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I. INTRODUCTION

Appellants Sara and Cameron Monte and their two minor children seek reversal of the trial court's granting of Defendants' Motion for Summary Judgment, and the resulting Judgment of Dismissal, based upon the granting of said motion, of Plaintiffs' tort claims for False Arrest, False Imprisonment, and Outrage.

In the Brief of Respondents, filed July 25, 2016, Clark County and its Prosecuting Attorney, Anthony Golik, mischaracterize the miniscule evidence in support of prosecution, misapply the burden of proof, engage in purposeless discussion of issues which are not before the Court, and ask the Appellate Court to draw inferences in favor of the moving party on Respondent's Motion for Summary Judgment.

II. REPLY TO ARGUMENTS OF RESPONDENTS

1. Respondents confuse the issue before the Trial Court, and before the Appellate Court.

In the "Counter-Statement of the Case," Respondents appear to raise some sort of hypertechnical argument: That the Appellants have waived their assignment of error as to the Trial

Court's erroneous application the doctrine of Prosecutorial Immunity, because in oral argument, Appellants' counsel referred to one aspect of the underlying causes of action as one for "Warrantless Arrest" as opposed to "Unlawful Arrest".

The distinction is so fine as to be invisible. A warrantless arrest, like any other warrantless seizure, is presumptively unreasonable, and therefore presumptively unlawful. The terms "warrantless arrest" and "unlawful arrest" in this case are synonymous.

Further, in support of this spurious claim of waiver, Respondents refer to the Verbatim Report of Proceedings from the April 15, 2016 hearing. Appellants have never seen the Verbatim Report of Proceedings, because Respondents have failed to comply with RAP 9.5(a)1:

**"FILING AND SERVICE OF REPORT OF PROCEEDINGS --
OBJECTIONS**

(a) ...

(1) A party filing a brief must promptly forward a copy of the verbatim report of proceedings with a copy of the brief to the party with the right to file the next brief."

Even with this Respondent-created disadvantage, a cursory review of Respondent's brief makes it apparent that Respondents are referring to two separate comments which occurred ten pages

apart in oral argument. Also, it is absolutely correct that the issue of whether or not the arrest was unlawful was not before the Trial Court; the only issue before the trial court on summary judgment was whether or not the causing of a warrantless, unlawful arrest is a prosecutorial function.

It was the Respondents who limited the issue to this singular inquiry, by moving for summary judgment on a theory of Prosecutorial Immunity.

2. Respondents confuse the “Scope of Appeal” by arguing that Appellants did not demonstrate in the Court of Appeals that the warrantless arrest violated the Statute of Limitations.

Repeatedly in this appeal, Respondents engage in irrelevancies. Having succeeded in confusing the Trial Court, Respondents employ the same tactic with the Appellate Court. In the procedural posture of Respondents’ Motion for Summary Judgment:

- The lawfulness of the arrest is not an issue to be determined by either court;
- Whether or not the Statute of Limitations had elapsed is not an issue to be determined by either court;
- The bad faith of the prosecutor’s office is not is not an issue to be determined by either court;

- Whether or not probable cause existed for the arrest, or even if so, whether the Washington State Constitution, Article I, Section 7 demands an additional inquiry into the existence of exigent circumstances is not an issue to be determined by either court;
- Whether it was Scott Jackson, as opposed to his speaking agent subordinate, who directed the police to arrest the Appellant is not an issue to be determined by either court.

When a Prosecutor claims Prosecutorial Immunity for his alleged tortious misconduct, He admits the truth of all the accusations against him. Kalina v. Fletcher, 522 U.S. 118, 122, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 261, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993).

Respondents must have overlooked that basic rule of law, when they state at page 18 of the Brief of Respondent:

“The Appellants have presented no evidence that can lead a rational trier of fact to conclude that the Respondents acted outside the scope of their official duties by making a charging decision and communicating that decision to law enforcement agencies.”

That simple, one sentence argument is wrong on so many levels that it clearly demonstrates the confusion which permeates

the Respondents' approach to this appeal.

First, Appellants have no burden of proof. Because the shield of immunity is disfavored, the burden of proof to avoid accountability is assigned to the Prosecutor, Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d (1991).

Second, as Respondents have done from the very beginning of this case in their ill-fated removal to Federal District Court, they mischaracterize the cause of action as premised upon the Prosecutor's charging decision. There is no cause of action presented for "Unlawful Prosecution" or "Unlawful Communication of a Charging Decision."

Third, whether or not any employee of the Prosecuting Attorney acted within or outside of their "official duties" is of no legal significance. An employee's "official duties" are defined by whatever the employer requires, and may or may not involve the exercise of a "prosecutorial function."

The Prosecutor's Office, (and it makes no difference which employee was the guilty party,) told the police that Scott Jackson wanted the Appellant arrested (three and a half years after the alleged incident, and several years after the children had been returned safely to Appellant's home by the courts and DSHS).

Respondents have attempted to cast blame for the unlawful arrest on the police officer who acted at the direction of the Prosecutor's Office. These attempts to water down the import of the Prosecutor's and police officer's communications is an attempt to have this court draw inferences in favor of the moving party, the 180 degree reverse of the required procedure.

When a party to a lawsuit elects to proceed by a Motion for Summary Judgment, the reviewing courts, both Trial and Appellate, construe all the evidence in a light most favorable to the non-moving party, and draw all reasonable inferences in favor of the non-moving party. Meissner v. Simpson Timber Co., 69 Wn.2d 949 421 P.2d 674 (1966), and a plethora of cases too numerous to list.

In other words, all the accusations made in the Complaint, Burns v. Reed, *supra*, and in Plaintiffs'/Appellants' pleadings Meissner, *supra*, are presumed true, for purposes of opposing Respondents' Motion for Summary Judgment.

3. Respondents argument on "Probable Cause" has no place in this appeal. The existence or lack of existence of probable cause was not before the trial court on summary judgment, as the Respondents elected to claim Immunity.

As pointed out above, the legality or illegality of the arrest was not before the Trial Court, nor presented to this Court.

At page eight and nine of its brief, however, Respondents claim that the arrest of Appellant was supported by probable cause. This must be true, they argue, because the judge hearing the initial appearance signed a form saying so.

This section of the Brief of Respondents has no purpose, and requires no response, however out of caution, in case the Court has assigns any significance to Respondents' representation, it should be noted that after making this observation, Respondents premise no argument based upon it. Why they took up their time and the Court's time with this claim can only be an attempt to subconsciously undermine the case on the merits, despite the fact that the immunity issue before the Appellate Court presupposes that the arrest was unlawful and tortious.

The document relied upon by Respondents is "Arresting Officer's Declaration of Probable Cause." (Exhibit A to Second Declaration of Robert W. Novasky, **CP 245**). It contains not one shred of evidence to support a claim of premeditation, an essential element of the crime for which Sara Monte was arrested; the document was presented to the Court when she was in custody, a lay person with no legal representation at the time; the Declaration as to motive and intent relied entirely upon the ramblings of a

mentally ill and incompetent informant, Sara herself, and the Declaration was unconstitutionally deficient and insufficient to establish probable cause, because it was not signed by the affiant, "B. Kipp", (who was not the investigating officer on the case, nor was she the arresting officer, despite the representation on the form.) The name "B.Kipp" is typed on the form, but there is no written signature as required by RCW 9A.72.085 (1)(b) and (3).

An unsigned affidavit of probable cause is invalid and may not be the basis of a finding of probable cause. Groh v. Ramirez, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004), United States v. Pickard, 207 F.2d 472, 475 (9th Cir.1953) State v. Tye, 248 Wis.2d 530, 636 N.W.2d 473 (2001).

Further, an initial judicial determination of probable cause by a judge in a criminal case is irrelevant as to the ultimate issue of reasonableness of an arrest in a civil case based on false arrest. The United States Supreme Court has held, in denying immunity for False Arrest:

"In Leon, (United States v. Leon, 468 U. S. 897 at 922, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984) we stated that:

"Our good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization

The analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause, and that he should not have applied for the warrant. If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. It is true that, in an ideal system, an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should."

Malley v. Briggs, 475 U.S. 335 at 346, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)

Respondent's reliance upon the erroneous and irrelevant finding of probable cause at Sara Monte's preliminary appearance in 2014 may be tested in further proceedings in the trial court, but is not an issue for this court at this time.

4. Respondents again focus on legal authority that has no applicability to the cause of action in this case.

From the middle of page 15 through page 18, Respondents purport to argue controlling law. What the Respondents fail to do, however, is to cite any case whatsoever holding that when a Prosecutor takes a "team approach" to an arrest by making himself part of the arrest team, he or she is performing a prosecutorial function.

Respondents have interjected the phrase “official duties” into their argument, which is not the test for Prosecutorial Immunity. The actual test, according to the United States Supreme Court, is that the conduct is: “intimately associated with the judicial phase of the criminal process,” Imbler v. Pachtman, 424 U.S. 409, at 430, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). Mr. Jackson’s or Mr. Golik’s “official duties” might include doing performance reviews of deputy prosecutors, or turning the lights out when they are the last person to leave the office at night, but those “official duties” are not “intimately associated with the judicial phase of the criminal process.”

The three and half pages devoted by Respondents to a Prosecutor’s immunity when filing charges are wasted time , paper and ink as relates to the issue before this court. Clearly, an arrest is a police function, prior to occurrence any action intimately associated with the judicial process.

Respondent argues that the recent case of McCarthy v. Clark County, 193 Wn. App. 314 (2016) has some applicability to this case. It does not.

The Prosecutor in that case did not direct the police to make an unlawful arrest of the Defendant after prosecution was

prohibited by law and prior to invoking the judicial process; she prepared her pending case by interviewing witnesses and developing evidence of additional offenses, in order to charge additional crimes, in a case which had already been filed and was already ensconced in the judicial process. On its unique facts, McCarthy stands for the proposition that a Prosecutor who develops evidence to supplement a previously made charging decision, in a case that has already been filed, is engaged in a prosecutorial function, and nothing more.

5. Respondents' seek to create evidence where none exists.

Although it is completely irrelevant and has no place in this appeal, Appellants feel compelled to address a representation by Respondents in their brief. At page 9, paragraph 4 of their brief, Respondents state:

“Upon further investigation of Monte’s argument, Respondents analyzed the statute of limitations issue as it pertained to attempted murder. Finding that the law was unclear, Respondents agreed to the dismissal shortly thereafter.”

As in the “probable cause” discussion in Respondents’ brief, this appears to be another subtle attempt to justify and legitimize

the behavior of the Prosecuting Attorney's employees. There is no evidence in this record to support the proposition that any Prosecutor thought the law was unclear. The Prosecutors carried on the unlawful prosecution, seeking to exact a plea bargain, after being advised by independent counsel that their case was hopeless. **CP 51**, Complaint, Declaration of Roger A. Bennett, **Exhibit 15**. If the Prosecutors thought the law was unclear, they would have litigated it—they had nothing to lose.

6. Respondents ignore the concepts of causation and agency.

Respondents sprinkle throughout their brief the notion that the Prosecuting Attorney is blameless for the arrest, and that the Chief Criminal Deputy was oblivious to what the police were up to. Respondents seek to cast blame on the police officers who made the physical arrest.

The Complaint, **CP 51**, (to the Declaration Roger A. Bennett, **Exhibit 15**) alleges that the unlawful arrest was caused by the Prosecuting Attorney, through his employees and agents, and those acting at his direction and at the direction of his deputies, agents and employees. There is nothing novel here. The Prosecuting Attorney is liable for the conduct of persons who act at the direction of his office. The series of e-mails discussed in the

Opening Brief of Appellant demonstrates the sequence of events leading up to the arrest, as opposed to the one or two e-mails that Respondents parse out of the total, seeking to distance themselves from responsibility.

The obvious truth from the evidence presented is that all the police were hesitant to arrest Sara Monte. The original officer on the scene in 2010, Deputy Hamilton, did not arrest her; he called an ambulance (**CP 51**, Declaration of Roger A. Bennett, Report of Hamilton, **Exhibit 2**). The primary investigator, Barry Folsom, went even further, and refused to arrest or even do a probable cause statement in 2014 (**CP 51**, Declaration of Roger A. Bennett, **Exhibit 11**, e-mail from Scott Jackson).

The eventual arresting officer, Spencer Harris, questioned the decision to arrest, and did not arrest until after he was advised that it was what "Scott" wanted, due to "fear with summoning her in" (**CP 51**, Declaration of Roger A. Bennett, **Exhibit 13**).

III. CONCLUSION

In Burns v. Reed, supra, the Prosecuting Attorney advised a police officer that probable cause can be evidenced by relying on

the statements of a hypnotized Defendant. In reliance upon such hypnosis-induced statements, the Prosecuting Attorney advised police to arrest the Defendant without an arrest warrant.

The Prosecutor was entitled to no Prosecutorial Immunity.

In Monte v. Golik and Clark County, the Prosecuting Attorney advised the police that probable cause can be found in the irrational ramblings of a mentally ill Defendant. In reliance upon such irrational statements, the Prosecuting Attorney advised the police to arrest the Defendant.

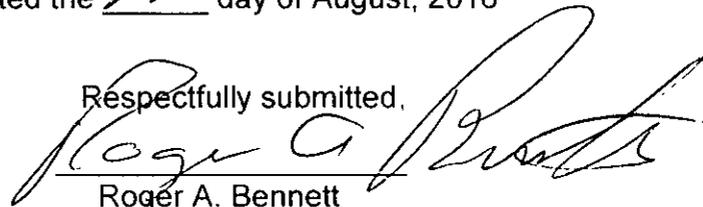
The Prosecutor is entitled to no Prosecutorial Immunity.

The cases are indistinguishable, for purposes of determining whether or not the Respondents have met their burden of showing that a warrantless arrest is a prosecutorial function

Appellant respectfully requests that the Court of Appeals reverse the trial court's grant of summary judgment which dismissed Plaintiffs' claims, and remand the matter for trial.

Dated the 22nd day of August, 2016

Respectfully submitted,



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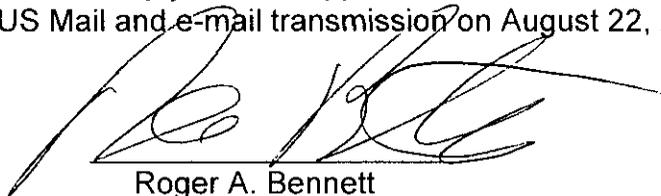
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CERTIFICATE OF SERVICE

I declare, under penalty of perjury and RCW 9A.72.085 that I served a copy of this Reply Brief of Appellants on the above named attorneys, by US Mail and e-mail transmission on August 22, 2016.



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