

71869-0

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No. 71869-0-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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HAROLD WRIGHT,

Appellant,

vs.

PIERCE COUNTY, a municipal corporation; et. al,

Respondents.

FILED  
APR 11 2013  
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SUPERIOR COURT  
PIERCE COUNTY  
WASHINGTON

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APPELLANT'S REPLY BRIEF

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ORIGINAL

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## 1. Respondents Ignore Disputes Of Fact

Respondents make no meaningful reply to Daley's expert declaration on the Deputies' interview tactics. Those matters are set forth in the opening brief; Mr. Wright need not repeat himself.

On Kooiman and the Prosecutors' Office, the Failey/Ko interview rises and falls on the admissibility of Barbara Corey's declaration of admissions made by DPA Assurer. The rest does not. Pierce County destroyed the 911 tape.

If Corey's declaration of what Ausserer said is admissible on Failey/Ko, there is a question of fact. Respondents rely on applying Judge Settle's finding of inadmissibility. That fails. His ruling provides no estoppel.<sup>1</sup> Infra. Further, a Washington Judge must make an independent consideration because even for identical rules, they are interpreted by different case law. State v. Brown, 113 Wn.2d 520, 547-548 (1989).

Pierce County provides neither analysis or authority why Ausserer's admissions are not of the party opponent Pierce County. They only argue because Mr. Wright's cases involves an attorney making what they call "procedural" admissions, Ausserer is not a speaking agent.

First, that is a manufactured distinction; case law recognizes it not, it is contrary to practice. If a defense attorney admits in opening the defendant was

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<sup>1</sup> Related, respondents assert Washington's party opponent exception is more stringent than the FRE's. They never explain why. Regardless, even if so it is of no weight. Judge Settle's evidence ruling is not estoppel infra. nor it is binding supra. Mr. Wright here has only argued Washington law.

negligent, that binds the client on the “substance.”

Second, even within their argument, Ausserer’s admissions were procedural: Pierce County’s Brady duty and its destruction of exculpatory Brady evidence. If the test is procedural, Ausserer’s statement meets it.

Third, it defies logic the APA is not the speaking agent of the County on matters it is prosecuting.

Generally, an attorney representing a client in litigation is authorized to speak for the client concerning that litigation.

State v. Williams, 79 Wn.App. 21, 28 (1979). The limitation of “generally” refers to when “the attorney is pleading alternatively or inconsistently on the client's behalf.” Id. That does not apply here.

Felony charges are captioned with the State as plaintiff. That is of no import: (1) Washington makes no charging decisions. The County is the party in interest on the charge; (2) the party opponent exception requires the admission is offered against a party in the litigation at bar, not in a previous litigation. Pierce County is the party APA Ausserer was the speaking agent of when he made the statements for Pierce County.

Someone must be the speaking the speaking agent of Pierce County on evidence production in matters it is prosecuting. Pierce County does not suggest who that is if not an APA prosecuting the case.

Further, as a basic application of the rule Ausserer qualifies. There is no Mr. or Ms. Pierce County; in these matters the Prosecutor is always the speaking

agent. An APA's statements under delegated authority are "the party's own statement," if not directly in "a representative capacity." ER 802(2)(d)(i). Pierce County does not deny Ausserer was "authorized" to speak on its behalf to Corey on this issue. ER 801(d)(2)(iii). Ausserer was not merely "authorized," he and Pierce County were duty bound by Brady to make those binding statements. Finally, Pierce County does not deny Ausserer was "within his scope of authority" when he made the statement. ER 802(d)(2)(iv). Their denial he made the statement at all is not a denial of authorization to make it, if made.

Space prohibits Mr. Wright replying to each factual misstatement. Further, he lacks space to point out each assertion of material fact with no citation. Their brief is rife with "facts" they rely on and require to prevail that are neither cited or in the record. It is assumed this Court will identify those as they are obvious. But as one example, throughout they argue the Criminal Trial Court conducted an in camera review of the Failey/Ko interview and found it work product. Worse, they assert this happened in front of Mr. Wright's criminal defense attorney and Mr. Wright's arguments to the contrary here are lies.

There is no evidence the criminal court reviewed the Failey/Ko interview. A transcript shows a review of something. However, respondents made no record what that was and there is clearly no record Mr. Wright's attorney knew what it was. To even assert that is frivolous as the whole point of the alleged review and non-production was it was supposedly work product.

Respondents never produced that material. They made no record on summary judgment. They cannot hide something behind a privilege and rely on its content as evidence they did nothing wrong. See Bittaker v. Woodford, 331 F.3d 715 (9<sup>th</sup> Cir. 2003) explaining the choice: “If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.” Id. at 720. Further, as a matter of CR 56(e) they have no record demonstrating there was an in camera review. There is no order or docket entry the interview was reviewed. The only so-called evidence is Kooiman’s assertion. However, that is as Mr. Wright already pointed out hearsay. It is not hearsay for respondents to point to a transcript to argue a review of something took place. But, it is hearsay and speculation<sup>2</sup> for Kooiman to speak on behalf of the Criminal Judge of what she supposedly reviewed that the Judge did not put on the record.

Moving on, respondents assert Mr. Wright falsely argues there was no statement by Failey reconciling her admission to Ko Mr. Wright was not in the room, and Kooiman’s declaration of probable cause to give Kooiman a good faith basis to assert probable cause. Respondents’ counting all statements in the case to argue they support Kooiman’s declaration ignores to critical time. Failey gave (1) several statements to the Deputies, after that she gave (2) her statement to Ko Ausserer conceded demonstrated Mr. Wright was not in the room, and

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<sup>2</sup> It also lacks foundation. Assertions that do not satisfy admissibility do not create a question of fact. CR 56(e).

with no other statements disclosed reconciling them Kooiman certified and obtained a finding of probable cause. That Failey later got back on board does not change the fact when Kooiman swore probable cause Failey provided no reconciling statement and what she last said, which Kooiman hid at home, was Mr. Wright was not in the room.

Mr. Wright's relating Failey's statement to Ko as conceded by Ausserer is not hearsay. It is not offered for the truth of the statement as much as for Kooiman's state of mind her cause certification was a sham. Second, to the extent it is hearsay, respondents concealing the Failey/Ko statement provides an exception. See Cf. State v. Dobbs, 167 Wn.App. 905, 915 (2012) (procuring the statement's absence). Mr. Wright would not rely on Ausserer's statement to Corey if it was not hidden at Kooiman's home and to date to not produced.

Respondents argue because their interpretation of an email Ausserer wrote to Corey about the Failey/Ko statement conflicts with Corey's testimony, it is "undisputed" what Ausserer says is true. A party's own email is another contradictory statement. It is more as likely Ausserer wrote what he needed to in an email and confided to Corey on the phone what actually happened. His email resolves no dispute of fact.

Finally, and the appeal does not turn on this but it illustrates their flawed briefing, at fn. 3 respondents decry Mr. Wright mentioning below Ms. Failey by name but consistent with the standards they brought to prosecuting Mr. Wright

will only refer to her here as “the victim.” Respondents at summary judgment in their memo used Ms. Failey’s name 26 times and many more times than that in their declarations. Respondents’ false hysteria and tactics here, on summary judgment, and during the criminal proceedings are seen for what they are.

**2. Respondents’ Estoppel Argument Exaggerates The District Court Order And Turns The Meaning Of Summary Judgment On Its Head**

Summary judgment does not resolve facts. The import of summary judgment is the finding no action lays or questions of fact exist. Respondents’ argument that to find no cause laid on the 42 USC 1983 claim the District Court resolved facts that must be applied to Mr. Wright’s state torts having different elements puts summary judgment on its head.

Collateral estoppel may bar a claim where the dismissal of one claim or theory inherently defeats the elements of another. However, it does not occur because dismissal resolved facts, and those resolved facts are applied to the elements of another claim; it is that losing one claim is inherently incompatible with the allegation of another. Respondents cite such a case (unpublished) reaching that conclusion; albeit, respondents ignored the distinction.

The only matter adjudicated by Judge Settle was the 1983 claim, finding no violation of the US Constitution. That creates no estoppel on Mr. Wright’s State claims because a finding conduct does not violate the US Constitution is not mutually incompatible with his State claims.

As a work-around, respondents attempt to bootstrap Judge Settle's unnecessary factual discussion, see FRCP 56, into findings of fact to argue preclusive effect over facts and claims not adjudicated.

Respondent's argument FRCP 56 does not prohibit findings of fact, even if true, does not transform Judge Settle's Order into them. The rule on findings of fact, adjudicated fact, is FRCP 52. Respondents do not deny Judge Settle's Order does not comply with FRCP 52. His Order, respondents do not dispute, is the same addressed in US v. ALCOA, 2 FRD 224, 231 (1941) explaining a Judge's discussion and impressions of evidence are not findings because they appear in an order.

Additionally, for respondents to merely point to FRCP 56 and assert it does not prohibit findings of fact ignores case law. While FRCP 56 contains no explicit prohibition, Federal Case Law does. Debunking the notion factual discussion on Federal summary judgment constitutes an adjudication or finding a fact, the 9<sup>th</sup> Circuit holds:

Findings of fact on summary judgment perform the narrow functions of pinpointing for the appellate court those facts which are undisputed and indicating the basis for summary judgment; they are not findings of fact in the sense that the trial court has weighed the evidence and resolved disputed factual issues.

Heiniger v. City of Phoenix, 625 F.2d 842, 843-844 (9<sup>th</sup> Cir. 1980) (underline added). See also Pacific Service Stations v. Mobil Oil, 636 F.2d 306, fn 3. (Em. App. 1980). Washington goes even further:

Findings of fact and conclusions of law are not necessary on summary judgment, CR 52(a)(5)(B), and, if made, are superfluous and will not be considered by the appellate court.

Donald v. City of Vancouver, 43 Wn.App. 880, 883 (1986). The relationship between Judge Settle and the Trial Court was not appellate but the point is clear: the only import of a summary judgment order is its legal conclusion. A Judge's factual commentary is of no weight. Id.

The foregoing is sufficient. Judge Settle's discussion independent of his legal ruling the U.S. Constitution was not violated, creates no estoppel on Mr. Wright's state tort claims or the admissibility of evidence under Washington's evidence rules. For completeness, the case law cited by Respondents will be addressed. First, respondents cite Washington Mutual v. US, 636 F.3d 1207 (9<sup>th</sup> Cir. 2011) holding estoppel prevents "relitigation of both issues of law and issues of fact actually adjudicated in previous litigation between the same parties." Id. at 1217. Respondents ignore "actually adjudicated." Summary Judgment adjudicates questions of law, not fact.

Second, respondents cite Allen v. McCurry, 449 US 90 (1980) for the unremarkable concept, stated in Mr. Wright's opening brief, facts "necessary to a judgment" are eligible to give rise to preclusion in later suit. That merely establishes the condition precedent the fact must have been "necessary" to the judgment it was adjudicated in. Even if a necessary fact, it still must be adjudicated; summary judgment orders do not adjudicate facts. Heiniger.

Third, respondents cite Gausvik v. Abbey, 126 Wn.App 868 (2005). Estoppel was found because plaintiff litigated the precise same issue in first Federal then State Court: whether his claim was barred by Washington's statute of limitation. Id. at 884. That is not this case.

Respondents cite a variety of cases<sup>3</sup> to rebut an argument never made, asserting Mr. Wright contends a summary judgment order lacks finality. Mr. Wright never said that. Nor does he ignore, as respondents assert (p. 15) "the significant distinction between a motion that is granted, and one that is denied." A granted summary judgment order may have estoppel effect. Respondents waste time arguing generic, undisputed concepts. The issue is not whether a summary judgment order may give rise to estoppel; it is if this one does.

Instead of addressing that, respondents' argument draws lines connecting the District Court Order to here. That is of no weight. Respondents' task on summary judgment was not to cite where Judge Settle discussed a fact, it was to point in the record the absence of a question of fact. They did not do that.

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<sup>3</sup> For instance, respondents cite Brownfield v. City of Yakima, 178 Wn.App. 850 (2014) and Cunningham v. State, 61 Wn.App. 562 (1991).

Brownfield is an unpublished opinion; Mr. Wright moves to strike its citation. Exercising caution and addressing an issue in the event a motion to strike is not granted should not be a reason to deny the motion. But, Mr. Wright will tread lightly and say only that Brownfield is the unpublished case mentioned above where the Court found estoppel based on a prior summary judgment order not because it adjudicated facts but because the dismissal of one claim inherently mooted elements of a claim later asserted in State court. Notably, estoppel was not applied to state claims where the elements were different or did not conflict with the dismissed claim despite the fact the facts relied on for the claims were the same; that is an argument respondents rely on heavily and elevate as being the determinative issue here. Their citation to Brownfield illustrates their error.

**3. Respondents' Statute Of Limitations Argument Ignores The Basis Of Mr. Wright's Claims**

**a. DISCOVERY RULE**

Respondents make no cogent reply regarding the discovery rule. They largely ignore Davis v. Clark County, 966 F.Supp.2d 1106, 1139 (WD Wash 2013); the statute bars what evidence may be relied on. Without authority they assert "newly discovered evidence must be much more than just arguably relevant." Mr. Wright may agree: the evidence must color the claim. When it does, Davis explains consistent with the discovery rule, the claim is not barred. Mr. Wright's discovered evidence does, as he explained in his opening brief.

Respondents' argument that because Judge Settle indicated none of the destroyed evidence would have changed the outcome has no weight because Judge Settle said it. Heiniger. Yet, that is the only argument they make. First, even if true that does not dispose of all of the claims. Second, it is novel to assert (as only one example) evidence Ms. Failey initially gave an incompatible version and only after being coached up by the Deputies gave a completely different version might may not have changed the outcome. Barbara Corey's as both a fact witness and expert explains why the destroyed evidence (all of it) mattered on every level from opening and closing to direct and cross examinations. At the least, a question of fact lays.

**b. EQUITABLE TOLLING**

Respondents' only argument equitable tolling does not lie is "there are

no (bad faith, deception of false) assurances here.” As Corey explained, for six years the respondents falsely certified they identified and produced all Brady material. Arguably they could not produce evidence destroyed but they did not even identify it. They concealed its former existence despite their knowledge. That is quintessentially “bad faith, deception, (and a) false assurance.”

**c. ACCRUAL**

Respondents refuse to address the undeniable fact Mr. Wright’s claims rise and fall on the fact of an extant conviction. Once convicted, a jury determination he committed the crime, no claims accrued.

As to malicious prosecution, the conviction’s presence barred the prima facie fourth element, requiring “the proceedings terminated on the merits in favor of the plaintiff, or were abandoned.” Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 497 (1942). That did not happen until December 2013 when respondents dismissed all charges.

Similarly, the conviction barred the prima facie element of proximate cause/damage on every claim. For example, being convicted the Deputies’ misconduct was not the proximate cause of damage; it did not matter what they did: Mr. Wright committed the crime.

Mr. Wright’s claims dependent on the invalidity of conviction are unlike claims independent of conviction; for instance: excessive force. If an officer uses excessive force, that is true regardless of conviction. Neither reversal or

dismissal must take place to accrue the claim; it accrued when force was applied.

This dichotomy was briefed in Mr. Wright's opening brief and explained by Heck v. Humphrey, 512 US 477 (1994) and Wallace v. Kato, 549 US 384 (2007).<sup>4</sup> The two species of claims are those contingent on the validity of the conviction and those independent of it. Heck, 512 US at 486-487 and Wallace, 549 US at 389-390. When a claim relies on a conviction's invalidity, it does not accrue until it is set aside or the case dismissed. In the words of Heck, the Court "den(ies) the existence of a cause of action" until the wrongful conviction occurs and is reversed. Heck, 512 U.S. at 489-490.

Mr. Wright dissected Gausvik in his opening brief and need not repeat that full analysis here: (1) its brief discussion of accrual was dicta, defendants were immune; (2) it addressed accrual in a negligent investigation claim, not made here; and (3) most importantly its discussion was if RCW 4.16.190 tolled the statute while plaintiff was incarcerated; the case really had nothing to do with and never addressed whether the claim accrued – given the claims made that was apparently assumed. Gausvik has little to do with this case. To the extent it is stretched to apply, as already briefed it was wrongly decided, internally inconsistent (see Mr. Wright's dissection the suggestion a plaintiff could sue then move to "stay," p. 47, fn. 2), and is contrary to long standing basic principles of

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<sup>4</sup> Most fundamentally, respondents never deny the logic of Heck or explain the illogic of Gauvsik. To the extent Mr. Wright argues Gauvsik is wrongly decided respondents have provided no response; they only myopically deny Heck and endorse Gausvik. That is not persuasive.

accrual and the elements of malicious prosecution.

As to respondents' argument on Gausvik v. Abbey, again, they do not allow facts to get in their way of making an argument. At page 23 they assert Mr. Wright "inaccurately" states Gausvik does not address Heck. They say Gausvik "mentions Heck five separate times." Sort of.

Gausvik v. Abbey is the only Washington case on this issue; that was the case addressed by Mr. Wright. That case fails to address Heck or its logic, not mentioning it once. Gausvik v. Perez, 239 F.Supp.2d 1067 (ED Wash. 2002), not the case referred to, mentions Heck. When it does, it endorses Heck.

It is true as respondents say, Gausvik v. Perez found it could not find "any Washington cases" applying Heck. However, the spin respondents put at p. 24 of their brief of that limited statement, stretching it to Gausvik v. Perez concluded (in respondent's words) "Washington has never followed" Heck, creates a false impression. It is accurate that up to that time Heck never came up. There is a universe of difference between saying Washington "does not follow" a case and acknowledging the fact it had not yet been addressed.

To the extent Gausvik v. Perez discusses Washington accrual it is of no weight. Like Gausvik v. Abbey, it addressed if RCW 4.16.190 tolls the statute while incarcerated after sentencing. 239 F.Supp.2d at 1104. Applying it, like Gausvik v. Abbey, the Court found tolling only before sentencing as the statute says. That has nothing to do with this case; Wright does not rely on RCW

4.16.190. He need resort to tolling because he filed within three years of accrual.<sup>5</sup> In both plaintiffs made claims the gist of which were not contingent on the invalidity of the conviction. That is unlike Mr. Wright's claims.

Lastly respondents cite Davis v. Clark County, 966 F.Supp.2d 1106 (WD Wash. 2013). Mr. Wright cited that in his opening brief, anticipating the arguments respondents make based on it. He need not repeat that here.

In Davis plaintiff alleged "negligent investigation." Mr. Wright does not. Davis's claims had no element the proceedings terminate in his favor. That is present in Mr. Wright's claims. Davis (and Gausvik) are apples and oranges. Davis, like Gausvik, provides no support because it is distinguishable on its facts even if we set aside what is respectfully suggested to be its lack of logic as explained by Heck (something Judge Bryan knew when he called the result "unfair") and internal inconsistency a plaintiff must sue on an unaccrued claim, racing to the courthouse to file a motion to stay to beat a motion to dismiss.

#### **4. Respondents Have No Immunity**

Respondents' arguments ignore the misconduct alleged and argue assuming all disputes of fact are resolved in their favor. For instance, they argue

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<sup>5</sup> Actually, he filed before claim accrual because in an over abundance of caution Mr. Wright filed after reversal and while respondents continued to prosecute him. Arguably, respondents should have moved for dismissal then based on the criminal proceedings had not concluded in Mr. Wright's favor. Instead, they moved to stay the civil case pending their retrying Mr. Wright – apparently betting on the ultimate conviction to make, in their minds, the issue that much more clear. If this court would like to take Mr. Wright to task for filing a case prematurely so be it. But, it is suggested what this court should not do is take him to task for filing it late.

at p. 30 “it is undisputed” the Failey/Ko interview “never left her office.” That is disputed. Arguments relying on resolving disputed facts require no response save addressing the facts themselves.

Respondents spout generalities: prosecutors are immune for the decision to prosecute (p. 28), suppression of evidence is immune (p. 30). As broad statements, they are agreed. Mr. Wright makes no such claims.

Mr. Wright does not allege liability simply for the decision to prosecute; he alleges it for procuring probable cause by improper means and maliciously pursuing him on it. There is no immunity from a malicious prosecution claim when prosecution is initiated with a “want of probable cause for the institution or continuation of the prosecution.” Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 497 (1942). Respondents continue to ignore neither a finding of probable cause or conviction provide a defense when either are “obtained by fraud, perjury, or other corrupt means.” Hanson v. City of Snohomish, 121 Wn.2d 552, 559-60 (1993). Respondents argue, including p. 36, the probable cause finding and the conviction bar the claims. Those arguments everywhere ignore Peasley, Hanson, and Mr. Wright’s antecedent evidence both probable cause and the conviction were based on the destruction of evidence constituting fraud, perjury and corrupt means.

Related, at p. 37 respondents assert the Deputies are not liable because Kooiman’s decision to prosecute constitutes “a superseding or interceding

cause” of damage, citing Smiddy v. Varney, 665 F.2d 261 (9<sup>th</sup> Cir. 1981), tactically omitting the next sentence (and all cases applying the rule) that “the presentation by the officers to the district attorney of information known by them to be false” bars that defense. Id. at 266. The Deputies’ interview tactics known to only result in false consistencies and destruction of inconsistencies constitutes the submission of false evidence; a question of fact exists. Further, this argument of superseding cause was not raised below. They may not raise this for the first time when Mr. Wright had the right to respond below.

Given the interview tactics universally condemned as having as their only purpose the elimination of witness inconsistencies and creating evidence of consistency (explained by Daly), combined with the destruction of evidence and Kooiman’s certification of facts incompatible with facts she knew but did not disclose, the finding of probable cause and conviction were obtained by “fraud, perjury or other corrupt means.” Hanson. At the least, a question of fact lays.

If that is not true, Mr. Wright asks why have respondents never explained their being compelled to dismiss all charges when the only “difference” was the discovery by Mr. Wright of the destroyed evidence (contents of the 911 tape and constructive destruction of the contrary Faiely/Ko interview). Respondents always knew those facts. It is not their knowledge that changed: it was only that they were found out.

Thus, Mr. Wright does not as respondents assert ignore Imbler v.

Pachtman, 424 US 409 (1976) finding knowledge of “witness falsehoods” or “materiality of evidence not revealed” are intrinsic to prosecutions. It is more accurate to say Imbler acknowledged it was the first case to consider immunity here (“This case marks our first opportunity to address the 1983 liability of a state prosecuting officer.” Id. at 420) and since there have been many cases involving the conduct herein Mr. Wright cites and relies on; cases respondents ignore in favor of citing undisputed general statements.

Spring boarding off their broad statement from Imbler, petitioners segue (p. 29) to argue suppression is immune. Mr. Wright has never contended otherwise. However, this case is not a Brady violation failure to produce case.<sup>6</sup>

It is undisputed the 911 tape was destroyed. Destroying evidence of witness inconsistencies and creating evidence of consistency by corrupt interview tactics is evidence destruction. Suppression immunity is not available for destruction. The only argument suppression immunity may be heard on is the Failey/Ko statement but there is a question of fact whether it was constructively destroyed.

The admissible evidence is Kooiman did not suppress the Failey/Ko interview; she secreted it at her home. Corey, a qualified expert in Prosecutorial conduct, explains why that is not suppression, it is constructive destruction.

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<sup>6</sup> Related, at p. 29 respondents argue Kooiman has absolute immunity for using false testimony at trial. Mr. Wright’s amended complaint makes no such allegation. This is yet another straw man. The falsity was in obtaining probable cause.

Sending aloft exculpatory evidence in a satellite does not destroy it. However, it effectively does: it is removed from relevant existence for production or discovery by a different, ethical, prosecutor to produce it. That happened here.

It is conceded Washington has not addressed this. However, Washington puts substance over form. It is a question for the jury whether a DPA secreting evidence at home constitutes effective destruction. There is no difference between taking a match to evidence and putting it where it may not be found.

Respondents cite Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675 (9<sup>th</sup> Cir. 1984) asserting it held destruction after initiating the case immune. Respondents ignore in Ybarra the evidence was a double wide mobile home with no physical place to keep it, destroyed only after the conclusion of the investigation and presumably after it was documented. Id. at fn. 4. There was no allegation of suppressed pictures of it. The act immune was destruction of a double wide mobile home after the investigation, not wholesale evidence destruction. Respondents stretch Ybarra beyond its facts and holding.

A variety of Federal cases post Ybarra reject immunity for destroying evidence. See Yarris v. County of Delaware, 465 F.3d 129 (3<sup>rd</sup> Cir. 2006)<sup>7</sup> (“while deciding not to furnish the prosecution's evidence to the defense may be an act of advocacy, throwing the evidence away is not such an act.” Id. at 137);

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<sup>7</sup> Respondents at p. 30 argue Mr. Wright’s citation to Yarris “actually buttresses defendants’ (sic) position” and cite the portion addressing mere suppression. Mr. Wright does not allege liability for mere suppression and relies this court sees respondents’ continually misstating his position for what it is.

Masters v. Gilmore, 663 F.Supp.2d 1027 (Colo. 2009); Spencer v. Peters, 907 F.Supp.2d 1221 (WD Wash. 2012); Odd v. Malone, 538 F.3d 202, 211 (3<sup>rd</sup> Cir. 2008) (“by virtue of their egregiousness, some acts fall wholly outside the prosecutorial role no matter when or where they are committed.”); Kahanna v. State Bar of Cal., 505 F.Supp. 633 (ND Cal. 2007) Carbajal v. Seventh Judicial Dist., 2011 WL 5006992 (Colo. 2011).<sup>8</sup>

Masters is notable for respondents’ reliance on Imbler. Masters considered evidence destruction in the context of Imbler and found no basis to conclude “a prosecutor's alleged destruction of exculpatory evidence falls within the framework for absolute prosecutorial immunity set forth in Imber and subsequent cases.” 663 F.Supp.2d at 1040. The Court denied immunity for the allegation of destroyed evidence. Id.

Respondents argue absolute immunity for failing to train but continue to grossly misstate Van de Kamp v. Goldstein, 555 US 335 (2009) as they did below; Mr. Wright previewed this at p. 36 of his brief. Due to space, Mr. Wright will not repeat himself. Van de Kamp only held a supervisor’s immunity is derivative of his underling’s. Because there the underling had immunity the supervisor had immunity for failing to train against the misconduct. Id. The case did not establish an independent “administrative training” immunity as

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<sup>8</sup> This is an unpublished opinion but falls within the federal rule allowing citation to unpublished opinions after a certain date. It is believed case law may be cited to the Courts of Appeal if it may be cited in the issuing jurisdiction. If not, Mr. Wright asks this court disregard the citation.

respondents assert. See Atherton v. District of Columbia Office of Mayor, 567 F.3d 672 (CADDC 2009) and Schneyder v. Smith, 653 F.3d 313 (3<sup>rd</sup> Cir. 2011), both debunking this argument of respondents based on Van de Kamp.

The only intention of Van de Kamp was to prevent a plaintiff end running immunity by alleging a failure to train against conduct itself immune. Under Van de Kamp and its progeny, the respondent principals' immunity is derivative of their agents Kooiman and the Deputies. If the agents are immune from their misconduct, the principals are immune for failing to train against it. If not, the principals are not. It is that simple.

#### **5. Respondents' Negligence Arguments Ignore The Claims**

Mr. Wright does not allege "negligent investigation." Defeating that strawman does not sustain Respondents' summary judgment. Mr. Wright alleges destruction and creation of evidence by Kooiman and the Deputies, and negligence by the principals for allowing that to happen.

Respondents' argue, pp. 38-40, no negligent supervision, training, or retention claim may be made because they concede scope of employment. They overstate the rule and ignore the evidence. The rule is only such claims are "generally improper" when the employer concedes scope of employment. LePlant v. Snohomish County, 162 Wn.App. 476, 480 (2011). The reason they are only "generally improper," not per se barred, is illustrated by this case: the principal cannot have it both ways.

The principals (Pierce County, Prosecutors, and Sherriff) cannot both assert the misconduct alleged is not tolerated and trained against, e.g., not an authorized part of employment, and assert it was within employment. It must be one or the other. The subterfuge of the argument is understood by recognizing Pierce County's "concession" the conduct was within employment is not a concession the *misconduct alleged took place* and *that* was within employment. Instead, they deny the alleged misconduct, allege what *they contend* took place, and concede only *their version of events* was within employment.

Assuming Mr. Wright's evidence is believed by the jury, both the employee and the employer may be liable: the employee directly for their misconduct and the employer because "negligence on the part of the employer is a wrong to the injured party, entirely independent of the liability of the employer under the doctrine of respondeat superior." Niece v. Elmview Group Home, 131 Wn.2d 39, 48 (1997).

**6. Respondents Offer Essentially No Argument On Malicious Prosecution**

Respondents offer one page of argument, pp. 43 – 44, on what is really the entire lawsuit: malicious prosecution. Putting all their eggs in one basket, they argue the finding of probable cause and jury verdict insulate them. As now said many times: respondents ignore Mr. Wright's claim is not the prosecution based on slim but proper evidence was malicious but that probable cause and the conviction itself were based on "fraud, perjury, or other corrupt means."

Hanson, 121 Wn.2d at 559-560. Respondents' attempt to dissect various phases of trial as constituting "multiple findings of probable cause" is seen for the exaggeration it is.

The only response to the claim is at p.44 regarding "malice." But, they offer neither evidence or authority. Instead, they invoke the same tired and false hysteria that Failey was Mr. Wright's "student" when she was nothing of the sort and belittling the reversal of the conviction as a "technicality."

History is replete with the stories of tyrants who trampled on individuals' rights because they viewed the law a mere "technicality." The Courts of Appeal do not reverse convictions because of technicalities; the reverse convictions because rights were violated.

Respondents boasting Mr. Wright, but for the "technicality" of the protection of law, would "be in prison" is seen for the sour grapes it is. Respondents should have put their boasts and wildly inappropriate statement to the press where their collective mouths are: they should have tried him again if he was so guilty. Who here has any doubt respondents would have done that, particularly facing this lawsuit, if they believed there was the slightest chance of convicting him. Respondents have only their empty words to support their actions; Mr. Wright's life has been destroyed because of it.

#### **7. Respondents' Abuse Of Process Arguments Are Not Unique**

Between pp. 41-43 respondents argue on abuse of process but offer

nothing unique from their argument on malicious prosecution. Mr. Wright adequately addressed that in his opening brief and above.

The only unique argument made is at p. 42, asserting the claim is only a remedy “for extortion.” They cite no case. Citing a case where process was abused for extortion does not mean it may be used only in that circumstance. As respondents concede at p. 43, all that is required is the use of process for an “ulterior motive.” Hough v. Stockbridge, 152 Wn.App. 328 (2009). In other words, not merely to prosecute but for some other end. Barabara Corey’s declaration explains, after laying a foundation, there was no legitimate prosecutorial goal furthered by pursuing Mr. Wright with the evidence known by the Prosecutors’ Office. She explains given Mr. Wright’s status as the only Black principal in the district, with a white alleged victim who was herself suing Mr. Wright only years later, the Prosecution smacked of a politically and racially motivated abuse process. A question of fact exists.

#### **8. Respondents Provide No Response On Outrage**

Between pp. 44-46 respondents cite generic rules, none of which are disputed: no reply is required. Respondents provide no argument why, assuming the misconduct took place, it does not constitute outrageous behavior. None of the conclusory string citations in respondents’ footnote 33 involve the misconduct alleged. The conduct is what it is. Mr. Wright’s further propounding it will provide no greater illumination.

## 9. Respondents' Defamation Arguments Fail

Respondents assert collateral estoppel arguing without authority or analysis Mr. Wright's 1983 argument of extra judicial statements is "essentially identical to a state law defamation claim." It is not. 1983 requires a violation of the US Constitution; Judge Settle found no violation. That is the full estoppel effect. Geiger. A person may be defamed yet not have their Constitutional rights violated. Respondents' argument the denial of Mr. Wright's motion to disqualify estoppes this claim is without logic, reason, or authority; it requires no response.

Respondents assert a privilege applies but do not identify what it is. A party may not rely on a privilege but not identify it.

Respondents may cite all the cases to schools, banks, etc., they wish. They have no weight given Corey v. Pierce County, 154 Wn.App. 752 (2010) involving defamation by a Prosecutor. It is an amazing omission for respondents to ignore Corey. Corey explained, with substantial citation, a prosecutor does not have absolute immunity for statements to the press. Respondents' assertion to the contrary is frivolous. Buckely v. Fitzsimmons, 509 US 259, 277 (1993) and Genzler v. Longanbach, 410 F.3d 630, 637 (9<sup>th</sup> Cir. 2005) also reject that.

At best, a Prosecutor has qualified immunity but it is lost if the speaker had "actual malice of his knowledge of or reckless disregard for the falsity of the statement." Corey, supra. at 761. That is the same standard of malice for a public individual, it may be addressed together.

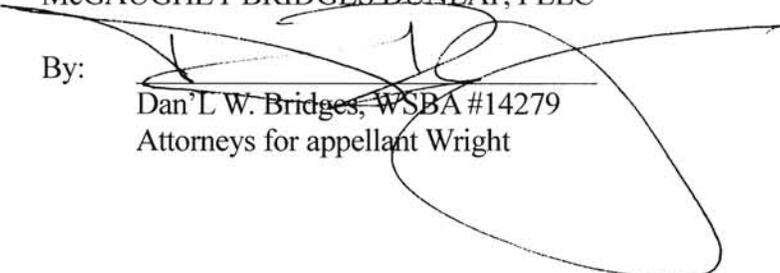
Respondents' full response on the merits comprises two paragraphs at pp. 46-47 regarding malice. They conclusorily assert Mr. Wright "cannot come close to proving malice" because his evidence constitutes "lame excuses." Mr. Wright is unaware of a "lame excuses" defense. Respondents beat the same drum of probable cause and conviction ignoring the evidence both were the product of Kooiman's, et. al., antecedent fraud and bad faith.

Respondents' ignore Corey's declaration and Corey's holding Kooiman's statements are outside prosecutorial ethics and demonstrate malice. It may be proper for a prosecutor to state their charges are just but they go a large step too far declaring a person "guilty." Kooiman knew of the destroyed incompatible 911 tape, Failey/Ko interview, the failings of her DNA "evidence," the corrupt witness statements but lashed out to the press when her malicious conviction was reversed. What is more, nothing changed between Kooiman's defamatory statement and respondents' moving to dismiss the charges. Respondents have never squared their dismissing the charges – itself an admission they knew they could obtain no conviction – with Kooiman's pronouncing Mr. Wright guilty. It is incapable of reconciliation. It was reckless. Defamation lays.

DATED this 8<sup>th</sup> day of December, 2014.

McGAUGHEY BRIDGES DUNLAP, PLLC

By:

  
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Attorneys for appellant Wright

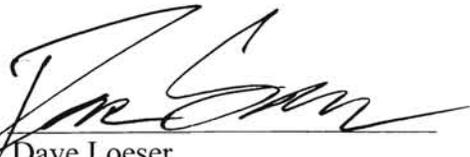
**CERTIFICATE OF SERVICE**

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that today, December 8<sup>th</sup>, 2014, I delivered by e-mail a copy of Appellant's Reply Brief to:

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Dated this 8<sup>th</sup> day of December, 2014 at Seattle, Washington.



Dave Loeser

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