

71869-0

71869-0



Court of Appeals No. 71869-0

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

HAROLD WRIGHT,

Appellant,

vs.

PIERCE COUNTY, a municipal corporation; et al.,

Respondents.

BRIEF OF RESPONDENTS

Stewart A. Estes, WSBA #15535
Mary Ann McConaughy, WSBA #8406
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Attorneys for Respondents

TABLE OF CONTENTS

I. COUNTER STATEMENT OF ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR 1

II. STATEMENT OF THE CASE..... 1

A. Procedural Background 1

B. Counter Statement of Facts..... 3

1. The Rape and Investigation..... 3

2. Plaintiffs’ Factual Misrepresentations..... 4

III. SUMMARY OF ARGUMENT 13

IV. ARGUMENT..... 13

A. Plaintiffs Are Collaterally Estopped From Relitigating the Factual Issues Assertions They Make in This Court and Were Considered and Rejected by the Federal Court..... 13

1. Party or Privity. 15

2. Finality of Judgment..... 15

3. Prior Adjudication of Facts..... 16

4. Identity of Issues. 16

B. The Statute of Limitations Bars Plaintiffs’ State Law Claims..... 21

1. Plaintiffs’ Claims Accrued Four to Seven Years Before Filing Their Suit..... 21

2. The Three Year Statute of Limitations Bars All Claims. 22

C. The Prosecutors Are Entitled to Absolute Immunity. 28

1. DPA Kooiman is Absolutely Immune from Suit..... 29

2.	Absolute Immunity Applies to the Prosecutors’ Office Alleged Failure to Train.	33
D.	Plaintiff’s Rape Conviction Bars His Tort Claims.	36
E.	Multiple Determinations of Probable Cause by the Prosecutor and Judge, and the Jury’s Conviction Broke the “Chain of Causation” With the Individuals’ Actions.	36
F.	Plaintiffs’ Negligence Claims Are Baseless.	38
1.	Plaintiffs’ Negligent Training and Retention Claims Are Not Cognizable.	38
G.	Plaintiffs Cannot Make Out an Abuse of Process Claim.	41
H.	Plaintiffs Cannot Establish Malicious Prosecution: Probable Cause Was Repeatedly Found By the Court and the Jury.	43
I.	Plaintiffs Cannot Establish Outrage.	44
J.	Plaintiffs’ Defamation Claim Is Barred By Several Factors Including Collateral Estoppel and Immunity and/or Privilege.	46
1.	Collateral Estoppel Precludes This Claim.	46
2.	Statements of Opinion Are Not Actionable.	47
3.	Plaintiffs Cannot Establish “Actual Malice.”	47
4.	DPA Kooiman Has Absolute Prosecutorial Immunity for This Statement.	49
V.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Allen v. McCurry</i> , 449 U.S. 90, 94 (1980).....	14
<i>Alpine Indus. Computers, Inc. v. Cowles Pub. Co.</i> , 114 Wn. App. 371, 382, 57 P.3d 1178, 1185 (2002) amended, 64 P.3d 49 (2003).....	48
<i>Atherton v. D.C. Office of Mayor</i> , 567 F.3d 672, 687 (D.C. Cir. 2009).....	35
<i>Babcock v. State</i> , 112 Wn.2d 83, 107, 768 P.2d 481 (1989), reconsidered on other grounds, 116 Wn.2d 596, 809 P.2d 143 (1991).....	45
<i>Banks v. Nordstrom, Inc.</i> , 57 Wn. App. 251, 263, 787 P.2d 953, review denied, 115 Wn.2d 1008 (1990).....	46
<i>Barrie v. Hosts of America, Inc.</i> , 94 Wash.2d 640, 644, 618 P.2d 96 (1980).....	18
<i>Beck v. City of Upland</i> , 527 F.3d 853, 862 (9th Cir. 2008).....	37
<i>Bender v. Seattle</i> , 99 Wn.2d 582, 594, 664 P.2d 492 (1983).....	44
<i>Benoy v. Simons</i> , 66 Wn. App. 56, 63, 831 P.2d 167, review denied, 120 Wn.2d 1014 (1992).....	46
<i>Brownfield v. City of Yakima</i> , 178 Wn. App. 850, 877, 316 P.3d 520 (2014).....	39
<i>Brownfield v. City of Yakima</i> , 178 Wn.App. 850, 316 P.3d 520, 531 (2014).....	15
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259, 271 (1993).....	33
<i>Burns v. Reed</i> , 500 U.S. 478, 478 (1991) (citations omitted).....	30
<i>Cabrera v. City of Huntington Park</i> , 159 F.3d 374, 380 (9th Cir. 1998).....	25
<i>Clay v. Portik</i> , 84 Wn. App. 553, 561, 929 P.2d 1132, 1136 (1997).....	18
<i>Condon Bros., Inc. v. Simpson Timber Co.</i> , 92 Wn.App. 275, 285, 966 P.2d 355, 360 (1998).....	18

<i>Corbally v. Kennewick Sch. Dist.</i> , 94 Wn.App. 736, 741, 973 P.2d 1074 (1999).....	47
<i>Creelman v. Svenning</i> , 67 Wn.2d 882, 885, 410 P.2d 606 (1966).....	29
<i>Cunningham v. State</i> , 61 Wn. App. 562, 566, 811 P.2d 225 (1991).....	15
<i>Davis v. Clark County</i> , 966 F.Supp.2d 1106 (W.D. Wash. 2013).....	25
<i>Doggett v. Perez</i> , 348 F.Supp.2d 1169, 1175 (E.D. Wash. 2004)	23
<i>Elrod v. G&R Constr. Co.</i> , 628 S.W.2d 17, 19 (Ark. 1982).....	40
<i>Gausvik v. Abbey</i> , 126 Wn. App. 868, 879-82, 107 P.3d 98, <i>review denied</i> , 155 Wn.2d 1006 (2005).....	25
<i>Gausvik v. Perez</i> , 239 F.Supp.2d 1067, 1105 (E.D. Wash. 2002) <i>rev'd on other grounds</i> , 345 F.3d 813 (9th Cir. 2003).....	23
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wn.2d 215, 219, 543 P.2d 338 (1975).....	23
<i>Genzler v. Longanback</i> , 410 F.3d 630 (9 th Cir. 2005)	31
<i>Gilliam v. DSHS</i> , 89 Wn. App. 569, 584-85, 950 P.2d 20, <i>review denied</i> , 135 Wn.2d 1015 (1998)	39
<i>Gold Seal Chinchillas, Inc. v. State</i> , 69 Wn.2d 828, 833-34, 420 P.2d 698, 701 (1966).....	47
<i>Gowin v. Altmiller</i> , 663 F.2d 820, 823 (9th Cir. 1981).....	36
<i>Grimsby v. Samson</i> , 85 Wn.2d 52, 59, 530 P.2d 291 (1975).....	45
<i>Guffey v. State</i> , 103 Wn.2d 144, 146, 690 P.2d 1163 (1984)	45
<i>Hackett, v. Washington Metro Area Transit Authority</i> , 736 F. Supp. 8, 10 (D.D.C. 1990)	40
<i>Hanson v. City of Snohomish</i> , 121 Wn.2d 552, 562, 852 P.2d 295 (1993).....	15
<i>Heck v. Humphrey</i> , 512 U.S. 447 (1994).....	24
<i>Herron v. Tribune Pub. Co. Inc.</i> , 108 Wn.2d 162, 183, 736 P.2d 249 (1987).....	48
<i>Hoppe v. Hearst Corp.</i> , 53 Wn. App. 668, 678, 770 P.2d 203 (1989).....	46
<i>Hough v. Stockbridge</i> , 152 Wn. App. 328, 343-44, 216 P.3d 1077 (2009).....	42

<i>Imbler v. Pachtman</i> , 424 U.S. 409, 425–26 (1976).....	31
<i>Janaszak v. State</i> , 173 Wn. App. 703, 297 P.3d 723 (2013).....	41
<i>Kalina v. Fletcher</i> , 118 S. Ct. 502, 505 (1997).....	30
<i>Keates v. City of Vancouver</i> , 73 Wn. App. 257, 263-64, 869 P.2d 88 (1994).....	45
<i>King v. Hutson</i> , 97 Wn. App. 590, 597, 987 P.2d 655 (1999).....	45
<i>LaLone v. Smith</i> , 39 Wn.2d 167, 234 P.2d 893 (1951).....	38
<i>Lawson v. Boeing Co.</i> , 58 Wn. App. 271, 792 P.2d 1263 (1990) <i>review denied</i> , 116 Wn.2d 1021 (1991).....	46
<i>Laymon v. Wash. St. Dept. of Nat. Res.</i> , 99 Wn. App. 518, 530, 994 P.2d 232 (2000).....	41
<i>Liberty Bank of Seattle, Inc. v. Henderson</i> , 75 Wn.App. 546, 878 P.2d 1259 (1994).....	48
<i>Liquid Carbonic Acid Mfg. Co. v. Convert</i> , 82 Ill. App. 39, 44 (Ct. App. Ill. 1899).....	42
<i>Lockwood v. AC & S, Inc.</i> , 109 Wn.2d 235, 258, 744 P.2d 605, 618 (1987).....	18
<i>Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)</i> , 119 Wn. App. 665, 699-700, 82 P.3d 1199, 1217 (2004).....	42
<i>Lutheran Day Care v. Snohomish County</i> , 119 Wn.2d 91, 101, 829 P.2d 746, 750 (1992).....	28
<i>Millay v. Cam</i> , 135 Wn.2d 193, 206, 955 P.2d 791 (1998).....	28
<i>Milstein v. Cooley</i> , 257 F.3d 1004, 1008 (9 th Cir. 2001).....	31
<i>Musso-Escude v. Edwards</i> , 101 Wash. App. 560, 567-68, 4 P.3d 151, 155 (2000).....	34
<i>Palmer v. Bennington Sch. Dist., Inc.</i> , 615 A.2d 498, 503 (Vt. 1992).....	47
<i>Passovoy v. Nordstrom, Inc.</i> , 52 Wn. App. 166, 170, 758 P.2d 524 (1988).....	18
<i>Peasley v. Puget Sound Tug & Barge Co.</i> , 13 Wn.2d 485, 499, 125 P.2d 681 (1942).....	43
<i>Putz v. Golden</i> , 2010 WL 5071270 (W.D. Wash. 2010).....	28

<i>Schmalenberg v. Tacoma News, Inc.</i> , 87 Wn.App. 579, 591, 943 P.2d 350 (1997), <i>review denied</i> , 134 Wash.2d 1013 (1998)	47
<i>Schneyder v. Smith</i> , 653 F.3d 313, 334 (3d Cir. 2011).....	35
<i>Shielee v. Hill</i> , 47 Wn.2d 362, 365, 287 P.2d 479 (1955).	38
<i>Smiddy v. Varney</i> , 665 F.2d 261, 263 (9th Cir. 1981)	37
<i>State v. Harold Wright</i> , 152 Wn. App. 64, 214 P.3d 968 (2009).....	3
<i>Tittle v. Johnson</i> , 185 S.E.2d 627, 628 (Ga. Ct. App. 1971)	40
<i>Van de Kamp v. Goldstein</i> , 555 U.S. 335, 342 (2009).....	31
<i>Washington Mutual v. United States</i> , 636 F.3d 1207 (9 th Cir. 2011).....	14
<i>Whaley v. State</i> , 90 Wn. App. 658, 676 n.39, 956 P.2d 1100 (1998).....	39
<i>Wood v. Battle Ground School Dist.</i> , 107 Wn.App. 550, 569, 27 P.3d 1208 2001).....	48
<i>Yarris v. Cnty. of Delaware</i> , 465 F.3d 129, 137 (3d Cir. 2006)	32
<i>Ybarra v. Reno Thunderbird Mobile Home Village</i> , 723 F.2d 675, 679 (9th Cir. 1984).....	32
Statutes	
Ch. 42.56 RCW.....	10
RCW 4.16.080(2).....	22
RCW 4.16.190(1).....	22
Treatises	
<i>Restatement (Second) of Torts</i> §682 (1977), <i>Comm. b</i>	42
Constitutional Provisions	
42 U.S.C. § 1983.....	34

I. COUNTER STATEMENT OF ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

The principal issue for this Court to resolve is the legal effect of a federal court order that granted Defendants summary judgment, when that order carefully scrutinized the record to determine if there were any facts to support Plaintiffs' factual claims that a prosecutor "constructively destroyed" evidence, and falsely swore out a probable cause certificate.

The federal court held that Plaintiffs did not produce any facts to support these assertions and dismissed the federal law claims. Plaintiffs now advance state law theories that are based on these *identical factual allegations*. The federal court order collaterally estops Plaintiffs from bringing these same claims in state court. And, Plaintiffs' suit was filed well past the date that the statute of limitations expired. Lastly, the claims are barred by absolute immunity and/or privilege, and for other reasons.

II. STATEMENT OF THE CASE

A. Procedural Background

Plaintiff filed this civil case alleging federal civil rights and state law claims in February 2011 -- almost four years after his conviction, and seven years after the rape investigation.¹ Plaintiffs filed the action in King

¹ This civil case was filed in February 2011. The criminal case was reversed in 2009 and pending re-trial in Pierce County Superior Court in early 2013. After defendants removed the case to federal court, Judge Settle entered a stay order pending resolution of the

County Superior. CP 1. Defendants removed it to federal court and brought a motion for summary judgment. Judge Benjamin Settle dismissed all federal claims and remanded the matter for a determination of the state law claims. CP 57. Plaintiffs did not appeal this dismissal.

Upon remand to Superior Court, Plaintiffs pursued their state law causes of action against seven Defendants: Pierce County; its former and current elected Prosecuting Attorneys; the deputy prosecuting attorney (DPA) who convicted Plaintiff; and the elected County Sheriff and two of his deputies (and all of their spouses). Defendants brought a summary judgment motion on the state claims arguing that Plaintiffs' allegations were without merit for six reasons. CP 23. The Superior Court agreed and dismissed plaintiffs' suit. CP 765. Plaintiffs appealed.

State Law Claims. 1) malicious prosecution and abuse of process; 2) defamation; 3) outrage; 4) negligent training; and 5) negligent retention.

Federal Law Claims. 1) Section 1983 "malicious prosecution," 2) Section 1983 claim "Wrongful and/or Unconstitutional Conviction," (based on alleged destruction of evidence); and 3) an "extra-judicial statements" claim (based on alleged defamatory comments).

The state law claims are based on the same facts as the federal claims were. The court discussed the facts at length because its rulings were that Plaintiffs did not have evidence to support their factual

criminal case. The Pierce County Prosecutor's Office moved to dismiss the criminal case against Wright and his co-defendant Richy Carter in January 2013.

assertions. CP 57-71, *Order*. As the facts are the same, the Court's rulings apply here with equal force.² For example, because the Court found that there was no evidence to support plaintiffs' claim of evidence destruction, Plaintiffs cannot use those same baseless allegations here for other claims.

B. Counter Statement of Facts

Plaintiffs' rendition of facts is dramatic, but is a product of their imagination. It is not supported, and is in fact contradicted, by the record and was rejected by the federal and state courts.

1. The Rape and Investigation.

This lawsuit arises out of the conviction of Plaintiff Harold Wright and another man for the 2004 rape of a former student. They were tried and convicted in 2007. Their convictions were overturned on appeal for technical errors in instructing the jury, *State v. Harold Wright*, 152 Wn. App. 64, 214 P.3d 968 (2009). They were recharged but not retried.

The rape that resulted in his prosecution occurred in the early morning hours of January 31, 2004. The rape victim,³ then 19-years old, consistently maintained that she had been forced into non-consensual sex

² The Superior Court held "Plaintiffs' primary factual allegation is the alleged destruction of evidence by DPA Kooiman. All state law claims flow therefrom." CP 775, *Order* (quoting Plaintiffs' response on summary judgment). The Court then ruled "Judge Settle's Order held there to be no factual basis for these allegations." *Id.*

³ Plaintiff insists on repeatedly using the actual name of his victim in the public record -- 42 times in his brief, and 43 more times in his lawyer's declaration. This declaration shockingly attached her rape examination results, complete with anatomical drawings. CP 582-646. Defendants moved to seal those records to maintain her privacy. CP 788. Defendants will simply refer to her as "the victim."

by at least two men who she could not identify because she was pulled into a dark room where the assault took place. The group of four men in their 30's had been drinking and partying with the much younger women at the home of one of the men. The victim knew Plaintiff Wright because he had been the Dean at a school where she was one of his students.

The attack was reported to police later the same day.⁴ Plaintiff Wright admitted being present and even seeing two people having sex. The WSP crime lab found Wright's DNA on the victim's breast. Semen from Wright's co-defendant Richy Carter was detected in her vaginal area. Although no other vaginal DNA was identified, the victim's friend reported seeing one of the men handing a condom to another man, and later witnessed several discarded condom wrappers on the floor nearby. Charges against Wright were filed following the DNA results, in 2007.

2. Plaintiffs' Factual Misrepresentations.

Plaintiffs continue to insist that prosecutors and detectives "constructively destroyed" two pieces of evidence, and made false allegations. But, as observed by the Superior and federal courts, there is "no factual basis for these allegations." CP 775.

The Victim's "Confession" That Wright "Didn't Do It."

Plaintiff's most frequently repeated claim is that the victim told

⁴ The investigative reports and witness interviews can be found at CP 133-236.

prosecutors in 2004 that Harold Wright did not rape her. Criminal lawyer Corey goes so far as to claim that DPA Ausserer told her that the victim admitted that “Harold Wright had no role at all in an alleged rape”. CP 597 (¶ 32). This is demonstrably false. It is also triple hearsay as Corey claims that 1) DPA Ausserer told her, 2) that he read a memo that said 3) the victim told DPA Ko something.

The undisputed facts on this point are: In 2004, Deputy Prosecutor Sunni Ko spoke to the victim and wrote a summary of that discussion that included her work product thoughts on the case. Because the privileged memo contained some facts, the prosecutor provided it to Judge Worswick *in camera* before the 2007 criminal trial. The Court held that it did not have to be disclosed, and that it contained “no new facts.” CP 354-363.

The case was set for retrial in January 2013. Despite a prior ruling that he did not have to do so, DPA Jared Ausserer sent Wright’s attorney Corey an e-mail that summarized the victim’s statements as set out in the 2004 Ko memo.⁵ The email included the statement that “[The victim] stated she did not see Harold Wright before or during the incident.” CP

⁵ Part of the problem for prosecutors was that the victim was interviewed *17 different times* for various criminal and civil proceedings. In 2013, DPA Kooiman was not sure if DPA Ko’s 2004 memo was based only on her review of these statements or a direct conversation with the victim. She contacted Ko, confirmed that it was based on an interview and then the email was sent. CP 359 (“After reviewing the documents on the 3rd day of January, 2013, and comparing them to the 17 statements previously provided by Failey, DPA Kooiman contacted Ms. Ko to determine if she actually conducted an interview or if this was merely work product done with the comparison of interviews.”).

359, *Kooiman Decl.*

Despite a clear email record to the contrary, lawyer Corey now claims that DPA Ausserer told her that the victim said Wright “had no role at all” in the rape and “was never in the room.” CP 597. This representation has no basis in fact, which is why it was rejected by both the federal and state courts. The email summary is *completely consistent* with what the victim said in the days immediately after her rape and at trial: She walked into a darkened room to find her shoes, was grabbed and thrown down, and never saw the faces of the two men who raped her.

Plaintiff brazenly claims that “not even to date has Pierce County disclosed a contrary or reconciling statement made by [the victim] before the [2007] probable cause declaration was sworn by Kooiman for Kooiman to have been relating in her declaration.” *Brief of Ap’t.* at 23. Plaintiffs’ claim is again demonstrably false.⁶

Not only is the 2013 summary not new information, *Wright made*

⁶ The victim made several statements to this very effect *three years before* the probable cause certification was signed in 2007. In fact she made these same statements the day of the attack and the next day:

- In the victim’s initial handwritten statement on the day of the attack in January 2004 she said: “It was really dark in there couldn’t see anything someone had taken my pants off. *I don’t know who all raped me. It was dark.*” CP 154 (emphasis supplied).
- The next day she said in her interview with a detective: “*I’m not too sure who was all at the bedroom* at the time, ‘cause it was so dark in there.” CP 222.
- She told the medical staff who examined her: “Unable to see [secondary] to darkness.” CP 611.
- All this was the subject to cross examination at trial. CP 301.

As Judge Worswick held in 2007, the summary of her statement in the email “does not appear to contain any new facts.” CP 362-63.

this very argument at his 2007 trial. He brought a motion to dismiss at the conclusion of the State’s case based on this point. CP 311, Transcript of trial (“Given that [“she doesn't know who was in the room”], there's no evidence and it can only be based on speculation, that he would have been in the room while sexual intercourse was going on.”). The motion was denied. The Court held that there was enough evidence on Wright’s identification to send the case to the jury. CP 314 (“... at the time the assault was occurring, there were people who were kissing on her breast area. We do have DNA of Harold Wright from that area. I think that is sufficient to defeat a half-time motion.”). The jury convicted him.⁷

“Constructive Destruction of the [Victim’s] Confession That Harold Wright Was Not Involved.” CP 590 (quoting *Corey Decl.*) Corey asserts that “Mr. Ausserer also disclosed to me that he found some materials in a couple of boxes related to this case at DPA Kooiman's residence,” which contained the victim’s “confession” that Wright did not rape her. *Id.* This claim is even more irresponsible than the one above. First, the undisputed facts regarding the victim’s actual 2004 statement are set out above – she never said anything like this. Second, the memo was

⁷ Wright was convicted in part on the fact that the two men who were *not* charged were on a different floor of the house at the time the rape occurred, and two rapists left the room afterward and Wright came soon thereafter and started “messaging” with the victim while she tried to get her pants on. “[The victim] said Herald Wright told her this is the way he was on the weekends but come the week, he was all professional.” CP 387. In addition, Wright’s DNA was found on her breast and he admitting being near the room at the time of the rape, even opening the door and watching it occur. *See*, CP 436-37.

neither hidden nor destroyed. We know that the Ko memo was created in 2004, still existed in June 2007 for *in camera* review, and in 2013 was located in the archived box in the prosecutor's office. The transcript of the 2007 proceeding contains the Court's ruling on the memo:

The next issue is regarding the documents that were given to me for review. I was given two packs of documents. One of them was a copy of documents which had been provided to defense counsel. The second one I received is a 16-page document with a cover sheet on it that says "work product notes and emails." I did review it. I also asked Ms. Kooiman in my chambers the source of the documents that were in my possession. I do in fact believe these are work product and will not be disclosed. Further, the information that's in these documents does not appear to contain any new facts. It appears to just strictly contain work product and thought processes of the attorneys for the State.

CP 362-363, *Verbatim Transcript of June 11, 2007 proceedings*.⁸ Despite Plaintiff's false claim that this never occurred ("there was neither an *in camera* review or Order," *Brief of Ap't* at 19), Wright was *present in court* when it happened. CP 361 ("present out of custody" with counsel).⁹

Third, DPAs Kooiman and Ausserer both categorically deny this

⁸ Plaintiffs' assertion that the trial court's oral ruling -- on a certified transcript -- is "an out of court statement" and thus hearsay is, in a word, amusing. *Brief of Ap't* at 19.

⁹ Both the federal and state courts rejected this strained argument:

Despite Judge Settle's clear finding to the contrary, Plaintiffs contend that "[t]here is no record of an *in camera* review of any material by the Pierce County Superior Court; much less of the Failey/Ko witness interview " Pl. Response, at 9, n. 5. Even if this allegation were not barred by collateral estoppel, the record shows otherwise.

CP 776, *State Court Order*. As Judge Settle held:

This allegation is supported only by the inadmissible declaration of Wright's criminal defense attorney. The admissible evidence on record shows that Ms. Kooiman did not take any evidence home and that Mr. Ausserer has never been to her house.

State Court Order (quoting *Federal Court Order*, CP 57).

representation. CP 355, 365-366. Kooiman never hid anything. And Ausserer not only never found the memo in her garage, he has never even visited her home. CP 355, 365-366. The undisputed facts are that “Ms. Kooiman brought the matter to my attention.” CP 366, *Ausserer e-mail*.

Ausserer described the events as follows:

On the evening of January 2nd [2013 while preparing for the second trial] assigned DPA Kooiman continued to sort through the three archived boxes on this matter. In doing so, she reviewed a work product packet which was previously provided for in camera review with Judge Worswick. The packet is referred to on RP 22-23. Judge Worswick did not provide the documents to defense as she determined they did not contain any new facts.

CP 355, Ausserer e-mail to Corey.

Thus, the victim’s statement was discussed in open court in 2007 and handed to the judge in front of Wright and his lawyer, who now make false assertions to the contrary. *Brief of Ap’t* at 6 (claiming the statement was “destroyed and their existence not disclosed until years later, after the conviction was reversed.”).¹⁰ Judge Settle concluded that Wright “failed to meet his burden on the issue of whether the evidence was intentionally suppressed by the prosecution.” CP 67.

Prosecutor Kooiman “Destroyed 911 Call Recording.” Plaintiffs next claim that DPA Kooiman “destroyed” a tape containing a 911 call.

¹⁰ As discussed below, even if this actually happened, DPA Kooiman would have absolute prosecutorial immunity for the act of not disclosing a work product memo.

This claim is also false, and was found to be baseless by the federal court. Initially, the significance of this claim is suspect. No one knows what was on the audio, so Plaintiffs' claim it was "exculpatory" is pure speculation. Second, the tape of the 2004 911 call was not "destroyed," and certainly was not touched by anyone in the prosecutor's office.

As Judge Settle held, a separate agency¹¹ maintained 911 audio recordings. CP 57. That agency (formerly "LESA," now South Sound 911), maintained the tape for only six months according to its protocol.¹² CP 369-70. It was recorded over in the ordinary course of business years before Wright was charged with a crime in 2007. CP 369. Prosecutor Kooiman was not even assigned to the case for more than two years after the tape was routinely erased by another agency. CP 118. Thus, as Judge Settle held no prosecutor is responsible for a separate agency's decision to maintain a public record¹³ for only six months.

Even if the prosecutor "constructively destroyed" evidence (by not requesting a copy from LESA), the absence of the tape has no relevance to the conviction. Plaintiffs claim that the 911 audio could have been

¹¹ LESA was not a Pierce County agency. It was, and its successor entity is, an interlocal organization made up of several member agencies, including the County, the City of Tacoma, the City of Lakewood and others. www.southsound911.org and CP 369.

¹² Under state rules, LESA could have lawfully destroyed the tape after only three months. A state-wide record retention schedule, promulgated by the Washington State Archives, only requires that 911 recordings to be preserved for 90 days. CP 431.

¹³ Wright or his lawyers could have requested a copy of the audio as a public record at any time during its six month existence. Ch. 42.56 RCW. They failed to do so.

material because contemporaneous with the call, the dispatcher roughly typed a summary of it on a record known as the “CAD.” The CAD indicated that the 911 caller reported that she was talking to two young women and “they” had been raped. CP 377. Plaintiff argues that had the audio been available, the caller’s statement would have helped his case because only one woman was raped. This claim has several problems.

First, the 911 caller Tonni Fincham (mother of the victim’s friend), testified that she did *not* tell the dispatcher that her daughter had been raped. CP 374. The CAD entry by the dispatcher, which is double hearsay, is inaccurate. Plaintiff failed to interview the caller before trial. CP 381. If he had, she would have stated that no one told her that both women were raped, and she did not say that. *Id.*

In sum, as the federal court found, no one in the prosecutor’s office “destroyed” the 911 call audio. And even if they had (and are not absolutely immune for this), the audio contained nothing of value to Plaintiff in his prosecution – other than establishing that his brother was also on a sexual rampage with him. To say otherwise is rank speculation.

“DPA Kooiman Falsely Swore to Facts in The Probable Cause Determination.” Plaintiffs claim that a prosecutor made two false statements in a probable cause document in 2007 and again in 2012. *Brief of Ap’t* at 29 (“Kooiman falsely swore that [the victim] identified Mr.

Wright or that his DNA was present on him.”).

The only false swearing is done by Plaintiff. As discussed above, the first allegation about the victim’s “confession” that Wright did not rape her is patently incorrect. So is his second allegation. Plaintiff claims that “Pierce County's crime lab technician could not even say the DNA was Mr. Wright's.” *Brief of Ap't* at 5. “Later, the lab conceded it could not even say it was Wright's. CP 584.” *Id.* at 8 (citing *Corey Decl.*). Both statements are false. The record is undisputed -- Wright’s DNA was found on the victim’s breast.

In lieu of reading Ms. Corey’s false hearsay account of WSP Scientist Sanderson’s interview, Defendants cite to the transcript itself. CP 442-458. The Court will search in vain for any statement that is consistent with Corey’s claim. Sanderson in fact specifically *rejected* her assertion that the DNA was not Wright's. "Well, what I obtained as a DNA profile was a mixture, and *Harold Wright is included* as a potential contributor to that mixture." CP 545 (emphasis supplied). Sanderson determined that the profile match was 1 in 17,000. *Id.* He then agreed to the statement that "of all the analysis you did on all the samples, the only DNA you found related to Harold Wright was on the swab around the breast area" CP 546. DPA Kooiman’s probable cause determination is not inaccurate. Rather, it is an almost verbatim recitation of WSP’s report:

[WSP] Forensic Scientist Jeremy Sanderson determined the DNA in the swabbing was a "mixed DNA profile originating from two or more individuals." Sanderson compared the profiles from the breast swabs to the known profiles for all four men. Daryl Wright and Jerry McClurkin were excluded as contributors to the mixture. ... Sanderson determined that *the DNA profile from the breast swab matched the DNA profile of Harold Wright, Jr.*; the estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile is 1 in 17,000.

CP 242-243 (emphasis supplied). There was no false swearing.

III. SUMMARY OF ARGUMENT

Plaintiffs' claims are baseless for six reasons. First, collateral estoppel prevents Plaintiffs from attempting to re-litigate the identical factual assertions that were rejected by the federal court. Second, the statute of limitations alone is sufficient to dispose of the claims. Third, the claims are clearly barred by absolute prosecutorial immunity. Fourth, Wright's conviction conclusively established "probable cause," and therefore broke the chain of causation between alleged wrongful acts and damages. Fifth, Plaintiffs fail to state any other viable state tort claims. Finally, the defamation claim was baseless.

IV. ARGUMENT

A. **Plaintiffs Are Collaterally Estopped From Relitigating the Factual Issues Assertions They Make in This Court and Were Considered and Rejected by the Federal Court.**

The federal court determined there was no evidence to support the Plaintiffs' principal factual assertions that are now before this court: The

prosecutors' "destruction" of evidence, and the victim's "confession" that Wright did not rape her. These things didn't happen; they are made up. Plaintiffs cannot now relitigate these identical claims.

Plaintiffs begin their argument with the fairly astonishing assertion that "a Judge is not bound to decisions of a prior Judge." *Brief of Ap't* at 16. Thankfully, collateral estoppel is not so easily vanquished. They next claim that the federal court did not make formal "findings of fact" so its factual conclusions are without effect. This makes little sense and they offer no authority to support this strained argument.¹⁴

The federal court concluded that Plaintiffs failed to "meet their burden" of establishing the same facts that they now claim entitle them to relief under state law. CP 57-71. Plaintiffs are barred by collateral estoppel from attempting to relitigate claims that prosecutors and detectives destroyed or suppressed evidence. *Gausvik v. Abbey, supra*, at 883-884 (prior federal court dismissal on summary judgment on statute of limitations was binding on plaintiff in subsequent state court proceeding).

The elements of collateral estoppel are:

¹⁴ The doctrine only requires that facts be "adjudicated," or "decided." It contains no artificial requirement that "findings" must be made. "Collateral estoppel, or issue preclusion, bars the relitigation of both issues of law and *issues of fact actually adjudicated* in previous litigation between the same parties." *Washington Mutual v. United States*, 636 F.3d 1207 (9th Cir. 2011) (emphasis supplied). "[O]nce a court has *decided an issue of fact* or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis supplied).

(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, 852 P.2d 295 (1993).

1. Party or Privity.

Plaintiffs concede this element.

2. Finality of Judgment.

Plaintiff's assertion that one trial court decision cannot estop another trial court defies belief -- this is obviously the basic form of estoppel. Plaintiff's "lack of finality" argument is likewise specious.¹⁵ "[A] grant of summary judgment constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue." *Brownfield v. City of Yakima*, 178 Wn.App. 850, 316 P.3d 520, 531 (2014) (estoppel applied because the "ruling was in the form of a summary judgment order."). Plaintiffs fail to recognize the significant distinction between a motion that is granted, and one that is denied. The order here

¹⁵ Our courts have rejected this argument: "*Cunningham argues that the trial court erred in finding collateral estoppel because the partial summary judgment was not a final judgment.* He contends that finality for collateral estoppel purposes is the same as finality for determining appealability under CR 54. *We recently rejected a similar argument on the ground that such a rigorous finality requirement does not implement the purposes of collateral estoppel: to protect prevailing parties from relitigating issues already decided in their favor, and to promote judicial economy.*" *Cunningham v. State*, 61 Wn. App. 562, 566, 811 P.2d 225 (1991) (emphasis supplied).

was granted, judgment was entered and Plaintiffs failed to appeal.

3. Prior Adjudication of Facts.

Plaintiffs rather strangely claim that there was no adjudication. “Even viewed in the strongest light the Order does not constitute findings of fact; Findings of fact are not authorized by FRCP 56.” *Brief of Ap’t* at 16. But the cited rule merely states there is no *requirement* to make findings or conclusions when ruling on motions. Judge Settle repeatedly held that Plaintiffs had not established facts to support their federal claims. The ruling contains a lengthy analysis of the factual record and explains why Plaintiff is unable to prove his case.

4. Identity of Issues.

The federal and state claims are based on the identical set of facts: alleged destruction of evidence (911 audio and victim statement), and improper witness interviews. The federal court held there were no facts to support those allegations. Our Court of Appeals recently held that collateral estoppel applies in these very circumstances.

Although the claims asserted in state court are different from those asserted in federal court, issues resolved in federal court are determinative of some of the state claims, under the collateral estoppel doctrine.

Brownfield, supra at 524. The following is a summary of the fact issues that Plaintiffs raised in federal court—and lost.

a. The Victim “Confessed” That Wright Did Not Rape Her.

As set forth in the facts section, the victim never “confessed” to any such thing. She made the same statement on the day of the rape, the next day, and for months: She was dragged into a darkened room and did not see who raped her.¹⁶ Wright made this same argument at trial and lost.

b. The “Constructive Destruction” of the Victim’s Confession.

As set forth above, the 2004 memo that DPA Ko wrote summarizing the case and the victim’s statement was presented to the criminal court in 2007 *in front of plaintiff and his lawyer*. After the conviction, the memo was placed in one of three Archive boxes in the prosecutor’s office where it remained until 2013, until DPA Ausserer summarized it for Wright. It was never destroyed or even hidden in anyone’s garage. (Even if it had been, it had already been reviewed by the court and the State was relieved of any obligation to disclose it in 2007).

Plaintiffs’ only basis to make this claim is a hearsay statement of his criminal lawyer Corey who has already been shown to grossly mischaracterize known written statements (e.g., the victim’s statement that she did not see Wright in the room because it was too dark, because she

¹⁶ In the victim’s initial handwritten statement on the day of the attack, she said “It was really dark in there couldn’t see anything someone had taken my pants off. *I don’t know who all raped me. It was dark.*” CP 154.

“confessed that he didn’t do it;” and, the DNA results. *See supra*). Here, she falsely attributes a verbal comment to a deputy prosecutor. Mr. Ausserer adamantly denies ever having made the statement that he found a memo in DPA Kooiman’s garage. CP 366. And, Corey’s version of DPA Ausserer’s statement is clearly hearsay.¹⁷ He is neither a party, nor the speaking agent for the County or any other Defendant. The federal and state courts found Corey’s statement to be hearsay.¹⁸ Judge Settle’s order discusses the factual deficiencies of this claim and the hearsay problem:

. . . Wright alleges that Defendants “constructively destroyed evidence of an interview with the alleged victim wherein she did not identify Harold Wright as the perpetrator.” Comp. ¶ 3.1.3. ***There are numerous problems with this allegation.*** One problem is that, even at trial, the victim was unable to specifically identify the alleged rapists. Therefore, even if [the victim] failed to identify Wright as the perpetrator, this does not conflict with her testimony at trial.

¹⁷ Plaintiffs only cite cases holding that an attorney’s *procedural actions* can bind a party. *Clay v. Portik*, 84 Wn. App. 553, 561, 929 P.2d 1132, 1136 (1997) (“an attorney’s procedural acts ...”). They cite nothing on the pertinent point.

¹⁸ Plaintiff claims that the lower court erred because it did not evaluate the admissibility of this statement under state law. However, the Washington rule of evidence is even more restrictive. It requires a showing that one is “authorized to make the particular statement at issue, or statements concerning the subject matter, on behalf of the party.” *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 170, 758 P.2d 524 (1988). Washington rejected the federal rule’s broad admissibility standard. *Condon Bros., Inc. v. Simpson Timber Co.*, 92 Wn.App. 275, 285, 966 P.2d 355 (1998) (quoting ER 801 cmt. §(d)). In *Condon*, the Court excluded statements despite the fact that the proponent testified that he called twice and “asked for the man in charge of the railroad”. *Id.* See also, *Barrie v. Hosts of America, Inc.*, 94 Wash.2d 640, 644, 618 P.2d 96 (1980) (bar manager not authorized to speak for the bar). *Compare, Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 258, 744 P.2d 605, 618 (1987) (“corporate medical director” was authorized speaking agent). Thus, if the issue were analyzed under state rule, he would have lost even more resoundingly.

Another problem is that the trial judge ruled that the witness interview was work product and did not need to be disclosed to Wright's attorney. Kooiman Dec. Exh. B. ***There is no authority before the Court for the proposition that a prosecutor or police officer is liable for suppression of evidence when acting pursuant to court order.*** This is especially true if the court order expressly states that the work product "does not appear to contain any new facts." *Id.* Therefore, Wright has failed to meet his burden on the issue of whether the evidence was intentionally suppressed by the prosecution.

Wright, however, asserts that prosecutor Lori Kooiman hid the interview in her garage only to be found later by prosecutor Jared Ausserer. Dkt. 65-1 at 7-8. This allegation is supported only by the inadmissible declaration of Wright's criminal defense attorney. ***The admissible evidence on record shows that Ms. Kooiman did not take any evidence home and that Mr. Ausserer has never been to her house.*** See Dkts. 58 & 59 (declaration of Ms. Kooiman and Mr. Ausserer). Therefore, Wright has failed to produce admissible evidence to support his claims

CP 67-68 (emphasis supplied).

c. "Destruction" of the 911 Call Audio.

Plaintiffs claim that DPA Kooiman "destroyed" a 911 call audio by not ordering that it be preserved. Interestingly, she was not even assigned to the case for more than two years *after* the tape was recorded over by another agency in the normal course of their business. CP 355. And as we know from the fact discussion *supra*, this claim is false. The audio of the 911 call was not "destroyed." It was recorded over by another agency years before Wright was charged with a crime (in 2007), without the knowledge of anyone in the Prosecutor's office.

Judge Settle held there are no facts to support Plaintiffs' claim:

. . . Wright alleges that Defendants "either intentionally destroyed or allowed to be destroyed, the material and exculpatory evidence of at least one 911 tape." Comp. ¶ 3.1.1. The admissible evidence in the record, however, shows that the recording was maintained by a third party, LESA. *Dkt. 55, Declaration of Tifni Buchanan*, ¶ 3. Moreover, only authorized employees of LESA had access to the audiotapes. *Id.*, ¶ 5. Therefore, Wright has failed to show that any individually named Defendant had the ability to suppress or destroy the 911 recording. * * *

Furthermore, Wright has failed to show that the recording would have produced a different verdict. In the original trial, the jury was unable to reach a verdict on the count of second degree rape of [the victim]. There is no reasonable probability that the 911 recording of Ms. Fincham's mother would have produced an acquittal of third degree rape, which is non-consensual sex. Therefore, the Court grants Defendants' motion on Wright's due process claim based on the 911 call.

CP 66-67. This fact issue was conclusively resolved.

d. Detectives "Constructively Destroyed" Evidence by Conducting "Group Interviews."

Wright vaguely argues, with no factual support, that police conducted "group interviews" which allowed witnesses to synchronize their versions of events. Judge Settle rejected this factual claim as well:

Third, Wright alleges that "Defendants Harai and Parfit undertook conduct tantamount to the intentional destruction of evidence" in the way they conducted interviews of witnesses. * * *

In this case, Wright has completely failed to meet his burden. Even if true, Wright's allegations do not support the finding of coercive or abusive techniques. While allowing witnesses

to attend group interviews and/or sharing witness testimony with other witnesses is not the most reliable way to gather information, it is not so coercive or abusive to deliberately fabricate false information.

CP 67.¹⁹

In sum, Plaintiffs are barred from relitigating the above factual and legal issues.

B. The Statute of Limitations Bars Plaintiffs' State Law Claims.

1. Plaintiffs' Claims Accrued Four to Seven Years Before Filing Their Suit.

The incident that led to Wright's prosecution occurred in 2004. The most recent challenged act by Defendants (obtaining Plaintiff's conviction) occurred in 2007—almost *four years* before suit was filed. Plaintiff was well aware of the alleged tortious actions of Defendants beginning almost *ten years ago*. Defendants' allegedly tortious acts occurred during the police investigation which began when the crime was reported on January 31—the day it occurred. Other alleged wrongful acts of police investigators and prosecutors took place before and during his criminal trial that resulted in a conviction in July 2007. All acts occurred *more than three years prior to plaintiffs' filing their complaint*.

¹⁹ Although Wright suggests sinister implications about this event, tellingly he cannot offer a single example of any improper coaching or a suggestive question. And, the facts are that one of the victim's friends sat with her during her interview, but the victim did *not* attend the witnesses' interviews. CP 155, 169, 220.

2. The Three Year Statute of Limitations Bars All Claims.

Except for re-filing charges against after reversal on appeal (clearly entitled to absolute prosecutorial immunity) and the defamation claim, all allegedly tortious activities occurred *well outside the three-year statute of limitations period*. Recovery is barred for events that occurred before February 9, 2008—three years before this lawsuit was filed. The applicable statute of limitations for the majority of state law tort claims is three years.²⁰ Plaintiffs did not even come close to filing their state law claims in three years.

Significant Dates	
Jan. 30-31, 2004:	Plaintiff rapes victim
Jan. 31- Feb. 2, 2004:	“Group” interviews.
Feb. 2007	Charges filed against Wright
June 18, 2007	Criminal trial. Plaintiff argues victim’s lack of identification, and “group” interviews.
July 12, 2007	Plaintiff is <i>convicted</i> of rape charges
<u>Feb. 9, 2008</u>	<u>Acts prior to this date barred</u>
Feb. 9, 2011	Plaintiffs’ <i>Complaint</i> filed in state court.

²⁰ “The following actions shall be commenced within three years ... An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, *or for any other injury to the person or rights of another not hereinafter enumerated....*” RCW 4.16.080(2). Although statutory tolling is available in Washington for incarceration “on a criminal charge prior to sentencing,” RCW 4.16.190(1), Plaintiff was never imprisoned.

a. Plaintiff's State Law Claims Accrued on the Date of His Conviction: This Suit Four Years Later is Untimely.

Plaintiffs claim that “Washington explicitly follows Federal law on accrual....” *Brief of Ap't* at 50. This is baseless. Even in federal court, “[s]tate law, however, not federal law, determines when a state law action accrues.” *Gausvik v. Perez*, 239 F.Supp.2d 1067, 1105 (E.D. Wash. 2002) *rev'd on other grounds*, 345 F.3d 813 (9th Cir. 2003). *See also, Doggett v. Perez*, 348 F.Supp.2d 1169, 1175 (E.D. Wash. 2004). (“State law determines when a state law action accrues.”).

In Washington, injury actions accrue at the time the challenged act or omission occurs. “Usually, a cause of action accrues when the party has the right to apply to a court for relief.” *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 219, 543 P.2d 338 (1975). Here, the challenged acts or omissions occurred *by no later than the July 2007 conviction*. His suit brought four years later is untimely. In a similar case, the Court in *Doggett* held that under Washington law such claims accrue upon conviction or earlier. In dismissing the state law claims as time barred, the court held:

[T]his court must conclude that some of the state law claims of Mark and Carol Doggett accrued on December 28, 1994 (date of arrest) while others accrued on April 28, 1995 (date of conviction). On those dates, they suffered injuries of which they were aware (arrest, imprisonment and convictions), and which were proximately caused by what they assert were negligent and/or intentionally

tortious acts and/or omissions of the defendants. *As of those dates, the plaintiffs had the right to seek relief on their state law causes of action since they could potentially establish each element of those causes.*

Doggett v. Perez, supra at 1176-77 (emphasis supplied).

In another federal case, the plaintiff filed suit five years after his conviction. *Gausvik v. Perez, supra* at 1123. The Court held that the fact that plaintiff's conviction was reversed within three years did not save it from being untimely. "Based on existing state law, the court must conclude that all of plaintiff's state law claims are barred by the applicable statutes of limitation") *Id.*

b. Washington Does Not Follow *Heck v. Humphrey*.

Plaintiffs insist that a *federal* law rule should apply here instead of state law. This flawed argument has been repeatedly rejected. Under federal law, claims that call into question the validity of a conviction do not accrue until a conviction is reversed. *Heck v. Humphrey*, 512 U.S. 447 (1994). However, Washington does not follow the federal rule. *Doggett*, 348 F.Supp.2d at 1176 ("Nor has Washington adopted the federal *Heck* rule for determining accrual of state law claims.").

The Court of Appeals has for its part held that "[c]ase law does not support Gausvik's argument that he had to wait for his conviction to be overturned before filing suit." *Gausvik v. Abbey*, 126 Wn. App. 868, 879-

82, 107 P.3d 98, *review denied*, 155 Wn.2d 1006 (2005).²¹ This is the same conclusion reached by three federal courts to reach their decisions.

Plaintiff Wright next claims that *Gausvik v. Perez* “fails to address the analysis of *Heck*, not mentioning it once.” *Brief of Ap’t* at 47, n. 2. Again, this is inaccurate. In fact, the 41 page *Gausvik* opinion mentions *Heck* five separate times. *Gausvik* considered the same arguments that Plaintiff makes here, with an extended discussion of the state law statute of limitations. *Gausvik* then discusses a Ninth Circuit opinion at length that focused on *Heck* and cited it 11 times. *Id.* at 1082-83 (citing *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998)). The *Gausvik* court concluded that Washington has never followed the *Heck/Cabrera* rule. “This court has not found any Washington cases which follow the rationale of the Ninth Circuit in *Cabrera v. City of Huntington Park*, 159 F.3d 374 (9th Cir.1998), regarding accrual of civil causes of action which imply the invalidity of a criminal conviction.” *Gausvik, supra* at 1105. So, rather than failing to address *Heck*, *Gausvik* discusses it in detail.

Plaintiffs also cite *Davis v. Clark County*, 966 F.Supp.2d 1106 (W.D. Wash. 2013) suggesting that the Washington statute of limitations rule set forth in *Gausvik* has been undermined or rejected. But, Judge

²¹ *Gausvik* brought one action in state court against the DSHS, and sued law enforcement officials in federal court.

Bryan actually held to the contrary. In rejecting the identical argument that Plaintiffs make here, the court ruled:

Plaintiffs argue that the statute of limitations did not begin to run until their convictions were invalidated in 2010. Dkt. 50. They assert that post conviction relief (that is proving themselves actually innocent) is a prerequisite to their negligence claim, so that element was not “susceptible to proof” until 2010. *Id.*

Plaintiffs' argument, is, however, contrary to Washington law. In *Gausvik v. Abbey*, 126 Wash.App. 868, 107 P.3d 98 (2005), the Washington State Court of Appeals Division II, held that a father's negligent investigation claim accrued for purposes of the statute of limitations when he was convicted and sentenced for child rape, not when his conviction was invalidated. ***The Gausvik Court considered and rejected the argument urged by Plaintiffs here***—that proximate cause and injury could not be established under Washington law until invalidation of the conviction. *Id.*, at 881, 107 P.3d 98.

Davis v. Clark County, at 1138 (emphasis supplied).

In sum, our Court of Appeals and three federal courts that have addressed the state law statute of limitations and have *all* concluded that Washington does not follow *Heck*. Plaintiffs' assertions to the contrary are simply wrong. The statute of limitations disposes the state law claims.

c. The “Discovery Rule” Does Not Save Plaintiffs' Claims.

Plaintiff knew in 2004-2007 all the allegedly tortious conduct on which he bases his claims, most of which he raised in his 2007 trial. Plaintiff was aware before trial that 1) the deputies interviewed the

witnesses in the same room; 2) a memo summarizing an initial victim interview existed; and, 3) LESA briefly stored 911 audio. Plaintiff now claims that two pieces of evidence were “constructively destroyed.” But as shown above, these allegations are without any factual basis. Most importantly, the allegedly destroyed “witness statement” was submitted to Judge Worswick for in camera review in 2007 *in front of Wright and his lawyer*. The court made a ruling *on the record* that it did not have to be disclosed, and that it contained “no new facts.” Thus, Plaintiff was aware of all these facts four years before filing suit.

Even truly newly-discovered evidence must be much more than just arguably relevant. It must be capable of *changing the outcome of the criminal trial*. As Judge Settle found, none of the alleged later-discovered information had any chance of changing the result.²²

Plaintiff again cites *Davis, supra*. But the facts in *Davis* are not remotely similar. There, a detective withheld his file on another suspect in the case. The plaintiffs “had no reason to think these documents were in existence.” *Id.* at 27. That is hardly the case here. Everyone knew that a 911 audio possibly existed at a third party agency. *See, Barbara Corey Decl.*, describing her specific and longstanding knowledge of this fact.

²² “Wright has failed to show that the recording would have produced a different verdict.” CP 65. Similarly, the CAD entry (that incorrectly noted Tonni Fincham said her daughter was also raped) was inadmissible hearsay. Ms. Fincham also denies ever making the statement, and would have never supported Plaintiffs’ claim at trial. CP 374.

And, Wright was well aware that the witnesses were interviewed together and that a work product memo existed in at least 2007.

d. There is No Basis for “Equitable Tolling.”

Plaintiffs claim that “equitable tolling” changes the rule of accrual in this case. But equitable tolling only applies when a false promise by the tort-feasor has encouraged plaintiff to delay pursuing his rights. “The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). *See, e.g., Putz v. Golden*, 2010 WL 5071270 (W.D. Wash. 2010) (applying equitable tolling because the defendant “assured [plaintiffs] in 1987 that they had obtained the necessary” approvals). There are no such assurances here.

Plaintiff neglects to acknowledge that the federal court has already found that he has no facts to support these claims. He raised most of these arguments at his criminal trial. There is no basis for equitable tolling.

C. The Prosecutors Are Entitled to Absolute Immunity.

Even assuming Plaintiffs can somehow get around the bar of the statute of limitations and collateral estoppel, the County and its prosecutors are entitled to absolute prosecutorial immunity. A county enjoys the absolute immunity of its prosecutors. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 101, 829 P.2d 746, 750 (1992) (citing

Creelman v. Svenning, 67 Wn.2d 882, 885, 410 P.2d 606 (1966)). “The public advantage of free, independent, and untrammled action by the prosecuting attorney outweighs the disadvantage to the private citizen in the rare instance where he might otherwise have an action against the county and state, either or both.” *Creelman, supra* at 885.

1. DPA Kooiman is Absolutely Immune from Suit.

DPA Kooiman is alleged to have engaged in three improper acts: “constructively destroying” the 911 tape, and the work product memo (containing the victim’s “confession” that Wright did not rape her), and filing a probable cause determination with false factual assertions.

No Factual Basis for These Claims. The factual assertions have no basis in fact. Kooiman did not “constructively destroy” any evidence. *Statement of Facts, supra*. (In fact the 911 tape was recorded over in 2004 – three years before Kooiman was involved in the case.) And, the false swearing claim is likewise baseless. Plaintiffs allege that “Kooiman unequivocally swore [the victim] identified Mr. Wright as the person who raped her when [she] told DPA Ko Mr. Wright was not even in the room,” and that she “materially misrepresented the results of DNA testing.” *Brief of Ap’t* at 23. These baseless allegations have been discussed above and rejected by two prior courts (three courts if you count the criminal jury). Thus, nothing in the *Determination of Probable Cause* is falsely sworn.

The victim never said Wright did not rape her, and WSP clearly concluded that Wright's DNA was found on her breast. Wright's only basis for this latter claim is his lawyer's hearsay account of what a scientist told her in an interview, the transcript of which reveals her claim to be false.

Absolute Immunity Bars Claims. Even assuming that there was any facts to support these claims (and that neither the statute of limitations or collateral estoppel apply), DPA Kooiman's alleged acts are absolutely immune from suit. Prosecutors are "absolutely immune from liability under Section 1983 for their conduct in initiating a prosecution and in presenting the State's case, insofar as that conduct is intimately associated with the judicial phase of the criminal process." *Burns v. Reed*, 500 U.S. 478, 478 (1991) (citations omitted). The modern rule of absolute immunity²³ follows from the same reason that prosecutors were given immunity at common law—without it, resentful defendants would bring retaliatory lawsuits against their prosecutors, and because a prosecutor "inevitably makes many decisions that could engender colorable claims of constitutional deprivation, [d]efending these decisions, often years after

²³ Plaintiffs assert that the prosecutor is only entitled to qualified immunity because she acted as a witness rather than a lawyer. But unlike in *Kalina*, DPA Kooiman did not "personally attest to the truth" of the facts in the Determination. Rather, she wrote: "I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the Pierce County Sheriff, incident number 040310494; That *the police report and/or investigation provided me the following information.*" CP 242 (emphasis supplied). This language distinguishes this matter from the affidavit in *Kalina v. Fletcher*, 118 S. Ct. 502, 505 (1997) (prosecutor "personally vouched for the truth of the facts set forth in the certification under penalty of perjury.").

they were made, could impose unique and intolerable burdens upon a prosecutor.” *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425–26 (1976)).

Plaintiff ignores the explicit holding of *Imbler v Pachtman*, *supra* at 425: “The prosecutor's possible knowledge of a witness’ falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument” are all matters intrinsic in prosecutions—and are entitled to absolute immunity. The allegations of wrongdoing here involve activities “intrinsic” to the core functions of a prosecutor.

Ninth Circuit authority directly on point holds that the alleged suppression by DPA Kooiman is entitled to absolute immunity. “This immunity covers the knowing use of false testimony at trial, the suppression of exculpatory evidence, and malicious prosecution.” *Milstein v. Cooley*, 257 F.3d 1004, 1008 (9th Cir. 2001) (emphasis supplied). In another Ninth Circuit case, a prosecutor was alleged to have destroyed exculpatory evidence needed for the defense to a murder charge. Absolute immunity applied because it occurred after the case was charged²⁴ and pursuant to the preparation of the prosecutor's case.

²⁴ In the cases cited by Plaintiffs where absolute immunity was not available, the prosecutors involved were engaged in investigatory activities *prior* to filing charges or the establishment of probable cause, or in activities distinct from the prosecutorial function. *Buckley, supra*; (no immunity when a prosecutor manufactures false evidence during the preliminary investigation of a crime); and, *Genzler v. Longanback*, 410 F.3d 630 (9th Cir. 2005) (interviews before probable cause finding and filing charges in the nature of “police-type investigative work.”)

Moreover, assuming arguendo Malloy had a duty to preserve the evidence under these facts, that duty would arise from his role as an officer of the court charged to do justice. *See Brady v. Maryland*[.] An act or an omission concerning such a duty cannot be construed as only administrative or investigative; it too is necessarily related to Malloy's preparation to prosecute.

Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 679 (9th Cir. 1984). Here, all Kooiman's alleged acts occurred post charging.

Plaintiffs' argument that Kooiman's alleged suppression of the memo amounts to "constructive destruction" is at best illogical.²⁵ It is undisputed that the memo never left her office, and she presented it to the trial judge in June 2007, and DPA Ausserer saw it in 2013 in his office. CP 355, 363. Even if she took it home, that is merely suppression – the document still exists. Wherever she stored it, the central fact is that she possessed it and (with court approval) did not disclose it.

Plaintiffs' cited cases actually buttress Defendants' position. "[W]e find that the ADAs are absolutely immune from claims based on allegations that they "intentionally concealed" exculpatory evidence *prior* to trial." *Yarris v. Cnty. of Delaware*, 465 F.3d 129, 137 (3d Cir. 2006) (emphasis in original).

The critical analysis for prosecutorial immunity is not whether the

²⁵ Plaintiff's purpose in concocting this strained and illogical "constructive destruction" theory is assumed to be based on the inaccurate assumption that if evidence is destroyed rather than simply withheld, absolute immunity will not apply.

alleged conduct is wrongful, or even illegal, but in what capacity the prosecutor was functioning in relation to the alleged wrongful action. Pre-filing administrative functions are not entitled to immunity, whereas advocacy functions are. As stated in *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993), “the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful.”

2. Absolute Immunity Applies to the Prosecutors’ Office Alleged Failure to Train.

After making the argument that when a prosecutor fails to produce evidence she “constructively destroys” it, Plaintiffs continue this illogical approach in their negligent training argument. They do not dispute that the County trained its DPA’s to *produce* exculpatory evidence. Rather they assert it failed to train them not to hide it. “[T]he 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.” *Brief of Apt* at 36. If one is taught to produce such evidence, by definition they are trained not to hide or destroy it. This is a distinction without a difference, nor is it relevant.

Plaintiffs’ failure to train allegations are subject to absolute immunity. The U.S. Supreme Court has conclusively resolved this issue.

In *Van de Kamp v. Goldstein*, 555 U.S. 335, 343-44 (2009),²⁶ the plaintiff sued under Section 1983 claiming that the district attorney and his chief assistant violated their constitutional obligation to produce exculpatory information when they failed to adequately train and supervise deputy district attorneys. They asserted these were “administrative” tasks that were beyond the protection of the immunity. The Court disagreed.

Concerning “administrative procedures” argument the Court held “prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here.” *Id.* at 344. The Court explained, “the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management.” *Id.*

Next, Plaintiffs assert that “[t]here is no immunity for falsely swearing a probable cause statement and therefore no immunity for negligently failing to prevent it.” *Brief of Ap't.* at 38. However, Plaintiffs have no evidence of false swearing. And even if they did, *Van de Kamp*

²⁶ Washington courts applying prosecutorial immunity have repeatedly referenced, and followed, federal authorities on the issue. “Analysis of a prosecutor's absolute immunity from suit under state law claims tracks common law immunity analysis under 42 U.S.C. § 1983.” *Musso-Escude v. Edwards*, 101 Wash. App. 560, 567-68, 4 P.3d 151, 155 (2000) (citing multiple cases and their references to federal authorities).

holds there is absolute immunity for failing to train prosecutors on how to prosecute their cases. (This also assumes Plaintiffs can first get past the bar of collateral estoppel and the statute of limitations.)

Plaintiffs cite a case that does not deal with prosecutorial training programs, but with different -- clearly administrative -- functions. As that court there explained, the prosecutor's alleged activities "had nothing to do with a prosecutor's preparation for or participation in a criminal trial." *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 687 (D.C. Cir. 2009). "In sum, it is clear that [defendant] was performing administrative/managerial functions" *Id.* at 686. The case is of no use here.

Plaintiffs other case suffers the same problems. "*Van de Kamp* establishes subcategories within the 'administrative' class of official functions. That is, some administrative functions relate directly to the conduct of a criminal trial and are thus protected, while others ('concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like,' *id.* at 862) are connected to trial only distantly (if at all) and are therefore not subject to immunity." *Schneyder v. Smith*, 653 F.3d 313, 334 (3d Cir. 2011). The court held that a prosecutor's failure to advise the court (per its directive) of a fact only he knew "is, broadly speaking, administrative rather than advocative." *Id.* at 334. Neither of these cases has anything to do with training on *Brady*

obligations.

D. Plaintiff's Rape Conviction Bars His Tort Claims.

"Probable cause" is conclusively established by a conviction. It is a complete defense to the state law claim for malicious prosecution. *Hanson v. Snohomish*, 121 Wn.2d 552, 558-59, 852 P.2d 295 (1993) ("majority of courts holds that probable cause is established by the prior conviction of the malicious prosecution plaintiff, even where that conviction has been overturned."). This is true even if the conviction is subsequently reversed - - unless it was obtained by fraud, perjury, or other corrupt means. *Gowin v. Altmiller*, 663 F.2d 820, 823 (9th Cir. 1981).

Once again, Plaintiffs have no evidence to support their wild claims. The federal court found a complete absence of any factual basis as did the state court judge. This hardly amounts to "fraud or perjury." Wright's conviction dooms all of his state law claims.

E. Multiple Determinations of Probable Cause by the Prosecutor and Judge, and the Jury's Conviction Broke the "Chain of Causation" With the Individuals' Actions.

The independent determinations of probable cause by the prosecutor, the Court, and finally, the jury's conviction of Wright, each broke the "chain of causation." This bars liability as to any claims that the *prosecutors* engaged in "malicious prosecution or abuse of process." Also, the chain of causation between Plaintiff's conviction and the alleged

wrongful acts of investigating deputies was broken by the conviction.

A prosecutor's independent judgment to file charges breaks the chain of causation between the actions of police officers and the harm suffered by a tort plaintiff. In a leading Ninth Circuit case, a man was arrested for murder and the prosecutor filed charges against him. He spent more than a month in jail until a court dismissed the charges against him for lack of evidence. He sued two police officers and a polygrapher. The Ninth Circuit held “that the district court erred in refusing to hold that they were not liable for damages incurred after a district attorney, exercising his independent judgment, filed charges.” *Smiddy v. Varney*, 665 F.2d 261, 263 (9th Cir. 1981) (“*Smiddy I*”).²⁷ See also *Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir. 2008) (“the prosecutor's independent decision can be a superseding or intervening cause of a constitutional tort plaintiff's injury, precluding suit against the officials who made an arrest or procured a prosecution.”)

Thus, the prosecutor's decision to file charges, (CP 638) the trial court's multiple findings of probable cause broke the “chain of causation”—as did the jury's guilty verdict. CP 244 (“The Court having found probable cause...;”); 246 (same); 248; 250; and 252 (Judgment).

²⁷ “Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted.” (citations omitted). *Id.* at 267.

F. Plaintiffs' Negligence Claims Are Baseless.

First, the statute of limitations has run all 2004 police conduct. Wright knew about the interview techniques used by the deputies by 2007. Second, the claims are barred by collateral estoppel. CP 57. Even if he can get past these hurdles, he cannot make out basic negligence claims.

1. Plaintiffs' Negligent Training and Retention Claims Are Not Cognizable.

a. Negligent Training Only Applies to Acts *Outside* the Scope of Employment.

Courts have used two approaches when dismissing “negligent hiring/training” claims brought against an employer when *respondeat superior* for the employee’s negligence will render the employer liable anyway. The first holds that a negligent hiring claim only applies when the employee acts *outside* the scope of their employment. The second holds the claim is “redundant” with a vicarious liability claim.

A negligent hiring claim makes no sense when the employer will be vicariously liable. An employer is vicariously liable for the negligent acts of employees that occur *within* the scope of employment. *Shielee v. Hill*, 47 Wn.2d 362, 365, 287 P.2d 479 (1955). Contrarily, a negligent supervision claim applies only when an employee acts *outside* the scope of employment. *LaLone v. Smith*, 39 Wn.2d 167, 234 P.2d 893 (1951).

The purpose behind a negligent hiring and supervision action is to prevent an employer from avoiding liability for

the misconduct of an employee committed *outside the scope* of employment, when the employer should not have hired or maintained the employee because of his or her tendencies.

Brownfield v. City of Yakima, 178 Wn. App. 850, 877, 316 P.3d 520 (2014) (emphasis supplied). Here, Defendants admitted that every action was taken *within* the scope of each employment. CP 1, 476-78. Thus, the negligent retention and training claims have no legal basis.

b. Negligent Training Claims Against an Employer Are “Redundant” To Claims Against an Individual Employee.

A second analytical point of view is that a negligent retention claim is “redundant” with a vicarious liability claim. Washington law is crystal clear on this point. In *Gilliam v. DSHS*, 89 Wn. App. 569, 584-85, 950 P.2d 20, *review denied*, 135 Wn.2d 1015 (1998), the Court held:

Here, the State acknowledged Morrow was acting within the scope of her employment, and that the State would be vicariously liable for her conduct. Under these circumstances a cause of action for negligent supervision is redundant.

See also, Whaley v. State, 90 Wn. App. 658, 676 n.39, 956 P.2d 1100 (1998) (“negligent supervision claim is properly dismissed as redundant of other negligence claims.”). Thus, as a matter of law, Plaintiff cannot make out a negligent training/retention claim the employee acted *within* the

scope of their employment, or it is redundant.²⁸

Also, many jurisdictions recognize the significant prejudice that can result from allowing both theories to go to the jury.²⁹ The court in *Houlihan, supra*, at 665 held that it was prejudicial error to allow a direct negligence claim which permitted evidence of driver's prior offenses, due to "the danger the jury might draw the inadmissible inference" that because driver was "negligent on other occasions, he was negligent at the time of the accident."³⁰

c. Negligent Police Investigation Claims Are Not Cognizable In Washington.

Plaintiff claims it was negligence to interview a victim and witness

²⁸ The County's negligence in training or retaining an officer is of no consequence if that officer *was not negligent*. Conversely, if an officer was negligent, his acts will automatically create liability for the County *even if his training was impeccable*.

²⁹ See, e.g., *Hackett, v. Washington Metro Area Transit Authority*, 736 F. Supp. 8, 10 (D.D.C. 1990) (negligent hiring, supervision, and retention claims "would be prejudicial and unnecessary"); *Elrod v. G&R Constr. Co.*, 628 S.W.2d 17, 19 (Ark. 1982) (even where punitive damages are allowed, when defendant admits agency, the "possible prejudice that could be created by the introduction of a prior bad driving record in our view outweighs any possible advantages."); *Tittle v. Johnson*, 185 S.E.2d 627, 628 (Ga. Ct. App. 1971) (where defendant has admitted agency, defendant is "entitled to have the trial of the case free from the prejudicial evidence" of prior bad acts of its agent).

³⁰ Plaintiffs claim that Det. Harai supposedly made a false statement in an incident report in another case. (They make no claim that Det. Harai falsified anything in *this* case.) Thus, the allegation is not even relevant to his alleged sloppy interviewing technique. And, the alleged falsification occurred in September 2004—seven months *after* his interview of the victim. CP 280-87.

Even if the facts of Det. Harai's alleged misconduct were relevant, this character evidence is unfairly prejudicial, ER 403, and simply inadmissible "prior bad acts." ER 404(b). A federal court has commented on this inappropriate practice: "The practical effect of plaintiffs' proceedings against the employer under a negligent entrustment theory as well as under the doctrine of *respondeat superior* would be to allow plaintiffs to introduce at trial evidence of the driver's prior traffic violations, otherwise inadmissible under *Fed. R. Evid. 404(b)*." *Cole v. Alton*, 567 F.Supp. 1084, 1085 (N.D. Miss. 1983) (trial court erred by allowing direct negligence claim to go to jury).

together. First, there is no proof that this occurred. The victim testified at trial that “her friends were allowed to be present when her audiotaped statement was given, but that in her recollection her two friends were not interviewed in her presence.” All three women were cross-examined about the interview procedures. CP 120. Second, Plaintiff cannot point to any effect it had on his conviction. Indeed, his trial theory was that their stories were *inconsistent*.³¹

Third, whatever the criticisms of “group interviews,” negligent investigation is not recognized in Washington. “A claim of negligent investigation will not lie against police officers.” *Laymon v. Wash. St. Dept. of Nat. Res.*, 99 Wn. App. 518, 530, 994 P.2d 232 (2000). *See also, Janaszak v. State*, 173 Wn. App. 703, 297 P.3d 723 (2013) (“We have refused to recognize a cognizable claim for negligent investigation against law enforcement officials and other investigators.”). Thus, Plaintiffs cannot advance a “negligent interview” claim.

G. Plaintiffs Cannot Make Out an Abuse of Process Claim.

Plaintiffs’ sixth cause of action is the little-used tort of “abuse of process.” This claim is not often brought because it is so difficult to

³¹ The King County Sheriff’s policy cited by Plaintiff’s expert on this point *allows* the victim to have a friend present during the interview. The purpose for excluding others has nothing to do with witness contamination, but rather the victim’s increased willingness to share details when alone. “Conduct the interview in a private setting away from family and other officers unless the victim requests someone else be present.” CP 699.

establish. Plaintiffs bring this claim instead of malicious prosecution in an attempt to avoid the bar created by his conviction establishes.³² However, he cannot satisfy its elements.

This tort is the civil remedy for extortion and requires that “process” be abused for an ulterior purpose.

But the “mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.” Instead, “[t]he gist of the action is the misuse or misapplication of the process, after it has once been issued, for an end other than that which it was designed to accomplish.” In other words, the action requires “a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.”

Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 699-700, 82 P.3d 1199 (2004) (footnotes omitted).

“The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.” *Restatement (Second) of Torts* §682 (1977), *Comm. b.* In *Hough v. Stockbridge*, 152 Wn. App. 328, 343-44, 216 P.3d 1077 (2009), the court approved jury instructions which defined abuse of process as follows:

³² Abuse of process is distinguished from malicious prosecution, in that abuse of process typically does not require proof of malice, lack of probable cause in procuring issuance of the process, or a termination favorable to the plaintiff, all of which are essential to a claim of malicious prosecution. *See, e.g., Liquid Carbonic Acid Mfg. Co. v. Convert*, 82 Ill. App. 39, 44 (Ct. App. Ill. 1899).

The ulterior motive or purpose may be inferred from what is said or done about the process, but the improper act may not be inferred from the motive. The purpose for which the process is used, once it is issued, is the only thing of importance. One who uses a legal process against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by his abuse of process.

Here, there is no allegation or evidence that the County prosecuted Wright for an extortionate purpose; or that it attempted “to accomplish an object not within the proper scope of the process.” Plaintiff himself alleges that the County was attempting to send him to prison—the exact purpose of a criminal prosecution. Even if it was misguided, there is no evidence it was for a purpose other than incarcerating an accused criminal. The elements of this claim cannot be met.

H. Plaintiffs Cannot Establish Malicious Prosecution: Probable Cause Was Repeatedly Found By the Court and the Jury.

“[M]alicious prosecution claims are not favored in the law.” *Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993). Elements of the claim are (1) defendant initiated or continued the prosecution; (2) the prosecution lacked probable cause; (3) proceedings were instituted or continued through malice; (4) proceedings terminated on the merits in favor of the plaintiff or were abandoned; and (5) the plaintiff suffered injury as a result of the prosecution. “Probable cause” is a complete defense to the claim. *Id.*, at 558.

Wright's conviction conclusively established probable cause. The *Hanson* Court expressly held that "a conviction, although later reversed, is conclusive evidence of probable cause, unless that conviction was obtained by fraud, perjury or other corrupt means. *Id.* at 560. Moreover, There was more than adequate probable cause to prosecute. CP 76-81 & 436-37 (summarizing facts supporting conviction). Additionally, the trial court's *multiple* findings of probable cause broke the "chain of causation"—as did the jury's guilty verdict. CP 244 ("The Court having found probable cause...;"); 246 (same); 248; 250; 252 (Judgment); and, 554 (verdict). Nor was there any fraud.

The "malice" element may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff. *Bender v. Seattle*, 99 Wn.2d 582, 594, 664 P.2d 492 (1983). No one did anything improper here. A man who cynically took advantage of a young intoxicated former student was prosecuted, and convicted. But for a split decision from Division II on a technical jury instruction issue (not any alleged misconduct by Defendants), Wright would be in prison.

I. Plaintiffs Cannot Establish Outrage.

"The elements of the tort of outrage are: (1) extreme and outrageous conduct; (2) that the actor intends to cause, or is reckless in

causing, emotional distress; and (3) that actually results in severe emotional distress to the plaintiff.” *King v. Hutson*, 97 Wn. App. 590, 597, 987 P.2d 655 (1999). The conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). Summary judgment is proper if the court determines that no reasonable person would regard the conduct in question as extreme and outrageous. *Keates v. City of Vancouver*, 73 Wn. App. 257, 263-64, 869 P.2d 88 (1994).

The tort of outrage “does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.’ In this area plaintiffs must necessarily be hardened to a certain degree of rough language, unkindness and lack of consideration.” *Grimsby*, at 59 (*quoting Restatement (Second) of Torts* § 46 cmt. d). Numerous Washington cases involve the trial court's grant of a defendant's motion for summary judgment challenging the outrage claim *as a matter of law*—all of these cases were affirmed on appeal.³³ This is a difficult tort to prove, and

³³ See, e.g., *Guffey v. State*, 103 Wn.2d 144, 146, 690 P.2d 1163 (1984) (Washington State Patrol trooper drew his weapon, pointed it at the innocent plaintiff, and ordered him out of the vehicle); *Babcock v. State*, 112 Wn.2d 83, 107, 768 P.2d 481 (1989), reconsidered on other grounds, 116 Wn.2d 596, 809 P.2d 143 (1991), (CPS caseworkers had failed to properly investigate claims of sexual abuse, leading to the rape of several

Plaintiffs cannot do it here – even if it were not barred by the statute of limitations, absolute immunity and the other reasons listed above.

J. Plaintiffs’ Defamation Claim Is Barred By Several Factors Including Collateral Estoppel and Immunity and/or Privilege.

Plaintiffs base their defamation claim against prosecutor Kooiman on the allegation that when asked by the *News Tribune* why her office re-filed charges against Wright and his accomplice, she made the rather obvious rejoinder “We believe they are guilty of the crime.” This claim is barred for several reasons.

1. Collateral Estoppel Precludes This Claim.

Plaintiffs previously raised a constitutional claim in federal court involving this same statement. The alleged “Extrajudicial Statements” under Section 1983 (essentially identical to a state law defamation claim). This claim was dismissed. Plaintiff also made two motions to disqualify

children); *Hoppe v. Hearst Corp.*, 53 Wn. App. 668, 678, 770 P.2d 203 (1989) (defamatory newspaper articles and cartoons which were sharply critical of the plaintiff); *Banks v. Nordstrom, Inc.*, 57 Wn. App. 251, 263, 787 P.2d 953, *review denied*, 115 Wn.2d 1008 (1990) (wrongful arrest and prosecution of a person misidentified as a shoplifter); *Lawson v. Boeing Co.*, 58 Wn. App. 271, 792 P.2d 1263 (1990) *review denied*, 116 Wn.2d 1021 (1991) (false complaints of sexual harassment by a co-worker, which constituted deliberate and malicious lies intended to interfere with the co-worker's job "do not reach this high threshold" of outrage); *Benoy v. Simons*, 66 Wn. App. 56, 63, 831 P.2d 167, *review denied*, 120 Wn.2d 1014 (1992) (allegations that a doctor needlessly prolonged an infant child's life, gave false statements regarding the child's condition, improperly pressured the family, improperly billed the family, and stated to the child's mother to take his body home from the hospital on a bus); and *Keates v. City of Vancouver*, 73 Wn. App. 257, 264, 869 P.2d 88 (1994) (lengthy and belligerent interrogation of husband, falsely accusing him of his wife's murder).

DPA Kooiman in the criminal case.³⁴ These motions were dismissed, and affirmed on appeal. Plaintiffs are estopped from relitigating this same issue now for the fourth time. See discussion *supra*.

2. Statements of Opinion Are Not Actionable.

More significantly, the statement is one of personal opinion and not subject to liability. "Statements communicating ideas or opinions cannot support a defamation claim, as false ideas are not actionable." *Schmalenberg v. Tacoma News, Inc.*, 87 Wn.App. 579, 591, 943 P.2d 350 (1997), *review denied*, 134 Wash.2d 1013 (1998). There is no defamation.

3. Plaintiffs Cannot Establish "Actual Malice."

Plaintiffs must prove actual malice for two distinct reasons. First, as a school principal Plaintiff is a public figure; this status requires a showing of malice.³⁵ Second, DPA Kooiman's status as state official making an official comment about her work entitles her to absolute³⁶ or

³⁴ Wright twice unsuccessfully moved to disqualify DPA Kooiman from prosecuting him. In 2010, while the re-trial was pending he filed a second motion, attaching the newspaper article at issue here. CP 751-756. The trial court rejected this tactic. The Court of Appeals in the criminal appeal held "Wright does not show that [Kooiman's] statement has a substantial likelihood of materially prejudicing him in the criminal case." CP 763.

³⁵ Principals and teachers are public officials for purposes of defamation. *Corbally v. Kennewick Sch. Dist.*, 94 Wn.App. 736, 741, 973 P.2d 1074 (1999) ("Mr. Corbally's conduct was that of a public official because it involved the manner in which he performed his teaching duties pursuant to public contract."). *See also, Palmer v. Bennington Sch. Dist., Inc.*, 615 A.2d 498, 503 (Vt. 1992) ("... Palmer, as principal of the Molly Stark Elementary School, was a public official for purposes of defamation law.").

³⁶ DPA Kooiman's comments are absolutely privileged. *See, Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 833-34, 420 P.2d 698, 701 (1966) (citation omitted) ("As long as the acts complained of have more than a tenuous relation to their official capacity, state officials, acting through the members of their staffs, are absolutely privileged with

qualified privilege.³⁷ Both Plaintiff's status and Defendant's status require a showing of actual malice, and the test is the same.³⁸

If a privilege applies, the burden of proof shifts to the plaintiff to demonstrate abuse of that privilege. *Alpine Indus. Computers, Inc. v. Cowles Pub. Co.*, 114 Wn. App. 371, 382, 57 P.3d 1178, 1185 (2002) amended, 64 P.3d 49 (2003). "[A] showing of actual malice will defeat a conditional or qualified privilege." *Herron v. Tribune Pub. Co. Inc.*, 108 Wn.2d 162, 183, 736 P.2d 249 (1987). Actual malice must be shown by clear and convincing proof of knowledge or reckless disregard as to the falsity of a statement. *Bender*, 99 Wn.2d at 601.

Plaintiffs cannot come close to proving malice, as DPA Kooiman had numerous reasons to believe the truth of her opinion. A person who investigates misconduct, relies on the statements of others, and then offers an opinion cannot be liable in defamation even if it turns out to be false:

Proof of knowledge of, or reckless disregard as to, the falsity of the statements is also required to establish abuse of the privilege. As to the investigating employees, there is

respect to the content of their oral pronouncements or written publications." See also *Liberty Bank of Seattle, Inc. v. Henderson*, 75 Wn.App. 546, 878 P.2d 1259 (1994) (the supervisor of banking and a duly appointed conservator were absolutely privileged from defamation based on their statements to the press).

³⁷ Even if absolute privilege does not apply, qualified privilege does. *Wood v. Battle Ground School Dist.*, 107 Wn.App. 550, 569, 27 P.3d 1208 (2001) ("an inferior state officer, is entitled to a qualified privilege.").

³⁸ "Whether establishing an abuse of a qualified privilege or proving fault when the plaintiff is a public official, a plaintiff must prove actual malice." *Wood, supra* at 571. The showing that a privilege applies raises both the standard of fault and burden of proof, even where the plaintiff is a private individual. *Bender, supra* at 601-02.

absolutely no showing of any malice, recklessness, or failure to examine the facts. **They took statements, interviewed witnesses, and expressed their *opinion* that harassment had occurred.** As there was no showing of any abuse or actual malice by the investigating employees, summary judgment was appropriate.

Lawson v. Boeing Co., 58 Wn. App. 261, 267, 792 P.2d 545, 549 (1990), *review denied*, 116 Wn.2d 1021 (1991) (bold added, italics in original).³⁹

Here, prosecutor Kooiman relied on the testimony of the victim and other witnesses, Wright's lame excuses (his DNA was transferred to the victim's breast by "ordinary conversation"), and the corroborating DNA evidence. *See* CP 76-81, and 436-37 (summary of facts on which prosecution was based). The trial court on multiple occasions found that probable cause existed, and a jury convicted him in 2007.⁴⁰ When one relies on the statements of others, there can be no defamation liability absent clear proof the speaker believed that the sources were liars.

4. DPA Kooiman Has Absolute Prosecutorial Immunity for This Statement.

This claim is also barred by DPA Kooiman's prosecutorial immunity. *See supra*.

³⁹ This situation is to be contrasted to one where the speaker was personally involved in the event. For example, if Plaintiff Wright were to sue the victim for defamation for accusing him of rape, she could not rely on this privilege as she would have personal knowledge of whether the statement was true. *Lawson, supra*.

⁴⁰ DPA Kooiman was also aware that Wright's fellow rapist Richy Carter had been accused (and sued) for a gang rape with many similar features to this incident. CP 332, and 334. While arguably not admissible against Wright in the prosecution (although the two men were tried together), this information is certainly relevant to Kooiman's knowledge base and her alleged "malice."

V. CONCLUSION

Defendants' motion for summary judgment was properly granted.

The Superior Court should be affirmed.

Respectfully submitted this 7th day of November, 2014.

KEATING, BUCKLIN & McCORMACK,
INC., P.S.



By: _____
Stewart A. Estes, WSBA No. 15535
Attorneys for Respondents

800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175
Telephone: (206) 623-8861
Fax: (206) 223-9423
Email: sestes@kbmlawyers.com

DECLARATION OF SERVICE

I declare under the penalty of perjury under the laws of the State of Washington that on November 7, 2014, a true and correct copy of the foregoing document was sent to the following parties of record via method indicated:

Attorneys for Plaintiffs

Dan'L W. Bridges
McGaughey Bridges Dunlap, PLLC
3131 Western Avenue, Suite 410
Seattle, WA 98121

E-mail U.S. Mail Legal Messenger Other Agreed E-Service

DATED this 7th day of November, 2014.


Staci Black, Legal Assistant
sblack@kbmlawyers.com