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DIVISION II
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NO. 39553-3-II

COURT OF APPEALS, DIVISION II

LAWRENCE SCHMITT,
Plaintiff/Appellant

vs.

DORIS LANGENOUR ET AL.,
Defendants/Appellees

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
The Honorable Craddock Verser, Judge
Cause No. 05-2-02450-1

BRIEF OF APPELLANT

TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR	1
A. The trial court erroneously granted Defendant’s Motion for Summary Judgment.	1
II. STATEMENT OF ISSUES PERTAINING TO THE ASSIGNMENT OF ERRORS	1
III. STATEMENT OF THE CASE	1
IV. STATEMENT OF RELATED CASES	6
V. STANDARD OF REVIEW	7
VI. ARGUMENT	9
A. Defendant Forbes was not entitled to absolute immunity because she was not acting within the scope of her duties as a KCPO deputy prosecutor.	9
B. Defendant Forbes was not entitled to qualified immunity because she violated a clearly established right and because her conduct was not objectively reasonable.	11
1. Defendant Jennifer Forbes Violated Clearly Established Rights.	12
2. DPA Jennifer Forbes’s Conduct was not Objectively Reasonable.	14
C. Appellant presented sufficient evidence to support his claim that DPA Forbes assisted Langenour in fabricating a false accusation against Schmitt.	14
D. Plaintiff presented sufficient evidence to support prima facie claims of false arrest, false imprisonment and	19

malicious prosecution.

- E. The trial court erred when it granted defendant Forbes's motion for summary judgment because there are contested issues of material fact. 21
- F. The trial court erred when it granted defendant Forbes's motion for summary judgment because the Plaintiff was entitled to discovery. 23

VII. CONCLUSION 24

TABLE OF AUTHORITIES

	<u>PAGE</u>
Federal Case Law	
<u>Act Up!/ Portland v. Bagley</u> , 988 F.2d 868, 871 (9th Cir. 1993)	11-14
<u>Beltran v. Santa Clara County</u> , 514 F.3d 906 (9 th Cir. 2008).	10
<u>Buckley v. Fitzsimmons</u> , 509 U. S. 259, 261 (1993)	10-14
<u>Devereaux v. Abbey</u> , 263 F.3d 1070, 1074-75 (9th Cir. 2001)(en banc).	12-15
<u>Giebel v. Sylvester</u> , 224 F.3d 1182, 1189 (9 th Cir. 2001)	13
<u>Hampton v. Chicago</u> , 484 F.2d 602, 608 (CA7 1973), <i>cert. denied</i> , 415 U.S. 917 (1974)	10
<u>Harlow v. Fitzgerald</u> , 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)	11
<u>Imbler v. Pachtman</u> , 424 U.S. 409, 430-431 (1976)	10
<u>Kalina v. Fletcher</u> , 552 U.S. 118, 118 S.Ct. 502 (1997)	9
<u>Malley et al. v. Briggs et al.</u> , 106 S. Ct. 1092, 475 U.S. 335 (1986)	19
<u>Myers v. Morris</u> , 810 F.2d 1437, 1458 (8th Cir. 1987)	15
<u>Pyle v. Kansas</u> , 317 U.S. 213, 216 (1942)	12-14
Washington Case Law	
<u>Berry v. Crown Cork & Seal Co.</u> , 103 Wash. App. 312, 14 P.3d 789 (2000).	8
<u>Grimwood v. Univ. of Puget Sound, Inc.</u> , 110 Wash.2d 355, 359, 753 P.2d 517 (1988).	7
<u>Hanson v. City of Snohomish</u> , 121 Wash.2d 552, 558, 852 P.2d 295 (1993)	20
<u>Lockwood v. A C & S, Inc.</u> , 109 Wash.2d 235, 246, 744 P.2d 605 (1987)	8
<u>Lunsford v. Saberhagen Holdings, Inc.</u> , 125 Wash. App. 784, 787-92, 106 P.3d 808 (2005)	8
<u>McNabb v. Department of Corrections</u> , 163 Wash.2d 393, 180 P.3d 1257 (2008)	7, 15
<u>Poorte v. Evans</u> , 66 Wash. App. 358, 832 P.2d 105 (1992)	8
<u>Powell v. Viking Ins. Co.</u> , 44 Wash. App. 495, 503, 722 P.2d 1343 (1986)	8
<u>Right-Price Recreation, LLC v. Connells Prairie Com. Council</u> , 146 Wash. 2d 370, 381, 46 P.3d 789 (2002).	9
<u>Schmidt v. Pioneer United Dairies</u> , 60 Wash. 2d 271, 276,	8

373 P.2d 764 (1962)	
<u>Seven Gables Corp. v. MGM/UA Entm't Co.</u> , 106 Wash.2d 1, 721 P.2d 1 (1986)	7-15
<u>Smith v. Safeco Ins. Co.</u> , 150 Wash. 2d 478, 485, 78 P.3d 1274 (2003)	9
<u>Strong v. Terrell</u> , 147 Wash. App. 376, 384, 195 P.3d 977 (2008)	8
<u>Van Hout v. Celotex Corp.</u> , 121 Wash.2d 697, 853 P.2d 908 (1993)	8
<u>Wilson v. Steinbach</u> , 98 Wash. 2d 434, 437, 656 P.2d 1030 (1982)	7

Wasington Court Rules & Jury Instructions	PAGE
CR 12(b)(6)	23-24
CR 56	23
CR 56(e)	7
CR 56(f)	23
WPIC 5.01	9

I. ASSIGNMENTS OF ERROR

- A. The trial court erroneously granted Defendant's Motion for Summary Judgment.**

II. STATEMENT OF ISSUES PERTAINING TO THE ASSIGNMENT OF ERRORS

- A. Was defendant Forbes entitled to absolute immunity because she was acting within the scope of her duties as a KCPO deputy prosecutor?**
- B. Was defendant Forbes entitled to qualified immunity?**
 - 1. Did defendant Forbes violate a clearly established right of plaintiff Schmitt?**
 - 2. Was defendant Forbes's conduct objectively reasonable?**
- C. Did the plaintiff/appellant present sufficient evidence to support his claim that DPA Forbes assisted Langenour in fabricating a false accusation against Schmitt.**
- D. Did the plaintiff/appellant present sufficient evidence to establish prima facie cases for his claims?**
- E. Did the trial court err when it granted defendant Forbes's motion for summary judgment because there are contested issues of material fact?**
- F. Did the trial court err when it granted defendant Forbes's motion for summary judgment because the Plaintiff was entitled to discovery?**

III. STATEMENT OF THE CASE

In the afternoon hours of June 16, 2002 Lawrence Schmitt discovered two Dalmatian dogs running on his property and chasing his numerous pets (geese, chickens and rabbits). Mr. Schmitt chased the dogs

away. He followed the dogs down the street so he could warn their owner to keep them contained. The dogs disappeared near Langenour's property. Mr. Schmitt confirmed with neighbors that Langenour owned Dalmatians and he approached her in her driveway. (CP 137)

According to Mr, Schmitt, he asked her to keep her dogs on her property. He warned her of his right to shoot them should they return to his property and attempt to harm his birds. He did not threaten her in any way. Mr. Schmitt told Ms. Langenour that he did not want to hurt any animals but he had a right to keep dogs from harming his animals, and that he would protect his animals if need be. He invited her to bring her children to see his animals and then he went home. (CP 138)

Ms. Langenour went down the street looking for Schmitt's van. When she located it, she contacted the neighbors across the street who informed her of Mr. Schmitt's ongoing criminal charges relating to their family. (The Fellis's falsely accused Mr. Schmitt of shooting at Mr. Fellis.) They also informed her that Mr. Schmitt shot their dog while it attacked his animals on the Schmitt property. (CP106-107, 138).

Ms. Langenour called 911 and reported that a strange man had threatened to shoot her dogs. At no time did she report that Mr. Schmitt threatened her in any way. (CP 111-114). On that same day, Ms. Langenour also talked with Deputy Herrin after he returned her called. The in-

formation she provided the deputy reflected what she told 911. At no time did she tell him that Mr. Schmitt had threatened to shoot her. Lagenour admits that she did not advise Deputy Herrin that Schmitt had threatened to shoot her, but claimed that she did advise him that Schmitt threatened her. (CP 107). However, this information was not contained in Deputy Herrin's report and he testified at his deposition that during the first interview Lagenour did not allege that Schmitt threatened her or to harm her in any way. (CP 169-170) During that first discussion, Deputy Herrin informed Ms. Lagenour that Schmitt was within his rights to shoot her dog if it ran loose again. (CP 107, 170-171).

The next day, Ms. Lagenour called Linda Fellis who advised her to contact Attorney Forbes who was the Deputy Prosecutor assigned to her criminal case pending against Mr. Schmitt. Shortly thereafter on the same day, Lagenour talked to Ms. Forbes about Schmitt (CP 107-108).

After conferring with Forbes, Lagenour revised her allegations against Schmitt by adding additional information sufficient to meet the legal definition of a felony Schmitt could be charged with. Ms. Forbes sent an email to Officer Herrin's supervisor asking that Deputy Herrin interview Ms. Lagenour again (CP 116-117). At his deposition Deputy Herrin testified that he was " . . .contacted by one of the shift sergeants, and he had a printed-up e-mail indicating that I needed to recon tact Doris

and that there was additional information concerning what happened . . .” (Emphasis added. CP 173). During an interview with attorney Longacre, Deputy Herrin stated that he read an email that Forbes sent to his sergeant stating that Langenour called the prosecutor’s office and that “she evidently called and had additional info. . . .” (Emphasis added CP 116) However, Forbes denies that she sent an email. She claims that she went to the Sheriff’s office to see if Herrin had filed a report and asked that Herrin either contact her or Ms. Langenour. (CP 101, 249-250).

Pursuant to Forbes’ request, Deputy Herrin went out to interview Ms. Langenour again. Before going to see her, he called and told her that he was coming over and that a written statement would be needed. (CP 118). In her handwritten and verbal statements to Deputy Herrin, Langenour added the claim that Schmitt had threatened to shoot her. At his deposition, Deputy Herrin stated that Ms. Langenour made no reference to any threats by Schmitt during the first interview. (CP 169-170). He also testified that during the second interview her story changed and provided additional information about Schmitt’s alleged threat to shoot her. (CP 176).

After meeting with Langenour, Deputy Herrin had a phone conversation with DPA Forbes. They discussed was comfortable with whether Deputy Herrin had probable cause to arrest. (CP 178-179) Forbes also in-

formed Deputy Herrin about the pending shooting related charges in the Fellis case and that Schmitt was subject to conditions of release. DPA Forbes advised him that if there was probable cause for felony harassment that he should immediately arrest Mr. Schmitt and book him for felony harassment and violations of his conditions of release. (CP 79) Following the conversation with Forbes, Deputy Herrin arrested Schmitt for felony harassment and bail was set at \$10,000. (CP 118, 230).

KCPO moved to combine the Langenour charge with the Fellis case in which Schmitt was charged for assault with a deadly weapon based on a frivolous claim that he pointed a rifle at Fellis. Whereas, Schmitt had done nothing more than lawfully shoot the Fellis's dog as it, and its companion dog, mauled Schmitt's prize ducks on Schmitt's property. CP 138)

Thereafter, additional frivolous charges were added. Schmitt was charged with "assaulting an officer" because he accidentally sprayed a small bit of saliva on a Deputy. He was also charged with bail jumping because he missed a court date due to conflicting notices from the court clerk. Nevertheless, Schmitt refused to plea bargain. (CP 138-139)

On the day of trial for all charges in December of 2002, the court severed the Langenour charge. Schmitt remained incarcerated on home detention until December 18, 2002 when a Kitsap Superior Court Jury acquitted him of all other pending charges. The Langenour trial judge

granted Schmitt's motion to disqualify Forbes from the case and disqualified the KCPO. The KCPO appealed and the Appellate Court upheld the disqualification of Forbes only. When the case came back down, the new prosecutor assigned to the case reviewed its merits and dismissed the charges on June 22, 2005. (CP 139).

Plaintiff filed his complaint for damages on October 10, 2005. (CP 1-10) On October 22, 2007, Defendant Forbes filed a "Motion to Stay Discovery". On April 30, 2008, Defendant Forbes's filed her "Motion for Summary Judgment". The trial court entered an "Order Granting Defendant Forbes's Motion for Summary Judgment" on June 26, 2009. Plaintiff filed his "Notice of Appeal" on July 14, 2009.

IV. STATEMENT OF RELATED CASES

There are two cases that are related to this case that are referenced above. They are State v. Schmitt, Kitsap Superior Court case number 03-2-01707-0 and State v. Schmitt, Kitsap Superior Court case number 05-2-02450-1 As referenced above the first Schmitt case pertained to false claims made by Fellis (and prosecuted by Forbes) in which Mr. Schmitt was acquitted. The second case was the criminal proceeding based upon Ms. Langenour's false testimony. The frivolous charges in the Langenour case were dismissed by the State after the deputy prosecutor replacing Forbes reviewed the case.

V. STANDARD OF REVIEW

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). When reviewing a motion for summary judgment, the court considers all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wash. 2d 434, 437, 656 P.2d 1030 (1982); McNabb v. Department of Corrections, 163 Wash.2d 393, 397, 180 P.3d 1257 (2008).

Affidavits submitted in support of a motion for summary judgment "shall set forth such facts as would be admissible in evidence." CR 56(e). The facts alleged in said affidavits must be based on the affiant's personal knowledge. CR 56(e); Grimwood v. Univ. of Puget Sound, Inc., 110 Wash.2d 355, 359, 753 P.2d 517 (1988). Mere allegations, conclusory statements, argumentative assertions and speculation do not raise issues of material fact that preclude a grant of summary judgment. See Grimwood, 110 Wash.2d at 360; Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wash.2d 1, 13, 721 P.2d 1 (1986).

Once the moving party meets its burden to show that there is no genuine issue as to any material fact, the nonmoving party must set forth

specific facts rebutting the moving party's contentions and disclosing that a genuine issue as to a material fact exists. Strong v. Terrell, 147 Wash. App. 376, 384, 195 P.3d 977 (2008) (citing Seven Gables Corp., 106 Wash.2d at 13) *review denied* 165 Wash.2d 1051 (2009). To defeat summary judgment, the nonmoving party need only set forth specific facts showing there is a genuine issue for trial with respect to each element of its claim. CR 56(e).

Circumstantial evidence may create inferences sufficient to defeat summary judgment. See Van Hout v. Celotex Corp., 121 Wash.2d 697, 706-07, 853 P.2d 908 (1993); Lockwood v. A C & S, Inc., 109 Wash.2d 235, 246, 744 P.2d 605 (1987); Lunsford v. Saberhagen Holdings, Inc., 125 Wash. App. 784, 787-92, 106 P.3d 808 (2005); Berry v. Crown Cork & Seal Co., 103 Wash. App. 312, 14 P.3d 789 (2000). Conflicting statements regarding a material fact by the same witness may preclude summary judgment. Powell v. Viking Ins. Co., 44 Wash. App. 495, 503, 722 P.2d 1343 (1986). An inference regarding a material fact created by circumstantial evidence may defeat summary judgment even if it fails to conclusively exclude a contrary or conflicting alternate inference that does not support the non-moving party's theory of the case. Schmidt v. Pioneer United Dairies, 60 Wash. 2d 271, 276, 373 P.2d 764 (1962); Poorte v. Evans, 66 Wash. App. 358, 832 P.2d 105 (1992)

The court must view the facts and all reasonable inferences in the light most favorable to the non-moving party. Right-Price Recreation, LLC v. Connells Prairie Com. Council, 146 Wash. 2d 370, 381, 46 P.3d 789 (2002). Unless reasonable minds can reach only one conclusion on the evidence, the court should not grant summary judgment. Smith v. Safeco Ins. Co., 150 Wash. 2d 478, 485, 78 P.3d 1274 (2003).

In this case, there exist genuine material issues of fact. Ms. Forbes cannot overcome the effect of circumstantial evidence simply by declaring herself totally free of wrongdoing. The law of evidence gives the same weight to both circumstantial and direct evidence. See WPIC 5.01. Otherwise, wrongdoers would make a mockery of our justice system simply by falsely declaring themselves innocent despite circumstantial evidence to the contrary.

VI. ARGUMENT

3. **Defendant Forbes was not entitled to absolute immunity because she was not acting within the scope of her duties as a KCPO deputy prosecutor.**

Contrary to DPA Forbes' assertions, prosecutors only have absolute immunity from Sec. 1983 claims when doing tasks that are solely a prosecutor's role. They lose their immunity if they step outside that role. Kalina v. Fletcher, 552 U.S. 118, 118 S.Ct. 502 (1997) (The prosecutor was acting as a witness when signing a sworn complaint.). "[A]cts under-

taken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." Buckley v. Fitzsimmons, 509 U. S. 259, 261 (1993). However, a prosecutor is not entitled to absolute immunity when acting as an investigator or administrator rather than an advocate. Imbler v. Pachtman, 424 U.S. 409, 430-431 (1976). Absolute immunity is not available when a prosecutor is advising officers during their pretrial investigation of facts. Hampton v. Chicago, 484 F.2d 602, 608 (CA7 1973), *cert. denied*, 415 U.S. 917 (1974). "A prosecutor doesn't have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate . . ." Beltran v. Santa Clara County, 514 F.3d 906 (9th Cir. 2008).

The focus of the inquiry with respect to absolute immunity is not what transpired, but what function the prosecutor was performing. If the prosecutor is acting within the scope of his or her duties as an advocate, then immunity is appropriate. But if the prosecutor is acting as a witness, investigator or administrator then qualified immunity is not available. Forbes, as she admits, did not prosecute the case. She was removed due to her participation in the pretrial phase of the case as a witness and an inves-

tigator. All of the alleged misconduct occurred outside the scope of Forbes's duties as a DPA in the pre-trial phase of the investigation.

In this case, DPA Forbes participated in the investigation by: interviewing a witness, notifying KCSO about "additional testimony", inducing Langenour's false testimony, presenting false testimony regarding her email; directing deputy Herrin to re-interview Langenour and by advising deputy Herrin regarding probable cause, when to arrest and how to charge Schmitt.

Forbes clearly stepped out of her role as prosecutor. Accordingly, Forbes, by her actions, lost any right to claim the absolute immunity afforded prosecutors.

B. Defendant Forbes was not entitled to qualified immunity because she violated a clearly established right and because her conduct was not objectively reasonable.

Government officials performing discretionary functions are entitled to Qualified Immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Whether an official is entitled to qualified immunity depends upon "whether, in light of clearly established principles governing the conduct in question, the officers objectively could have believed that [their] conduct was lawful." Act Up!/ Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). A two-part test is used to apply

this standard as follows: "(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" *Id.* A government official is not entitled to summary judgment on the basis of qualified immunity if a genuine dispute of material fact exists. Pierce v. Multnomah County, 76 F.3d 1032, 1038 (9th Cir. 1996).

i. Defendant Jennifer Forbes Violated Clearly Established Rights.

In Pyle v. Kansas, 317 U.S. 213, 216 (1942), the Supreme Court held that the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution. The 9th Circuit Court of Appeals has found, sitting en banc, that a citizen has a clearly established right against being criminally charged based on deliberately fabricated false evidence. Following the Pyle case, the Ninth Circuit Court of Appeals has held that:

While Pyle does not deal specifically with the bringing of criminal charges, as opposed to the securing of a conviction, we find that the wrongfulness of charging someone on the basis of deliberately fabricated evidence is sufficiently obvious, and Pyle is sufficiently analogous, that the right to be free from such charges is a constitutional right.

Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001)(en banc).

The Ninth Circuit also determined that the deliberate fabrication of evi-

dence is unconstitutional on the basis that "the proposition is virtually self-evident." Id.¹ " Precedent directly on point is not necessary to demonstrate that a right is clearly established. Rather, if the unlawfulness is apparent in light of pre-existing law, then the standard is met. . . ." (Emphasis added, internal quotation marks and citations omitted) Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001) *quoting from* Giebel v. Sylvester, 224 F.3d 1182, 1189 (9th Cir. 2001).

Devereaux follows the reasoning of the Supreme Court which has also held that there is no requirement that the courts must have previously ruled that "the very action in question" is unlawful. Anderson v. Creighton, 483 U.S. 635, 640 (1987). Indeed, the Ninth Circuit has held that some wrongs are simply self-evident. "[E]ven if there is no closely analogous case law, a right can be clearly established on the basis of 'common sense.'" Giebel v. Sylvester, 244 F.3d 1182, 1189 (9th Cir. 2001) (citation and internal quotation marks omitted).

Any reasonable official in Ms. Forbes's shoes would have known her conduct was unlawful for several reasons. First, suborning perjury is a crime. Second, it is a violation of professional ethics. Third, this is not a

¹ Although the 9th Circuit held that this was a case of first impression, the Supreme Court held in 1993 that prosecutors who fabricate evidence during the investigatory stage of a case are not entitled to absolute immunity and must rely upon a qualified immunity defense. The dicta infers that pretrial fabrication is a clearly established right since this was a 42 USC sec. 1983 case. See: Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993).

case of first impression. The Supreme Court has held that obtaining a conviction based upon perjured testimony is a violation of a clearly established right. *See: Pyle v. Kansas*, 317 U.S. at 216 (1942). Likewise, the fabrication of false evidence is a violation of a defendant's clearly established rights. *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001) (en banc); *Buckley v. Fitzsimmons*, 509 U.S. at 259 (1993). Therefore, a reasonable official should have known that her conduct was unlawful.

2. DPA Jennifer Forbes's Conduct was not Unreasonable.

In order to obtain qualified immunity a reasonable officer must have objectively believed that his or her conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). There is no way a reasonable officer could have believed that inducing Ms. Langenour to present false testimony as a complaining witness was lawful. It is well known that suborning perjury is a crime and it is also a violation of the professional code of ethics. DPA Forbes could not possibly in good faith have believed that her conduct was lawful.

C. Appellant presented sufficient evidence to support his claim that DPA Forbes assisted Langenour in fabricating a false accusation against Schmitt.

The defendant argues that there is insufficient evidence to support Mr. Schmitt's complaint. She admits that when reviewing a motion for

summary judgment, the court considers all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. McNabb v. Department of Corrections, 163 Wash.2d 393, 397, 180 P.3d 1257 (2008). However, she argues that mere allegations, conclusory statements, argumentative assertions and speculation do not raise issues of material fact that preclude a grant of summary judgment. Seven Gables Corp. v. MGM/UA Entertainment Co., 106 Wash.2d 1, 13, 721 P.2d 1 (1986).

The fundamental issue is whether there is evidence sufficient to permit a jury to reasonably infer that the non-moving party's theory of the case is correct. With respect to a deliberate fabrication of evidence claim, the plaintiff must prove that the evidence was false, that the defendant knew or should have known it was false and that the defendant continued the investigation with said knowledge. *See: Myers v. Morris*, 810 F.2d 1437, 1458 (8th Cir. 1987) and Devereaux v. Perez, 218 F.3d 1045, 1063 (9th Cir.), *rehearing en banc granted*, 235 F.3d 1206 (9th Cir. 2000)

Hence, the plaintiff must have sufficient evidence to support a reasonable inference: (1) that Langenour's claim that Mr. Schmitt threatened to shoot her was a false accusation; (2) that DPA Forbes when interviewing Langenour knew or should have known that she was eliciting a false statement and (3) that Forbes asked the deputy to continue the inves-

tigation knowing (or having reason to believe) that the “additional information” was a false accusation.

With respect to the truthfulness of the accusation that Mr. Schmitt threatened to shoot Ms. Langenour, there were only two witnesses to the conversation: Mr. Schmitt and Ms. Langenour. Ms. Langenour has no evidence to corroborate her claim. Whereas, Schmitt’s denial is corroborated by the Cencom 911 tape which documents that during her discussion with the Cencom operator she did not allege that Schmitt threatened to shoot her. She only alleged that he threatened to shoot her dogs if they came back onto his property and threatened his birds. Langenour also admits that Schmitt invited her to bring her children over to play with his birds chicks. Why would man who has allegedly just threatened to shoot you invite you to bring your children to play with his pets baby chicks?. In addition, Deputy Herrin testified that Ms. Langenour did not accuse Schmitt of threatening her during the first interview and that is why he did not continue the investigation.

Langenour’s testimony also is not credible because she claims that she advised Deputy Herrin that Schmitt threatened her during the first interview. This is impeached by the Cencom 911 tape, by Deputy Herrin’s denial of such and by the Deputy’s statement that if she had indicated in any way that Schmitt had threatened her that he would have pursued the

matter further.

DPA Forbes claims that she was not aware that Langenour accusation that Schmitt threatened to shoot her was new information. She denies sending an email and claims she only made contact with KCSO to look for a report. However, Deputy Herrin states that he saw an email sent by Forbes to one of his superiors requesting that he reinter view Ms. Langenour because she had “additional information”. (CP 116-117) Deputy Herrin claims that when he conferred with DPA Forbes she told him that Ms. Langenour “had additional info about contact with Mr. Schmitt.” (Emphasis added. CP 117).

Langenour stated that she was upset because the deputy advised her that Schmitt had done nothing unlawful. She knew deputy Herrin was not going to investigate the matter because in his opinion Schmitt had done nothing unlawful. She was upset about this and that is why she called DPA Forbes. One would expect that Langenour advised Forbes about why she was dissatisfied with the deputy. Consequently, Forbes should have known that the deputy was not pursuing the complaint and no report was forthcoming.

Deputy Herrin testimony is credible and he has no motive to lie about the email he saw and his conversation with Forbes. DPA Forbes lied about the email because the fact that she knew Langenour had “new in-

formation” or “additional info” logically indicates by inference that she knew that Langenour previously failed to accuse Schmitt of threatening to shoot her or harm her personally. The fact that she requested that Deputy Herrin re-interview Langenour logically infers that she knew the deputy had closed the investigation and that the additional information was needed to charge Schmitt with a criminal offense.

Additionally, the fact that Schmitt was acquitted of all charges in the first trial and the fact that the new prosecutor assigned to his case decided to voluntarily dismiss all the Langenour charges further impeaches DPA Forbes’s and Ms. Langenour’s credibility.

Based upon the direct and circumstantial evidence submitted by plaintiff a reasonable jury could presume that Langenour’s accusation against Schmitt was fallacious. A jury could reasonably conclude that Forbes and Langenour were not credible witnesses and that Forbes knew or should have known that Langenour was fabricating evidence that would be used to charge Schmitt.

Ms. Langenour was unsophisticated with respect to her knowledge of the penal code. She talked twice with the authorities and never raised the issue of a personal threat. She obviously did not know what she would have to say to get Schmitt charged with felony harassment. Nevertheless after talking with DPA Forbes she was able to provide deputy

Herrin with all the elements of a felony harassment claim in a written statement. A jury could reasonably conclude that DPA Forbes acted as an accomplice and assisted Ms. Langenour in fabricating false testimony.

D. Plaintiff presented sufficient evidence to support prima facie claims of false arrest, false imprisonment and malicious prosecution:

As a result of the deliberate fabrication of evidence, Mr. Schmitt was falsely arrested, falsely imprisoned, falsely charged and subjected to a malicious prosecution.

A false arrest occurs when an officer executes a warrantless felony arrest absent probable cause. False imprisonment occurs when a person is unlawfully detained for a felony without consent absent probable cause. A complaining witness who procures the issuance of an arrest by maliciously submitting a false complaint absent probable cause may be held liable for false arrest. Malley et al. v. Briggs et al., 106 S. Ct. 1092, 475 U.S. 335 (1986). By assisting Langenour in fabricating a false complaint, DPA Forbes would incur liability as an accomplice to the complaining witness since the fabricated evidence was necessary and essential to support probable cause to justify the warrantless arrest. DPA Forbes also exerted her authority to have the investigation, which was closed, continued and requested that a warrantless arrest be initiated.

But for the intervention by DPA Forbes, deputy Herrin's investiga-

tion would have remained closed, a case-file would not have been opened, Herrin would not have filed a report, and Schmitt would not have been arrested. Deputy Herrin has testified that DPA Forbes exerted her authority to continue the investigation by asking the KCSO to have him re-interview Langenour due to “new evidence”. Forbes even admits that she requested that the deputy make an immediate warrantless arrest! As a result, Schmitt was unlawfully arrested absent probable cause without a warrant and unlawfully detained without his consent. His conditions of release on other prior pending frivolous charges were also revoked.

Based upon the foregoing, the plaintiff has presented sufficient evidence to support a prima facie cases for both false arrest and false imprisonment.

The elements of a prima facie case for malicious prosecution requires proof that the defendant: (1) initiated or continued the principal action, (2) without probable cause, and (3) with malice. The plaintiff must also show that (4) the principal action was terminated on the merits in the favor of the malicious prosecution plaintiff, and (5) that the principal action injured or damaged the malicious prosecution plaintiff. Hanson v. City of Snohomish, 121 Wash.2d 552, 558, 852 P.2d 295 (1993).

Deputy Herrin has stated that the case was closed until DPA Forbes requested that he re-interview the complainant due to “additional

evidence". Absent the fabrications, there was no probable cause to arrest. The fact that the fabrication was deliberate and that DPA Forbes wanted to use the arrest to revoke Schmitt's bail and stack additional charges against him is evidence from which a jury could infer malice. The principal action was voluntarily dismissed due to lack of merit by the prosecutor replacing Forbes. Schmitt was unlawfully arrested, detained and forced to undergo financial hardship and emotional distress due to DPA Forbes unethical and unlawful misconduct.

Therefore, the plaintiff has set forth a prima facie case for malicious prosecution and DPA Forbes can not claim absolute immunity because her misconduct did not occur while she was acting as a prosecuting attorney. In fact, she did not prosecute the case. Acting as a police officer/investigator she assisted the complainant in fabricating false charges, had the investigation continued and requested that the deputy to make a warrantless arrest for felony harassment and violation of his conditions of release on the Fellis case.

E. The trial court erred when it granted defendant Forbes's motion for summary judgment because there are contested issues of material fact.

This is a case in which the testimony of Langenour and Forbes is headlong in contradiction with the testimony of Mr. Schmitt, Deputy Her-

rin and the Cencom tapes:

- Langenour claims she told Herrin that Schmitt threatened her, but Deputy Herrin denies it.
- Langenour's claim that Schmitt threatened to shoot her is headlong with her failure to mention such in the Cencom call (which was recorded) and as Deputy Herrin has stated during his first interview.
- DPA Forbes claim that she lacked any knowledge of the fact that Langenour's allegation that Schmitt threatened her was new information and that she did not ask for an additional interview. She claims that she thought the deputy already knew about Schmitt's alleged threat to shoot Langenour and that she was only looking for a report.
- Whereas, Deputy Herrin has testified that he saw an email requesting an additional interview of the complainant due to additional information and that DPA Forbes advised him the complainant had "new information."

The foregoing headlong testimony pertains to:

- whether Langenour made a false complaint;
- whether Forbes knew Langenour changed her story;
- whether Forbes sent an email and asked to have an additional interview of the complainant based upon "new evidence";
- whether Forbes knew or should have known Langenour's accusation was false;
- whether Langenour could have fabricated the false statement

without Forbes's assistance; and

- Whether Langenour and Forbes are credible witnesses.

These contested facts are all material issues and pertain to the credibility of the witnesses. Since questions of fact and credibility are for the jury to decide, the motion for summary judgment must be denied.

F. The trial court erred when it granted defendant Forbes's motion for summary judgment because the Plaintiff was entitled to discovery.

Because summary judgment is disfavored in Washington when all the facts relevant to the merits of a case have yet to be discovered, CR 56 provides a vehicle to deny or postpone a summary judgment hearing:

Should it appear from the affidavits of a party opposing the [Summary Judgment] motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, *the court may refuse the application for judgment or may order a continuance* to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(Emphasis added,) CR 56(f).

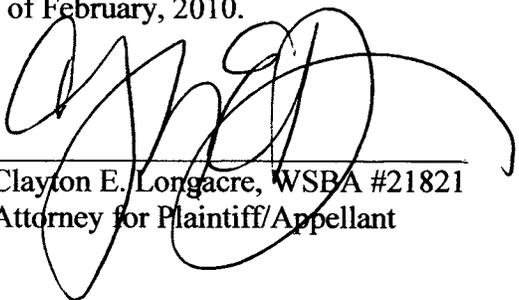
Previously, Mr. Schmitt had scheduled the depositions of the same witnesses that defendant Forbes used against him in her Motion for Summary Judgment. Mr. Schmitt approved a courtesy agreement to suspend discovery and proceed to a CR 12(b)(6) Motion to Dismiss hearing on the sufficiency of the Complaint alone. However, when DPA Forbes con-

verted her 12(b)(6) motion into a Motion for Summary Judgment and filed a Motion to Stay Discovery, Schmitt was left inadequately prepared to answer the Summary Judgment hearing. Schmitt opposed the Motion to Stay Discovery arguing that he needed to acquire evidence in support of his case against DPA Forbes. This request was warranted and manifestly just. A short six week continuance allowing the resumption of discovery was necessary and in the best interests of justice.

VII. CONCLUSION

Based upon the foregoing arguments, the plaintiff respectfully submits that he has presented sufficient evidence to support his prima facie claims and shown that DPA Forbes is not entitled to absolute immunity or qualified immunity. Moreover, there remain genuine issues of disputed facts. Therefore, the plaintiff requests that the Court reverse the trial court's order granting summary judgment.

DATED this 18th day of February, 2010.



Clayton E. Longacre, WSBA #21821
Attorney for Plaintiff/Appellant

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

LAWRENCE SCHMITT,) Case No. 39553-3-II
Plaintiff/Appellant)
)
vs.) DECLARATION
) OF SERVICE
)
DORIS LANGENOUR ET AL.,)
Defendants/Appellees)
_____)

I, Clayton E. Longacre, hereby declare under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action; that on the 18th day of February, 2010, I caused a copy of *Appellant's Brief* to be sent from Port Orchard, Washington, via overnight delivery prepaid addressed as follows:

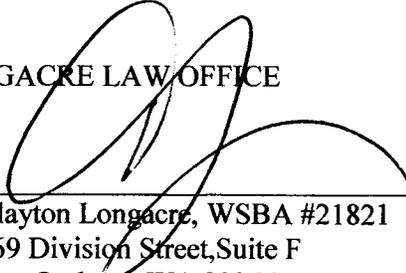
Attorney General of Washington
Torts Division
Atten. El Shon Richmond
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504-0126

and I also caused for filing purposes an original and one copy of *Appellant's Brief* to be sent from Port Orchard, Washington, via overnight delivery prepaid addressed as follows:

Washington Court of Appeals
Division Two at Tacoma
950 Broadway, Suite 300
Tacoma, WA 98402

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