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Court Of Appeals No. 71869-0-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

HAROLD WRIGHT,

Appellant,

vs.

PIERCE COUNTY, a municipal corporation; et. al,

Respondents.

FILED
COURT OF APPEALS
DIVISION I
MAY 11 2011
SEATTLE, WA

APPELLANT'S OPENING BRIEF

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ORIGINAL

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A. Assignment Of Error

1. The trial court erred granting respondents' motion for summary judgment.

B. Issues Related To Assignments Of Error

1. The US District Court dismissed appellant's 1983 claim finding the conduct alleged violated no US Constitutional right. It is an issue whether that narrow ruling creates collateral estoppel on any other matter.
2. Whether the Trial Court committed errors of evidence from excluding as hearsay, admissions by an authorized speaking agent for Pierce County, to considering inadmissible hearsay offered by Pierce County.
3. Whether there is immunity for swearing a declaration of probable cause the declarant knows or has reason to know is false.
4. Whether a judicial finding of probable cause and later conviction, both of which were based on false statements and the destruction of evidence, may support the argument a prosecution was not malicious nor an abuse of process.
5. Whether there is a question of fact arising out of negligence when Pierce County failed to train its employees to not destroy (or allowed to be destroyed) evidence nor to create/destroy evidence by interview techniques whose only purpose is to create false statements.
6. Whether questions of fact existed on the balance of appellant's tort claims ranging from outrage to defamation.

C. Overview

Mr. Wright was convicted of Third Degree Rape. That was reversed. State v. Wright, 152 Wn.App. 64 (2009). Pierce County

recharged. All total, Pierce County pursued Mr. Wright for 6 years.

Pierce County was able to convict because it destroyed exculpatory evidence incompatible with the case it presented at trial. It protests its evidence destruction had nothing to do with its charging, conviction, and continued pursuit of Mr. Wright. The proof is in the pudding. After 6 years of prosecution and mere weeks from trying Mr. Wright a second time, immediately after its destruction of evidence was discovered Pierce County had no choice but to dismiss with prejudice all charges. It is clear the individual DPA involved and Pierce County had every intention on trying Mr. Wright a second time despite their knowledge of the destroyed evidence. It was only the ethics of a different DPA who revealed the misconduct that stopped a second injustice. Once their destruction of evidence was revealed, they could not present the same tainted case they did the first time and had no case.

Evidence was destroyed. That is not disputed. The question is Respondents' culpability for it and their prosecution of Mr. Wright knowing all along information they finally admitted in 2013 compelled it to dismiss the charges with prejudice.

Bolstering its destruction of evidence was the use of interview techniques universally discredited as having as their only goal the creation of false testimony. Pierce County conducted group interviews, prompting

witnesses and alleged victim to make statements consistent with each other on what had been coached in pre-interview coaching sessions.

Mr. Wright sued in King County Superior Court alleging violations of 42 USC 1983 and state torts. Respondents removed to US District Court in Tacoma as opposed to the Seattle given this was a King County filing. Albeit, once removed the Court declined to transfer venue.

In District Court, respondents moved for summary judgment on the merits of the whole of the case. The Court granted summary judgment on the singular and narrow issue that the conduct did not implicate the US Constitution; no 42 USC 1983 claim laid. The case was remanded for resolution of the state claims. As District Courts oft do, it weighed in on conflicting evidence and its ultimate merit but nothing was reduced to findings of fact.

Despite the Order, ultimately making only one ruling and dismissing on one narrow legal issue, respondents argued it collaterally estopped Mr. Wright contesting a single fact or aspect of the District Court's commentary. The State Court agreed, adopting the District Court's dicta commentary as undisputed fact.

The standard of review from summary judgment is de novo as are the Trial Court's decisions of law. However, the Order demonstrates the error therefore Mr. Wright will use it as a guide.

The summary judgment Order commits error on a variety of levels. It: (1) adopts the District Court's commentary as undisputed fact, ignoring disputes of fact; (2) makes evidentiary error on issues from giving no weight to Pierce County's admissions through its speaking agent finding they were hearsay while giving conclusive weight to disputed hearsay offered by Pierce County; (3) giving no weight and never addressing Mr. Wright's testimony, witness, or experts; (4) concluding a reversed conviction immunizes false probable cause swearing and malicious prosecution while not accounting that the cause finding and conviction were obtained by a false declaration and destroyed evidence.

This case presents the epitome of a malicious prosecution with no apparent motivation other than political grandstanding and/or race. Mr. Wright was the only Black principal in his District. The alleged victim was white. When the case was originally referred, the charging prosecutor (based on evidence and a witness statement later destroyed by respondents) appreciated there was no probable cause to proceed. The case sat fallow for years, only to be resurrected by a different prosecutor after the impossibly incompatible evidence had been destroyed and/or hidden by her. 6 years later, Pierce County had no choice but to dismiss all charges. Not a single thing had changed between the charges' dismissal and the original charge (or recharge after the original conviction was

reversed). The only thing that changed was Respondents' destruction of evidence, something it knew all along but had been hidden from Mr. Wright, had been discovered. But for that eve of trial discovery, respondents had every intention on proceeding to trial a second time based on the same corrupt case.

D. Facts

1. Overview

Pierce County prosecuted Mr. Wright alleging he, with Ritchie Carter, forcibly raped Sarah Failey. State v. Wright, 152 Wn.App 64 (2009). Deputy Prosecuting Attorney (DPA) Kooiman swore a probable cause declaration to that effect and that Mr. Wright's DNA was found on Failey. CP 638. That was the case at trial. Wright. Mr. Wright was convicted. When the conviction was reversed, Pierce County recharged Mr. Wright relying on the same facts originally sworn. Appendix 1.

Before charging Mr. Wright originally, Failey and another witness made statements irreconcilable with Kooiman's probable cause declaration and case presented. Those statements were destroyed and their existence not disclosed until years later, after the conviction was reversed. Pierce County produced only coached witness statements in criminal discovery. It was also learned Pierce County's crime lab technician could not even say the DNA was Mr. Wright's.

Mr. Wright did not discover the destroyed evidence until the eve of retrial. Within a week, Pierce County moved to dismiss all charges. Nothing had changed beside the revelation of destroyed evidence.

2. The Night In Question

On January 3, 2004 Mr. Harold Wright and several friends (Jerry McClurkin, his brother Gerald, and Ritchie Carter) met at a restaurant that converts to over 21 in the evening. CP 547. He was carded and saw others carded. Id. While seated, 2 women (Whittaker and Fincham) approached, later joined by Sarah Failey. Id. Failey is the alleged victim.

Mr. Wright's group left; the 3 women wanted to join, following in their car to McClurkin's home. CP 548. While there, Ms. Failey danced provocatively against all of the men. Id. Mr. Wright did not drive or he would have left then. His ride (Carter) wanted to stay so Mr. Wright excused himself to the outside deck. Id.

Later Mr. Wright realized everyone was upstairs except him and Ms. Whittaker. CP 549. Wanting to go, Mr. Wright went to tell Mr. Carter it was time to go. Id. Mr. Wright saw no one. He poked his head into a bedroom and saw what he believed was Failey on top of a man. From the sounds he inferred they were having intercourse or close to doing so. Id. He did not hear her say "no," "stop," nor anything like it. Id.

Mr. Wright said words to the effect of, 'come on, its time to go,'

ducking out. He saw Ms. Whitcker in the hall. Id. They discussed what to do; Whittaker left to make a call. Id. Mr. Wright walked downstairs and waited. Eventually, tired of waiting, he went back upstairs. Id. On his way, Sarah Failey passed him in her bra and danced against him, signing and using the N-word. Id. Mr. Wright pushed by her. Failey got on an exercise bike and used it in a sexually provocative manner. Id.

Everyone reassembled down stairs. CP 550. Failey and her friends wrote their numbers down; there were no takers for Ms. Failey's. Id. The group went to their cars, Mrrs. Carter and Wright noticed Failey was crying. Carter walked to Failey's car and returned. The women's car drove off, struck a curb, and that was the last Mr. Wright knew of it. Id. The next day, he received a call saying there was a rumor he was involved in non-consensual sex. Mr. Wright called the Pierce County Sheriff's Office and volunteered to make a statement. Id.

Ms. Failey's rape examination was negative. CP 625 The findings were consistent with consensual intercourse. CP 583.

DNA was found on Failey that preliminarily matched Mr. Carter and Mr. Wright. CP 626. In her probable cause declaration Kooiman unequivocally swore it was Mr. Wright's DNA. When the required test was run in 2010, it was a mixed saliva sample consistent with talking to a person. Respondents did not ask for the required follow up to verify that or

determine what the substance was. CP 584, 631. Later, the lab conceded it could not even say it was Wright's. Id. CP 584.

3. 911 Call – Destruction Of The 911 Tape

A 911 call was placed on January 4, 2004. CP 585, 634. It is undisputed the tape was (1) destroyed, and (2) contradicted Kooiman's probable cause declaration and case presented by Pierce County.

In December 2012, on the eve of Mr. Wright's re-trial DPA Jerrad Ausserer produced (for the first time) to Mr. Wright's criminal defense attorney Barbara Corey a CAD (Computer Aided Dispatch) report summarizing the destroyed 911 tape. Id. According to it, Fincham's mother related Failey and Stephanie Finchman were telling her they both were "raped" by Harold Wright and his brother Daryl (not Carter). Id. The tape indicated Failey and Fincham were "telling" the mother those things: they were present and talking to her then. Id. According to Corey, a former sexual assault Prosecutor for Pierce County, the 911 tape was critical Brady material that should have been preserved so it was available to produce before the first trial. Its absence materially affected the defense as it altered every aspect from cross-examination, impeachment, to pretrial witness interviews. CP 587-590. It is incompatible with Kooiman's probable cause declaration and the evidence presented at trial. Id.

According to Corey, when she headed the Special Assault Unit for

Pierce County, she required as standard practice to immediately contact Pierce County's LESA (Law Enforcement Support Agency) when a report was referred. CP 586. It was essentially "the first" thing done because Pierce County understood 911 tapes contain material evidence for both the investigation and Brady evidence. CP 586-587. Securing the tape is simple and requires all of about 60 seconds to call. Id. Despite that being Pierce County's policy when she was there, it was revoked when she was wrongfully fired in a political maneuver by the Prosecutor's Office. Corey v. Pierce County, 154 Wn.App. 752 (2010).

The Trial Court rubber stamped (with no analysis) the District Court's erroneous dicta as undisputed, that "the recording was maintained by a third party, LESA" and therefore Pierce County is not culpable for its destruction. CP 66. That was error on two independent levels. First, any attempt to distinguish LESA as a "third party" is error because it is undisputedly a Pierce County agency. CP 544-546. Second, as explained by Corey, LESA either operates at the direction of the Prosecutor's Office or otherwise does as the Prosecutor's Office asks. CP 586. Even if LESA was a true third party the issue remains whether Pierce County through its Prosecutor willfully rescinded a policy to preserve exculpatory evidence when doing so could have only have one effect: the destruction of evidence. Pierce County did not deny the existence of that policy

previously, its revocation, nor that it knew revoking it would cause the destruction of exculpatory evidence.

4. Discovery In December 2012 Of Direct Evidence

In addition to disclosing the content of the destroyed 911 tape, in December 2012 DPA Ausserer (co-prosecuting the case with Kooiman on remand) disclosed for the first time Failey's original statement to DPA Ko when the case was originally referred to the Prosecutor's Office in 2004 that Mr. Wright was not in the room at the time and that he found that evidence secreted in a box Kooiman kept in her garage. CP 590.

The significance of Failey's statement to Ko in 2004, with the destroyed 911 tape, cannot be overstated. CP 589-595. They cannot be reconciled with Kooiman's probable cause declaration sworn years later. That is notable because no subsequent statement by Failey was disclosed reconciling her statement to DPA Ko that Mr. Wright was not in the room, CP 597; if a subsequent statement took place, under Brady it had to be produced. The conclusion is clear: one was never given. Id. Given all of that, DPA Kooiman's affidavit of probable cause was a sham. CP 597-601.

According to Corey, it is not unreasonable for a prosecutor to take work home. CP 591. However, it is inappropriate to take evidence (Failey's statement to Ko) home and hide it. Id. The effect of that secrets the evidence; it makes it unavailable for other DPAs to see; it constitutes

destruction of the evidence no differently than throwing it away because once removed from the office, it ceases to exist in the realm where it should exist as material that is reviewable by others and available for production as Brady material. CP 592. That happened here. Id.

5. Corrupted Sherriff's Office Interviews

The Sheriff's office appears to only ever have conducted pre-coached, group interviews. According to John Daly, a former Special Assault Detective and expert in police investigation and interview techniques, it was established by 2004 officers should not conduct group interviews for any crime, much less sexual assault. CP 649-650, 652, 660. Further, an interview must not ask leading questions nor engage in tactics designed to elicit any particular response. Id. Some of the most important evidence is the independent consistency or inconsistency in statements. CP 650. According to Daly, the inappropriateness of group statements was by that time so well established in this legal community that doing so cannot be viewed as anything but an intention to destroy evidence of inconsistencies or create evidence of consistency. Id.

The first Deputy dispatched, Marc Parfitt, conducted a group interview of Failey and Whittaker in the presence of Whittaker's mother on January 31, 2004. CP 655.

On February 2, 2004 Detective Harai interviewed Failey, Fincham,

and Whittaker together. CP 651-652, 658, 661. He conducted pre-interview coaching sessions with the witnesses and only then taped his interview. As one example from his report, after first having an off the record talk: “I then asked Jamie Whittaker if I could tape our interview... I then went back through the interview with Jamie Whittaker on tape.” CP 660. He did the same thing with each of the witnesses, ending with Failey. When he interviewed Failey, he allowed Fincham and Whittaker to prompt and conform Failey’s statement to theirs’. CP 662. Harai took 3 (or 6, depending on your perspective) bites at the apple to get the three witnesses to conform to their pre-interview statements. Id.

In addition to conducting group interviews, both Deputies engaged in interview methods well established during the interviews to be corrupt. CP 660-665. Specifically, both employed overly leading questions; suggesting answers by reference to what was discussed in their pre-interviews (coaching sessions). Id.

Pierce County has no training or procedures for conducting witness interviews. CP 649. Public records requests for such materials were made pre-litigation; nothing was identified except for a few video tapes. Id. All Deputies used the same corrupt techniques; these are not the actions of one rogue officer: these are tactics Pierce County unreasonably either expressly or impliedly accepts and/or encourages. CP 660.

6. Recharging – Proof Of Wrongful Conviction

DPA Kooiman certified in her declaration of probable cause facts that could not be reconciled with the destroyed evidence not disclosed until December 2012. CP 591, 598-560. After reversal, she and Pierce County continued prosecuting Mr. Wright in the face of that knowledge.

Respondents' December 2012 motion for dismissal asserts charges were dropped because of: (1) the destroyed 911 Tape as illustrated by the CAD report, (2) the contradictory witness statement by Failey in her civil lawsuit, (3) diminished witness memory, and (4) allegedly “recent” DNA results. CP 644-645. Assertions (2) – (4) are a subterfuge. As a former prosecutor, Ms. Corey addresses those issues.

As to (2) regarding the contradiction in Failey's criminal statements with a civil lawsuit she filed (as distinct from her additionally contradictory statement to Ko) Kooiman admits she knew of that before the first trial, CP 120. Her actions show that had nothing to with the dismissal as Kooiman already prosecuted and later recharged Mr. Wright with that knowledge. As to (3) regarding diminished witness memory, that is not a reason to drop proper charges; due to the inherent passage of time, that is always present when a case is reversed and remanded. CP 594. The solution is to refresh the witness's memory with trial testimony. Id. As to (4) regarding the allegedly “recent” DNA results, there was nothing

“recent” about them; Kooiman knew that information two years earlier in November 2010, CP 594-595, and again her action show respondents continued to prosecute Mr. Wright with that knowledge.

That leaves, by Pierce County’s own admission, the reason the charges were dropped was the destroyed 911 tape. Although Pierce County did not mention the hidden/constructively destroyed Failey/Ko interview in its motion, its import is clear. However, Pierce County had knowledge of those thing before it charged Mr. Wright originally, while it continued to prosecute him the first time, when it recharged him after reversal, and while it continued to prosecute him the second time. Thus, it is undisputed it was not the ‘fact’ of those things that caused the motion for dismissal in December 2012 - respondents always knew those facts. It was that respondents got caught when Ausserer disclosed Pierce County’s knowledge – 6 years later – to Mr. Wright’s criminal defense attorney. But for that, respondents would have maliciously prosecuted Mr. Wright a second time through trial. Nothing more need be said.

7. District And Trial Court Orders

There is no substitute for reading the orders directly.

The District Court dismissed only Mr. Wright’s 1983 claims, finding the conduct did not violate the US Constitution. The District Court made no findings of fact.

The Superior Court adopted the District Court's entire discussion as collateral estoppel, not recognizing the narrowness of the District Court's ruling. Pierce County's proposed Order mentions in passing evidence admissibility issues but provides no analysis. Its exclusion of party opponent admissions but relying on hearsay offered by Pierce County was error and provided the foundation for the dismissal.

E. Authority and Argument

1. The District Court Order Provides No Estoppel

Assuming estoppel is available, it is limited by the Order it is based on. The Order only held the US Constitution was not violated. Summarizing its findings, the Court explained: "... the Court has found that Wright has failed to establish an underlying Constitutional violation." CP 70. It "remanded the remaining state claims" because without the 1983 action, the Court "lack[ed] jurisdiction" to rule further. CP 66.

Collateral estoppel requires:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

Hanson v. City of Snohomish, 121 Wn.2d 552, 562 (1993). A ruling the conduct does not violate the US Constitution does not estoppe Mr.

Wright's state tort claims.

The District Court is not superior to the Superior Court. A Judge is not bound to decisions of a prior Judge. In re Estate of Jones, 170 Wn.App. 594, 605-606 (2012) explained why stare decisis, collateral estoppel, nor law of the case bind a subsequent Judge who is expected to exercise independent judgment; id:

Were it otherwise, a trial judge would have no authority to reconsider a prior ruling or correct a prior mistake, but would have to memorialize the original ruling in a judgment in order for an appellate court to correct the problem.

The District Court's commentary on evidence provides no estoppel. First, even viewed in the strongest light the Order does not constitute findings of fact; only findings of fact constitute an "adjudication" of fact. See Hanson. Findings of fact are not authorized by FRCP 56. See FRCP 52. If a District Court disregarded that and made findings anyway, it is unclear they would have weight. If so, they must comply with FRCP 52 to be findings. The Order contains no language or process required by FRCP 52 to be findings. Instead, it is what US v. ALCOA, 2 FRD 224 (1941) characterized its own order as:

I have not complied with Rule 52. Among the deficiencies are the following: I have made 'no formal findings.' I have not found 'the facts specially.' I have not stated 'separately' the court's 'conclusions of law.' With few exceptions, I have stated 'but ultimate conclusions.' I have not,—at least

except in a discursive and general way,—formulated ‘underlying findings of fact.’ I have discussed only ‘portions of the evidence.’ In great part I have engaged in ‘reasoning.’ Neither the discussion nor the reasoning constitutes ‘special’ or ‘formal’ findings.

Id. at 231.

Second, a subsequent Judge and specifically a State Judge following a District Court is not merely not bound, but is required, to independently evaluate admissibility under State law. State v. Brown, 113 Wn.2d 520, 547-548 (1989). Even evidence rules drafted identically are interpreted by two different sets of case law. Id. It was frivolous for Pierce County to argue the Trial Court was bound by the District Court’s evidence rulings and error for the Court to bait into it. If nothing else, it would be an “injustice” to apply estoppel based on erroneous evidence rulings by a different judge, deciding a legal claim that had different elements than the claims before the Trial Court.

There is no collateral estoppel when different claims are presented under different evidence. Hanson. Mr. Wright’s task is to prove the Trial Court made errors of evidence; not the District Court. If evidence is admissible under State law the District Court excluded under the FREs, that alone demonstrates the unavailability of estoppel because the evidence admissible on the claims is different. See Brown.

Finally, even if FRCP 52 could be ignored and its errors of

evidence disregarded, the District Court’s factual discussion does not constitute estoppel because resolving facts was not “essential” to the summary judgment question; facts determined must be “an essential, ultimate fact” for collateral effect to apply. Beagles v. Seattle-First Nat. Bank, 25 Wn.App. 925, 931, (1980). A summary judgment order does not determine what facts are true; it determines whether ‘if the facts’ are proven true, would they create a question of fact. No fact is determined on summary judgment.

Ultimately, the District Court found Mr. Wright failed to state a 1983 claim concluding his primary theory, “wrongful conviction” which has been recognized in Heck v. Humphrey, 512 US 477 (1994) and Wallace v. Kato, 549 US 384 (2007), did not exist. (Order, p. 8). There were no facts “essential” to that resolution.

2. The Trial Court Erred On Evidentiary Issues

The improper consideration or exclusion of evidence on summary judgment requires reversal if it deprives the Order of its foundation. The Trial Court’s Order relies on inadmissible evidence offered by Pierce County while excluding admissible evidence offered by Mr. Wright.

a. IT WAS ERROR TO ADMIT AND RELY ON KOOIMAN’S HEARSAY

The Trial Court relied heavily on Pierce County’s Hearsay

assertion through Kooiman it obtained an Order following an alleged in camera review of Failey's statement to Ko, finding it did not need to disclose it. CP 777. The Trial Court found there is no liability for not producing evidence a Judge said need not be produced. Admission of Kooiman's hearsay was error as was the Order based on it.

First, it is a red herring: it addresses only the hidden (destroyed) Failey/Ko statement. It does not excuse destruction of the 911 tape.

Second, Kooiman's assertion of what a Judge allegedly told her is quintessentially hearsay: it is an alleged out of Court statement offered for the truth of the matter asserted. See ER 801. Pierce County never explained, and neither the Trial or District Court ever ruled, why that was admissible. The way to prove an Order is to provide the Order; that is not novel. There is no Order. Also, the undisputed evidence is the opposite: there was neither an in camera review or Order. CP 711, 714-719. The docket shows neither. Id. There are no Clerk's minute entries of an in camera review much less an Order. Id. That is undisputed; not vice versa. It was error for the Trial Court to rely on an alleged Order there is no evidence of even a motion being made much less an Order issued.

b. IT WAS ERROR TO EXCLUDE PIERCE COUNTY'S ADMISSIONS AND GIVE NO WEIGHT TO COREY'S OPINIONS

The Trial Court applied the District Court's dicta, CP 775-776, that

Corey's relating what Pierce County admitted through its authorized agent DPA Ausserer was hearsay, excluding those admissions. That was error.

ER 801(d)(2) has four means to satisfy the party opponent exception; Ausserer's admissions (in the discharge of his Brady obligation) on behalf of respondents of destroyed/hidden evidence fulfill all four. One would suffice. Further, as Pierce County's attorney, his comments are presumptively that of Pierce County. Clay v. Portick, 84 Wn.App. 553, 561 (1997) ("An attorney appearing on behalf of her client is her client's representative and is presumed to speak and act on her behalf.") See also State v. Garland, 169 Wn.App. 869, 875 (2012); Savage v. State, 72 Wn.App. 483, 497 (1994) (reversed in part on other grounds, 127 Wn.2d 434).

The Trial Court also rubber stamped the District Court's disregarding Corey's expert testimony. The District Court struck much of Corey's declaration stating it was opinion while giving no weight to the fact she was offered as an expert. The Trial Court paid no heed as well. Corey's opinions are admissible under ER 702; they do not differ from a medical malpractice case. Her declaration provides expert guidance on the functions of both DPAs and Prosecutor's Offices in general. Corey v. Pierce County, 154 Wn.App. 752, 759 (2010) acknowledges the admissibility of expert, prosecutor testimony in cases involving Prosecutor

policies and procedures.

3. There Is No Immunity For Destroying Evidence Or Falsely Swearing A Declaration Of Probable Cause

The party seeking immunity must prove it. Burns v. Reed, 500 US 478, 487 (1991).

Absolute immunity exists only for “advocatory” conduct. Imbler v. Pachtman, 424 U.S. 409 (1976). Those are only acts “intimately associated with the judicial phase of the criminal process.” Atherton v. District of Columbia Office of Mayor, 567 F.3d 672, 682 (CADDC 2009).

Qualified immunity exists for administrative functions. Forrester v. White, 484 U.S. 219 (1988). However, it is lost when the conduct violates an established right. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). That is a low threshold, requiring only the right is “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Anderson v. Creighton, 483 U.S. 635 (1987).

A person’s title as prosecutor is of no weight; the Court looks to the function being discharged. Van de Kamp v. Goldstein, 555 U.S. 335, 342-343 (2009). A prosecutor at best has only qualified immunity (subject to none for destroying evidence) for administrative conduct or action taken before probable cause attaches:

...[A] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have

anyone arrested.

Genzler v. Longanbach, 410 F.3d 630, 637-638 (9th Cir. 2005). At the time the 911 material was destroyed not only was there no probable cause, the Charging DPA found a lack of probable cause by her decision not to charge. Probable cause did not attach for years.

A supervising attorney's immunity is derivative (no more or less) than the underlying misconduct. Van de Kamp, supra. at 861-862.

All the conduct herein, including coercive interview tactics, are destruction of evidence. The right to not have evidence destroyed is long and well-established. California v. Trombetta, 467 U.S. 479, 489 (1984). Provided the exculpatory value was "apparent before the evidence was destroyed" and other "comparable evidence" was not "reasonably available" by other means, there is no immunity. Id. The civil defendant need not fully appreciate how or why the evidence was exculpatory. Arizona v. Youngblood, 488 U.S. 51, 57 (1988). An official is not entitled to qualified immunity for failing to preserve or gather evidence as those are recognized rights. Cunningham, 345 F.2d 802, 812 (9th Cir. 2003).

a. KOOIMAN'S FALSELY SWEARING A PROBABLE CAUSE DECLARATION IS NOT IMMUNE

Kalina v. Fletcher, 118 S. Ct. 502 (1997) held there is no immunity for a prosecutor's falsely swearing a declaration of probable cause. In

Kalina as in this case, the Prosecutor swore as true "two inaccurate factual statements." Id. As here, one fact the prosecutor swore was the identification of plaintiff as perpetrator when "in fact, the (witness) did not identify" the plaintiff. Id. Kalina held swearing facts under oath to support probable cause "is the function of (a) witness, not of (a) lawyer." Id. at 130. There is no immunity for conduct "insofar as (the prosecutor) performs the function of the complaining witness." Id. at 131.

The expert declaration of Corey explains in detail why Kooiman's probable cause declaration is incapable of being squared with the facts known by her and the Prosecutor's Office. Similar to Kalina, Kooiman unequivocally swore Failey identified Mr. Wright as the person who raped her when Failey told DPA Ko Mr. Wright was not even in the room; not even to date has Pierce County disclosed a contrary or reconciling statement made by Failey before the probable cause declaration was sworn by Kooiman for Kooiman to have been relating in her declaration. Kooiman also materially misrepresented the results of DNA testing. Even if Kooiman could be given the benefit of the doubt regarding DNA in her first declaration, her continuing the prosecution despite her later acquired knowledge the lab could not say the DNA was Mr. Wright's, combined with the other failures of evidence, was malicious. Kooiman protests those facts were not false; a question of fact exists.

Pierce County and the Trial Court conclude the finding of probable cause and jury verdict wash any false swearing. That ignores when “the conviction was obtained by fraud, perjury, or other corrupt means” a conviction or finding of probable cause provides no defense. Hanson v. City of Snohomish, 121 Wn.2d 552, 559-60 (1993). Destruction of evidence, Kooiman’s false swearing, etc., are those things. The conviction would not have been obtained without the destruction of evidence; that disclosing its former existence compelled dismissing the charges demonstrates that. The probable cause finding would not have been obtained without the false swearing. Respondents may not rely on either the judicial finding or jury verdict.

b. DESTRUCTION OF EVIDENCE HAS NO IMMUNITY

Simply said, destruction of evidence has no immunity:

...while deciding not to furnish the prosecution's evidence to the defense may be an act of advocacy, throwing the evidence away is not such an act.

Yaris v. County of Delaware, 465 F.3d 129, 137 (3rd Cir. 2006). In Yaris the prosecutor destroyed “exculpatory information”; a pair of black gloves and “investigative notes” regarding the gloves. Id.

Other authority is in accord. See Masters v. Gilmore, 663 F.Supp.2d 1027 (Colo. 2009), citing Yaris also citing Odd v. Malone, 538

F.3d 202, 211 (3rd Cir. 2008) holding “by virtue of their egregiousness, some acts fall wholly outside the prosecutorial role no matter when or where they are committed.” Id. at 1039. Kahanna v. State Bar of Cal., 505 F.Supp. 633 (ND Cal. 2007) and Carbajal v. Seventh Judicial Dist., 2011 WL 5006992 (Colo. 2011). See also Spencer v. Peters, 966 F.Supp.1146 (9th Cir. WD Wash 2013) remarkably on point, holding not even qualified immunity is available when a prosecutor hid evidence of a witness interview in her garage. Id. at 1166.

It is not disputed the exculpatory 911 tape was destroyed. Corey explains why it was exculpatory although as it is incompatible with the case presented by Pierce County, that is evident. CP 592.

Pierce County argues it did not destroy it, LESA did. It was undisputed LESA was (at the time) a subdivision of Pierce County no different than the Prosecutor’s Office.¹ CP 544-546. For Pierce County to admit LESA destroyed the evidence is to admit it did.

At best, respondents’ conduct constitutes a failure to preserve exculpatory evidence. Corey’s declaration explains Pierce County knew the exculpatory value of 911 tapes and at one time had a policy to preserve them for that reason. CP 586-587. On summary judgment the inference is present the decision to revoke a policy to preserve exculpatory evidence

¹ Evidence LESA was a division of Pierce County is admissible here. That the District Court committed error does not bind the Superior Court to repeat it.

is effectively a decision to destroy particularly when it will be destroyed after a period of time as respondents admit is the case.

Thus, although qualified immunity might be available for merely not preserving evidence, see Yaris, 465 F.3d at 136, that is not available here as allowing exculpatory evidence to be destroyed violates a “well-established right.” See Cunningham v. City of Wenatchee, 345 F.3d 802, 812 (9th Cir. 2003).

Finally, under the function test, the destruction of the 911 tape is not entitled to absolute immunity because its took place before probable cause attached; there is at best only qualified immunity for actions taken before probable cause. Genzler, 410 F.3d at 637-638. But, even that qualified immunity is lost by a violation of the established right to not have evidence destroyed. Cunningham.

Regarding the effective destruction of the Failey admission to Ko that Mr. Wright was not even in the room, Corey’s declaration explains that at length. It is fundamentally a destruction of evidence for a DPA to secret evidence at home. Spencer and CP 591. It ceases to exist no differently than throwing it in the garbage. Id. Its fortuitous discovery later does not mitigate its constructive destruction during the critical time Respondents maliciously prosecuted Mr. Wright.

c. THE SHERIFF'S OFFICE'S COERCIVE INTERVIEW TACTICS ARE NOT IMMUNE

Because the investigative role is not judicial, conduct within the Sheriff's office is at best qualifiedly immune. Qualified immunity is not present because using "coercive" interview techniques constitutes a violation of a "well-established right" because that conduct is tantamount to either the fabrication or destruction of evidence. Cunningham, supra. There is no immunity if the officers "used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir.2001).

The declaration of John Daly, with facts, explains why the interview tactics employed here had long been universally condemned with the understanding the only point of using them was to either destroy evidence of conflicting statements or fabricate evidence of consistent statements. CP 649-654. Pierce County had neither training or procedures, such as other jurisdictions in this State have. CP 652-653. That was unreasonable.

4. Malicious Prosecution and Abuse Of Process Lay

Malicious prosecution requires evidence:

(1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was

want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution.

Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 497 (1942).

“Malice and probable cause constitute the “gist” of the action.” Id. “[I]f a factual issue as to whether probable cause or malice exists, the question must be submitted to the jury.” Bender v. City of Seattle, 99 Wn.2d. 582, 594 (1983) (emphasis added). Peterson v. Littlejohn, 56 Wn. App. 1, 781 P.2d 1329 (1989) held a reckless disregard of a plaintiff’s rights creates an issue of fact on malice for the jury. In Peterson, the victim described the perpetrator as having severe acne and a scar on his right eyebrow. Id. at 3. However, defendant acknowledged that when plaintiff came to have his photo taken he saw “no evidence of any acne and failed to look for the scar in the eyebrow.” Id. at 4. The disconnect between the description given and the actual presentation of the plaintiff/suspect colored the element of malice; ignoring a fact right in front of one’s face creates a question of ill will. Id.

Abuse of process is arguably related to malicious prosecution; the elements are all but the same. See Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now, 119 Wn.App. 665, 695 (2004).

Abuse of process recognizes a “misuse or miss application of the process... for an end other than what it was designed to accomplish.” *Id.* at 699. There is no plausible, “proper” use of this process to pursue Mr. Wight when the reasons for the dismissal are considered. As Corey explained, the prosecution was afoul of any concept of Prosecutorial ethics and although Mr. Wright does not rely on this exclusively, pursuit because of race “or other arbitrary classification” has been recognized as an improper purpose. *U.S. v. Armstrong*, 517 U.S. 456, 464-465 (1996).

a. KOOIMAN’S FALSE SWEARING OF PROBABLE CAUSE AND INITIATION OF PROSECUTION

Falsely swearing facts to obtain a finding of probable cause is the definition of malicious prosecution. *See Peterson*. At best for respondents there is a question of fact whether Kooiman falsely swore that Faiely identified Mr. Wright or that his DNA was present on him. According to Pierce County’s admission through Ausserer, Faiely told DPA Ko that Mr. Wright was not in the room. Pierce County has never produced a statement by Failey, pre-probable cause, to the contrary. The inference is there was none. Kooiman has no immunity for false swearing. First, *Kalina* held a Prosecutor swearing facts is not immune because being a fact witness is not a prosecutorial function. Second, even assuming qualified immunity is available (which is denied) it is not present because

it was a well established right of a criminal defendant to not have a false probable cause declaration offered against him and Kooiman as a DPA knew that. Her pursuing Mr. Wright with the irreconcilable 911 tape contents are not required but provides further support.

The elements are present and do not require extended discussion: swearing a false declaration is the epitome of malice, Peterson, there was a want of probable cause (the facts sworn to obtain it were false and therefore a later conviction is of no weight, see Hanson), the proceedings terminated in favor of Mr. Wright with the dismissal with prejudice, see Peasley, and Mr. Wright was unquestionably damaged. Corey's declaration explains why Kooiman's declaration cannot be squared with either the facts known by the Prosecutor's Office or Prosecutorial ethics.

Kooiman's later defamation of Mr. Wright in the press (infra.), announcing without reservation he was "guilty" is not required but amply illustrates her ill will and malice in pursuing Mr. Wright.

b. THE PROSECUTION WAS ENABLED BY THE DESTRUCTION (ACTUAL AND CONSTRUCTIVE) OF EVIDENCE

The destroyed 911 tape was mutually incompatible with the case presented and conviction obtained that Mr. Wright and Mr. Carter forcibly raped Ms. Failey. The 911 tape recounts Failey's and the County's star witness Fincham, telling Fincham's mother they were both raped; and not

by Mr. Wright and Mr. Carter but Mr. Wright and his brother. The tape's destruction allowed the County to present the case it did. If not destroyed, the case actually presented by the respondents was a factual impossibility. With its existence, the County could not even maintain the charge much less persist in the prosecution. That immediately upon its former existence being discovered the County had no option but to dismiss the charges resolves that; Mr. Wright need only create a question of fact.

Had the 911 tape not been destroyed, that would have been enough. However, independent of the 911 tape, Kooiman's constructive destruction of Faiely's statement to DPA Ko that Mr. Wright was not even in the room demonstrates the failure of the case and the malice/lengths Kooiman would go to pursue Mr. Wright. As Corey explains, by any measure of Prosecutorial ethics and procedure, Kooiman's secreting evidence of the statement at her home, only to be discovered after she obtained her wrongful conviction, was an effective destruction of it. Without the Failey/Ko's statements' existence, Kooiman obtained a conviction. With its materialization, Pierce County had no option but to dismiss the charges. Obtaining a conviction by the constructive destruction of evidence constitutes a fraud on the court or "corrupt means," the later conviction based on it provides no defense. Hanson.

The elements speak for themselves and do not require detailed

discussion. Independent of Kooiman's false swearing, Pierce County's initiation and continuation of its prosecution in the face of that irreconcilable evidence present in Pierce County's file was malicious. The case terminated in favor of Mr. Wright. He was undeniably damaged.

If anything, Mr. Wright was entitled to summary judgment. It is undisputed Pierce County had knowledge before it recharged him of every single fact and aspect of the case it later certified compelled moving to dismiss with prejudice. That summary judgment was granted to respondents was error.

Corey explains the decision to charge (originally and the second time) confound any appropriate prosecutorial consideration. CP 599-561. The "right" decision was made to not charge in 2007. The decision to charge, when nothing changed, is without reason according to Corey. In her opinion as a 30 year prosecutor, this case has every hall mark of a politically (publicity seeking) and racially motivated prosecution. Id. Corey's declaration explains it is inexplicable Harold Wright was charged in the first place, much less recharged on remand. Id. And that absent any credible, legitimate purpose, evidence of inappropriate bias is revealed. Id. That concept is well established in employment discrimination law under Title VII, as illustration.

Wright was the only Black secondary school principal in his

district. Id. The alleged victim Failey (white), when interviewed by PDA Ko, told her that Wright committed no crime. Id. The so-called DNA evidence was not reliable. Id. The Prosecution's own expert witness admitted that. Id. The Respondents had knowledge of incompatible, but destroyed evidence, and still they pursued Wright and would have continued but for Ausserer blowing the whistle.

Independently, Kooiman's prosecution of Harold Wright falls within that circumstance where the prosecution itself was so exclusively directed against the only Black male principal at a middle school in the Tacoma School District, with the white victim telling the prosecutor's office he did not do it, a negative rape exam, no reliable DNA evidence, and destroyed exculpatory evidence that the prosecution amounted to a "denial of equal protection of the law." Armstrong.

Corey's declaration (id.) explains there is no objective, rational explanation for the institution much less continuation of these legal proceedings other than, in the words of Loeffelholz, "an end other than what it was designed to accomplish." It was ill-founded, contrary to the evidence, prosecutorial ethics, and impossible to continue once Kooiman's misconduct in secreting evidence at her home and the gravity of Pierce County's destruction of the 911 tape came to light. Id.

c. THE DEPUTIES' CONDUCT CONSTITUTES MALICIOUS PROSECUTION

Law enforcement is liable for malicious prosecution when its misconduct procures prosecution when proper behavior would not. McDaniel v. City of Seattle, 65 Wn.App. 360, 368 (1992). At best only qualified immunity is available but it is lost if the conduct violated a well-established right the Deputies should have known. At the time, the right to not have false or tainted witness statements created was a well established right. Cunningham. Pierce County is vicariously liable for that conduct it condoned. McDaniel.

The elements of malicious prosecution are met. The decision to have pre-interview coaching sessions with witnesses so they could arrive at a consistent story, conducting group interviews, prompting the witnesses with facts, etc., demonstrate an intention to destroy witness inconsistency and create witness consistency. CP 651-653. That practice had long been rejected in the law enforcement community because they were acknowledged to create false evidence. CP 658-659. To continue the practice cannot be reconciled with anything other than an intention to create evidence to initiate a prosecution. Id. Without coaching, Failey and Fincham provided a materially different story than after coaching. Standing alone this is sufficient; however, the conduct of the Deputies

combined with the prosecutors had a synergistic effect. The case terminated in Mr. Wright's favor. He was damaged.

5. Negligence Lays

After the District Court dismissed the 1983 claim the Respondents immediately obtained a stay and then filed for summary judgment. Mr. Wright responded to summary judgment indicating ample facts of negligence were pled in the original complaint. He offered to the Trial Court leave to amend should be granted but because the complaint put negligence at issue made the argument in response to summary judgment. CP 526-531. No objection was made by Respondents therefore the theory is offered again here as it was considered by the Trial Court.

Negligence arising out of Prosecutorial conduct is a viable claim. See Van de Kamp v. Goldstein, 556 US 335 (2009). In VandeKamp plaintiff sued alleging negligence by the Prosecutor's Office for failing to properly train prosecutors to produce evidence. Id. at 347-348. Plaintiff styled the allegation as a failure to properly keep track of evidence. The claim was cognizable but immunity existed for the Prosecutor's Office because the principal enjoys the same immunity as that of the subordinate. Id. Therefore, because an individual prosecutor has absolute immunity for the misconduct of failing to produce evidence, the principal has derivative absolute immunity for failing to properly train to produce evidence. Id.

Here however, the negligence was not in failing to train to produce evidence, it was in failing to train to not destroy it or to otherwise train to understand that hiding evidence at home is the same as its destruction. CP 593. Pierce County has no immunity for that as there is no immunity for the underlying misconduct.

VandeKamp is an important case particularly as respondents below exaggerated its holding, asserting it found absolute immunity for all liability arising out of document retention or an “information system.” That was not the holding. Atherton v. District of Columbia Office of Mayor, 567 F.3d 672 (CADDC 2009) confirms that.

In Atherton a supervising prosecuting attorney used VanDeKamp to argue he had absolute immunity for negligently supervising his subordinate prosecutor. Atherton rejected that, explaining consistent with Mr. Wright’s analysis here: “The Supreme Court held that it would be anomalous to deny immunity to a supervising prosecutor for failure to train when the trial prosecutor... would be entitled to absolute immunity protection.” Id. VanDeKamp merely prevents a creative attorney from end-running immunity by alleging negligence in a supervisor for allowing immune misconduct to take place. Id. It creates no immunity for negligence per se. Id. The same conclusion was reached in Schneyder v. Smith, 653 F.3d 313 (3rd Cir. 2011).

In Schneyder, plaintiff was wrongly incarcerated 52 days when a prosecutor failed to alert the Court of trial continuances and the fact the plaintiff was still incarcerated pending trial; the trial judge instructed the prosecutor to do so while the plaintiff was being held on a warrant telling the prosecutor he would release plaintiff if held too long. Id. at 317. The judge told the prosecutor he (the judge) was relying on the prosecutor to keep track of that information and keep the court advised. Id. The prosecutor did not and plaintiff was held far too long. Plaintiff sued the Prosecutor's Office alleging negligence. The prosecutor in Schneyder, as he did in Atherton and as respondents did here, argued VanDeKamp created immunity for negligence arising out of document or information retention. Recognizing both a negligence claim and lack of immunity for it, Schneyder reiterated the 'function' test holding because the act of the individual prosecutor in failing to keep the Judge advised was "connected to trial only distantly (if at all) [it is] therefore not subject to immunity." Id. According to Schnyder, when information is solely in the possession of the Prosecutor, there is "a duty of disclosure that [is] neither discretionary nor advocative, but [is] instead a purely administrative act not entitled to the shield of immunity, even after *Van de Kamp*." Id.

Here, Corey's declaration discusses why Pierce County via the Prosecutor's Office was negligent; not in failing to train against conduct

that is immune but against conduct that has no immunity: the destruction of evidence. CP 593. Here, not only is there ample evidence Pierce County does not train and has no procedures at all to supervise its DPAs to not destroy evidence (the 911 tape, the Failey/Ko statement), Pierce County was negligent by abrogating a prior policy to preserve and not destroy exculpatory evidence in the form of 911 tapes. As cited above, the primary destruction of evidence is not subject to immunity at all. If any immunity could be stretched to reach evidence destruction, it is at best qualified immune but that does not exist because destruction of exculpatory evidence violates a well-established right Pierce County had knowledge of. Corey also explains Pierce County's failure to train DPAs such as Kooiman to not swear false probable cause statements was negligent. There is no immunity for falsely swearing a probable cause statement and therefore no immunity for negligently failing to prevent it.

Similarly, Pierce County was negligent in its training of its Deputies and failing to have policies and procedures to have prevented coaching and group interviews of witnesses in alleged sexual abuse matters. CP 652-653, 663, 665. Mr. Daly's declaration explains in detail what reasonableness required and where Pierce County did not do so. Id. The proof is in the pudding: uncoached and unrehearsed, Failey and Fincham made a statement to Fincham's mother they both had been raped

by Mr. Wright's brother. Later, after group interviews and pre-interview sessions by the Sheriff's Deputies, they got on the same page and there they stayed. The Deputies' off the record, pre-taped interviews were abhorrent practice. Id. Daly explains why Pierce County's failure of training was unreasonable and resulted in destruction of evidence of inconsistent witness statements. Id. The need for that is made even more clear here where Pierce County destroyed the evidence of the 911 tape.

Pierce County was negligent in retaining Deputy Harai, known to have falsified a witness statement of a dead person yet was allowed to take coached statements here. CP 667-668. Harai fabricated a statement of a person who was at the time dead. CP 602-603. The declaration of Daly explains to allow him to continue in the role of conducting more witness interviews, a task he was corrupt in, was unreasonable.

6. Respondents' Conduct Was Outrageous

"The elements of outrage generally are factual questions for the jury. Sutton v. Tacoma School Dist. No. 10, ___ Wn.App. ___, 324 P.3d 763, 768 (2014). The Court "must make an initial determination as to whether the conduct may reasonably be regarded as so 'extreme and outrageous' as to warrant a factual determination by the jury." Id.

The point will not be belabored. It is undisputed Kooiman and Pierce County charged Mr. Wright with Rape after a different DPA

already determined there was no probable cause to do so. It is at best for respondents disputed that Kooiman lied in her declaration to obtain a finding of probable cause, that she and Pierce County destroyed (actual and constructive) evidence irreconcilably incompatible with Kooimans' probable cause declaration and case presented, and that it was only by that evidence destruction obtained their conviction. Once the conviction was reversed and knowing that, they prosecuted him yet again. It was only when their evidence destruction came to light they had no choice but to dismiss the charges with prejudice. But for DPA Assuer's ethics, Kooiman and Pierce County would have continued to prosecute Mr. Wright based on false and destroyed evidence.

Assuming that as true, that well constitutes conduct "extreme and outrageous." Pierce County's decision to allow exculpatory evidence to be destroyed by its revocation of a policy to preserve it (the 911 tape), its group, coached interviews by Deputies, its failure to have any training to prevent those activities, its retention of a Deputy known to have falsified witness statements to continue in a position to take witness statements, all bolster that conclusion. Respondents' defamation is also evidence.

7. Kooiman And Pierce County Defamed Mr. Wright

After her wrongful conviction was reversed, Kooiman announced to the local press on behalf of Pierce County: "We think they are guilty of

the crime” of rape. CP 561.

Corey held a Prosecutor may be liable for comments made to the press. The standard is simple:

Defamation requires the plaintiff prove falsity, an unprivileged communication, falsity, and damages.

Id. at 761. Mr. Wright was not a public figure. But if he was, that adds the element of "actual malice of his knowledge of or reckless disregard for the falsity of the statement.” Id. Pierce County and Kooiman’s supervisors have vicarious liability for Kooiman’s conduct. Blankenhorn v. City of Orange, 485 F.3d 463, 488 (9th Cir. 2007); LaPlant v. Snohomish County, 162 Wn. App. 476 (2011).

There is no absolute immunity for statements to the press. Buckely v. Fitzsimmons, 509 US 259, 277 (1993). See also Genzler v. Longanbach, 410 F.3d 630, 637 (9th Cir. 2005). Even if qualified immunity applies, it is lost when the conduct is knowing or reckless. Supra.

Here, Kooiman and Pierce County stepped beyond all Prosecutorial ethics by making a pronouncement of guilt. CP 551-552, 561-562, 601-602. That it was also contrary to the information in her file was defamatory. This case is essentially directly on point to Corey. In Corey the elected prosecutor told the press Corey was discharged for issues relating to dishonesty in handling internally donated funds when she

was actually fired because she refused to participate in a politically motivated personnel decision. The jury found for Corey.

In both cases, the speaker had some knowledge of falsity; in Corey, Horne knew an internal investigation undermined the truth of his statement, id. at 762-763, the statement of Failey that Wright was not in the room, etc., was contrary to Kooiman's statement that Mr. Wright was "guilty" of rape, the 911 tape adds to her knowledge of falsity. Id. Further, in Corey Horne's statements deviated from prosecutor ethics which was evidence of malice. Kooiman's statement was no less unethical; commenting on her belief of guilt not simply to the press, but in the same area where a jury would be drawn. CP 601-602. Hypothetically there is an argument for privilege; however, Kooiman is not entitled to it. She was not speaking to a person with a "common interest," she acted with malice and knowledge of the falsity of her statement, lashing out after Division Two took away her wrongfully obtained conviction, no different than Pierce County Prosecuting attorney Horne did in Corey.

Her statement that Mr. Wright was guilty, both on her own behalf and on behalf of Pierce County is, if Respondents would be candid here, quintessentially defamatory. When Kooiman made her statement of guilt to the press, she and Pierce County knew of the destroyed 911 tape and its content, the contrary statement of Failey, etc. Once knowledge of that

evidence became known, Pierce County moved to dismiss all charges with prejudice. Respondents find themselves in a conundrum: how may they maintain Kooiman's statement to the press of guilt was not defamation in light of their knowledge of the destroyed evidence when once that knowledge became public they had no choice but to dismiss the charges.

8. The Claims Are Not Barred By The Statute Of Limitations

The complaint was filed in February 2011. Kooiman's defamation took place on July 18, 2012, after the conviction was reversed. (Dec. of Wright, para. 18). The amended complaint addressed the defamation. That claim is not time barred under any analysis.

a. AUTHORITY

The balance of the claims are of two characters: (1) those that did not accrue until after the reversal and (2) those not discovered until December 2012 when the destruction of evidence was revealed.

Claim accrual does not occur until all elements accrue. Malnar v. Carlson, 128 Wn.2d 521, 529 (1996). Accrual does not take place upon a wrongful act; actual loss or damage must occur. Haslund v. City of Seattle, 86 Wn.2d 607, 619 (1976). "The mere danger of future harm, unaccompanied by present damage" is insufficient. Id. at 620.

Under the discovery rule a claim does not accrue until a plaintiff

“discovers, or in the reasonable exercise of diligence should discover, the elements of the cause of action.” 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 575-576 (2006).

In the context of claims arising out of law enforcement and prosecution, the US Supreme Court recognizes two classes; claims that if proven: (1) do not call into question the validity of an underlying criminal conviction, and (2) do call into question the validity of the underlying conviction. Heck v. Humphrey, 512 US 477, 486-487 (1994) and Wallace v. Kato, 549 US 384, 389-390 (2007).

Claims not questioning the validity of the conviction, such as excessive force, “accrue before the setting aside of – indeed, even before the existence of – the related criminal conviction...” Wallace, 549 US at 394. They are independent of the conviction. Id. Whereas claims contingent on the non-validity of the conviction do not accrue until after reversal: we “deny the existence of a cause of action” until the wrongful conviction occurs and is reversed. Heck, 512 U.S. at 489-490.

That is logical. Given the elements of malicious prosecution, there is a failure of the element of the prosecution having been resolved in favor of the plaintiff until after reversal or dismissal. Below, respondents argued Washington rejects Heck. That is incorrect. No case has squarely done so. The only case tangentially related to this issue is Gausvik v. Abbey,

126 Wn.App. 868 (2005); it never mentioned Heck or its analysis.

b. ARGUMENT

Mr. Wright had no damage until he was wrongly convicted; tainted interviews, destroyed evidence, or even false probable cause statements meant nothing until conviction. There may have been misconduct but no damage attached and no claim accrued. See Haslund.

However, even if some de minimis damage could be speculated, the conviction negated the fourth element requiring “the proceedings terminated on the merits in favor of the plaintiff, or were abandoned.” Peasley. With the second recharging, the proceedings were not terminated. Proceedings continued and did not “terminate on the merits in favor of” Mr. Wright until the charges were dismissed with prejudice in December 2012. Heck, 512 U.S. at 489-490. His claims are those Heck recognizes as relying on the ultimate “invalidity” of the conviction.

Mr. Wright filed his lawsuit early, in February 2011, before claim accrual, in an abundance of caution. His claims are not time barred.

However, even assuming claims could have been made while the conviction was outstanding, the gist of his claims rely on evidence not even discovered until December 2012; the destruction of evidence: the 911 tape, the Kooiman admission to Ko that Wright was not in the room, etc. At best for Respondents, a limitation argument would only act to exclude

evidence, not discovered until December 2012.

Cited below with no cogent response by respondents nor attempt by the Trial Court to reconcile in its order is Davis v. Clark County, 966 F.Supp.2d 1106 (WD Wash 2013). In Davis plaintiffs sued with claims similar to Mr. Wright's. Plaintiffs arguably always "knew" of a tainted investigation, outside of the limitation period. However, other misconduct was discovered within the limitation period; as in the case at bar, after litigation commenced. Under the discovery rule, claims based on that discovered evidence was not time barred even if earlier conduct would be excluded by the limitation period. Id. at 27.

[I]t was not until they began this litigation that they discovered the Defendants' failure to turn over the information contained in the archived box and in the report regarding Mr. Ollom. Not only that, but Plaintiffs had no reason to know of or attempt to discover the contents of the archived box or the report. They requested this type of information at their criminal trials and had no reason to think these documents were in existence. Accordingly, Plaintiffs' state law claims for intentional infliction of emotional distress, negligence, and negligent training, supervision, and retention, based on the evidence found in the archived box and the report regarding Monte Ollom, should not be dismissed as barred by the statute of limitations.

That is a perfect image of the case at bar (with the exception that Mr. Wright's claim did not accrue until December 2012). Mr. Wright's criminal defense attorney asked for the destroyed evidence and had the

right to rely on its nonproduction to mean it did not exist. All of his claims alleging misconduct that resulted in that destruction of evidence and other misconduct are not barred by the statute of limitations. Id.² That follows the discovery rule. See 1000 Virginia Ltd. Partnership.

² In candor to this Court, Davis cited Gausvik for the proposition a claim of malicious prosecution may be asserted with an extant conviction. However, it did so with no analysis; it merely mechanically applied the case. That District Court, in the same district as Division Two that authored Gausvik, appears to have believed its hands were tied. (“Unfair as this seems, it appears to be Washington law.” Id. at 1138.) Gausvik’s holding is indeed “unfair.” It is “unfair” because it is impossibly inconsistent with the elements of malicious prosecution, etc., and fails to address the analysis of Heck, not mentioning it once. Instead, Gasuvik conclusorily stated a plaintiff could sue even with an extant conviction because once convicted “he kn(ows) the factual basis for his claim.” Gasuvik, 126 Wn.App. at 880. Notably however, the plaintiff in Gasuvik did not allege malicious prosecution; he alleged “negligent investigation” which is not a claim made here. Further, the Court’s analysis rose and fell on RCW 4.16.190 that tolls the limitation period while a person is incarcerated before they are sentenced. That is also not an issue here and is distinguishable from Mr. Wright’s claim. Gausvik perfunctorily asserted collateral estoppel “may have reduced” the “chances of prevailing.” Id. at 881. That statement makes no sense. Collateral estoppel does not ‘reduce’ the “chance” of prevailing. It is binary: either it precludes a claim or it does not. A conviction absolutely precludes any claim reliant on the validity of a conviction; we do not need Heck to explain that. A conviction is an impassable bar because the criminal case did not conclude in the plaintiff’s favor.

Gasuvik is no more correct as to a claim of negligent investigation than malicious prosecution; however, that it involved a negligent investigation claim distinguishes it here. Ultimately, Gausvik found immunity for the claims thus it is questionable what is dicta and what is not.

Gasuvik can only be explained as an outlier case, the implications of its holding not well or completely thought out, that by a KeyCite search was not appealed to the Supreme Court, and has not been cited a single time by a subsequent Washington case for a proposition that is at issue in this case. With respect to that Court, it seems to acknowledge the implausibility of the import of its ruling given collateral estoppel by suggesting a plaintiff might be able to file a lawsuit and then move to “stay” it while the underlying conviction was on appeal. To even suggest that as a needed workaround says all that need be said of the inconsistency of the case’s logic. If there was a civil claim to be made, there would be no need to seek a stay: the claim could be made. To even acknowledge the need for a stay to seek review and reversal of a conviction is to acknowledge there is no civil claim; if there was, there would be no need for a stay in the first place.

Finally, if not tolled strictly, the doctrine of equitable tolling should prevail. Equitable tolling was not considered by either Gasuvik or Davis.

The elements are met here:

The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.

Graham Neighborhood Ass'n v. F.G. Associates, 162 Wn.App. 98, 119 (2011).

There is ample evidence of both bad faith and deception by Pierce County. The destroyed and hidden evidence, not discovered until 2012, underscores the respondents' bad faith and delaying Mr. Wright's pursuit of his remedies – both criminal and civil. Had that evidence been discovered sooner, even pre-reversal of his conviction, that would have (by respondents' logic) provided a much greater impetus to sue even though his claim was still barred. If known during his original appeal, that would have formed an additional basis for appeal. Given the defendants' high Brady obligation it no doubt would have formed yet another reason for not a reversal but a reversal with prejudice.

Mr. Wright exercised due diligence. He filed within a year of the conviction being reversed. CP 1-20. His action was prompt.

The final consideration of whether to apply equitable tolling is whether it would be “consistent with both the purpose of the statute

providing the cause of action and the purpose of the statute of limitations.”
Millay v. Cam, 135 Wn.2d 193, 206 (1998). That is true here.

The purpose of the three year period is to avoid stale claims; to not could lead a civil defendant being without evidence or witnesses. Tolling only until reversal furthers that interest. With an active appeal, the case is not fallow only to return years later. The case is actively litigated and watched by the individuals who may later be defendants. They are on notice of the potential for a claim and the need to preserve evidence and keep in contact with witnesses.

If defendants respond by arguing tolling is an exceedingly narrow remedy and every element must be met, they are met here. However, it is acknowledged “equitable tolling of the time bar (should be) available in other contexts” where the elements do not neatly fit. In re Carter, 172 Wn.2d 917, 928-929 (2011). Carter adopted tolling to consider an objection to a habitual offender sentence despite the elements not being squarely present because doing so was the only logical means to reconcile the claim. Carter acknowledges that a court in equity must be flexible.

Additionally, tolling provides for a unity of actions whereas not tolling guarantees piecemeal litigation. Tolling is consistent with Heck. Although Mr. Wright’s 1983 claim was dismissed, malicious prosecution and 1983 claims typically go hand in hand. To not consistently toll the

state claims to the hand-in-glove 1983 claims the US Supreme Court expressly acknowledges do not even accrue until after reversal would require piecemeal litigation. Where possible and desirable, Washington law tracks Federal law. Henningsen v. Worldcom, Inc., 102 Wn.App. 828, 842 (2000). See also Pulcino v. Federal Express Corp., 141 Wn.2d 629, 660-661 (2000) Washington explicitly follows Federal law on accrual; for example, in employment law. See Lewis v. Lockeheed Shipbuilding and Const. Co., 36 Wn.App. 607, 613 (1984). The linkage between 1983 and state tort claims is no different.

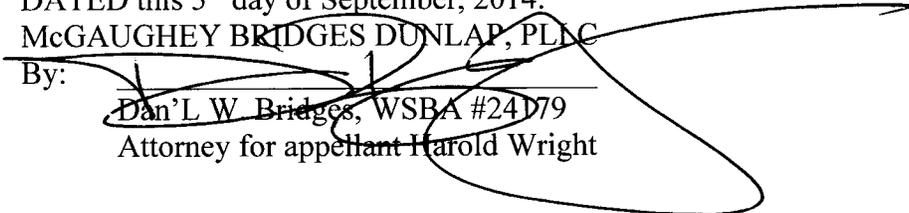
F. Conclusion

Although disputed, the facts alleged and supported by admissible evidence and witness testimony reveal shocking misconduct on both an individual and systemic level. The reasons Pierce County offered for the motion for dismissal of the criminal charges are an obvious subterfuge. Its knowledge of those items for years did not prevent it from charging Mr. Wright twice and maliciously prosecuting him for 6 years: it was only that it got caught in that knowledge that made a difference. The questions of fact are many. Summary judgment was error.

DATED this 5th day of September, 2014.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:


Dan L. W. Bridges, WSBA #24179

Attorney for appellant Harold Wright

CERTIFICATE OF SERVICE

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that today, September 5th, 2014, I sent out for next day delivery via ABC Legal Messenger, Appellant's Opening Brief.

Stewart A. Estes WSBA
Mary Ann McConaughy, WSBA
Keating Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Dated this 5th day of September, 2014 at Seattle, Washington.



Dave Loeser

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Court Of Appeals No. 71869-0-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

HAROLD WRIGHT,

Appellant,

vs.

PIERCE COUNTY, a municipal corporation; et. al,

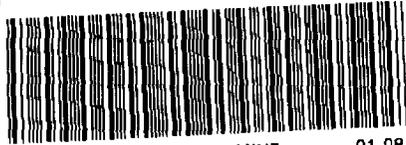
Respondents.

APPENDIX TO APPELLANT'S OPENING BRIEF

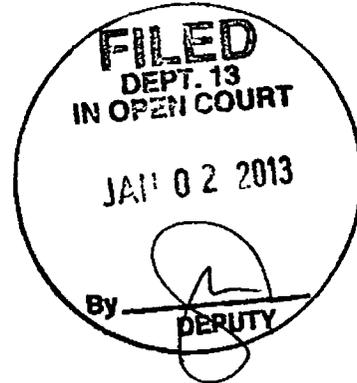
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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-00808-1

vs.

HAROLD HILLS WRIGHT, JR,

AMENDED INFORMATION

Defendant.

DOB: 4/9/1971
PCN#: 539174037

SEX : MALE
SID#: 23788936

RACE: BLACK
DOL#: UNKNOWN

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse HAROLD HILLS WRIGHT, JR of the crime of RAPE IN THE SECOND DEGREE, committed as follows:

That HAROLD HILLS WRIGHT, JR, in the State of Washington, on or about the 31st day of January, 2004, did unlawfully and feloniously, under circumstances not amounting to rape in the first degree, engage in sexual intercourse with S.F., by means of forcible compulsion, contrary to RCW 9A 44 050(1)(a), and against the peace and dignity of the State of Washington

COUNT II

And I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse HAROLD HILLS WRIGHT, JR of the crime of INDECENT LIBERTIES, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of the others, committed as follows

That HAROLD HILLS WRIGHT, JR, in the State of Washington, on or about the 31st day of January, 2004, did unlawfully and feloniously by forcible compulsion, knowingly cause S.F , not the spouse of the defendant and not the state registered domestic partner of the defendant to have sexual

1 contact with him or another, contrary to RCW 9A 44.100(1)(a), and against the peace and dignity of the
2 State of Washington

3 DATED this 2nd day of January, 2013

4 PIERCE COUNTY SHERIFF
WA02700

MARK LINDQUIST
Pierce County Prosecuting Attorney

5
6 jea

By



JARED AUSSERER
Deputy Prosecuting Attorney
WSB#: 32719

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that today, September 11th, 2014, I sent out for next day delivery via ABC Legal Messenger, a copy of the Appendix to Appellant's Opening Brief.

Stewart A. Estes WSBA
Mary Ann McConaughy, WSBA
Keating Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Dated this 11th day of September, 2014 at Seattle, Washington.



Dave Loeser



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