC pursuant to Mont. R. Civ. P. 12(b)(6) for "failure to state a claim upon which relief can be granted." This Court reviews such a dismissal *de novo*. *See Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 66 P.3d 316. "A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *McKinnon v. Western Sugar Coop.*

Corp., 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221. "The determination whether a complaint states a claim is a conclusion of law, and the District Court's conclusions of law are reviewed for correctness." *Plouffe*, 2003 MT at ¶ 8.

In considering the motion to dismiss, all well-pleaded factual allegations are taken as true, and the complaint is construed in the light most favorable to the plaintiff. *See Willson v. Taylor*, 194 Mont. 123, 126, 634 P.2d 1180 (1981). However, "the court is under no duty to take as true legal conclusions or allegations that have no factual basis or are contrary to what has already been adjudicated." *Cowan v. Cowan*, 2004 MT 97, ¶ 14, 321 Mont. 13, 89 P.3d 6.

SUMMARY OF THE ARGUMENT

Every one of Overstreet's claims relate to the preparation, filing, and prosecution of criminal charges against him, and as such, they are barred by prosecutorial immunity. Additionally, the individual Defendants are statutorily immune from suit for acts committed within the scope of their employment. Finally, every one of Overstreet's claims is fatally flawed for other reasons: his negligence claim is barred by the statute of limitations, his spoliation claims are not cognizable in the underlying criminal action, he cannot meet all the elements of his malicious prosecution claim, standing trial is an insufficient basis for his emotional distress claim, and actual malice is not a cognizable cause of action

against the State. The District Court correctly ruled that Overstreet had failed to state any claim upon which relief could be granted, and should be affirmed.

ARGUMENT

I. The District Court correctly found, as a matter of law, that the State of Montana is the only proper defendant.

A. The Montana Highway Patrol was properly dismissed.

"[T]he State of Montana is the only proper defendant in tort claims brought against the State of Montana." *Marten v. Montana*, 2019 U.S. Dist. LEXIS 71040, at *5 (D. Mont. Apr. 26, 2019) (citing Mont. Code Ann. § 2-9-313). The "State" is defined to mean "the state of Montana or any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state." Mont. Code Ann. § 2-9-101(7). The Montana Highway Patrol ("MHP") is an instrumentality of the State. *See* Mont. Code Ann. § 44-1-101. Therefore, naming both the State and MHP as defendants is redundant and improper, and the District Court did not err in dismissing MHP as a defendant.

B. The individually named defendants were properly dismissed.

The individually named defendants are immune from suit because the State and County have acknowledged that all were operating within the course and scope of their employment during all complained-of acts. For acts taken within their prosecutorial capacity, Becker and Piccolo are State actors; for any other acts, they are County actors. Montana Code Annotated § 2-9-305(5) provides,

> In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d).

Overstreet has not argued that any of the exceptions in subsections (6)(b) through (6)(d) apply in this case, and none do. Therefore, Mont. Code Ann. § 2-9-305(5) "serves as a complete bar to holding [defendants] individually liable." *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 60, 358 Mont. 193, 244 P.3d 321.

Although Overstreet argues strenuously in his opening brief that Appellees Fetterhoff, Becker, and Piccolo[1] were not acting within the course and scope of their employment during the complained-of acts, the argument is contrary to what he actually alleged in his SAC. *See* Doc. 125 at 14 (citing Doc. 96 at ¶¶ 203, 204, 206, 215, 217, 223, and 225). Moreover, the application of statutory immunity is not a presumption that he can rebut. The plain language of the statute provides that if the individual defendant's governmental employer acknowledges that he or she acted within the course and scope of his or her employment, it accepts liability and

[1] Although this appeal is captioned to include Kendra Lassiter as an Appellee, the District Court denied leave to add her as a defendant on July 12, 2023 (Doc. 122), and that order has not been appealed. In the event that this Court deems Lassiter to be included as an Appellee, the arguments pertaining to Appellees Fetterhoff, Becker, and Piccolo should be deemed to apply equally to Lassiter.

the employee is absolutely immune from suit. *See, e.g., Emanuel v. Great Falls Sch. Dist.*, 2009 MT 185, ¶ 20, 351 Mont. 56, 209 P.3d 244; *Denke v. Shoemaker*, 2008 MT 418, ¶ 87, 347 Mont. 322, 198 P.3d 284. The State and County have done so, and thus their individually named employees are absolutely immune.

II. Prosecutorial immunity is an absolute bar to all claims.

Every one of the actions about which Overstreet complains is a classic prosecutorial function, and therefore each claim is barred by the doctrine of prosecutorial immunity. Prosecutorial immunity is well-established in Montana's common law, immunizing prosecutors from civil liability for conduct within the scope of their prosecutorial duties. *See Ronek v. Gallatin County*, 227 Mont. 514, 516, 740 P.2d 1115; *see also Steele v. McGregor*, 1998 MT 85, ¶¶ 25-26, 288 Mont. 238, 956 P.2d 1364; *Reneger v. State*, 2018 MT 228, ¶ 9, 392 Mont. 495, 426 P.3d 559. This immunity "allows [the prosecutor] 'to speak and act freely and fearlessly in enforcing the criminal laws.'" *Ronek*, 227 Mont. at 516 (quoting *State ex rel. Dept. of Justice v. District Court*, 172 Mont. 88, 90, 560 P.2d 1328 (1977)). That is, "[p]rosecutorial immunity does not reflect judicial or social approval of prosecutorial misconduct, but rather reflects a balance between an individual's right to be treated fairly by prosecutors and society's need to keep the criminal justice system functioning without undue interference and protracted delay." *Ronek*, 227 Mont. at 520 (quotation marks and citation omitted). The doctrine

extends to the State and its agencies and to Montana counties, in addition to the individual actor. *See State ex rel. Dept. of Justice v. District Court*, 172 Mont. 88, 92-93, 560 P.2d 1328 (1976); *Reneger*, 2018 MT at ¶ 9.

In determining whether prosecutorial immunity applies, Montana courts conduct a functional analysis of the capacity in which the claimant acted. "A criminal prosecutor is 'absolutely immune from civil liability' when performing the traditional functions of an advocate, 'regardless of negligence or lack of probable cause.'" *Renenger*, 2018 MT at ¶ 10 (quoting *Rosenthal v. County of Madison*, 2007 MT 277, ¶¶ 29-30, 339 Mont. 419, 170 P.3d 493). Traditional prosecutorial functions are those that "occurred in the course of filing and maintaining criminal charges." *Smith*, 266 Mont. at 7; *see also* Mont. Code Ann. § 7-4-2716 (county attorney duties related to state matters include filing and prosecuting criminal actions). The marshaling of evidence for a criminal trial is also a "traditional function" of an advocate. *See Torres v. Goddard*, 793 F.3d 1046, 1053 (9th Cir. 2015). A prosecutor's ill intent or malice are irrelevant. *Rosenthal*, 2007 MT at ¶ 30 (citing *Imbler v. Pachtman*, 424 U.S. 409, 423-24, 96 S. Ct. 984 (1976)). "Therefore, even if [a prosecutor] had arguably improper motives that influenced the decision to file the complaint, the decision to file the complaint was within [the prosecutor's] authorized discretion and such motives cannot deprive a prosecutor of absolute immunity." *Rosenthal*, 2007 MT at ¶ 30; *see also Steele*,

1998 MT at ¶ 20. Application of prosecutorial immunity "is not limited to persons who hold the title of 'prosecutor,'" but extends to others involved in prosecutorial functions. *Kelman v. Losleben*, 894 P.3d 955, 957, 271 Mont. 156 (Mont. 1995).

The converse, of course, is that when a prosecutor is not acting in a prosecutorial capacity – even where they are acting within the scope of their employment – they are not entitled to prosecutorial immunity. Actions taken in an "administrative" capacity are not entitled to prosecutorial immunity. In *Kelman v. Losleben*, an investigator for the Montana Department of Justice was not entitled to prosecutorial immunity when investigating a gambling license application, because the investigation was administrative in nature and unrelated to any criminal charges. 894 P.2d at 958. In *Smith v. Butte-Silver Bow County*, the County Attorney was not entitled to prosecutorial immunity for failing to inform the county jail that a detainee may be suicidal, because charges had already been filed and the information was "extraneous" to maintenance of the charges. 266 Mont. 1, 7, 878 P.2d 870 (1994). The *Smith* Court concluded that, "While maintaining the safety of individuals incarcerated is important to the criminal justice system, the County Attorney's decisions in that regard are part of his administrative function… acts or omissions of a prosecutor involving conditions of post-arrest confinement are not protected by prosecutorial immunity because they lack an intimate

association with the prosecutorial phase of the judicial process." *Smith*, 266 Mont. at 7-8.

The timing of the prosecutor's acts is also important; if they occurred during the "investigative" phase of a case, where there is not yet probable cause to arrest any particular person, prosecutorial immunity does not apply. In *Buckley v. Fitzsimmons*, the U.S. Supreme Court concluded that a prosecutor's pre-charge investigation of a boot print at the scene of a crime was not undertaken in his prosecutorial capacity, but was "entirely investigative in character." 509 U.S. 259, 274, 113 S. Ct. 2606 (1993). This was because the prosecutor did not have probable cause to arrest the plaintiff at that time, and a prosecutor "neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." 509 U.S. at 274. Likewise, in *Burns v. Reed*, the U.S. Supreme Court determined that legal advice given to law enforcement during the "investigative phase of a criminal case" was not entitled to prosecutorial immunity. 500 U.S. 478, 492-496.

The relevant question in applying prosecutorial immunity to this case is whether the State, through its employees and the County Attorneys, was acting in a prosecutorial capacity with respect to the complained-of acts and omissions. Because each of Overstreet's allegations relate to the preparation, filing, or

prosecution of criminal charges against him, prosecutorial immunity applies. The factual allegations underlying Overstreet's claims in the SAC include:

- Defendants "participated in the investigation and continued prosecution of a criminal action … knowing they had failed to diligently review and secure all evidence in connection with the case, had knowingly failed to produce and provide all evidence, including, but not limited to exculpatory evidence to Plaintiff in connection with the case, and by failing to abide by Court Orders to produce evidence" (Doc. 96 at ¶ 187);

- Becker and Piccolo "told Mr. Overstreet they would not re-try the case, released the evidence, then did not dismiss the action with prejudice" (Doc. 96 at ¶ 188);

- Fetterhoff, Becker, and Piccolo "failed to fully investigate the case and … charged [Overstreet] with criminal offenses of Vehicular Homicide While Under the Influence, and Negligent Vehicular assault, on December 13, 2015, and continued the breach of duty until March, 2020, when the charges were dismissed, when they did not have probable cause to charge the offenses" (Doc. 96 at ¶ 194);

- Becker and Piccolo "continued the prosecution against Plaintiff without probable cause and … hid evidence from Plaintiff during their prosecution against Plaintiff" (Doc. 96 at ¶ 197);

- Fetterhoff, Becker, and Piccolo "did not do a thorough investigation, did not provide the air bags from the vehicle to the crime lab for testing, and … dispos[ed] of evidence collected in the course of the investigation" (Doc. 96 at ¶ 200);

- Fetterhoff "charged Walter Joey Overstreet with criminal offenses without probable cause" (Doc. 96 at ¶ 201); and

- Fetterhoff "did not do a thorough investigation and threw evidence into the garbage" (Doc. 96 at ¶ 202).

Each of these acts has "an intimate association with the prosecutorial phase of the judicial process," *Smith*, 266 Mont. at 7-8, and is therefore a prosecutorial act entitled to prosecutorial immunity. Unlike the plaintiffs in *Kelman* and *Smith*, Overstreet's allegations all revolve around the circumstances of his criminal prosecution, not some other administrative function of the Defendants. And unlike the plaintiffs in *Buckley* and *Burns*, all of the complained-of acts occurred after there was probable cause to suspect him, and after he had been charged with a crime.[2] With respect to each fact Overstreet alleges, the State was acting in its role as an advocate. Therefore, even if he could prove that every alleged act was undertaken with malice and the intent to cause him harm, it would make no difference – each allegation fits very comfortably in the definition of the traditional prosecutorial functions of preparing, filing, and prosecuting criminal charges, and the State is absolutely immune. *See Rosenthal*, 2007 MT at ¶ 30. The District Court should be affirmed.

[2] The SAC does not allege the date when Overstreet was first charged with the crimes at issue here, but this Court can take judicial notice pursuant to Mont. R. Evid. 201 that the information in Cause No. DC 2016-7 was filed in the Sixth Judicial District for Park County, Montana on January 20, 2016.

III. Each count of the SAC is fatally flawed in additional ways.

Although the Appellees' absolute prosecutorial immunity is dispositive of all issues in this case, Appellees also briefly address each specific count of the SAC and why the District Court correctly dismissed it.

A. Overstreet's negligence claim is time-barred (Count I).

Because Overstreet filed his original Complaint on March 29, 2021, his negligence claims that accrued before March 29, 2018 are barred by the three-year statute of limitations. *See* Mont. Code Ann. § 27-2-204(1). A claim "accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action." Mont. Code Ann. § 27-2-102(1)(a).

Overstreet's second trial took place on March 13, 14, and 15, 2018. *See* Doc. 96 at ¶ 101. Thus, on March 29, 2018, Overstreet's second trial had been finished for two weeks. Most of Overstreet's negligence allegations go to the State's alleged failure to "diligently review and secure all evidence in connection with the case," "produce and provide all evidence," and "abide by Court Orders to produce evidence." Doc. 96 at ¶ 187. Specifically, Overstreet alleges that he and his counsel "learned of the long brown hair located in the driver's door when Barbara Watson with Watson Crash Reconstruction, LLC, testified at trial two about the existence of the long brown hair which she excluded from her expert report." Doc. 96 at

¶ 151. Overstreet's claim accrued when he became aware of the State's allegedly negligent act or omission, which, according to him, occurred no later than March 15, 2018. At that point, the State was no longer "hid[ing] evidence" from him. Doc. 96 at ¶ 197. Although Overstreet argues in his opening brief that he did not discover the destruction of the hair until June 20, 2019, *see* Br. at 28, his claims in the SAC are premised on the withholding of the hair, not its destruction. *See also* Doc. 125 at 15. Overstreet's claims related to the allegedly negligent handling of evidence are time-barred.

Overstreet also alleges that MHP and the County negligently employed Fetterhoff, Becker, and Piccolo. *See* Doc. 96 at ¶¶ 207-210. However, the SAC also alleges that all three individuals were employed at least from the start of the underlying criminal case in December 2015. *See* Doc. 96 at ¶¶ 7, 10, 17. Therefore, their hiring and training must have occurred before that time, and claims related to their employment are also time-barred.

B. Overstreet's spoliation of evidence claims are not cognizable in Montana (Counts II and III).

The District Court properly concluded "that the law is clear that spoliation claims pertain to civil actions and not to criminal cases," Doc. 77 at 13, and because the underlying claim relates to a criminal proceeding, the claims fail. *See* Doc. 125 at 15-16. Because spoliation of evidence "is a tort sanctionable as a discovery abuse under the Montana Rules of Civil Procedure," it "is not applicable

… in a criminal proceeding governed by the rules of criminal procedure." *State v. Jeffries*, 2018 MT 17, ¶¶ 24-25, 390 Mont. 189, 410 P.3d 972. For this reason alone, dismissal of Counts II and III was correct.

Additionally, Montana does not recognize first-party spoliation claims. "The torts of intentional and negligent spoliation of evidence are not recognized in Montana as independent causes of action against a direct party. They apply only to non-parties to the litigation." *Harris v. State*, 2013 MT 16, ¶ 34, 368 Mont. 276, 294 P.3d 382. This is because "trial judges are well-equipped to address a situation where one party alleges spoliation of evidence by another party in a lawsuit, and can even enter a default when necessary." *Harris*, 2013 MT at ¶ 34. Here, Overstreet alleges that the State of Montana is liable for negligent and intentional spoliation of evidence, but the State was a direct party to his prosecution. Thus, Overstreet's first-party spoliation claims are not cognizable causes of action in Montana.

Finally, even if he overcame those hurdles, Overstreet cannot establish the elements of a spoliation claim. Either negligent or intentional spoliation claims require a plaintiff to prove:

1. existence of a potential civil action;
2. a legal or contractual duty to preserve evidence relevant to that action;
3. destruction of that evidence;
4. significant impairment of the ability to prove the potential civil action;

5. a causal connection between the destruction of the evidence and the inability to prove the lawsuit; and
6. damages.

Oliver v. Stimson Lumber Co., 1999 MT 328, ¶ 41, 297 Mont. 336, 993 P.3d 11. Overstreet's claim fails because he cannot establish (1) the existence of a potential civil action at the time evidence was allegedly destroyed; (4) significant impairment of his ability to prove any action, (5) any causal connection between destruction of the evidence and his inability to prove any lawsuit, and (6) any damages. Indeed, he has already received any remedy he would be entitled to with the dismissal of his charges. The spoliation claims fail.

C. Overstreet fails to establish the elements of his malicious prosecution claim (Count IV).

The District Court properly found that Overstreet failed to establish at least three of the six elements of a malicious prosecution claim. *See* Doc. 125 at 16-17. To make out the claim, a plaintiff must establish:

1. a judicial proceeding was commenced and prosecuted against the plaintiff;
2. the defendant was responsible for instigating, prosecuting or continuing such 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 plaintiff; and
6. the plaintiff suffered damage.

Blacktail Mt. Ranch, Co., LLC v. State, 2009 MT 345, ¶ 10, 353 Mont. 149, 220 P.3d 388. Lack of any one element is dispositive. *Plouffe v. Mont. Dept. of Pub. Health & Human Servs.*, 2002 MT 64, ¶ 16, 309 Mont. 184, 45 P.3d 10. "[S]ince

an action for malicious prosecution runs counter to important legal and social policies, such as encouraging criminal proceedings against those who appear guilty of a crime, it is not favored by the law and the burden on the plaintiff is heavy." *Reece v. Pierce Flooring*, 194 Mont. 91, 97, 634 P.2d 640 (1981). The burden is particularly heavy when the claim is based on prosecution of criminal charges. *See Wendel v. Metro. Life Ins. Co.*, 83 Mont. 252, 263, 272 P. 245 (1928).

At a minimum, Overstreet fails to satisfy elements two and three. Although the State is obviously responsible for filing and maintaining the charges against Overstreet, it is just as obviously immune from suit for those actions (as discussed above), and element two fails. Furthermore, only County Attorneys are responsible for "instigating" criminal charges. When prosecutors file charges based on a third party's investigation, the third party is not responsible for "instigating" the charges. *See Vehrs v. Piquette*, 210 Mont. 386, 391, 684 P.2d 476 (1984). Overstreet does not allege that Fetterhoff withheld any information from Becker or Piccolo, and they acted independently in their prosecutorial capacity. The second element therefore fails at least against Fetterhoff.

On the third element, Overstreet fails to show that there was a lack of probable cause to charge him. Despite Overstreet's argument to the contrary, probable cause is a low burden and exculpatory evidence discovered later does not defeat it. *See State v. Holt*, 2006 MT 151, ¶¶ 28-29, 332 Mont. 426, 139 P.3d 819

("A showing of a mere probability that a defendant committed the offense charged is sufficient to establish probable cause to file an information"); *State v. Elliott*, 2002 MT 26, ¶ 26, 308 Mont. 227, 43 P.3d 279 ("An affidavit in support of a motion to file an information need not make out a prima facie case that a defendant committed an offense."). Furthermore, the "District Judge is to use common sense to determine whether probable cause exists," *Holt*, 2006 MT at ¶ 28. Here, the District Court in Overstreet's criminal matter already found twice that probable cause existed. *See* Doc. 125 at 16-17 (citing orders). Overstreet has not stated any reason why that determination was an abuse of discretion, and this Court can take judicial notice of it. *See* Mont. R. Evid. 201.

Finally, the District Court correctly found that Overstreet failed to offer any "proof that the prosecutor was actuated by malice." Doc. 125 at 17. Overstreet's malicious prosecution claim fails.

D. Criminal prosecution cannot form the basis of an emotional distress claim (Counts V and VI).

A claim for infliction of emotional distress "will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's" negligent or intentional conduct. *Sacco v. High Country Indep. Press*, 896 P.2d 411, 426-28, 271 Mont. 209. "The law intervenes only where the distress inflicted is so severe that no reasonable person could be expected to endure it." *Sacco*, 896 P.3d at 426. With that in mind,

this Court declined in *White v. State* to recognize emotional distress claims based solely on criminal prosecution. 2013 MT 187, 371 Mont. 1, 305 P.3d 795. As a matter of law, a criminal trial does not cause "emotional distress so severe that no reasonable person could be expected to endure it." *White*, 2013 MT at ¶ 44 (internal quotation marks and citation omitted).

Overstreet's claims for intentional and negligent infliction of emotional distress center around the investigation of his case, handling of evidence, and his being required to stand trial. *See* Doc. 96 at ¶¶ 241, 246. As a matter of law, the claims fail.

E. Overstreet's claim for actual malice is not an independent cause of action and does not apply to the State (Count VII).

Overstreet's claim for actual malice is premised on Mont. Code Ann. § 27-1-221, *see* Doc. 96 at ¶ 249, which provides that "reasonable punitive damages may be awarded when the defendant has been found guilty of actual fraud or actual malice." Actual malice is not an independent cause of action; it is a basis for an award of punitive damages. *See Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 91, 345 Mont. 12, 192 P.3d 186; *Thornton v. Whitefish Credit Union*, 2019 Mont. LEXIS 224, *9, 2019 MT 138N, 396 Mont. 549, 455 P.3d 435. The State is exempt from punitive damages. *See* Mont. Code Ann. § 2-9-105. Therefore, Overstreet's claim for actual malice fails.

CONCLUSION

Overstreet's Second Amended Complaint is barred in its entirety by the doctrine of prosecutorial immunity. In addition, the State of Montana is the only proper Defendant, Overstreet's negligence claims are barred by the statute of limitations, his spoliation claims do not apply when the underlying action is criminal and do not apply against a direct party, he fails to make out the required elements of a claim for malicious prosecution, Montana does not recognize a claim for emotional distress premised on criminal prosecution alone, and actual malice is not a standalone claim, let alone one cognizable against the State. For these reasons, the District Court correctly found that Overstreet failed to state any claim upon which relief could be granted and should be affirmed.

RESPECTFULLY SUBMITTED this 28th day of May 2024.

By: /s/ Liz Leman
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Toman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4984 words, excluding Certificate of Service and Certificate of Compliance.

/s/ *Liz Leman*
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CERTIFICATE OF SERVICE

I, Elizabeth Ann Leman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 05-28-2024:

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