

ORIGINAL

NO. 39553-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LAWRENCE SCHMITT,

Appellant,

v.

DORIS LANGENOUR, JENNIFER FORBES, DEPUTY
PROSECUTING ATTORNEY, KITSAP COUNTY PROSECUTING
ATTORNEY'S OFFICE,

Respondents.

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**BRIEF OF RESPONDENT/CROSS-APPELLANT
JENNIFER FORBES**

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I. INTRODUCTION

The underlying lawsuit was based not on improper conduct by Prosecuting Attorney Jennifer Forbes, but rather was based on the decisions of other prosecutors to charge Mr. Schmitt with new crimes and to seek revocation of his pretrial release. The question presented in this appeal is whether a state prosecuting attorney who acted within the scope of her duties in initiating and pursuing a criminal prosecution is immune from suit under 42 U.S.C. § 1983 for alleged deprivations of the defendant's constitutional rights. The answer to that question is yes.

Immunity from lawsuits, well grounded in history and reason, protects officials who are required to exercise their discretion and safeguards the related public interest in encouraging the vigorous exercise of official authority. Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his or her role as an advocate for the State, are entitled to immunity because fearless performance of the prosecutor's duty is essential to the proper functioning of the criminal justice system.

This Court should affirm the trial court's grant of qualified immunity and reverse the denial of absolute immunity.

II. ASSIGNMENT OF ERROR ON CROSS APPEAL

- A. The Trial Court Erred In Not Granting Dismissal On The Grounds Of Absolute Prosecutorial Immunity**

III. RESTAMENT OF THE ISSUES

- A. Was The Trial Court Correct In Dismissing Defendant Forbes Based On Qualified Immunity From Suit For The Actions She Took In Direct Furtherance Of Her Role As A Prosecuting Attorney?**
- B. Did Plaintiff Waive His State Law Claims By Not Bringing The Legal Argument Related To Those Claims To The Attention Of The Trial Court?**

IV. ISSUES ON CROSS APPEAL

- A. Should The Trial Court Have Granted Absolute Immunity Under The Facts Of This Case?**

V. STATEMENT OF THE CASE

A. Procedural History

This appeal involves Mr. Schmitt's federal claims of false arrest, false imprisonment, and malicious prosecution under 42 U.S.C. § 1983. CP at 3-8. These claims arise from Schmitt's encounter with his neighbor, defendant Doris Langenour, on June 16, 2002. CP at 4-8, 74-76.

Plaintiff filed his complaint on October 10, 2005. CP at 4.¹ The complaint originally named Doris Langenour, Jennifer Forbes, and the Kitsap County Prosecuting Attorney's Office as defendants. CP at 4.

Defendant Langenour, the person Schmitt accused of fabricating a police report, filed for summary judgment in March 2006, shortly after this case was filed. Plaintiff dismissed Langenour with prejudice by stipulation on May 19, 2006, before Langenour's motion was heard. Defendant Kitsap County Prosecuting Attorney's Office was dismissed via summary judgment at hearing on May 18, 2007. Neither of those two dismissals have been appealed.

Deputy Prosecuting Attorney Jennifer Forbes filed for summary judgment on all remaining claims on April 30, 2008, two and one-half years after plaintiff had filed his complaint. CP at 50. Plaintiff replied on May 27, 2008, and sought additional time to do discovery. CP at 83, 93. Forbes filed her reply on June 23, 2008. CP at 140.

On August 13, 2008, the trial court denied Forbes's motion on absolute immunity grounds, noting it was a close call. CP at 291. The trial court granted Plaintiff Schmitt additional time to do discovery so he could more fully respond to Forbes's qualified immunity argument,

¹ Defendant Jennifer Forbes noted in her opening brief below that there remained issues of statute of limitations and ineffective service of process that would be the subject of subsequent motions if plaintiff's claims survived. CP at 50 n.2. Those issues remain.

despite the fact that plaintiff had filed his complaint almost three years earlier. CP at 291.²

On April 27, 2009, a year after he filed his initial response to Forbes's motion for summary judgment, Schmitt filed a supplemental declaration of his attorney attaching the entire text of all the depositions he took during the eight plus months he was given to do additional discovery. CP at 157.

The court heard oral argument on June 26, 2009, and ruled from the bench dismissing all Schmitt's remaining claims due to qualified immunity. CP at 299, 297-98. This appeal follows.

B. Schmitt Confronts His Neighbor, Doris Langenour, Over His Suspicions That Her Dalmatians Were Chasing His "Beloved Pets"

On June 16, 2002, Schmitt allegedly saw two Dalmatians on his property chasing his pet geese and/or ducks. CP at 5. Schmitt chased the dogs away and then followed them to see if he could figure out who they belonged to. CP at 5, 38. Plaintiff followed the dogs until they disappeared from view near the house of Defendant Doris Langenour. CP at 5. He assumed that the two dogs belonged to the owner of the house

² Schmitt argues that the trial court erred in not granting him additional time to do discovery. *See* Appellant/Cross-Respondent's brief at 23. That is factually and legally incorrect. CP at 83, 157, 291.

and confronted Langenour in her driveway. CP at 5, 123. Langenour had not met Schmitt before. CP at 112, 124, 128, 269.

Plaintiff told Langenour that her Dalmatians had been on his property chasing his “beloved pet geese.” CP at 5, 38, 113. Langenour told Schmitt that he was wrong; that she kept her dogs in their kennels or in her house. CP at 74, 113, 125. Schmitt told Langenour that if he caught her dogs on his property again, he would shoot them. CP at 67, 75, 137. He also threatened to shoot Ms. Langenour herself. CP at 75, 126. Schmitt told Langenour that he had shot a neighbor’s dog in the past and had been charged with trying to shoot his neighbor as well.³ CP at 75, 125, 273.

Schmitt appeared disturbed, would lunge at her when he spoke, and was threatening, so Langenour asked him to leave. CP at 74-75, 126.

C. Langenour Reports Her Run-In With Schmitt To The Kitsap Sherriff’s Office

After the conversation with Schmitt, Langenour set out to see if she could determine where he lived and who he was. CP at 106. Langenour parked across from plaintiff’s property and made contact with

³ Plaintiff had been arrested one and one-half months earlier, on April 1, 2002, for assaulting Langenour’s neighbor with a firearm. CP at 101, 236. The following day, he had been arraigned on an Assault in the Second Degree charge. *Id.* Less than a week later, Schmitt was contacted by police based on a report that shots were being fired on his property. *Id.* One of the conditions of his release on the Assault 2 charge was that Schmitt could not possess firearms. *Id.*

his neighbor. CP at 106. In her conversation with the neighbor, Langenour learned Schmitt's name and the name of the prosecuting attorney who had pending charges against Schmitt. *Id.* That prosecuting attorney was respondent Forbes.

That same day, Langenour called the police and briefly spoke with one of their dispatchers. CP at 107. In that first conversation, she told the dispatcher that Schmitt had threatened to shoot her dogs. CP at 111-14. The dispatcher took her information and passed it along to a deputy sheriff named Benjamin Herrin. When Deputy Herrin talked with Langenour, Langenour did not know Schmitt's name or where he lived. CP at 171.

Langenour told Herrin about the confrontation with Schmitt and his threat to shoot her dogs. CP at 169-70, 198-99. As Langenour noted in her deposition, "[t]his was a very big gentleman, and I'm a very tiny woman. This gentleman was nasty, he was dirty and he came to my house. I didn't know who he was. He was uninvited." CP at 198-99.

Herrin did not go out to her house or make in-person contact. CP at 107. He informed Langenour that as far as he could tell, no crime had been committed. CP at 171-72. The conversation between Herrin and Langenour lasted about 10 minutes. CP at 172.

D. Langenour Is Referred To Respondent Forbes After Talking To A Neighbor, Linda Fellis

After reporting the incident to the Kitsap County Sheriff's Office, Langenour discussed the matter with another neighbor the next day. CP at 107. Fellis suggested that Langenour call Forbes. CP at 101, 107, 236. Langenour did so on June 17, 2002, the day after her conversation with Schmitt. CP at 101, 107. Langenour told Forbes that she had contacted the police but did not pass along what she had told them. CP at 240. Forbes and Langenour spoke briefly, about a minute. CP at 239⁴.

Langenour felt scared and threatened by Schmitt and had felt that the sheriff's office did not react appropriately. CP at 107-08. Langenour told Forbes how Schmitt had threatened to shoot her and her dogs. CP at 107. Forbes did not suggest to Langenour that she should change, alter, or add to her recollection of the events of the prior day, June 16, 2002. CP at 108.

Forbes then checked in her office's computer system to see if there had been a report taken. CP at 240. When she could not find one, Forbes walked next door to the sheriff's office's records department to locate it. CP at 241. Forbes asked a Kitsap County Sheriff's Department Supervisor, Mike Davis, to find out if there was a report and to get back to

⁴ Plaintiff had no evidence regarding the conversation between Forbes and Langenour that was any different. CP at 277, 282.

her. CP at 242. Herrin contacted Forbes who asked Herrin for a copy of his report when it was ready because she was prosecuting Schmitt in another matter and the Herrin report might evidence a violation of the terms of Schmitt's pre-trial release. CP at 243.

Forbes suggested that Ben Herrin should interview Langenour regarding her encounter with Schmitt as Forbes was prosecuting a pending felony assault case against Schmitt, and his conduct toward Langenour may have violated his conditions of release in that case. CP at 101, 117, 173, 177, 244. Forbes did not indicate what, if any, new information Langenour would have, nor did Forbes suggest to Herrin that he take Schmitt into custody. CP at 173, 177.

In the event that Herrin found probable cause for an arrest, Forbes asked that he also book Schmitt under her pending case for violation of his conditions of release. CP at 173, 177. Forbes then went on vacation and had no further contact with the case. CP at 245.

E. Deputy Herrin Arrests Schmitt And He Is Charged With Felony Harassment For His Threats To Langenour

Herrin contacted Langenour and spoke with her by phone. CP at 118, 133, 174, 229-30. Langenour told Herrin that Schmitt had threatened to shoot her and her dogs. CP at 102, 107, 118. Herrin decided to contact Langenour in person. CP at 118. When Herrin did, Langenour furnished

him with a written report and confirmed the contents. CP at 134. Langenour signed and dated the statement as well. CP at 118, 133, 226-28.

Herrin found Langenour to be truthful and credible. CP at 178. Based on Langenour's statement to him, Herrin found probable cause to arrest Schmitt and did so. CP at 68, 179. Forbes did not tell Herrin that she wanted him to take Schmitt into custody or that she thought he should or could take Schmitt into custody.

When Herrin contacted Schmitt, Schmitt confirmed all of Langenour's statement, except Schmitt said that he never threatened either Langenour or her dogs. CP at 180. Schmitt said that Langenour was lying but could not provide any reason that she would fabricate his threat to her. CP at 180. Herrin, based on the totality of the information before him, felt he had probable cause to arrest Schmitt and did so. CP at 68, 177.

F. Schmitt's Release Is Revoked For His Conduct With Langenour (By Another Deputy Prosecuting Attorney) And New Charges Are Filed (By Another Deputy Prosecuting Attorney)

Schmitt was later charged with felony harassment based on his encounter with Langenour by a different prosecutor, without consultation with Forbes, while Forbes was out of town.⁵ CP at 80, 68, 280 (Schmitt

⁵ Charging decisions are subject to absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118, 129, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997); *Burns v. Cy of King*,

has no evidence otherwise). On June 24, 2002, also while Forbes was out of the office on vacation, another deputy prosecuting attorney moved to revoke Schmitt's pretrial release agreement and increase his bail because of his conduct with Langenour. CP at 245. After hearing, Judge Russell Hartman found that Schmitt had violated the conditions of his pretrial release and granted the State's motion. CP at 121, 245. Schmitt has not appealed that revocation.

Schmitt made his claims based ostensibly on his arrest by Herrin, another prosecutor's decision to charge him with felony harassment, his subsequent home-monitored detention, and his assertion that Langenour changed her story the second time she spoke to Herrin. CP at 68. Langenour denies that she changed her story and Forbes had no knowledge of any change in Langenour's statement. CP at 76, 79-80. Regardless, his arrest, the new charges, and the revocation were all done by persons other than Forbes. CP at 121, 245.

883 F.2d 819, 824 (9th Cir. 1989). Plaintiff has not argued that the decision to charge him is a basis for liability.

VI. ARGUMENT ON APPEAL

A. The Trial Court Ruled Correctly In Granting Qualified Immunity To Forbes

The only issue properly before this Court is whether or not the trial court properly granted summary judgment to Defendant Forbes based on qualified immunity. Plaintiff Schmitt did not bring to the attention of the trial court any issues related to his state law claims and cannot, therefore, raise those issues for the first time on appeal. RAP 9.12; CP 50, 83-94, 157-263. The only claims at issue in this appeal are those based upon 42 U.S.C. § 1983.

B. Qualified Immunity Analysis

To determine whether a federal right is clearly established, we look first to United States Supreme Court precedent and then to decisions of the controlling circuit court of appeals. *See Denius v. Dunlap*, 209 F.3d 944, 950 (7th Cir. 2000); *Seaman v. Karr*, 114 Wn. App. 665, 680, 59 P.3d 701, 708 (2002). Pursuant to the standard in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), public officers acting in their official capacities are shielded from liability for damages or civil rights claims brought pursuant to 42 U.S.C. § 1983 insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Under United States Supreme Court precedent, as it has evolved since the *Harlow* decision, the qualified immunity defense has been defined quite broadly: "[I]t provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [I]f officers of reasonable competence could disagree on th[e] issue [whether or not a specific action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *see also Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir.1997); *Romero v. Kitsap Cy*, 931 F.2d 624, 627 (9th Cir. 1991). Moreover, Schmitt bears the burden of proving that the rights he claims were clearly established at the time of the alleged violation. *See Davis v. Scherer*, 468 U.S. 183, 197, 104 S. Ct. 3012, 82 L. Ed. 2d 139, *reh'g denied*, 468 U.S. 1226 (1984); *Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1996); *see also, Romero*, 931 F.2d at 627. Schmitt needs to show that the contours of the right were sufficiently clear, that, at the time in question (in this case, June 2002), Forbes understood that what she did (believed the report of Langenour) violated that right and that, in light of the preexisting law, the unlawfulness of her act was apparent. *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.1994). If the law does not put a public officer on notice that her conduct would be clearly unlawful, then qualified immunity applies.

Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). To determine whether a federal right is clearly established, our courts of appeals look first to United States Supreme Court precedent and then to decisions of the controlling circuit courts of appeals. See *Denius*, 209 F.3d at 950; *Seaman*, 114 Wn. App. at 680.

In *Saucier*, the Supreme Court mandated a two-step sequence for resolving qualified immunity. First, a court would decide whether the facts that a plaintiff had laid out constituted a violation of a constitutional right in general, regardless of the legal clarity of that right. *Saucier*, 533 U.S. at 201. Second, if the plaintiff has satisfied this first step, the court would decide whether the right at issue was clearly established at the time of defendant's alleged misconduct. *Id.* The privilege is an *immunity from suit* rather than a mere defense to liability. It is lost if a case is erroneously permitted to go to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

The decisions prior to *Saucier* had held that “the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.” *Cy of Sacramento v. Lewis*, 523 U.S. 833, 841, n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). *Saucier* made that suggestion a mandate. For the first time, the United States Supreme Court

held that whether “the facts alleged show the officer’s conduct violated a constitutional right . . . must be the initial inquiry” in every qualified immunity case. *Saucier*, 533 U.S. at 201. Only after completing this first step may a court turn to “the next, sequential step, namely whether the right was clearly established.” *Id.*

In reconsidering the procedure required in *Saucier*, the Supreme Court, in *Pearson v. Callahan*, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009), concluded that the sequence set forth in *Saucier* should no longer be required.

This was because *Saucier*’s two-step protocol disserved the purpose of qualified immunity because it forced the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily. *Pearson*, 129 S. Ct. at 818. The Supreme Court noted the futility of sending a case to trial on the factual dispute when it said:

At the same time, however, the rigid *Saucier* procedure comes with a price. The procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. District courts and courts of appeals with heavy caseloads are often

understandably unenthusiastic about what may seem to be an essentially academic exercise.

Pearson, 129 S. Ct. at 818. In addressing claims in a 42 U.S.C. § 1983 case, the court may first decide that the constitutional right was not clearly established before determining if a violation has occurred.

C. It Is Not Unconstitutional For A Prosecutor To Believe The Statements Of A Witness

1. The Record Evidences No Constitutional Violation

Although qualified immunity can now be based upon a conclusion that either no constitutional violation occurred or that the existence of the right in question was not clearly established, both issues of law, the absence of any constitutional violation is addressed initially because of the complete lack of evidence.

Plaintiff argues without any factual support that Forbes coerced Langenour into fabricating the report that Schmitt had threatened her dogs *and* her, or that Forbes should have known Langenour was being untruthful.⁶ A deputy prosecuting attorney does not violate the constitution when he or she believes a report from a crime victim. The fact that the victim and the accused disagree about what happened does not mean the victim is lying or that police or law enforcement knew the

⁶ This is in spite of the fact that the Kitsap County Prosecuting Attorney's Office was dismissed on summary judgment and Schmitt voluntarily dismissed Doris Langenour with prejudice while her motion was pending. Plaintiff has not appealed either of those dismissals.

victim was lying. Nor does the fact that Langenour's subsequent version of the events involving Schmitt's threatening conduct was more detailed mean that the additional information is untruthful.

There is no basis, beyond Schmitt's pure speculation, that Forbes did anything other than ask for Langenour to be interviewed. In this case, Forbes was not told what, if anything, Langenour reported to the 911 dispatcher or Herrin. CP at 240. Schmitt offered no evidence to the contrary.⁷

The call she did receive was short, with Langenour reporting the incident, Forbes asking if she had reported it to law enforcement, Langenour saying she did, and then the conversation ending. CP at 239. When asked what he knew about it, plaintiff admitted he had no evidence regarding the conversation between Forbes and Langenour. CP at 281, 282.

Instead, he points to the dismissal of the Langenour harassment charge and his acquittal on the Fellis charges. Those two cases are irrelevant. First, they occurred well after Schmitt claims there was a violation of law. Second, there is no authority for the proposition that if a defendant is acquitted he automatically has a cause of action under

⁷ Schmitt cannot even establish that Forbes was the deputy prosecuting attorney who filed the case involving Langenour and instead states that his grounds for concluding so are, simply, "[p]sychic." CP at 280.

42 U.S.C. § 1983. Whether or not a different prosecuting attorney decides that the fact that Langenour's story was different on June 18, 2002, than it was on June 16, 2002, impacts the possible outcome of the later prosecution has no bearing on whether when Forbes talks to Langenour and believes her is a violation of the United States Constitution. Schmitt offers no authority for the proposition that it does.

2. Schmitt Impermissibly Relied On Pure Speculation, An Insufficient Evidentiary Showing At Summary Judgment

To survive summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value." *Travis v. Tacoma Pub. Sch. Dist.*, 120 Wn. App. 542, 549, 85 P.3d 959 (2004) (citations omitted). The non-moving party must respond by setting forth specific facts showing that there is a genuine issue for trial. *See Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 649 P.2d 836 (1982); *Diamond Parking, Inc. v. Frontier Bldg. Ltd. P'ship*, 72 Wn. App. 314, 319, 864 P.2d 954 (1993), *review denied*, 124 Wn.2d 1028, 883 P.2d 327 (1994). In this case, plaintiff confuses speculation with circumstantial evidence, producing only the former in lieu of the latter.

Under CR 56(e), a declaration cannot be considered in a summary judgment proceeding if it sets forth no more than the declarant's

understanding of a fact without also including the specific facts upon which the understanding is based. *Marks v. Benson*, 62 Wn. App. 178, 813 P.2d 180 (1991). Conclusory allegations that are not founded on facts cannot be considered in a summary judgment motion. *Orion Corp. v. State*, 103 Wn.2d 441, 461-62, 693 P.2d 1369 (1985); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988); *Layne v. Hyde*, 54 Wn. App. 125, 134, 773 P.2d 83 (1989) (general, conclusory statements are insufficient to establish a conspiracy).

A pyramid of possibilities does not make a chain of evidentiary circumstances. It is not a possible theory, but inference from facts reasonably ascertained, which impels. *Parmelee v. Chicago, M. & State P. Ry. Co.*, 92 Wash. 185, 158 P. 977 (1916). No one should be found at fault upon mere suspicion or because they may have had an opportunity to commit an act, or even because of bad character. *State v. Payne*, 6 Wash. 563, 34 P. 317 (1893); *State v. Gillingham*, 33 Wn.2d 847, 855, 207 P.2d 737 (1949). Where mere suspicion is raised by the evidence, there is not a sufficient basis to support a finding of conspiracy. *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 424 P.2d 290 (1967); *Holman v. Coie*, 11 Wn. App. 195, 215, 522 P.2d 515 (1974).

A plaintiff cannot establish causation on the basis of speculation and conjecture but, instead, must produce evidence from which the cause

in fact may be inferred. 16 David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 4.2, at 145-46. Causation is speculative when, after consideration of the facts, “there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover.” *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999) (quoting *Gardner v. Seymour*, 27 Wn.2d 802, 809, 180 P.2d 564 (1947)). Here, although both Forbes and Langenour both testified that Langenour merely reported the facts of the interaction with Schmitt to Forbes, Schmitt relies on pure conjecture that Langenour changed her story *because of* her conversation with Forbes.

On appeal, he again asserts, without support in the record, that Forbes coerced Langenour to provide false testimony, that Forbes directed Herrin to arrest Schmitt, and that Forbes knew that Langenour was lying. *See* Brief of Appellant (Br. Appellant) at 17-19 (no citations to clerks papers in support of any of Schmitt’s factual statements). Not only does he fail to point this Court to any evidence in support of those claims, despite the extra eight months he had to do additional discovery, those statements of fact he tries to rely on are contrary to the known facts of this case and his own deposition testimony.

His failure to identify specific facts justifying trial required the discharge of this case below. Schmitt has done nothing to strengthen his case on appeal.

D. Schmitt Is Unable To Show That His Constitutional Rights, If Any, Were Clearly Established At The Time

Under qualified immunity, defendants are presumed to be immune from suit unless the plaintiff can satisfy his burden of proving the existence of a clearly established, fact-specific right. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Once a government defendant raises the issue of qualified immunity, "the plaintiff bears the burden of proving that the right allegedly violated was 'clearly established' at the time of the occurrence at issue." *Davis*, 468 U.S. at 197. Forbes is, therefore, presumed to be qualifiedly immune from suite unless Schmitt can satisfy the burden that he alone has to prove the existence of a clearly established, fact-specific right. *Anderson*, 483 U.S. at 639.

On page 18 of his brief, plaintiff argues in part that Forbes is liable if she should have known Langenour was falsely reporting the threat by Schmitt. That is not the correct standard. In this case, plaintiff must show an actionable, intentional wrong doing, not merely negligence by Forbes.⁸

⁸ Schmitt also speculates "that Langenour advised Forbes about why she was dissatisfied with the deputy." There is no support in the record for that assertion.

In *Davidson v. City of New Orleans*, 96 U.S. 97, 24 L. Ed. 616 (1877), and *Daniels v. Williams*, 474 U.S. 327, 330-32, 106 S. Ct. 677, 88 L. Ed. 2d 662 (1986), the United States Supreme Court held that mere negligence or lack of due care by state officials does not trigger the protections of the Fourteenth Amendment and, therefore, does not state a claim under 42 U.S.C. § 1983.

A constitutional right is clearly established if it would be clear to a reasonable official that her conduct was unlawful in the situation she confronted. *Davis*, 468 U.S. at 202. If the law did not put the official on notice that her conduct would be clearly unlawful, then a summary judgment dismissal based on the doctrine of qualified immunity is appropriate. *Id.* Moreover, "the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. Therefore, regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not clearly established or the officer could have reasonably believed that his particular conduct was lawful. *Romero*, 931 F.2d at 627

The claimed right must also be proven at the proper level of specificity. If the inquiry is made at too general a level, it bears no relationship to the "objective legal reasonableness" that is the touchstone

Schmitt was given additional time to do discovery and ended up submitting the entire transcripts of several witnesses including Langenour (CP at 183-200) and Forbes (CP 235-53). There is no evidence to support the assertion that Langenour advised Forbes as represented.

of *Harlow*. Plaintiffs could convert the rule of qualified immunity into a rule of virtual, unqualified liability simply by alleging violation of “extremely abstract rights.” *Anderson*, 483 U.S. at 639.

Schmitt was unable to cite any controlling authority clearly indicating that a deputy prosecutor violates a defendant's constitutional rights when he or she believes the statement of a crime victim and/or asks a deputy to look into the statement and make his or her own assessment as to probable cause. Here, Forbes was contacted by Langenour because Forbes was already prosecuting Schmitt due to his actions towards his other neighbors, the Fellisses. CP at 101, 106, 107.

Part of that prosecution included a condition on Schmitt’s release that he not have any further violations of law and not possess firearms. CP at 101, 236. Schmitt had already been arrested once for violating the terms of that conditional release. *Id.* When Forbes returned from vacation, Schmitt had been charged by another deputy prosecuting attorney for the Langenour incident, and revoked by another deputy prosecuting attorney in connection with the Fellis case. CP at 245.

Forbes talked briefly with Langenour about Schmitt’s conduct and, because it may have been a violation of the release agreement in the ongoing prosecution, tried to locate the police report of the incident. CP at 239, 240, 241. When it wasn’t available on her computer, she walked to

the sheriff's office to locate it. CP at 241. While she was waiting to see if the report could be located, she asked Herrin's supervisor if he could locate the report. CP at 242. There was no evidence that Forbes was aware that when Langenour had contacted the 911 dispatcher and talked to Herrin that Langenour reported *only* a threat to her dogs. CP at 240.

When Herrin contacted Forbes about the call he had received the day prior from Doris Langenour, the record evidences that Forbes told him he should interview Langenour; and if he felt there was sufficient information to arrest for harassment as to Langenour, then Schmitt should also be booked under her on-going case number as a violation of the release agreement. CP at 243-244. There was no suggestion from Forbes as to what Herrin should do; she did not attest to any facts and there is simply no evidence that she coached, coerced, or in any way influenced the report of Langenour.

Once Herrin, based on all his interactions with Langenour, found sufficient evidence to take Schmitt into custody, both the second harassment regarding Langenour and the revocation of the pre-trial release agreement were handled by another prosecuting attorney while Forbes was on vacation. CP at 245.

There is no support in the law for the notion that when a prosecutor receives a brief report that may evidence the violation of an ongoing

prosecution and asks a police officer to investigate the report, the prosecutor is on notice that her behavior violates clearly established constitutional norms.

In *Saucier*, the Supreme Court held that *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (2001), clearly established the more general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. *Saucier*, 533 U.S. at 201-02. Yet that alone, as succinctly stated, was not enough. Rather, the court emphasized that the right the official is alleged to have violated must have been “clearly established” in a more particularized, and hence more relevant, sense. The contours of the right must be sufficiently clear so that a reasonable official would understand that what he or she is doing violates that right. *Anderson*, 483 U.S. at 640.

The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his or her conduct was unlawful in the situation he or she confronted. *See Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) (“as we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can

determine if it was clearly established”); *see also Saucier*, 533 U.S. at 201-02.

E. The Decisions Of Another Prosecutor And Of Deputy Herrin Sever The Chain Of Causation To Any Act Of Forbes

Evaluating causation in this type of case requires a court to consider two basic tort principles. *See Higazy v. Templeton*, 505 F.3d 161, 175 (2nd Cir. 2007); *Murray v. Earle*, 405 F.3d 278, 292 (5th Cir. 2005). On one hand, government officials, like other defendants, are generally responsible for the “natural” or “reasonably foreseeable” consequences of their actions. *Higazy*, 505 F.3d at 175 (*citing Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961)); *Murray*, 405 F.3d at 292. At the same time, however, liability may not attach if “an intervening decision of an informed, neutral decision-maker ‘breaks’ the chain of causation,” meaning that the harm to the plaintiff can be traced more directly to an intervening actor. *Murray*, 405 F.3d at 292; *see also Higazy*, 505 F.3d at 175; *see also Stoot v. City of Everett*, 582 F.3d 910, 926 (9th Cir. 2009) (also holding that prior to 2009, the Ninth Circuit had not recognized a § 1983 claim based on wrongful coercion of the statement of a crime victim).

In this case, Herrin made the decision to arrest Schmitt based on his conversations with Langenour. Another deputy prosecuting attorney,

during Forbes's vacation, made the decision to move for a revocation, and yet another deputy prosecuting attorney made the decision to charge and prosecute Schmitt for the Langenour charge. CP at 245, 121. Neither deputy prosecuting attorney consulted with Forbes before doing so, and Herrin, having spoken with Langenour personally, made the decision to arrest. CP at 245, 177, 179.

Therefore, any acts of Forbes cannot be the cause of plaintiff's alleged harm.

F. Plaintiff Was Unable To Show That An Objectively Reasonable Prosecutor Would Have Believed That The Facts Of This Case Violate Any Clearly Established Right

Even if Schmitt had alleged a violation of a clearly established right, this action is also subject to dismissal under the third prong of the immunity defense: could an objectively reasonable officer have thought the conduct was lawful? This second inquiry of objective reasonableness is generally decided as a matter of law. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73, (9th Cir. 1993). A court's ultimate determination of objective reasonableness is necessarily deferential.

The deferential standard is designed to shield public officers from undue interference with their duties, disabling threats of liability, and the substantial costs that attend an inquiry into subjective motivation and broad-ranging discovery. *Harlow*, 457 U.S. at 806, 817.

The standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 537, 116 L. Ed. 2d 589 (1991), quoting *Malley*, 475 U.S. at 341, 343, 341.

In deciding the essentially legal question of whether an objectively reasonable officer could have believed that he or she was acting lawfully, courts consider the surrounding circumstances and apply the standard of reasonableness at the moment. *See Saucier*, 533 U.S. at 206-07, (citation omitted); *Hunter*, 112 S. Ct. at 536-37; *Anderson*, 483 U.S. at 640-41.

Schmitt concedes that he has no evidence or knowledge of the substance of any pre-arrest communications between Langenour and Forbes, or whether Forbes even knew that Langenour had called 911 prior to Schmitt's arrest. CP at 276-77, 280-82, 286. When asked what his basis was for assuming that Forbes charged her with his crimes related to Langenour, Schmitt answered "[p]sychic." CP at 280.

What the record demonstrates is that Forbes had a short phone call with Langenour solely because Forbes was prosecuting Schmitt for his prior conduct involving Langenour's neighbor and her husband. CP at 101, 107, 236. That she sought the police report related to the conduct with Langenour solely because it might evidence a violation of the conditional release agreement in the case she was already prosecuting.

CP at 240, 242, 243. When she could not locate the report on her computer, she went to personally look for it. CP at 241. Again, only in connection with her ongoing prosecution of Schmitt. When she could not find the report, she asked for the officer who received the initial complaint from Langenour to forward her a copy of his report when it was completed. CP at 242.

When contacted by the deputy, Herrin, she noted that if he found that there was sufficient information to form probable cause that Schmitt's behavior with Langenour was criminal, then it would also be violation in the ongoing prosecution she had with Schmitt. CP at 173, 177. If that was the case, she only asked that Herrin book him under her case number as well for the violation thereof. *Id.* She did not attest to facts, suborn perjury, coerce witnesses, or involve herself in any other activity that a reasonable prosecutor would believe was anything other than acting as the State's advocate in an ongoing criminal prosecution.

In *Cruz v. Kauai Cy*, 279 F.3d 1064 (9th Cir. 2002) the deputy prosecutor allegedly violated the plaintiff's Fourth Amendment rights by submitting an affidavit personally attesting to witness statements made to the prosecutor without reasonable investigation that would have revealed the statements to be false, thereby causing a warrant to be issued for the plaintiff's arrest. *Cruz*, 279 F.3d at 1066 citing *Saucier*, 533 U.S. at 194.

The district court granted summary judgment in favor of both the county and the prosecutor on the ground of qualified immunity. *Id.* On appeal, the Ninth Circuit concluded that the prosecutor had submitted the affidavit “in reckless disregard of its falsity.” *Cruz*, 279 F.3d at 1069. Nevertheless, this Court also found the prosecutor to be qualifiedly immune. The plaintiff did not meet:

his burden of proving that the right allegedly violated here was “clearly established” at the time of the alleged violation. The right violated here [in *Cruz*], according to the complaint and evidence favorable to [plaintiff], was the Fourth Amendment right not to have a prosecutor, in order to obtain a bail revocation, personally attest to a false statement of a biased source with no investigation of the statement's truth or falsity. Unfortunately for [plaintiff], he has not cited any case that establishes such a right, nor is it self-evident. The situation is not one that appears to have been addressed, even tangentially, in the case law. It would not be “clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier*, 121 S. Ct. at 2156. The right asserted here accordingly was not “clearly established.”

Cruz, 279 F.3d at 1064.

Schmitt cites *Devereaux v. Abbey*, 263 F3d 1070, 1074-75 (9th Cir. 2001) for the proposition that when a prosecuting attorney knowingly secures a conviction on the basis of deliberately fabricated evidence, the constitutional violation is sufficiently recognized. *See* Br. Appellant at 12. While that may accurately reflect the *Devereaux* holding, the facts of that case and this one are markedly different. In *Devereaux*,

the prosecuting attorney was alleged to have manipulated and coerced children into giving false evidence against the plaintiff, as well as ignoring or withholding exculpatory evidence. *Devereaux*, 263 F3d at 1073. The court in *Devereaux* held that what “is required is an allegation or a showing that the interviewer knew or should have known that the alleged perpetrator was innocent, or that the interview techniques employed were so coercive and abusive that the interviewer knew or should have known that they would yield false information.” *Devereaux*, 263 F.3d at 1077.

In *Devereaux*, the Ninth Circuit noted that the detective had interviewed all three children in question, at times for hours, after they denied any abuse had occurred. In this case, the record establishes only that Langenour talked to Forbes for about a minute on one occasion. Even with that alleged backdrop, the Ninth Circuit found, that “[t]he investigatory behavior of which Devereaux complains is indeed troubling, and we do not condone it. But, in three attempts to do so, Devereaux has never made or provided evidentiary support for allegations that warrant the imposition of § 1983 liability on Defendants.” *Devereaux*, 263 F.3d at 1082.

Schmitt also cites the Supreme Court case of *Pyle v. State of Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942) in support of his assertion that qualified immunity is not appropriate in this case. In

Pyle the plaintiff had direct evidence of prosecutor misconduct including a letter from the prosecuting attorney himself. The Supreme Court summarized *Pyle*'s evidence, in part as:

The affidavit contained a statement that affiant 'was forced to give perjured testimony against Harry Pyle under threat by local authorities at St. John, Kansas and the Kansas State Police, of a penitentiary sentence for burglary if I did not testify against Mr. Pyle'. The letter stated, 'Your conviction was a grave mistake', and further that, 'The evidence at the trial of Murl Hudson certainly shattered the conclusions drawn from the evidence produced at your trial.'

Pyle, 317 U.S. at 215. The Supreme Court noted that *Pyle* complained that several of the witnesses against him were coerced by some combination of the prosecuting attorney's office and state and local police. The court noted that, as stated, there was an issue as to whether or not there was a constitutional violation.

Again, those are simply not the facts here. What the uncontested facts show here is that there was a confrontation in Langenour's driveway instigated by Schmitt. That as a result of that confrontation, Langenour eventually contacted Forbes because of her role as the prosecutor in the Fellis case. That Forbes talked to Langenour for about a minute and tried to track down Herrin's report from Langenour's first call. When Forbes could not find the report, she asked Herrin to contact her. The record reflects that she told Herrin that if he was comfortable that he had

probable cause to arrest in Langenour case, he should *also* book Schmitt for the violation of his pretrial release agreement.

There is no evidence that Forbes interviewed Langenour repeatedly and coercively for hours on end after Langenour denied any threats. That Did not happen. There is no evidence that Langenour was threatened by Forbes in an effort to secure harmful testimony. That also did not occur. All that Schmitt presented at trial, and all he relies on now, are vague, unsupported allegations that Forbes was “piling on” charges because she was personally upset that Schmitt did not accept a plea bargain. All those arguments completely lack support in the record.

Schmitt’s only argument is the completely unsupported legal conclusion that Forbes was suborning perjury. *See* Br. Appellant at 13. Schmitt did not produce any evidence, other than his own vague, conspiracy theories, to support those allegations. He argues that Forbes knew or should have known that when Langenour told her Schmitt threatened to shoot Langenour and her dog, Langenour was making a false accusation. The record does not support that inference.

The record shows that Forbes did not know Langenour or know about Schmitt’s run-in with Langenour until Langenour called Forbes. CP at 239. Further, the evidence was that Langenour called Forbes because she was prosecuting the Fellis case and that they only talked for a

minute. CP at 239. Both Langenour and Forbes deny that Langenour changed her story. Plaintiff asked for and was granted over six months to do discovery in order to create a sufficient record to withstand the summary judgment motion now at issue. Schmitt deposed Langenour, Forbes, Davis, and Herrin; and yet still has no evidence other than his own, unsupported conclusory allegations to emphasize for the court. CP at 157-63. Schmitt admitted he had no idea what the conversation between Forbes and Langenour was. CP at 277, 282.

G. Schmitt's Arguments To This Court Regarding His State Law Claims Were Never Brought To The Attention Of The Trial Court And Cannot Be Raised For The First Time On Appeal

In response to Forbes's motion for summary judgment, Schmitt filed a brief entitled Plaintiff's Response to Kitsap County/Prosecutor's Motion for Summary Judgment and Motion to Continue SMJ Hearing on May 27, 2009. CP at 83. Included therewith were two declarations: one in support of plaintiff's motion to continue and one in support of his response. CP at 95, 97. Forbes's reply was filed on June 23, 2008. CP at 140.

The trial court denied Forbes's motion on absolute immunity on August 13, 2008, and granted plaintiff additional time to conduct depositions in furtherance of his response. CP at 291. On April 27, 2009, plaintiff submitted a declaration of his lawyer that attached the entirety of

the depositions of Benjamin Herrin, Doris Langenour, Mike Davis (Herrin's supervisor), and Jennifer Forbes. CP at 157-263. There was no brief that linked the declaration to any particular argument or issue, rather Schmitt apparently expected the trial court to root through his submissions.⁹

There is no discussion of Schmitt's state law claims in the briefing below. CP at 88-93. Schmitt did not submit any legal analysis in conjunction with his April 27, 2009, filings. CP at 157-263, 297-98 (listing the briefs relied upon by the trial court). Schmitt did not bring to the attention of the trial court any of the arguments he now makes in conjunction with his state law claims. CP at 88-94, 157-263, 297-98.

Under RAP 9.12 (Special Rule for Order on Summary Judgment), the appellate court shall only consider those issues and evidence brought to the attention of the trial court. The upshot of RAP 9.12 is that contentions that were neither raised by the parties nor considered by the trial court at summary judgment will not be considered for the first time on appeal. *Ferrin v. Donnellfeld*, 74 Wn.2d 283, 285, 444 P.2d 701 (1968); *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn.

⁹ Schmitt's Assignment of Error § F argues that "a short six week continuance allowing the resumption of discovery was necessary and in the best interests of justice." Br. Appellant at 23-24. Plaintiff was granted from August 13, 2008, until at least April 27, 2009 (eight months), and in fact deposed each and every person mentioned in Defendants Motion for Summary Judgment. That assignment of error is entirely without merit.

App. 408, 413, 814 P.2d 243 (1991); RAP 9.12. Therefore, review is limited to the evidence and issues presented to the trial court. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009). Those arguments relating to plaintiff's state law claims have, therefore, been waived by his failure to preserve them for appeal.

Nowhere in his pleadings did Schmitt discuss his state law claims, assuming for purposes of argument he ever had them.¹⁰ The trial court considered all the briefings of the parties and ruled that all the claims should be dismissed. Plaintiff's arguments at pages 14 through 21 of his brief, to the extent they can be read as in support of his state law claims, were never argued to the trial court below and this Court need not address them. *Van Dinter v. Orr*, 157 Wn.2d 329, 333-34, 138 P.3d 608 (2006).

VII. ARGUEMNT ON CROSS APPEAL

The only issue on cross-appeal is that the lower court erred by not granting absolute immunity. This Court should reverse the trial court's ruling that Forbes was not protected under the doctrine of absolute prosecutorial immunity and affirm the dismissal on that additional basis.

¹⁰ Those claims, if they had not been waived, would be subject to dismissal on the grounds of absolute immunity. *See Tanner v. City of Federal Way*, 100 Wn. App. 1, 4, 997 P.2d 932, 934 (2000).

The record demonstrates that to the extent Forbes had any contact with Langenour, it was in furtherance of her ongoing prosecution of plaintiff for his prior conduct involving Langenour's neighbors, the Fellises. There is nothing in the record to suggest otherwise. Forbes was not involved in the charging decision or the prosecution involving Langenour. Her only contact with Schmitt was in the course and scope of her duty as an advocate for the State in an ongoing criminal prosecution. Plaintiff's uncited assertions of prosecutorial misconduct are exactly the type of unsupported, flat denials that cannot be used to defeat summary judgment.

A. Absolute Prosecutorial Immunity Protects Acts Associated With The Initiation And Pursuit Of Criminal Charges

Plaintiff, in his briefing, clouds the fact that Forbes was only involved in the Langenour complaint to the extent it evidenced a violation of the release agreement in her Fellis case. Schmitt tries to make her brief conversation with Doris Langenour, a defendant he voluntarily dismissed from the underlying lawsuit, into part of the investigative process for the charges that had not been filed. That is not what the record reflects and is not what happened. Langenour called and talked to Forbes for about a minute *because* she was prosecuting Schmitt for a prior assault. Were it not for Forbes's ongoing criminal case, Langenour would never have

contacted her. Forbes's involvement in the Langenour complaint only served the purpose of informing the trial court of a violation in an ongoing criminal complaint. She is, therefore, entitled to absolute immunity.

Under this well-established doctrine, a prosecutor enjoys absolute immunity from suits for damages (including § 1983 federal claims and state common law claims) when he or she acts within the scope of his or her duties in initiating and pursuing a criminal prosecution. *Tanner v. City of Federal Way*, 100 Wn. App. 1, 4, 997 P.2d 932 (2000); *Imbler v. Pachtman*, 424 U.S. 409, 420-21, 96 S. Ct. 984 (1976).

It is well established that a prosecutor who acts within the scope of his or her duties in initiating and pursuing a criminal prosecution is absolutely immune from liability. *Tanner*, 100 Wn. App. at 4. This rule applies to state common law claims and § 1983 federal claims alike.¹¹ *Tanner*, 100 Wn. App. at 4. Under the facts alleged here, Forbes acted within the scope of her prosecutorial duties in asking Herrin to speak with a victim/witness of Schmitt's potentially criminal conduct, when she was already actively prosecuting Schmitt for a similar crime.

B. Absolute Immunity Allows Our Prosecutors To Exercise Independent Judgment Without Fear Of Retaliatory Lawsuits

¹¹ Plaintiff did not oppose dismissal of his state claims below. Even if he had, dismissal would have been appropriate under either qualified or absolute immunity making those arguments raised for the first time on appeal a nullity.

Prosecutorial immunity is based upon the “concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from [her] public duties, and the possibility that [s]he would shade [her] decisions instead of exercising the independence of judgment required by [her] public trust.” *Imbler*, 424 U.S. at 423. Absent absolute immunity, the potential liability prosecutors would face would impair their vigorous and fearless performance of their duty to enforce the criminal code, a duty that is essential to the proper functioning of the criminal justice system. *Imbler*, 424 U.S. at 427-28. The prosecutor is a central actor in the judicial process whose performance should not be impaired by the threat of liability. *Kalina v. Fletcher*, 522 U.S. 118, 128, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). No amount of immunity, however, can undo the potential harm done by outlandish, unsupported allegations of unethical misconduct like the ones in this case.

C. Absolute Immunity Focuses On The Functions Performed And Is Not Limited To Only Those Acts Done In Court

In defining the scope of prosecutorial immunity, the focus is not on the lawfulness of the conduct at issue, but on the nature of the function performed. *See Kalina*, 522 U.S. at 127. Absolute immunity protects an official from suit for any act done in the course of performing his or her duties, even where willful misconduct is alleged. *Musso-Escude v.*

Edwards, 101 Wn. App. 560, 568, 4 P.3d 151 (2000). Even if Schmitt could do so, a showing that a prosecutor acted wrongly or even maliciously does not defeat absolute prosecutorial immunity. *Imbler*, 424 U.S. at 427 n.27.

Absolute immunity is not limited to the act of prosecuting a case in court, but encompasses actions by a prosecutor occurring outside the courtroom, even before a criminal charge is filed. “[T]he duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.” *Imbler*, 424 U.S. at 431 n.33. Many actions undertaken by a prosecutor in preparing for and initiating judicial proceedings are entitled to the protections of absolute immunity.

We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.

Buckley v. Fitzsimmons, 509 U.S. 259, 272-73, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Forbes merely asked detective Herrin to look into the incident at Langenour’s house; she did not participate in the investigation. *See Buckley*, 509 U.S. at 273-74 (noting that prosecutor who performs investigative functions, such as planning and executing raid on suspected

weapons cache, normally performed by police, is not entitled to absolute immunity).

D. Schmitt Seeks To Avoid Absolute Immunity Even Though Forbes's Actions Were In Furtherance Of Her Ongoing Prosecution Of Schmitt On The Pending Charge Regarding Mr. Fellis

1. All of Forbes's Conduct Was In The Preparation Of A Potential Revocation Proceeding, An Act Protected Under Absolute Immunity

In his complaint, Schmitt faults Forbes for asking a deputy to interview a witness so the deputy could determine if there was probable cause to make an arrest after an unsolicited witness asserted that Schmitt engaged in threatening conduct similar to that for which he was already facing criminal charges. Consequently, even accepting Schmitt's allegations as true, Forbes's request was protected prosecutorial conduct, well within the scope of her duties of both initiating and pursuing the criminal prosecution related to the Fellises. To be clear, there was no investigation conducted by Forbes.

Indeed, the only reason Langenour became aware of Forbes was because she was identified by Fellis as the deputy prosecuting attorney handling the pending criminal case against Schmitt. CP at 79. Thus, there can be no dispute of the fact that Forbes's involvement arose directly from her pursuit of the pending prosecution against Schmitt.

Federal courts have routinely afforded immunity to prosecutors for actions similar to Forbes's. *Ireland v. Tunis*, 113 F.3d 1435, 1445 (6th Cir. 1997) (absolute immunity is even warranted for "investigative acts" if they are undertaken in direct preparation for judicial proceedings); *Springmen v. Williams*, 122 F.3d 211, 213-14 (4th Cir. 1997) ("the fact that in this case a police officer implemented the prosecutor's decision does nothing to change this conclusion" that immunity applies); *Mullinax v. McElhenney*, 817 F.2d 711, 715 (11th Cir. 1987) (absolute immunity applied to function of carrying out factual investigation necessary to prepare a case); *Demery v. Kupperman*, 735 F.2d 1139, 1143-44 (9th Cir. 1984), *cert. denied*, 469 U.S. 1127, 105 S. Ct. 810, 83 L. Ed. 2d 803 (1985) (absolute immunity applied to act of conferring with potential witness in order to determine whether to initiate prosecution).

Here, Schmitt's complaint was focused on Forbes's decision to ask the deputy to interview Langenour regarding Schmitt's conduct relevant to his pending prosecution for almost identical criminal activity. CP at 4. Her request was in furtherance of the prosecution of Schmitt for his assault on the Fellises. Forbes's request is absolutely protected.

The fact that the witness provided information directly to the deputy resulting in the deputy finding probable cause to arrest Schmitt does not affect Forbes's absolute immunity. Consequently, Forbes is

entitled to absolute prosecutorial immunity and the court should reverse the trial court's denial of summary judgment on that basis.

2. Schmitt's Argument Regarding The Nature Of Forbes's Acts Ignores The Record And Misstates The Law

Schmitt's response to Forbes's assertion of absolute immunity consists of three paragraphs in which he primarily relies on *Kalina*, 522 U.S. 118, to claim that Forbes stepped outside of her role as a prosecutor and thereby lost her absolute immunity. However, *Kalina* more accurately stands for the proposition that a prosecutor can lose absolute immunity (but retain qualified immunity) when she ceases to act as an advocate and becomes a witness who makes a false statement of fact in an affidavit supporting an application for an arrest warrant. *Id.* at 126-27, 130-31. Unlike *Kalina*, the prosecutor here did not swear to the truth of any facts. *Tanner*, 100 Wn. App. at 3.

In *Kalina*, a King County deputy prosecutor commenced a criminal proceeding for burglary after personally vouching for the facts set forth in the "Certification for Determination of Probable Cause." *Id.* at 505. The deputy prosecutor's certification contained two false, material factual statements. *Id.* The two statements were necessary for the probable cause determination, but did not need to be made by a prosecutor as they could have been made by any competent witness. *Id.* at 509. Because the

deputy prosecutor acted as a complaining witness similar to a police officer who signs the same type of affidavit, the prosecutor was protected by qualified immunity rather than absolute immunity.

Unlike the prosecutor in *Kalina*, there is no assertion in the current case that Forbes was not seeking out witness testimony, let alone testifying falsely in a charging document. *Kalina* holds only that § 1983 may create a damage remedy against a prosecutor for making *false* statements of fact in an affidavit supporting an application for an arrest warrant. *Kalina*, 522 U.S. at 130-31. In this case, there is no evidence that Forbes made any false or misleading statement or that any statement she made in support of an application for an arrest warrant. Forbes did not sign an affidavit or make any statement under oath in connection with the arrest of Schmitt. She never performed any function other than that of a prosecutor. Consequently, the *Kalina* exception does not apply in this case.

It is absurd to argue that a prosecutor who receives a call from a potential witness regarding a pending case cannot speak to that witness or ask a sheriff's deputy to follow up with the witness, without losing her absolute prosecutorial immunity. Schmitt does not offer any support for the proposition that she does.

Moreover, Schmitt's brief ignores the key undisputed fact: her active prosecution of Schmitt for engaging in similar prior conduct toward Langenour's neighbors at the time of her contact with Langenour and Herrin. Prosecutors are absolutely immune from liability for gathering evidence to present to a trier of fact after an arrest. *See Goldstein v. City of Long Beach*, 481 F.3d 1170, 1173 (9th Cir. 2007) (citing *Broom v. Bogan*, 320 F.3d 1023, 1033 (9th Cir. 2003)). The record is clear: the decision as to whether or not Herrin had probable cause to arrest Schmitt was up to Herrin alone. CP t 243, 177, 179. Herrin's decision was partially based on the conversation he had with Schmitt. CP at 180.¹² Forbes was only collecting evidence to present to the trier of fact after Herrin arrested Schmitt if, indeed, Herrin chose to do so. Langenour only became aware of Forbes when Fellis suggested that Langenour call Forbes because she was the deputy prosecuting attorney handling Schmitt's pending criminal case. CP at 76.

Absent Forbes's original and active prosecution of Schmitt for assault for apparently trying to shoot Fellis's husband (CP at 75-76), there is nothing in the record to suggest that Langenour would have contacted Forbes at all. Forbes's involvement arose directly and solely from her

¹² Schmitt states that Herrin is credible and had no motive to lie. Br. Appellant at 17.

pursuit of the pending prosecution against Schmitt, fell well within the scope of her prosecutorial duties, and is protected by absolute immunity.

3. There Is No Evidence That Forbes Stepped Out Of Her Role As An Advocate For The State In An Ongoing Criminal Prosecution

Schmitt offers six acts that he believes disqualify Forbes for absolute prosecutorial immunity. *See* Br. Appellant at 11. First, plaintiff argues that Forbes is not entitled to absolute immunity because she interviewed a witness. *Id.* What the record reflects is that Forbes talked to Langenour for about a minute. CP at 239, 198. To the extent that there were interviews of Doris Langenour that resulted in Schmitt's arrest, they were done by Herrin. There is no evidence that prior to that conversation, Forbes was aware of what, if anything, in particular Langenour had reported to either the 911 dispatcher or Herrin. CP at 239-40. (Langenour did not tell Forbes what Langenour told police the prior day). Schmitt had no information that would contradict those facts. CP at 277, 282.

Second, Schmitt argues that Forbes cannot avail herself of absolute immunity because she notified the King County Sheriff's Office about what he calls "additional testimony." He offers no legal authority for that proposition. It is part of the prosecutorial function for a deputy prosecuting attorney to ask law enforcement to interview a witness regarding an ongoing prosecution.

Third, plaintiff claims that Forbes induced Langenour's false testimony. There is absolutely no evidence to support that very serious and specious contention. There is no evidence that, at the time Forbes talked to Langenour, she induced any statement from Langenour at all. CP at 277, 282. Forbes was also gone from the office when another deputy prosecuting attorney sought and was granted revocation of Schmitt's pretrial release. CP at 245.

Fourth, plaintiff argues that Forbes does not get absolute immunity because she presented false testimony about an email. He offers no connection between what he characterizes as false testimony on a collateral issue and his arrest by Herrin, his prosecution by deputy prosecuting attorney Walker or the revocation of his pretrial release by deputy prosecuting attorney Anderson.¹³ CP at 245. (Schmitt charged for Langenour harassment by deputy prosecuting attorney Walker during Forbes's vacation). CP at 121. Schmitt does not and cannot connect the email issue to any of his damages as it is completely irrelevant.

Fifth, Schmitt points to Forbes's directing Herrin to re-interview Langenour. Schmitt has submitted no authority (and defendant is aware of

¹³ The only time the issue of an email came up was well after the revocation and new charges had been filed by other deputy prosecuting attorneys in relation to a motion to disqualify Forbes because Schmitt believed her to be a material witness. Forbes denies sending an email (CP at 248-49), Herrin only says he thought Davis had one but did not recall where it came from (CP at 173) and Davis denies receiving one from Forbes (CP at 215).

none) establishing that Schmitt's request that Herrin speak with a witness about an incident related to an ongoing prosecution is not protected by absolute immunity. Instead he repeats the unsupported, conclusory allegations that Forbes was not acting in her capacity as an advocate for the state because she "induced false testimony." *See* Br. Appellant at 11; *see also* CP at 91 (claiming Forbes was not acting in the role of a prosecuting attorney when she directed the investigation of a new charge).

Lastly, Schmitt states that Forbes advised Herrin regarding probable cause and when and how to arrest Schmitt. None of those allegations are supported in the record. The record establishes that when Forbes spoke to Herrin, she only advised him that if he felt he had probable cause to arrest Schmitt for his criminal behavior involving Langenour, then Schmitt could *also* be booked for violating his release agreement. CP at 243, 177. Herrin testified that Forbes did not advise or suggest that there was probable cause or that Herrin should arrest Schmitt. CP at 177.

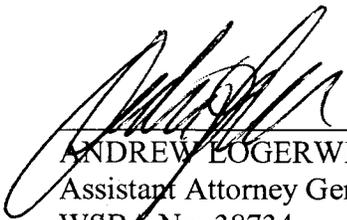
There is no support in the record for either the argument that Schmitt made below or the ones he makes now. Consequently, Forbes is entitled to absolute prosecutorial immunity and the trial court erred in denying the summary judgment motion on that basis.

VIII. CONCLUSION

This Court should affirm the trial court's grant of summary judgment on qualified immunity and reverse the court below and enter judgment for absolute prosecutorial immunity.

RESPECTFULLY SUBMITTED this 23rd day of April 2010.

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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 23rd day of April 2010 in Tumwater, Washington.

Merrie Brumfield
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