ORIGINAL

20-734
Case No.

FILED
NOV 19 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

BRETT EMMETT LLOYD,
Petitioner,

vs.

JOHN GERHARD; JEFFREY WARNER;
ANNALISA BALL; CITY OF BEAVERTON,
Respondents,

On Petition for a Writ of Certiorari to Oregon's District Court

PETITION FOR WRIT OF CERTIORARI

BRETT E. LLOYD
SID #20673731
Eastern Oregon Cor. Inst.
2500 Westgate
Pendleton, OR 97801
Pro Se Litigant-Petitioner

JANET M. SCHROER
1000 SW Broadway-20th Fl.
Portland, OR 97205
Attorney for Beaverton Defendants

KRISTEN L. TRANETZKI
121 SW Morrison St. - Suite 420
Portland, OR 97204
Attorney for Annalisa Ball

QUESTION(S) PRESENTED

Within the State of Oregon, to effectively state a malicious prosecution claim, under 42 U.S.C. § 1983, a plaintiff must establish State law elements of malicious proseucution and show that defendants, while acting under "color of law" intended to deprive the plaintiff of a constitutional right. See *Carey v. Piphus*, 435 U.S. 247, 257-58, 98 S.Ct 1042 (1978).

The questions presented are:

1. Was Petitioner unfairly denied redress for a malicious prosecution when the District Court of Oregon granted Defendants' Motion to Dismiss for a failure to meet the "favorable termination' requirement?

2. Was Defendant, Deputy District Attorney, John Gerhard, obligated to respond to Petitioner's lawfully served summons, under Fed. R. Civ. P. 12(a)(1)(A)?

3. Do anti-SLAPP laws offer First Amendment protections to Defendant Annalisa Ball for her filing of a known false police report?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases (cont.)

Cases (cont.)

Cases (cont.)

Cases (cont.)

Cases (cont.)

Cases (cont.)

Cases (cont.)

Cases (cont.)

Constitutional Provisions and United States Codes

Rules of Law

Rule of Law (cont.)

Other Authorities

INTRODUCTION

This case of first impression, poses a question left unanswered after an exhaustive inquiry into successful and unsuccessful claims of malicious prosecution. Petitioner seeks this Court's wisdom in further clarifying what constitutes a "dismissal in defendant's favor." As a requisite to a valid malicious prosecution claim, answering this question will require this Court to look beyond the four-corners of the case-in-point.

During contentious dissolution of marriage proceedings, Mr. Lloyd's wife, Annalisa Ball, conspired with Washington County DDA, John Gerhard, and Beaverton City Police Officer, Jeffrey Warner, to abuse Oregon's Criminal Justice System in an effort to extort marital assets out of Mr. Lloyd. Through a malicious prosecution, Defendants sought to leverage the dismissal of false criminal charges in lieu of Petitioner surrendering more than $500k in personal property (*see* Appendix D).

Adamant in his innocence, Petitioner refused to entertain any compromise with the government (*see* Appendix E). Mere days before DDA Gerhard's criminal case was to be presented to a jury, he filed a motion to have all charges in the indictment dismissed, (*see* Appendix P), which was granted by the Circuit Court (*see* Appendix R).

Within Oregon's two-year statute of limitations, Ore. Rev. Stat. 12.110, Petitioner filed a civil complaint in Oregon's District Court, under 42 U.S.C. § 1983, alleging malicious prosecution. District Court Judge, Honorable Mustafa Kasubhai dismissed Petitioner's Complaint in its entirety, claiming that Mr. Lloyd failed to show how the criminal indictment was dismissed in his favor.

For the following set-forth reasons, Brett Lloyd respectfully asks that this Court grant his Petition for Writ of Certiorari.

JURISDICTION

A. The U.S. Court of Appeals for the Ninth Circuit decided Petitioner's case on April 7, 2020, and filed their decision on April 21, 2020;

B. A timely Petition for Rehearing *En Banc* was denied by the United States Court of Appeals, on August 21, 2020, and a copy of the Order denying rehearing appears as Appendix A;

C. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

JUDICIAL OPINIONS

Petitioner respectfully prays that a Writ of Certiorari be issued to review the following judgments:

A. The opinion of the United States Court of Appeals for the Ninth Circuit appears at Appendix B of this petition, and is reported at: *Lloyd v. Gerhard*, No. 19 -35312 (9th Cir. 2020).

B. The opinion of the United States District Court of Oregon appears at Appendix C of this petition and is reported at: *Lloyd v. Gerhard*, Case No. 3:17-cv 00582-MK (Ore. Dist. Ct. March 31, 2019).

CONTEXTUAL BACKGROUND

I. Petitioner's 42 U.S.C. § 1983 Complaint Exposes An Abuse of Oregon's Criminal Justice System by the Defendants To Maliciously Prosecute An Innocent Man for Financial Gain.

A. The Relationship

In September of 2000, Petitioner began dating recent divorcee, Annalisa Ball, who had a one-year-old baby girl named EB. The couple began living together in October of 2003. They moved from San Francisco, California to Oregon in 2007 and welcomed the birth of their son, KL, on September 13, 2007. Brett Lloyd married Annalisa Ball on May 8, 2010, yet, Mrs. Ball decided not to take his surname. The couple celebrated the birth of their second son, SL, on August 24, 2011.

On July 30, 2012, the couple decided to refinance the $270,000 mortgage on their $520,000 home, as well as the auto-loan for their 2012 KIA Sorento, with USAA Federal Savings Bank. The 2012 KIA had been purchased to accomodate the couple's three children, and Annalisa Ball drove the vehicle as her daily mode of transportation for two-years (*see* Appendix Y). Mr. Lloyd, aside from paying the mortgage, set-up automatic payments of $429.68 a month to be deducted from his personal CHASE Bank checking account (*see* Appendix G-1). The payments were routinely paid on-time for the duration of the auto-loan (*see* Appendix G-2 & G-3).

B. Dissolution of the Marriage

While at work, on April 14, 2014, Petitioner received a subpoena from Attorney Kelly Lemarr, notifying

Petitioner that her client, Annalisa Ball, had filed for divorce (*see* Appendix H). The following week, Petitioner retained Attorney Henry LeSueur to represent him in his divorce proceedings.

October 31, 2014, Attorney Lemarr presented Petitioner with an Offer of Settlement, (*see* Appendix I), in which Annalisa Ball sought full-ownership of the couple's home, ownership of the couple's $14,000 KIA Sportage (no auto-loan), full custody of KL and SL, and half of the proceeds from the couple $34,000 KIA Sorento. In this Offer, Attorney Lemarr sought to blackmail Mr. Lloyd by stating that if Petitioner did not accept the full terms of their Offer, she had Mrs. Ball file a complaint with the Beaverton Police that falsely accused Petitioner of attaching his wife's signature to the couple's 2012 KIA Sorento's USAA auto-loan (*see* Appendix I-3).

When Petitioner refused the Settlement Offer, Attorney Lemarr had Mrs. Ball follow through with their extortion threat and file a report with Officer Jeffrey Warner (*see* Appendix J). In this police report, dated November 8, 2014, Officer Warner summarized Mrs. Ball's complaint as, "Soon to be ex-spouse forges victim's signature on car loan paperwork."

C. Conspiracy With State Actors

On November 10, 2014, Officer Warner forwarded his initial police report to the Washington County DA's office (*see* Appendix K-2). Subsequently, DDA John Gerhard conspired with Office Warner to fabricate a Supplemental Police Report, *id*, in which they asserted that at the time the alleged forgery occurred, July 30, 2012, Annalisa Ball was already an "ex-spouse" of Mr. Lloyd, and that the State's discovery showed Mr. Lloyd forged his ex-wife's signature (*see* Appendix G). This fraud was

committed by law-enforcement because, in the State of Oregon, signing a spouse's signature is not a criminal act, as long as the act was not performed with malicious intent and the spouse did not incur damages.

On February 20, 2015, DDA John Gerhard presented a Washington County grand jury with known false evidence (*see* Appendix K), supported by Annalisa Ball's perjured testimony, to obtain a three-count felony indictment, (see Appendix L), alleging: (1) Aggravated Identity Theft (Class-B Felony); (2) Forgery in the First Degree (Class-C Felony); (3) Computer Crime (Class-C Felony). Not only was the indictment willfully misleading as to when the crime occurred, *id*, but nowhere does it state that Brett Lloyd and Annalisa Ball were husband and wife. Furthermore, the charges against Petitioner accuse Mr. Lloyd of causing financial losses to Annalisa Ball of more than $10,000 in a single transaction. *Id.*

On February 23, 2015, Judge Suzanne Upton issued a Warrant of Arrest for Mr. Lloyd, based upon DDA Gerhard's felony indictment (*see* Appendix M).

On February 25, 2015, Petitioner was arrested and arraigned before Judge Beth Roberts, and Mr. Lloyd was assigned Attorney Thomas Collins from the Washington County Public Defender's Office, as counsel. Mr. Lloyd plead "not guilty" to all felonies in case no. C150439CR, and insisted Attorney Collins take the case to trial.

On March 4, 2015, DDA Gerhard sought to persuade Mr. Lloyd into pleading guilty to the Aggravated Identity Theft charge, a Class-B Felony (*see* Appendix E). Petitioner refused to entertain any responsibility for the fraudulent charges, and rejected DDA Gerhard's plea offer.

DDA Gerhard filed a Notification of Compliance with Crime Victim's Constitutional Rights, on March 20, 2015, which listed Annalisa Ball as the only victim in case no. C150439CR (*see* Appendix N).

On April 9, 2015, in the middle of Petitioner's criminal trial, on unrelated charges, DDA Andrew Pulver informed the presiding judge that he had evidence that would prove Annalisa Ball never suffered any harm as a result of the alleged forgery (*see* Appendix O-1):

> [Prosecutor:] I can tell you at a minimum, I'm going to present evidence that Annalisa Ball was not out any money because of this, and the only real victim is the bank.

Tr. 1441: *State Prosecutor's Pretrial Statements*

USAA Bank was never "out any money," and it was never listed as a victim in the case (*see* Appendix N). Judge Andrew Erwin would inform Mr. Lloyd's jury that the forgery charges were only being presented to them to show Annalisa Ball initiated the false charges out of malice and bias towards Mr. Lloyd (*see* Appendix O-4 & O-5):

> [The Court:] Okay. Hang on. I'll just stop everybody right here and tell you what you can use this evidence for, and what you cannot. You can use this evidence to show that Mrs. Ball is biased against the defendant [Mr. Lloyd] and has initiated that out of a bias. You may not use it in any way, shape, or form to somehow assume that the defendant is guilty of anything here.

Tr. 1491-1492: *Ofc. Jeffrey Warner's Cross-Examination*

Officer Jeffrey Warner would testify under-oath that he knew, all along, that Annalisa Ball never suffered any harm form the alleged forgery (*see* Appendix O-5):

[Prosecutor:] At any point during your interactions with Mrs. Ball, did she indicate to you that she was like out any money as a result of this?
[Ofc. Warner:] No.
Tr. 1492: *Ofc. Jeffrey Warner's Cross-Examination*

D. State's Dismissal of Their Indictment

On May 12, 2015, two-weeks before Mr. Lloyd's trial in case no. C150439CR was scheduled to begin, (*see* Appendix W), DDA Gerhard informed Attorney Collins that he was willing to drop the criminal charges if Petitioner signed full-ownership of the couple's house over to Mrs. Ball (see Appendix D).

When Petitioner refused to be extorted and forfeit significant personal property that he had constitutional right to negotiate over, DDA Gerhard filed a Motion for Judgment of Dismissal (*see* Appendix P). DDA Gerhard sought to justify the dismissal, "based upon the defendant's anticipated sentences in an "unrelated case." Yet, Petitioner was not scheduled to be sentenced on the unrelated charges for an additional two-weeks (*see* Appendix Q).

On May 15, 2015, Washington County Circuit Court Judge, Honorable Eric Butterfield, granted the State's motion for a dismissal (*see* Appendix R), which exonerated the Petitioner of the criminal charges in case no. C150439CR, and exposed those responsible for the indictment to civil action, under 42 U.S.C. § 1983.

Mr. Lloyd and Annalisa Ball's divorce was finalized on July 14, 2015 (*see* Appendix S).

E. Petitioner's 42 U.S.C. § 1983 Complaint

On April 13, 2017, Petitioner filed a *pro se* lawsuit in Oregon's District Court, (*see* Appendix T-3; #1), within the

two-year statute of limitations per Ore. Rev. Stat. 12.110. This Complaint asserted a claim of malicious prosecution, under 42 U.S.C. § 1983, as well as the torts of Invasion of Privacy Upon False Light, Intentional Infliction of Mental and Emotional Distress, and Negligence. Mr. Lloyd paid the filing fee and was assigned Judge Jolie Russo, who ordered Petitioner to make minor changes to his Complaint.

On June 20, 2017, Petitioner paid $15,000 to retain Attorney Michelle Burrows, who produced and filed a Second Amended Complaint, on August 11, 2017 (*see* Appendix U). Attorney Burrows promptly submitted her proposed Summons for the court's approval *(see* Appendix T-4; #4). Upon receiving the court's approval, on September 26, 2017, Attorney Burrows legally served all defendant's electronically with a Summons and Complaint, (*see* Appendix T-4; #15).

On October 10, 2017, Attorney Burrows demanded an additional $15,000 to fulfill her flat fee of $30,000. As soon as she received the money, Attorney Burrows filed a motion to have Petitioner's Complaint dismissed with prejudice, (*see* Appendix T-4; #19), without her client's knowledge or consent. When Petitioner requested a copy of the Case Summary and discovered Attorney Burrow's deceit, Mr. Lloyd promptly filed a stay for the dismissal of his lawsuit, which Honorable Russo granted it, allowing Petitioner to proceed *pro se* (*see* Appendix T-4; #22). Judge Russo considered all defendants, including DDA John Gerhard, properly served, and ordered all defendants to answer Petitioner's Second Amended Complaint by February 1, 2018. *Id.* Prior to Defendants answering the Complaint, Mr. Lloyd sought the court's leave to file a Third Amended Complaint, so he could reassert Attorney Kelly Lemarr as a defendant and reclaim his State torts, which were removed by Attorney Burrows (*see* Appendix T-4; #35).

On May 31, 2018, Honorable Russo denied Petitioner's request to amend his Complaint, (*see* Appendix T-5; #40), and ordered Officer Jeffrey Warner and City of Beaverton to answer Petitioner's Second Amended Complaint by July 1, 2018. Moreover, Judge Russo instructed Mr. Lloyd to re-issue Annalisa Ball and DDA John Gerhard a Summons and copy of the Second Amended Complaint. *Id.*

Per the court's instructions, Petitioner hired a process server and, on June 28, 2018, legally served all defendants, including DDA Gerhard, with a copy of his Second Amended Complaint (*see* Appendix V). Annalisa Ball, Jeffrey Warner, and the City of Beaverton, all filed timely responses. Only DDA John Gerhard refused to acknowledge and respond to Petitioner's lawfully served Summons and Complaint.

REASONS FOR GRANTING PETITION

I. Petitioner Asks This Court To Protect Citizens From Malicious Prosecutions Through A Clarification Of What Constitutes "A Proceeding Terminated In Plaintiff's Favor."

The interest in freedom from unjustifiable litigation receives protection in actions which, for want of a better name, have been called malicious prosecution and abuse of process. It is evident, for example, that the institution of criminal proceedings by one individual against another amounts to a publication of a charge that he is guilty of the crime for which he is prosecuted; and that this is a form of publication which, above all others, is dangerous to the repute of the person so charged. I Street, *Foundations of Legal Liability* (1906).

A. Federal Court's Reliance Upon State Law Elements Of Malicious Prosecution

In this case, Oregon District Judge, Honorable Mustafa Kasubhai, stated that "[t]o sustain a § 1983 claim for malicious prosecution, plaintiff must establish the State law elements of malicious prosecution and show defendants, while acting under 'color of law,' intended to deprive plaintiff of a constitutional right." See 42 U.S.C. § 1983; see also *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012)(Federal law refers to State law when determining acts of malicious prosecution).

Within the State of Oregon, to effectively state a malicious prosecution claim, under 42 U.S.C. § 1983, the plaintiff must allege: (1) defendants commenced and prosecuted a criminal proceeding against the plaintiff while acting under the "color of State law" (*see* Appendix L); (2) a lack or absence of probable cause to prosecute the action (*see* Appendix G); (3) malice, or a primary purpose other than to secure the adjudication of the claim (*see* Appendix D); (4) the proceedings terminated in the plaintiff's favor (*see* Appendix R); (5) the plaintiff suffered damages (*see* Appendix M). *Perry v. Rein*, 215 Or. App. 113 (2007); *Mantia v. Hanson*, 190 Or. App. 412, 79 P.3d 404 (2003).

a. Commencement of Criminal Proceedings

Any proceeding of a criminal character will support an action of malicious prosecution. *Losi v. Natalicchio*, 112 N.Y.S.2d 706 (N.Y. S.Ct 1952)(There must be a judicial proceeding; a mere investigation by a district attorney is not enough). The indictment, arrest, and prosecution of the

Petitioner, by all defendants, was initiated and pursued in bad faith, and epitomizes an abuse of power by law-enforcement. Prosecutions such as this are considered demagogic because they reflect illegitimate, personal considerations, (*see* Appendix D), as opposed to ostensibly valid law-enforcement objectives. Demagogic prosecutions often appear to involve minor, artificial, or "trumped up" charges. This Court has referred to such prosecutions as "official lawlessness." See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct 746 (1971); *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct 674 (1971).

Oregon Courts have stated that the test of whether the defendant instigated the prosecution is whether they "were actively instrumental in putting the law into force." To impose liability, there must be some affirmative action by way of advice, encouragement, etc. (*see* Appendix J). *Gowin v. Heider*, 237 Ore. 266, 386 P.2d (1964), quoting *Meyer v. Nedry*, 159 Ore. 62, 78 P.2d 339 (1938).

b. Lack of Probable Cause

Malicious prosecution is an action which runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged. Green, *Judge and Jury*, pp 338-339 (1930). It has never been regarded with any favor by the courts, and it is hedged with restrictions which make it very difficult to maintain. See Winfield, *Law of Tort*, pp 644 (1937) ("[I]ndeed it is so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty. It is notable how rarely an action is brought at all, much less a successful one). Chief among these is the requirement that the plaintiff must sustain the burden-of-

proof that the criminal proceeding was initiated or continued by the defendant without "probable cause." *Mitchell v. John Heine & Sons*, 38 N.S.W. 466 (1938).

For a defendant to possess probable cause to institute criminal proceedings he must have both a reasonable belief in the guilt of the accused, as well as a subjective belief. See *Hryciuk v. Robinson*, 213 Ore. 542, 326 P.2d 424 (1958)("It is not enough that his reasonable suspicion that the accused may be guilty is so strong that he deems it advisable that the accused be held for further investigation).

Here, the evidence is straight forward, Annalisa Ball, Officer Jeffrey Warner and DDA John Gerhard, all conspired to leverage false criminal charges against the Petitioner for the singular purpose of extorting marital assets from Petitioner's dissolution of marriage proceedings (*see* Appendix D). See *Jennings v. Shuman*, 567 F.2d 1213 (3d Cir. 1977)("The goal of the conspiracy was extortion, to be accomplished by bringing a prosecution against [plaintiff] without probable cause and for an improper purpose").

Honorable Andrew Erwin described Annalisa Ball's reason for filing the false police report to Mr. Lloyd's jury, as follows (*see* Appendix O-4 & O-5).

In Oregon, proof of the crime of forgery requires law-enforcement have evidence of the following: (1) intent to injure or defraud; (2) uttering of; (3) a forged bill; and (4) knowing the bill to be forged. See Ore. Rev. Stat. 165.013; see also *State of Oregon v. Blake*, 348 Ore. 95, 228 P.3d 560 (2010)(describing the elements of forgery).

In this case, DDA Gerhard and Officer Jeffrey Warner never sought to retain the services of a handwriting expert (*see* Appendix O-6). Although DDA Gerhard listed Annalisa Ball as the only victim of the alleged forgery, (*see* Appendix N) The government made it clear that Mrs. Ball never suffered any damages (*see* Appendix O-5).

Not only did the State lack evidence to show that Petitioner caused, or intended to cause, injury to his wife and partner of 14-years, but the State's discovery obtained clear evidence to the contrary (*see* Appendix G); see also *Kigler v. Helfant*, 421 U.S. 117, 126, 95 S.Ct 1524 (1975) (bad faith prosecution is one that has been brought without a reasonable expectation of obtaining a valid conviction).

c. Presence of Malice

Second in importance to the issue of probable cause is that of "malice," which has given the action its name. The plaintiff has the burden of proving that the defendant instituted the proceeding "maliciously." There must be "malice in fact." *Griswold v. Horne*, 19 Ariz. 56, 165 P.3 18 (1917)(malice of the "evil motive"). At the same time, it does not necessarily mean that the defendant was inspired by hatred, spite, or ill will. "Malice" is found when the defendant uses the prosecution as a means to extort money, *Cf. Krug v. Ward*, 77 Ill. 603 (1875); to collect debt, *Kitchens v. Barlow*, 250 Miss. 121, 164 So.2d 745 (1964); to recover property, *Suchey v Stiles*, 155 Colo. 363, 394 P.2d 739 (1964); to compel performance of a contract, *Cf. Munson v. Linnick*, 255 Cal. App.2d 589 (63 Cal. Rptr. 340 (1967)); to "tie up the mouths" of witnesses in another action, *Cf. Hammond v. Rowley*, 86 Conn. 6, 84 A. 94 (1912); or as an experiment to discover who might have committed the crime. *Johnson v. Ebberts*, 11 F. 129 (C.C. Or. (1880).

In an action for malicious prosecution, the existence of malice by a defendant in the original proceeding is always a question of fact, exclusively for the determination of the jury under proper instructions. See *Engelgou v. Walter*, 181 Ore. 481, 182 P.2d 987 (1947); *Brown v.*

Liquidators, 152 Ore. 215, 52 P.2d 187 (1936). "Malice may be inferred from the absence of probable cause." *Lippay v. Christos*, 996 F.2d 1490 (3d Cir. 1993); see also *Ira v. Columbia food Co.*, 226 Ore. 566, 360 P.2d 86 ALR 2d 1378 (1961)(malicious prosecution action in which the Oregon Courts held that the absence of probable cause was sufficient to enable a jury to find malice).

In this matter, the presence of malice is self-evident, as Defendants fabricated police reports, suborned perjury and concealed exculpatory evidence, all in an effort to assert enough pressure on Mr. Lloyd that he would relinquish his constitutional right to negotiate marital assets in a legitimate divorce proceeding, free of fear of retribution. DDA John Gerhard's willingness to drop all criminal charges against the Petitioner, in exchange for Annalisa Ball receiving the couple's $520,000 property, (*see* Appendix D), provides proof that the criminal charges were leveled against Mr. Lloyd for an improper purpose (*see* Appendix O-4 & O-5).

d. Termination in Favor of the Accused

In order to maintain an action for malicious prosecution, the plaintiff must show not only that the criminal proceeding has terminated, but also that it has terminated in his favor. Two reasons have been suggested for this. One is that a conviction of the accused is sufficient to establish that there was probable cause for the prosecution; the other that in the malicious prosecution action the plaintiff cannot be permitted to make a collateral attack upon the criminal judgment. See *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct 2364 (1994).

On the other hand, it is enough that the proceeding is terminated in such a manner that it cannot be revived, and the prosecutor, if he proceeds further, will be put to a new

one. See *Graves v. Scott*, 104 Va. 372, 51 S.E. 821 (1905). This is true for an acquittal in court, *Singer Mfg. Co. v. Bryant*, 105 Va. 403, 54 S.E. 320 (1906); a discharge by a magistrate or justice of the peace, *Overson v. Lynch*, 83 Ariz. 158, 317 P.2d 948 (1957); upon preliminary hearing; a failure of a grand jury to indict which results in the discharge, *Kearney v. Mallon Suburban Motors*, 23 J.J. Misc. 83, 41 A.2d 274 (1945); the quashing of an indictment, *Lutton v. Baird*, 95 Ind. 349 (1883); the entry of a *nolle prosequi* or a dismissal, *Myhre v. Hessey*, 242 Wis. 633, 9 M.W.2d 106 (1943); or abandonment of the prosecution by the prosecuting attorney or the complaining witness, *Glover v. Heyward*, 108 S.C. 486, 94 S.E. 878 (1917). It may be said generally, that this is true whenever the charges or proceeding are withdrawn on the initiative of the prosecution (*see* Appendix P).

According to DDA John Gerhard, Petitioner's alleged criminal conduct warranted three felony charges, (*see* Appendix L), yet, the prosecutor was comfortable dismissing the criminal indictment two-weeks prior to Petitioner's Sentencing Hearing on "other" charges (*see* Appendix Q). DDA Gerhard claimed to have dismissed the forgery indictment because, "defendant faced a lengthy prison sentence," when Petitioner had yet to be sentenced. In truth, DDA Gerhard sought the court's dismissal days before the case was set to go to trial, (*see* Appendix W), because he knew the underlying evidence would never support a conviction, (*see* Appendix G), and the State was never really interested in an adjudication.

An indictment may not be dismissed for government misconduct, absent prejudice to the defendant. See *Sears Roebuck & Co. Inc. v. United States*, 719 F.2d 1386, 1391-92 (9th Cir. 1983), *cert. denied*, 456 U.S. 1079, 104 S.Ct 1441 (1984); *Owen v. United States*, 580 F.2d 365, 367 (9th Cir. 1978)(court's supervisory powers).

e. Suffering Damages

In theory, at least, since malicious prosecution is a descendant of the action on the case, there can be no recovery unless it is proved that the plaintiff has suffered actual damage. But in practice, this rule has been almost entirely nullified by the "benevolent fiction" that certain kinds of damage necessarily follow the wrongful prosecution itself, and so will be assumed by the law to exist, and may be recovered without special pleading or proof. McCormick, *Damages*, pp 382 (1935).

As malicious prosecution involves not only the defamatory charge of a crime, which usually is reduced to writing, but likewise the process to enforce it, there is an obvious analogy to libel, or the kind of slander which is actionable without proof of damage; and so it is held that there may be recovery without proof from harm to the plaintiff's reputation, standing and credit.

Beyond this, there may be recovery of other damages, designated as "special," if there is a specific pleading and proof. The plaintiff may recover compensation for any arrest or imprisonment, (*see* Appendix M), *Rich v. Rogers*, 250 Mass. 587, 146 N.E. 246 (1925), including damages for discomfort or injury to health, or loss of time and deprivation of the society of his family. See *Civil Actions for Damages under the Federal Civil Rights Statutes* (45 Tex. L. Rev. 1015, 1028 (1967)).

B. The Oregon District Court's Justification For Granting Defendants' Dismissal

In considering a Motion to Dismiss, the court must accept all allegations of material fact in the complaint as true (*see* Appendix U). See also *Erickson v. Pardus*, 551 U.S. 89, 93-94, 127 S.Ct 2197 (2007). The court must also

construe the alleged facts in the light most favorable to the plaintiff. See *Scheuer v. Rhodes*, 416 U.S. 232 236, 94 S.Ct. 1683 (1974); see also *Hosp. Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740, 96 S.Ct 1848 (1976); *Barnett v. Centon*, 31 F.3d 813, 816 (9th Cir. 1994)(per curium). All ambiguities or doubts must also be resolved in the plaintiff's favor. See *Jenkins v. McKeithen*, 395 U.S. 411 421, 89 S.Ct 1843 (1969).

Furthermore, *pro se* pleadings are held to a less stringent standard than those drafted by lawyers. See *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct 594 (1972). "Although a *pro se* litigant ... may be entitled to great leeway when the court construes his pleadings, those pleadings, nonetheless, must meet some minimum threshold in providing a defendant notice of what they allegedly did wrong." *Brazil v. U.S. Dept. Navy*, 66 F.3d 193 (9th Cir. 1995).

Judge Mustafa Kabushai justified his dismissal of Petitioner's Complaint, with prejudice, under a misguided belief that the criminal charges against Mr. Lloyd were not "terminated in his favor." The court's claim that, "the State dismissed the forgery charges because plaintiff already faced a lengthy prison sentence; the State's dismissal of the charges in no way reflected adversely on the merits of the prosecution's case or otherwise implied Plaintiff's innocence," meant that the charges were not dismissed in Petitioner's favor, was an incorrect assumption.

Under Judge Kasubhai's extremely narrow interpretation, if a prosecutor brings frivolous charges against a defendant, that are ultimately abandoned and dismissed by the State, yet, the defendant is found guilty on unrelated charges, all of the States indictments should be considered justified. The Judge's assertion that, "Based on the undisputed facts on the record, the forgery proceedings were not terminated in Plaintiff's favor," is factually untrue.

Circuit Court Judge, Eric Butterfield, chose to dismiss all criminal charges against Mr. Lloyd (*see* Appendix R). If DDA Gerhard was truly concerned that major felonies had been committed by the Petitioner, it would have been in the public's best interest to have the charges maintained.[1] Yet, Judge Kasubhai, and the Defendants, continued to give the false impression that the Petitioner would have been convicted if the criminal charges had been maintained.

C. Petitioner's Argument For Why This Court Should Overturn the Lower Court's Decision

Fed. R. Civ. P. - Rule 8(a)(2), requires that the plaintiff give "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (*see* Appendix U-9). See also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct 1955 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct 99 (1957)). The complaint must contain "enough factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." See *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than sheer possibility that a defendant has acted unlawfully." *Id* (quoting *Twombly*, 550 U.S. at 586).

In deciding a Fed. R. Civ. P. - Rule 12(b)(6) Motion, the court generally may not consider materials outside the complaint and pleadings. See *Cooper v. Pickett*, 137 F.3d 616, 622 (9th Cir. 1998); *Branch v. Tunnell*, 14 F.3d 449,

---

[1] **Ore. Rev. Stat. 135.757 – Nolle Prosequi**
Entry of a nolle prosequi is abolished, and the district attorney cannot discontinue or abandon a prosecution for a crime, except as provided in ORS 135.755.

453 (9th Cir. 1994). The court may, however, consider: (1) documents whose contents are alleged in or attached to the complaint and whose authenticity is not in question, see *Branch*, 14 F.3d at 454; (2) documents whose authenticity is not in question, and upon which the complaint necessarily relies, but which are not attached to the complaint, see *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001); and (3) documents and materials of which the court may take judicial notice. See *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

Mr. Lloyd's Complaint was supported by evidence, and chronologically set-out an extortion scheme, initiated by Mrs. Ball and her divorce attorney, Kelly Lemarr. Their plan focused around extracting marital assets out of the Petitioner through blackmail, threatening Mr. Lloyd with "trumped up," false criminal charges unless Petitioner agreed to all of the terms set-forth in their Offer of Settlement (see Appendix I-3). "Threat" in this context involves the intentional exertion of pressure to make another fearful or apprehensive of injury or harm." *Planned Parenthood League of Mass, Inc. v. Blake*, 417 Mass. 467, 631 N.E.2d 985 (Mass. 1994).

When Mr. Lloyd refused their Settlement Offer, Annalisa Ball proceeded to file a report with Beaverton City Police Officer, Jeffrey Warner, which falsely accused Mr. Lloyd of forging his wife's signature on the couple's 2012 KIA Sorento auto-loan (*see* Appendix J). Officer Warner forwarded his initial police report to Washington County Deputy District Attorney, John Gerhard, (*see* Appendix K-2), who instructed Officer Warner to fabricate a supplemental police report that falsely asserted Mrs. Ball and Mr. Lloyd were already divorced at the time of the alleged forgery, (*see* Appendix K-1), and supported this misleading claim by having Mrs. Ball commit perjury.

[Prosecutor:] How do you know the Defendant seated two seats to my left?
[Annalisa Ball:] We were married.
[Prosecutor:] As far as the time in which you were actually married, what time frame was that, those four years? When did you get married, and when did that end?
[Annalisa Ball:] We got married in 2010, and we divorced when he was removed in 2014.
Tr. 87: *Annalisa Ball's March 31, 2015 Sworn Testimony*

Under cross-examination, Annalisa Ball conceded that, not only were she and Mr. Lloyd married at the time the alleged forgery occurred, but were, in-fact, still married.

[Atty Cohen:] In addition to this process, you mentioned that you filed for divorce. Is that still pending?
[Annalisa Ball:] It is.
Tr. 658: *Annalisa Ball's April 3, 2015 Sworn Testimony*

Moreover, DDA Gerhard's three-felony indictment deliberately neglected to mention that Mr. Lloyd and Annalisa Ball were husband and wife (*see* Appendix L). The State"s discovery and testimony failed to provide any support for DDA Gerhard's criminal indictment (*see* Appendix G & O-5).

[Prosecutor:] At any point during your interactions with Ms. Ball did she indicate to you that she was like out any money as a result of this?
[Ofc. Warner:] No.
Tr. 1441: *Officer Warner's April 9, 2015 Sworn Testimony*

DDA John Gerhard sought a compromise with the Petitioner, through a plea agreement (*see* Appendix E), which the Petitioner adamantly refused to entertain (*see* Appendix W). On the eve of the forgery case going to trial, DDA Gerhard filed a Motion for Dismissal, (*see* Appendix P), which Judge Eric Butterfield granted (*see* Appendix R).

DDA Gerhard's reason for seeking the dismissal was critically misleading, and irrelevant, as Petitioner's Sentencing Hearing, on unrelated charges, was not scheduled until May 28, 2015 (*see* Appendix Q).

Furthermore, by granting Defendant Gerhard's Motion for Dismissal, on the basis that Petitioner was to be sentenced in an unrelated case, unfairly denies Petitioner recompense if he successfully overturns the unrelated conviction and corresponding sentence. See *Restatement of Torts* § 670; see also *Singleton v. Perry*, 45 Cal.2d 489, 289 P.2d 794 (1955)(where prosecution on two charges, one found justified and the other not, plaintiff can recover damages for the false one).

Common reasoning would imply that criminal charges initiated for an improper purpose, (*see* Appendix D), could not be dismissed under a proper one. By providing proof that the charges were initiated without probable cause, and for a purpose other than adjudication of a crime, the only way the charges could be dismissed is in favor of Petitioner.

The foregoing conclusion follows upon recognition that the common-law of torts provides the appropriate starting point for a § 1983 inquiry, see *Carey v. Piphus*, 435 U.S. 247, 257-258, 98 S.Ct 1042 (1978), that the tort of malicious prosecution, which provides the closest analogy to claims of the type in Petitioner's Complaint, requires the allegation and proof of termination of the prior criminal proceeding in favor of the accused. See e.g., *Carpenter v. Nutter*, 127 Cal. 61, 63, 5 P.301 (1899).

Because a valid § 1983 lawsuit does not require the exhaustion of State remedies, if the plaintiff had not had the criminal proceedings dismissed in his favor, and won his civil case, the State would be obligated to release him even if he hadn't sought that release.

Both the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, and the Federal Habeas Corpus Statute, 28 U.S.C.S. § 2254, provide access to a federal forum for claims of unconstitutional treatment at the hands of State officials, but they differ in their scope of operation. In general, exhaustion of State remedies "is not a prerequisite to an action under § 1983." *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 501, 102 S.Ct 2551 (1982) (emphasis added). The Federal Habeas Corpus Statute, by contrast, requires that State prisoners first seek redress in a State forum. See *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct 1198 (1982).

In addition to proving a favorable termination, a plaintiff in a malicious prosecution action must prove the "[a]bsence of probable cause for the proceeding," as well as "'[m]alice,' or a primary purpose other than that of bringing the offender to justice." W. Keeton, D. Dobbs, and D. Owen, *Prosser and Keeton on Law of Torts* § 871 (5th Ed. 1984); see also, S. Spencer, C. Krouse, and A Grans, *American Law of Torts* § 28:7 pp. 3, § 28:11 pp. 61 (1991).

As 42 U.S.C. § 1983 requirements, however, these elements would mean that even a § 1983 plaintiff, whose conviction was invalidated as unconstitutional, could not obtain damages for the unconstitutional conviction and ensuing confinement if the defendant police officials, or perhaps the prosecutor, had probable cause to believe that the plaintiff was guilty and intended to bring him to justice.

Absent an independent statutory basis for doing so, importing into § 1983 the malicious prosecution tort's favorable termination requirement would be particularly

odd since it is the latter that the former derives. See *Prosser and Keeton on Law of Torts* § 874 ("The requirement that the criminal prosecution terminate in favor of the malicious prosecution plaintiff ... is primarily important not as an independent element of the malicious prosecution action, but only for what it shows about probable cause"); M. Bigelow, *Leading Cases on Law of Torts* § 196 (1985)("The action for malicious prosecution cannot be maintained until the prosecution has terminated; otherwise the plaintiff might obtain judgment in one case and yet be convicted in the other, which would of course disprove the averment of a want of probable cause"); see also *Restatement of Torts* § 682 (1977).

In this matter, DDA John Gerhard's excuse or seeking a dismissal of the criminal indictment was irrelevant, as he is a defendant in the case-in-point, accused of falsifying official police reports and initiating criminal proceedings against Mr. Lloyd without probable cause. Thus, dismissal of an indictment at the request of the district attorney is generally sufficient to satisfy the requirement, in a malicious prosecution case, that the criminal proceedings have terminated in favor of the plaintiff. See *Gumm v. Heider*, 220 Ore. 5, 25, 348 P.2d 455 (1960); *Portland Trailer Equip. Inc. v. A-1 Freeman Moving and Storage, Inc.*, 182 Or. App. 347, 356, 49 P.3d 803 (2002)(A prosecutor's voluntary dismissal of charges "is generally sufficient to satisfy the requirement that the criminal proceeding has terminated in favor of a plaintiff)(quoting *Rose v. Whitbeck*, 277 Ore. 791, 799-800, 562 P.2d 188 (1977)).

II. Petitioner Asks That This Court Uphold Fed. R. Civ. P. 12(a)(1)(A), Which Required Defendant John Gerhard To Respond To Petitioner's Lawfully Issued Summons

Attorney Michelle Burrows, previously retained by the Petitioner, filed Plaintiff's Second Amended Complaint, on August 11, 2017, then submitted her proposed Summons for the District Court's approval, on September 12, 2017. With the court's permission, Ms. Burrows served all defendants electronically, on September 26, 2017 (*see* Appendix T-4).

When the District Court allowed Mr. Lloyd to proceed in his § 1983 lawsuit *pro se*, Honorable Jolie Russo considered all of the defendants, including DDA John Gerhard, properly served and, thus, ordered all defendants to answer Petitioner's complaint by February 1, 2018. *Id.* Petitioner sought the District Court's leave to file a Third Amended Complaint that reinstated Attorney Kelly Lemarr as a defendant, a motion the court denied on May 31, 2018 (*see* Appendix T-5). Upon denying Petitioner's request to file a Third Amended Complaint, Judge Russo ordered Officer Jeffrey Warner to answer Petitioner's complaint by July 1, 2018, *id*, while instructing Mr. Lloyd to re-serve Defendants, Annalisa Ball and John Gerhard, with a Summons and copy of the Second Amended Complaint.

Subsequently, Petitioner hired an official process server and, following the court's instructions, re-served all Defendants with a Summons and Second Amended Complaint, including DDA Gerhard (*see* Appendix V-1 & V-2). Officer Jeffrey Warner and Annalisa Ball both filed timely responses to Mr. Lloyd's Complaint, while DDA John Gerhard chose to ignore Petitioner's lawfully served Summons and Complaint, for which Mr. Lloyd timely filed a Motion for Default Judgment.

A. Oregon District Court's Denial of Petitioner's Motion for Default Judgment

Within Honorable Mustafa Kasubhai's Findings and Recommendation, the court asserted that Petitioner's process server "served DDA Gerhard, on June 26, 2018, by leaving a copy of the summons and Second Amended Complaint with a receptionist at the Washington County DA's Office," and that Petitioner failed to provide "evidence that DDA Gerhard was properly served to support a default judgment." (*see* Appendix C-4).

Judge Kasubhai went on state that "plaintiff named DDA Gerhard as a defendant in his individual capacity, and plaintiff presents no evidence that the receptionist who allegedly accepted service at the DA's office was authorized to so on DDA Gerhard's behalf as an individual rather than in his capacity as a deputy district attorney." *Id.* Judge Kasubhai supported his claim by willfully misapplying Ore. R. Civ. P. 7D(2)[2] and 7D(3).[3]

---

[2] **Ore. R. Civ. P. 7 – Summons**
D. Manner of Service
(2) Service Methods
(c) Officer Service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at the office during normal working hours with the person who is apparently in charge.

[3] **Ore. R. Civ. P. 7 – Summons**
D. Manner of Service
(3) Particular Defendants. Service may be made upon specific defendants as follows:
(a) Individuals
(i) Generally. Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service.

Finally, Judge Kasubhai incorrectly asserted that "plaintiff did not attempt to serve DDA Gerhard until June 2018, well past the time limit set forth in Federal Rule of Civil Procedure 4 and almost one year after he filed his Second Amended Complaint." *Id.*

B. Argument for This Court Overturning The Oregon District Court's Decision To Deny Petitioner's Motion for Default Judgment

There are judicial decisions that hold that minor deficiencies in service procedures can be overlooked where the defendant clearly had actual notice of the lawsuit. See e.g. *Sidney v. Wilson*, 228 F.R.D. 517 (S.D.N.Y. 2005) ("Rule 4 of the Federal Rules is to be construed liberally "to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice," quoting *Romandette v. Weetabix Co. Inc.*, 807 F.2d 309 (2d Cir. 1986)). Other decisions suggest that leniency about service comes into play where the plaintiff has extended every effort to comply with the rules. See *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 508-09 (2d Cir. 2006), *cert. denied*, 128 S.Ct 1121 (2008). Fed. R. Civ. P. 4(e)(2)[4], clearly states that DDA John Gerhard's receptionist was

---

[4] **Fed. R. Civ. P. 4 – SUMMONS**

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by:

(1) Following State law for serving a summons in an action brought in courts of general jurisdiction in the State where the District Court is located or where service is made; or

(2) doing any of the following:

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

authorized to receive a copy of Petitioner's Summons and Complaint. Furthermore, Ore. R. Civ. P. 7D(2)(c)[1] supports Petitioner's method of delivery, stating that "[i]f the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of summons and complaint at the office during normal working hours with the person who is apparently in charge." (*see* Appendix V-1). Ore. R. Civ. P. 7D(3)(a)(i)[2], does not apply a capacity requisite to DDA John Gerhard's delivery of the true copy of the Summons and Complaint.

Finally, the case record provides proof that all defendants, including DDA John Gerhard, were served electronically, on September 26, 2017 (see Appendix T-4), 45-days after Petitioner filed his Second Amended Complaint, well within the 90-days required by Fed. R. Civ. P. 4(m). DDA John Gerhard intentionally chose to ignore both of Petitioner's lawfully served Complaints, which exposed him to Petitioner's default judgment.

III. Petitioner Asks That This Court Elucidate The First Amendment Protections Proscribed By The Anti-Strategic Lawsuit Against Public Participation Law

An anti-Strategic Lawsuit Against Public Participation (SLAPP) suit "is one in which the Plaintiff's alleged injury results from petitioning or free speech activities by a defendant that are protected by the Federal or State Constitutions." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). In response, "a defendant in Federal Court may file a Motion to Strike under an applicable anti-SLAPP statute." *Vineyard v. Soto*, No. 10-CV-1481-SI, 2011 U.S. Dist. LEXIS 129274, 2011 WL 5358659, at *2 (Dist. Or. Nov. 7, 2011) see also *Thomas v. Fry's Elecs., Inc.*, 400 F.3d 1206 (9th Cir. 2005).

Oregon enacted its anti-SLAPP law in 2001, as a means for expeditiously dismissing unfounded lawsuits attacking certain types of public speech through Special Motions to Strike, or anti-SLAPP Motions. *Ore. Educ. Ass'n. v. Parks*, 253 Or. App. 558, 560 n.1 (2012); *Platkin v. State Accident Ins. Fund*, 280 Or. App. 812 814, 385 P.3d 1167 (2016). Oregon Amended its anti-SLAPP law in 2009, to grant immunity from suit by "provid[ing] a defendant with the right not to proceed to trial, " as the 2009 enacted right of immediate appeal corroborates. *Batzel v. Smith*, 333 F.3d 1025 (9th Cir. 2003)(explaining that denials of anti-SLAPP motions are immediately appealable because "lawmakers wanted to protect speakers from the trial itself rather than merely from liability." The State of Oregon codified its Special Motion to Strike Law under Ore. Rev. Stat. 31.150.

Oregon's anti-SLAPP provisions "permit a defendant who is sued over certain actions taken in the public arena to have a questionable case dismissed at an early stage." *Staten v. Steel*, 222 Or. App. 17, 27, 191 P.3d 778, 786 (2008). A Special Motion to Strike is treated "as a Motion to Dismiss under Fed. R. Civ. P. 12(b), and requires the court to enter a 'judgment of dismissal without prejudice' if the motion is granted." *Gardner v. Martino*, 563 F.3d 981, 986 (9th Cir. 2009)(applying Oregon law).

A. The Oregon District Court Applied a Hyper-Standard of Law to Annalisa Ball's Special Motion to Strike, Contradicting State and Federal anti-SLAPP Laws

Upon timely filing his 42 U.S.C. § 1983 Complaint in Oregon District Court, Honorable Jolie Russo, satisfied with the claims put-forth, instructed Petitioner to serve a true copy of the Second Amended Complaint upon all

Defendants (*see* Appendix T-4; #15). In response to the Complaint, Annalisa Ball filed a Special Motion to Strike, arguing that her filing of a police report, one she knew to be false, was a protected petitioning activity under Oregon's anti-SLAPP statute. When Mr. Lloyd disputed Mrs. Ball's Special Motion to Strike, Judge Rosso was expeditiously replaced by Judge Mustafa Kasubhai, (see Appendix X), who promptly granted Mrs. Ball's anti-SLAPP Motion with prejudice, and awarded Defendant Ball $15,000 in attorney fees, on grounds that Petitioner "failed to show a probability of prevailing on the merits."

Honorable Kasubhai asserted the "[t]here can be no dispute that Ore. Rev. Stat. 31.150(2)(a)[5] encompasses statements reporting wrongdoing to police," which is generally true, unless the claims in the report to police are fraudulent and done with malicious intent. Annalisa Ball's filing of a false report to police, for the purpose of extorting marital assets outs of Mr. Lloyd in the couple's dissolution of marriage proceedings, (*see* Appendix D), is not conduct afforded protection under Oregon's anti-SLAPP law, or the First Amendment to the United States Constitution, as "[u]nlawful or criminal activities do not qualify as protected speech or petitioning activities." *Dwight R. v. Christy B.*, 571 U.S. 884, 134 S.Ct 258 (2013); see also *Zweizig v. NW Direct Teleservices Inc.*, 331 F.Supp.3d 1173 (D. Ore. 2018).

By placing within quotes, "oral statements" and "judicial proceeding," Judge Kasubhai seeks to imply that Annalisa Ball's filing of a police report is a protected part

---

[5] **Ore. Rev. Stat § 31.150 – Special Motion to Strike**

(2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

of a judicial proceeding.[6] This is err, as the filing of a report to police, much less a willfully misleading one, is not part of the judicial process.

By granting Defendant Ball's Special Motion to Strike, Judge Kasubhai set a dangerous precedent that expanded unintended protections to Ore. Rev. Stat. 31.150.

B. Argument For Why This Court Should Reverse the Oregon District Court's Decision

A defendant that files an anti-SLAPP Motion, under Ore. Rev. Stat. 31.150, based upon legal deficiencies, requires a court's analysis to be based upon Fed. R. Civ. P. 8 and 12 standards. Yet, if it consists of a factual challenge, then the motion must be treated as though it were a Motion for Summary Judgment, and discovery must be permitted. *Rogers v. Home Shopping Network, Inc.*, 57 F.Supp.2d 973 (C.D. Cal. 1999).

Analysis of a Special Motion to Strike is a two-step process. "First, the defendant has the initial burden to show that the challenged statement is within one of the categories of civil actions described in Ore. Rev. Stat. § 31.150(2)." *Id.* "[T]he critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." *Mann v. Quality Old Time Serv., Inc.*, 120 Cal.App. 4th 90, 102, 15 Cal.Rptr.3d 215, 220 (2004)(referring to the California anti-SLAPP statute). A required showing may be made on the basis of the pleading alone. *Staten*, 222 Or. App. at 31.

If the defendant meets the initial burden, then "the burden shifts to the plaintiff in the action to establish that there is a probability that the plaintiff will prevail on the

---

[6] **Judicial Proceeding** – Defined as "Any court proceeding, any proceeding to procure an order or decree, whether in law or in equity." *Black's Law Dictionary* (9th Ed. 2010)

claim by presenting substantial evidence to support a *prima facie* case." Ore. Rev. Stat. § 31.150(3); *Gardner*, 563 F.3d at 986. In making this determination, the court must take the facts from the pleadings and from the supporting and opposing affidavits, Ore. Rev. Stat. § 31.150(4); and state them "in the light most favorable to the plaintiff." *Mullen v. Meredith Corp.*, 271 Or.App. 698, 353 P.3d 598 (2015). The court must deny the Special Motion to Strike "[i]f the plaintiff meets the burden." Ore. Rev. Stat. § 31.150(3).

The Oregon Court of Appeals recently explained that "[a]lthough the statute refers to a plaintiff's need to show a probability of prevailing on the claim in order to proceed, we have interpreted that standard, in this context, to be a low bar." *Young v. Davis*, 259 Or. App. 497, 314 P.3d 350 (2013). To clear that low bar, a plaintiff has the burden of presenting substantial evidence to support a *prima facie* case against the defendant. *Id.* Typically, a plaintiff will not have access to discovery before being required to defend against a Special Motion to Strike. See Ore. Rev. Stat. § 31.150(2)("All discovery in the proceeding shall be stayed upon the filing of a Special Motion to Strike under ORS 31.150"). Therefore, a plaintiff may meet the burden of production by producing direct evidence, and "affidavits setting forth such facts as would be admissible in evidence." *Ore. Educ. Ass'n. v. Parks*, 253 Or. App. 558, 567, 291 P.3d 789 (2012).

Furthermore, "the trial court may not weigh the plaintiff's evidence against the defendant's" and "may consider defendant's evidence only insofar as necessary to determine whether it defeats plaintiff's claim as a matter of law. *Young*, 259 Or.App. at 509-510, 314 P.3d 350; *Hardy v. Lane Cnty.*, 274 Or.App. 644, 652, 362 P.3d 867 (2015), *review allowed*, 358 Ore. 550, 368 P.3d 215 (2016); *Comm v. Deaton*, 276 Or.App. 347, 367 P.3d 937, (2016).

When evaluating an abuse of process claim in the context of an anti-SLAPP motion, the motion rises or falls on the first prong. In an abuse of process claim, the plaintiff is not required to show proof of malice or probable cause, as is necessary in a malicious prosecution claim, but the two torts are not mutually exclusive. The common-law tort of abuse of process requires proving the following elements: that "(1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." *Gutierrez v. Mass Bay Transp. Auth.*, 772 N.E.2d 552, 563, 437 Mass. 396 (Mass. 2002). "The tort has been described as usually involving a 'form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money." *Keystone Freight Corp. v. Bartlett Consol., Inc.*, 77 Mass. App. Ct. 304, 930 N.E.2d 744, 751 (Mass. App. Ct. 2010)(quoting *Vittands v. Sudduth*, 49 Mass. App. Ct. 850, 822 N.E.2d 727, 730 (Mass. 2005)("The tort has been described as usually involving a form of coercion to obtain collateral advantage not properly involved in the proceeding itself, similar to extortion"). Thus, the gravamen of an abuse of process claim is whether the defendant had an ulterior motive (*see* Appendix D).

The court found instances where obtaining the process is, in and of itself, sufficient to achieve the illegitimate purpose for an abuse of process. See *id*, 822 N.E.2d at 731-32 ("without turning on any additional act of misuse, a number of cases find that initiating process alone can at times be so coercive and promoting of ulterior advantage that it supports an abuse of process claim."); see also *Carroll v. Gillespie*, 14 Mass. App. Ct. 12, 436 N.E.2d 431, 439 (Mass. App. Ct. 1982)(holding that "evidence was sufficient to support findings that [defendant] initiated the complaints with knowledge that they were groundless and sought to use the criminal process to collect a debt.").

In such instances, requiring additional conduct beyond the misuse of process to defeat an anti-SLAPP motion could effectively insulate the abuse of process claim and preclude redress. The court in *Humphrey v. Comoletti*, 2016 U.S. Dist. LEXIS101753 (D. Mass. Aug. 2, 2016), found that to avoid protecting sham police reports and the like from suit, the initiation process, without more, can be sufficiently coercive and calculated to promote an ulterior advantage to support and abuse of process claim and service an anti-SLAPP motion. The court's approach properly focuses the inquiry on the ulterior motive behind the seeking of the challenged process and avoids a view of the anti-SLAPP statute that would wholly insulate sub-categories of bad behavior from the reach of tort law.

Annalisa Ball's Special Motion to Strike sought the dismissal of Petitioner's claims by arguing that her filing of a police report, one she knew to be false, was an action protected under Oregon's anti-SLAPP law and the First Amendment to the United States Constitution, as an integral part of the judicial process. Defendant Ball's willful filing of sham police report,[7] to gain a financial advantage in her divorce proceedings,[8] are criminal acts in the State of

---

[7] **Ore. Rev. Stat. § 162.375 – Initiating a False Report**
(1) A person commits the crime of initiating a false report if the person knowingly initiates a false alarm or report that is transmitted to a fire department, law-enforcement agency or other organization that deals with emergencies involving danger to life or property.

[8] **Ore. Rev. Stat. § 163.275 – Coercion**
(1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct to the contrary to the compulsion or inducement, the actor or another will: **(e)** Falsely accuse some person of a crime or cause criminal charges to be instituted against the person;

Oregon. Through her deliberate mischaracterization of the truth, Mrs. Ball sought to sway the courts into permitting her to retain the ill-gotten financial gains she received through Mr. Lloyd's wrongful incarceration, as well as her justification for separating Petitioner from his children.

[The Court:] My understanding was, reading through the report, it was more of mom [Annalisa Ball] and – I think it was the stepdaughter, if I remember right –
[Atty Cohen:] Yes.
[The Court:] – are manipulating the kids, and this whole allegation, this process, is all about keeping the kids away from Mr. Lloyd.
[Atty Cohen:] Yes.
Tr. 70: *February 19, 2015, Case Assignment Hearing*

Annalisa Ball failed to show how her conduct was "in furtherance of the exercise of her constitutional right to petition * * * in connection with a public issue, or an issue of public interest, as required by Ore Rev. Stat. § 31.150(2).

Even if a defendant is able to prove legitimate petitioning activity, a plaintiff can still survive a Special Motion to Strike if they demonstrate that the challenged claim does not give rise to a "SLAPP" suit. See *Blandard v. Stewart Carney Hosp., Inc.*, 477 Mass. 141, 75 N.E.3d 38 (Mass. 2017). In essence, was the complaint filed by the Petitioner brought solely to chill Annalisa Ball's petitioning activities. *Chin v. Garda CL New England, Inc.*, 2017 U.S. Dist. LEXIS 221841 (D. Mass. 2017).

Petitioner did not file his Civil Complaint in Federal District Court until April 13, 2017, a full 23-months after the criminal indictment had been dismissed. Accordingly, there is no basis for inferring that Mr. Lloyd was motivated

to deter Annalisa Ball from participating in the malicious prosecution against him. However, there is ample evidence, independent of the petitioning activity, that established Mrs. Ball sought an ulterior advantage in making her sham report to police.

a. Ore. Rev. Stat. § 31.150(2)(a)

A defendant may bring a Special Motion to Strike under the anti-SLAPP statute for any claim in a civil action arising from any "oral statement made, or written statement or other document submitted in a legislative, executive or judicial proceeding or other proceeding authorized by law." Ore. Rev. Stat. 31.150(2)(a).[9]

Annalisa Ball failed to make a *prima facie* showing of how she is immune from Petitioner's § 1983 Complaint, or why she should be protected from exposure to a trial in the case. See *Makaeff v. Trump Univ. LLC.*, 715 F.3d 254, 276 (9th Cir. 2013). Defendant Ball's reliance upon the narrow protections of Ore. Rev. Stat. 31.150(2)(a) are moot, as filing a sham report to police to gain an ulterior advantage in her dissolution of marriage case, were criminal acts not protected under the anti-SLAPP law.

b. Ore. Rev. Stat. § 31.150(2)(c)

Judge Mustafa Kasubhai, and the Defendants within the complaint, were unable to show how the elements of Petitioner criminal case, even placed in a light most

---

[9] **Ore. Rev. Stat § 31.150 – Special Motion to Strike**

(2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

favorable to the Defendants, were of public concern. A defendant may bring a Special Motion to Strike under the anti-SLAPP statute, for any claim in a civil action arising from "any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest." Ore. Rev. Stat. § 31.150(2)(c).[10]

Annalisa Ball alleging that her spouse attached her name to an auto-loan, for a vehicle that Mrs. Ball had driven as her daily mode of transportation for more than two-years, (*see* Appendix Y), and which was paid for using auto-withdrawals from Petitioner's personal, CHASE Bank checking account, (*see* Appendix G-1), was neither a "pubic issue" or an issue of "public interest." See *In Defense of Animals v. OHSU*, 199 Or. App. 160, 188 (2005)("A matter or action is commonly understood to be 'in the public interest' when it affects the community or society as a whole, in contrast to a concern or 'interest of a private individual' or entity"). Yet, law-enforcement spending tax-payer funds to pursue a known frivolous indictment, for purposes other than obtaining a conviction or adjudicating a crime, (*see* Appendix D), should be a matter of grave public interest.

---

[10] **Ore. Rev. Stat § 31.150 – Special Motion to Strike**

(2) A special motion to strike may be made under this section against any claim in a civil action that arises out of:

(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest;

CONCLUSION

Petitioner has proceeded *pro se*, his submissions should "be liberally construed in his favor," *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995)(citing *Haines v. Kerner*, 404 US 519, 92 S.Ct 594, 30 L.Ed 2d 652 (1972), and read to raise the strongest arguments that they suggest. *Graham v. Henderson*, 89 F.3d 75, (2d Cir. 1996).

Malicious prosecution claims are rarely successful given the increasingly high-standards set by courts across the United States, so, when a case contains all of the elements necessary to succeed, courts should rule upon them favorably, to deter potential future misconduct.

For the afore mentioned reasons, Petitioner respectfully requests that this court grant his Petition for Writ of Certiorari.

DATED and submitted this 18 day of November, 2020.

Brett Emmett Lloyd

APPENDICES

Appendix A.....Ninth Circuit's denial of Rehearing *En Banc*
Appendix B.....Opinion of the Ninth Circuit
Appendix C.....Opinion of Oregon's District Court
Appendix D.....DDA John Gerhard's Email Re: Extortion
Appendix E.....DDA John Gerhard's Plea Offer
Appendix F.....Brett Lloyd's Criminal History
Appendix G....USAA Auto-Loan Documents
Appendix H....Attorney Kelly Lemarr's Filing for Divorce
Appendix I.....Attorney Kelly Lemarr's Offer of Settlement
Appendix J.....Officer Jeffrey Warner's Initial Police Report
Appendix K....Officer Warner's Supplemental Report
Appendix L.....DDA John Gerhard's Criminal Indictments
Appendix M....Judge Suzanne Upton's Warrant of Arrest
Appendix N....Compliance with Crime Victims' Rights
Appendix O.....Trial Transcripts
Appendix P.....State's Motion for Judgment of Dismissal
Appendix Q.....Court Order on Sentencing
Appendix R.....Court Order on Motion for Dismissal
Appendix S.....Henry LeSueur's Email Re: Final Judgment
Appendix T.....Case No. 3:17-cv-00582 Summary
Appendix U.....Second Amended Complaints
Appendix V.....Affidavits of Service
Appendix W.....Pretrial Conference Disposition
Appendix X.....Notice of Judicial Reassignment
Appendix Y.....Divorce Documents Re: Vehicle Swap