No. _____

In The
Supreme Court of the United States

JOHN A. FAKLA,
Petitioner,
v.
MIDDLESEX BOROUGH, MATTHEW GEIST, AND MARK MELCHIORRE,
Respondents.

PETITION FOR WRIT OF CERTIORARI

INDEX TO APPENDICES

APPENDIX A

Judgment of the United States Court of Appeals
for the Third Circuit (July 17, 2025)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-2610

JOHN FAKLA,
Appellant

v.

MATTHEW GEIST, Middlesex Borough Police Chief, both individually and in his official capacity; MARK MELCHIORRE, Middlesex Borough Police Office, both individually and in his official capacity as an officer of the Borough of Middlesex Police Department.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:22-cv-04126)
District Judge: Honorable Susan D. Wigenton

Submitted Under Third Circuit L.A.R. 34.1(a)
on June 9, 2025

Before: KRAUSE, PORTER, and AMBRO, *Circuit Judges*.

JUDGMENT

This cause came to be considered on the record from the U.S. District Court for the District of New Jersey and was submitted under L.A.R. 34.1(a) on June 9, 2025.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** that the order of the United States Magistrate Judge entered December 19, 2023, the orders of the District Court entered January 10, 2024 and February 28, 2024, and the judgment of the District Court entered August 2, 2024 are **AFFIRMED**. All of the above in accordance with the Opinion of this Court.

Costs will be taxed against the appellant.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 17, 2025

Certified as a true copy and issued in lieu of a formal mandate on August 8, 2025

Teste: Patricia A Dodszuweit

Clerk, U.S. Court of Appeals for the Third Circuit

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

UNITED STATES COURT OF APPEALS
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
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August 8, 2025

Melissa E. Rhoads
United States District Court for the District of New Jersey
Martin Luther King Jr. Federal Building & United States Courthouse
50 Walnut Street
Newark, NJ 07102

RE: John Fakla v. Matthew Geist, et al
Case Number: 24-2610
District Court Case Number: 2:22-cv-04126

Dear District Court Clerk,

Enclosed herewith is the certified judgment together with copy of the opinion in the above-captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment shows costs taxed, if any.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: Timothy McIntyre
Timothy McIntyre, Case Manager

267-299-4953

cc: Alan J. Baratz, Esq.
Jordan P. Brewster, Esq.
Donald A. Klein, Esq.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-2610

JOHN FAKLA,
Appellant

v.

MATTHEW GEIST, Middlesex Borough Police Chief, both individually and in his official capacity; MARK MELCHIORRE, Middlesex Borough Police Office, both individually and in his official capacity as an officer of the Borough of Middlesex Police Department.

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Before: KRAUSE, PORTER, and AMBRO, *Circuit Judges*.

(Filed: July 17, 2025)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PORTER, *Circuit Judge*.

John Fakla sued various individuals and entities associated with the local police and prosecutor's office of Middlesex County, New Jersey for alleged misconduct stemming from a 2012 DWI arrest and an alleged malicious prosecution that lasted from 2019 to 2021. Fakla's appeal challenges various aspects of the litigation process and the District Court's ultimate decision to grant summary judgment in favor of the Defendants. We will affirm.

I

Fakla claims that two officers from the Middlesex Borough Police Department, Mark Melchiorre and Matthew Geist, falsely arrested him in 2012. After this, he says, the officers "brutally assaulted" and "tortured" him, "injected him with an unknown substance," and told him they "wanted to tarnish his reputation." *Fakla v. Geist*, 2024 WL 3634191, at *2 (D.N.J. Aug. 2, 2024) (internal quotation marks omitted). Over the next seven years, Fakla harassed both men with increasingly erratic behavior. He appeared outside their houses and sent numerous messages to Melchiorre, one of which threatened the lives of his family. On July 1, 2019, Melchiorre was directing traffic. Fakla spotted him and began to drive past him repeatedly while shouting out the window. Fakla then parked his car on a street near Melchiorre, causing the officer to fear for his safety. Melchiorre called for backup, backup arrived, Fakla fled, and police pursued him. The next day, Fakla was arrested and charged with stalking and eluding.

Fakla was never convicted. On January 26, 2021, the trial court found that he was unfit to stand trial owing to his mental illness and that it was not "substantially probable"

he would "regain his competence within the foreseeable future." *Id.* at *3. All charges were dismissed with prejudice.

Fakla filed this suit on June 17, 2022, against Melchiorre, Geist, and many others, asserting claims under New Jersey and federal law. The Magistrate Judge then overseeing the case extended the discovery period several times. After issuing another extension through October 2023, the Magistrate Judge warned Defendants' counsel that if they did not respond to Fakla's outstanding requests he would grant leave for a sanctions motion. After the deadline passed, Fakla moved for sanctions. The Magistrate Judge scheduled a status conference in December, but Fakla's counsel failed to attend due to technical issues. Following the conference, the Magistrate Judge denied the motions based on the briefs "and for the reasons stated on the record at the conference," and closed discovery. Appellant's App. Vol. I at 12–13.

On January 9, 2024, the District Court held a hearing to address Defendants' motion for judgment on the pleadings. In an order that followed, it dismissed numerous claims with prejudice, including all counts that "relat[ed] to conduct that allegedly occurred" more than two years prior to the date of the complaint's filing. Appellant's App. Vol. I at 10–11. The District Court later clarified this referred to claims "to the extent they accrued prior" to that date. *Id.* at 9. It dismissed the remaining claims without prejudice and ordered Fakla to file an amended complaint. *Id.* at 11.

He did so. The new complaint alleged malicious prosecution under 42 U.S.C. § 1983 and the New Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6-2, as well as negligent and intentional infliction of emotional distress. The remaining Defendants sought

summary judgment and Fakla filed a motion to reopen discovery. The District Court denied Fakla's motion and granted summary judgment. Fakla timely appealed.

II

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1367. We have jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment de novo, "view[ing] the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Montone v. City of Jersey City*, 709 F.3d 181, 189 (3d Cir. 2013) (internal quotation marks omitted). "We review a district court's discovery orders for abuse of discretion, and will not disturb such an order absent a showing of actual and substantial prejudice." *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 281 (3d Cir. 2010).

III

A

Fakla seeks to fire a broadside at the District Court, but about half of his claims are unpreserved or forfeited. We decline to reach those arguments on the merits.

To begin, Fakla objects to the Magistrate Judge's decision to not schedule a hearing on his motion for sanctions. But he offers only a two-and-a-half-page block quote from the Federal Rules of Civil Procedure. He does not argue that the Magistrate Judge's decision was error. It is a cardinal rule of appellate litigation that the appellant must provide his "contentions and the reasons for them." Fed. R. App. P. 28(a)(8)(A). This is not discretionary: "[t]he appellant's brief *must* contain" his arguments. *Id.* at 28(a) (emphasis added). A brief that only quotes a rule without explanation fails to make an

argument, and thus fails to preserve the issue for appeal. *Doeblers' Pa. Hybrids, Inc. v. Doebler*, 442 F.3d 812, 821 n.10 (3d Cir. 2006).

Fakla accuses the Magistrate Judge of turning the status conference into an *ex parte* hearing. He should have raised that argument before the Magistrate Judge or before the District Court. *See* Fed. R. Civ. P. 72(a). He did neither. We will not consider arguments raised for the first time on appeal absent "narrow exceptional circumstances." *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017). Fakla fails to offer, and we fail to perceive, exceptional circumstances meriting review this late in the process.

Next, Fakla's statement of the issues asks us to consider the District Court's dismissal of the claims against Middlesex Borough Police Department. But he offers no discussion anywhere in his brief about the dismissal and why it was inappropriate. Likewise, Fakla makes the remarkable assertion that the District Court possessed evidence of its own and did not offer it to Fakla during a hearing. But Fakla does not identify when this happened, what evidence was involved, or the motion to which this evidence related. He neither offers citations to the record nor any argument. These two issues are unpreserved.

B

Fakla understands the District Court to have said that "any actions of the Defendants, relevant or not, before June 17, 2020, were barred" as inadmissible evidence due to its statute-of-limitations ruling. Appellant's Br. 5. He criticizes the District Court

for "pointing to numerous dates before [June 17]" in favor of the Defendants "and not allowing Plaintiff the same courtesy." *Id.* at 18.

Fakla is mistaken. The District Court's order states that certain "*counts*" predating June 17, 2020, were dismissed with prejudice. Appellant's App. Vol. I at 10 (emphasis added). The Court later clarified, twice, that it was referring to claims "to the extent they accrued prior to" that date. *Id.* at 9; *Fakla*, 2024 WL 3634191, at *4 n.8 (emphasis deleted). It did not say that certain evidence was inadmissible because it pre-dated 2020. Thus, the District Court did not err.[1]

C

Next, Fakla objects to the District Court's analysis of *Thompson v. Clark*, 596 U.S. 36 (2022). In Fakla's view, *Thompson* asserts that the "deprivation of liberty is sufficient" to make out a claim for malicious prosecution. Appellant's Br. 19. That is incorrect. *Thompson* teaches that a malicious prosecution claim requires, "*among other things*," a showing that the plaintiff's "prosecution ended without a conviction." 596 U.S.

[1] To the extent Fakla seeks to resurrect his other malicious-prosecution claims, they are waived. "Waiver is the intentional relinquishment or abandonment of a known right." *United States v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023) (internal quotation marks omitted). Before the District Court, Fakla's counsel "indicated . . . that the malicious prosecution claim arising out of the July 2019 arrest was the only claim that would not be barred by the statute of limitations." *Fakla*, 2024 WL 3634191, at *4. He did this at a moment when the Court was striking claims that were statutorily barred or else insufficiently pled.

Because the District Court disposed of the remaining malicious-prosecution claim on the merits, we decline to question its analysis of the statute of limitations and claim accrual under § 1983.

at 39 (emphasis added).[2] The District Court correctly considered two of those "other things": the lack of probable cause and the presence of malice. *Fakla*, 2024 WL 3634191, at *6–8. Fakla failed to show a genuine issue of material fact as to either element. *Id.*

On appeal, Fakla contends the prosecution lacked probable cause because the District Court dismissed the criminal charges with prejudice. But probable cause is based on "the facts and circumstances within the arresting officer's knowledge." *Id.* at *7 (quoting *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000)). That Fakla proved unfit for trial says nothing about whether probable cause existed on July 2, 2019, the date of his arrest. Fakla's malice argument rests on his allegation that there was no probable cause and is thus equally unpersuasive.

D

Finally, Fakla appeals the denial of his motion to reopen discovery. Discovery may be reopened "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Good cause requires the moving party to show he pursued discovery with "due diligence." *Race Tires Am., Inc. v. Hoosier Racing Tires Corp.*, 614 F.3d 57, 84 (3d Cir. 2010).

[2] A malicious-prosecution claim requires the plaintiff to show defendants: (1) "initiated a criminal proceeding"; (2) that ended in the plaintiff's favor; (3) acted without probable cause; (4) "acted maliciously or for a purpose other than bringing the plaintiff to justice"; and (5) "plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." *Harvard v. Cesnalis*, 973 F.3d 190, 203 (3d Cir. 2020) (quoting *Est. of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003)). *Thompson* clarified that a prosecution ends in the plaintiff's favor when there is no conviction. 596 U.S. at 39.

Fakla insists he employed due diligence by filing his sanctions motion. But he offers no explanation for the untimeliness of his motion to reopen. Nor does he address the District Court's conclusion that the evidence sought was immaterial to the remaining claims. We are satisfied that the District Court did not abuse its discretion.

IV

For the foregoing reasons, we will affirm.

APPENDIX B

Opinion of the United States District Court
(August 2, 2024)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN FAKLA, Plaintiff, v. MATTHEW GEIST, *et al.*, Defendants.	Civil Action No: 22-4126 (SDW) (SDA) **OPINION** August 2, 2024

WIGENTON, District Judge.

Before this Court is Defendants Matthew Geist ("Defendant Geist") and Mark Melchiorre's ("Defendant Melchiorre, together with Defendant Geist, "Defendants") motion for summary judgment pursuant to Federal Rule of Civil Procedure ("Rule") 56 (D.E. 105 ("MSJ")) and Plaintiff John Fakla's ("Plaintiff") cross-motion to reopen discovery pursuant to Rule 16(b)(4). (D.E. 109.)[1] Jurisdiction is proper pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391. This opinion is issued without oral argument pursuant to Rule 78. For the reasons stated herein, Plaintiff's motion to reopen discovery is **DENIED**, and Defendants' MSJ is **GRANTED**.

I. FACTUAL BACKGROUND[2]

[1] On February 6, 2024, Defendants filed a motion to dismiss (D.E. 93) Plaintiff's First Amended Complaint (D.E. 90) pursuant to Rule 12(b)(6). In accordance with Rule 12(d), this Court converted it into a motion for summary judgment. (D.E. 97.)

[2] Facts cited in this opinion are drawn from Defendants' Statement of Material Facts (D.E. 105-2 ("Defendants' Statement")), Plaintiff's supplemental statement of undisputed material facts (D.E. 110-3 ("Plaintiff's Statement")), and Defendants' responses to Plaintiff's Statement (D.E. 113-1.) The facts presented in Defendants' Statement are largely undisputed for purposes of summary judgment because Plaintiff has failed to properly contest most of the factual allegations set forth therein, as required by Local Civil Rule ("Local Rule") 56.1(a), which provides:

A. The Events of October 28, 2012

This case arises from an allegedly illegal traffic stop that occurred on October 28, 2012, and Plaintiff's several interactions with the Middlesex Borough Police Department ("Middlesex PD") since then. Plaintiff alleges that, on October 28, 2012, he was pulled over in his car by Defendant Melchiorre, a police officer in the Middlesex PD. (D.E. 110-3 ¶ 1.) Defendant Melchiorre and another Middlesex PD officer proceeded to arrest Plaintiff for driving while intoxicated. (*Id.*) After they brought Plaintiff to the Middlesex Borough police station, Plaintiff asserts, a series of disturbing actions were taken against him by Defendant Melchiorre and Defendant Geist, the Chief of the Middlesex PD. (*Id.* ¶ 2.) Specifically, Plaintiff insists that Defendants brutally assaulted him, rubbed a substance on his genitals and face, tortured and molested him, injected him with an unknown substance, accused him of trafficking drugs, and stated that they "wanted to tarnish" his reputation. (*Id.* ¶¶ 2–3.) Plaintiff asserts that he was held in custody for days and was released only after Defendant Melchiorre had searched his home and found no contraband to support the drug-trafficking accusations. (*Id.* ¶¶ 4–7.) Months later,

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> The opponent of summary judgment shall furnish, with its opposition papers, a responsive statement of material facts, addressing each paragraph of the movant's statement [of material facts], indicating agreement or disagreement and, if not agreed, *stating each material fact in dispute and citing to the affidavits and other documents submitted in connection with the motion*; any material fact not disputed shall be deemed undisputed for purposes of the summary judgment motion. In addition, the opponent may also furnish a supplemental statement of disputed material facts, in separately numbered paragraphs citing to the affidavits and other documents submitted in connection with the motion, if necessary to substantiate the factual basis for opposition. . . . Each statement of material facts shall be a separate document (not part of a brief) and shall not contain legal argument or conclusions of law.

L. CIV. R. 56.1(a) (emphasis added). Here, notwithstanding this Court's express instruction to Plaintiff to comply with Local Rule 56.1, he has failed to do so. Specifically, Plaintiff has failed to cite to record evidence in response to Defendants' Statement. Accordingly, this Court deems as undisputed the facts set forth in Defendants' Statement unless otherwise noted. *Kemly v. Werner Co.*, 151 F. Supp. 3d 496, 499 n.2 (D.N.J. 2015); *N.J. Carpenters Pension Fund v. Housing Auth. & Urban Dev. Agency*, 68 F. Supp. 3d 545, 549 (D.N.J. 2014). Even if this Court were to accept Plaintiff's conclusory and unsupported disputes, it raises few, if any, *material* disputes of fact, and thus the outcome of the present motion would not change.

Plaintiff was charged for the DUI. (*Id.* ¶ 5.) He pled guilty to the charges because his attorney advised him that the municipal court judge would not believe his recollection of the events that purportedly occurred on October 28, 2012. (*Id.* ¶¶ 8–9.)

B. Plaintiff's Efforts to Expose the Events of October 28, 2012

Plaintiff has spent years attempting to uncover the details of, and hold accountable Defendants for, the events that purportedly occurred on October 28, 2012. Plaintiff claims to have hired private investigators and attorneys, filed complaints with the Middlesex Borough PD's office of internal affairs, and authored various social media posts about Defendants and the Middlesex Borough PD. (*Id.* ¶¶ 8, 10–15.) When those efforts did not bear fruit, Plaintiff admits, he "bec[a]me more insistent with the release of these things, that he would be charged with terroristic threats and stalking." (*Id.* ¶ 15.) Indeed, undisputed evidence in the record establishes that Plaintiff has threatened Defendant Melchiorre and his family on multiple occasions, including by leaving threatening voicemails, sending angry emails, and appearing outside of Defendant Melchiorre's home. (D.E. 105-2 ¶ 14.)

Plaintiff's endeavors continued into 2019. In the first half of the year, Plaintiff had several encounters with the Middlesex Borough PD, all seemingly related to his efforts to investigate—or, allegedly, harass—Defendant Melchiorre. For instance, on April 3, 2019, Defendant Melchiorre's children saw Plaintiff drive by their home and, thereafter, park his car on a nearby corner. (*Id.* ¶ 4.) After the children explained what they had seen, Defendant Melchiorre identified Plaintiff and called the police. (*Id.*) Plaintiff was neither arrested nor prosecuted for his actions outside of Defendant Melchiorre's home on April 3, 2019. (*Id.* ¶ 7.)

Plaintiff had several other encounters with Middlesex Borough PD officers on June 21, 23, 30, and July 1. (D.E. 105-4 at 55–63.) Plaintiff acknowledges that his claims largely arise out of

his interactions with the Middlesex Borough PD on July 1, 2019. (D.E. 111 at 10 ("Defendants are correct in identifying that the Plaintiff only seeks liability for the second malicious prosecution claim . . . .").)

C. The Alleged Malicious Prosecution

On July 1, 2019, Defendant Melchiorre was directing traffic when he, on several occasions, observed Plaintiff drive by and shout at him. (D.E. 105-2 ¶ 8.) Eventually, Plaintiff parked his vehicle on a nearby side street and stayed there. (*Id.*) Defendant Melchiorre, fearing for his safety and focused on conducting traffic, called the Middlesex PD headquarters for back up. (*Id.* ¶¶ 8–10.) Officer Painchaud responded to the call, and immediately thereafter, a pursuit ensued. (*Id.* ¶ 9; D.E. 105-4 at 63.) Officer Painchaud attempted to pull over Plaintiff, but Plaintiff refused to do so. Instead, Plaintiff admits, he called 9-1-1 and informed the 9-1-1 operator that he would not stop. (D.E. 105-4 at 63.) The 9-1-1 operator, in turn, directed Officer Painchaud to "terminate the pursuit," and advised Plaintiff that he should return to his home but that it would not "absolve him of his obligation to stop for a lawful police motor vehicle stop." (*Id.*)

On July 2, 2019, Officer Painchaud filed in New Jersey municipal court a criminal complaint against Plaintiff along with an affidavit of probable cause to arrest him. (*Id.* at 55–62.) Municipal Court Judge Spero A. Kalambakas found that probable cause to arrest Plaintiff existed, and Plaintiff was arrested shortly thereafter. (*Id.*; D.E. 110-3 ¶ 25.)

In the months that followed, the Middlesex County Prosecutor's Office pursued charges against Plaintiff, and on October 23, 2019, a grand jury indicted him. (D.E. 110-3 ¶¶ 26–27.) The undisputed facts establish that Defendant Geist communicated with the Middlesex County Prosecutor's Office about the case, but that his role was "ordinary." (D.E. 105-2 ¶ 12.)

The prosecution against Plaintiff proceeded until early 2021. On January 26, 2021, Judge Joseph Paone of the Superior Court of New Jersey Law Division, Middlesex County-Criminal Part, found that Plaintiff "lack[ed] the fitness to proceed to trial as a result of mental illness," and that "[t]here [wa]s not evidence that it [would be] substantially probable that [Plaintiff] could regain his competence within the foreseeable future." (D.E. 105-4 at 44–45.) Approximately two months later, Judge Paone entered an order that, among other things, dismissed with prejudice the charges against Plaintiff. (*Id.* at 41–42.)

II. PROCEDURAL HISTORY

A. The First Complaint

On June 17, 2022, Plaintiff filed a 10-cout complaint against a slew of defendants.[3] (D.E. 1 ("Complaint").) In the months that ensued, the several then-named Defendants responded to the Complaint by either filing an answer or a motion to dismiss. (D.E. 9, 12, 14, 16.) On October 5, 2022, the parties appeared for an initial scheduling conference before then-Magistrate Judge Edward S. Kiel. (D.E. 24, 27.) Six days later, a pretrial scheduling order was entered, and discovery commenced. (D.E. 27.) Since then, multiple extensions to the discovery schedule have been granted (D.E. 52, 65, 68), and several of the originally named defendants have been dismissed from this suit.[4]

B. Reassignment and January 9, 2024 Hearing

[3] The original Complaint was filed against the Borough of Middlesex, the Middlesex Borough Police Department, Mark Melchiorre, Matthew Geist, Middlesex County, Middlesex County Prosecutor's Office, Martha McKinney, Brian Gillet, Christopher Van Eerde, Ann Klein Forensic Center, and several unnamed people and entities. (*See generally* D.E. 1.)

[4] Specifically, on October 18, 2022, Plaintiff stipulated to the dismissal of the Ann Klein Forensic Center as a defendant, (D.E. 31); on November 9, 2022, Plaintiff stipulated to the dismissal of the Middlesex County Prosecutor's Office, Martha McKinney, Brian Gillet, and Christopher Van Eerde as defendants, (D.E. 35); on September 19, 2023, Plaintiff stipulated to the dismissal of the County of Middlesex as a defendant, (D.E. 72).

On April 13, 2023, Defendants Melchiorre and Geist along with then-named Defendants Borough of Middlesex and Middlesex PD filed a motion for judgment on the pleadings.[5] (D.E. 53.) On November 29, 2023, this matter was reassigned to this Court. (D.E. 81.) The next day, this Court referred to then-Magistrate Judge Kiel Plaintiff's pending motion for sanctions and entry of default. Two weeks later, this Court scheduled for January 9, 2024, an oral argument on the motion for judgment on the pleadings. (D.E. 82.)

At the outset of the January 9 Hearing, Plaintiff, represented by able counsel, indicated to this Court that the malicious prosecution claim arising out of the July 2019 arrest was the only claim that would not be barred by the statute of limitations. (D.E. 91 at 4–5; *see also id.* at 9 ("[Defendants' counsel] is correct that from a statute of limitations standpoint the really only thing that would stand . . . .").) Plaintiff's counsel, moreover, acknowledged that discovery was closed and that he had evidence to prove the claims arising from the July 2019 arrest. (*Id.* at 10.)

Thereafter, this Court attempted to discuss the efficacy of the remaining counts and to determine whether Plaintiff wished to pursue them further. (*Id.* at 18.) During that hearing, Plaintiff consented to the dismissal of several claims (*see, e.g.*, *id.* at 19 ("We can stipulate that [Count 1] should probably be dismissed.")); *see also id.* at 20, 31); conceded that, by failing to adequately respond arguments in then-named Defendants' briefing, he waived certain claims (*see, e.g.*, *id.* at 30); and represented to this Court that he would file an amended complaint with well-pleaded factual allegations sufficient to state a claim upon which relief can be granted.[6] (*Id.* at

[5] Notably, on June 27, 2023, the then-presiding district judge issued an opinion and order granting a motion for judgment on the pleadings filed by the then-named Defendant Middlesex County. (D.E. 62, 63.) The June 27, 2023 opinion and order did not address the April 13, 2023 motion for judgment on the pleadings. (*See generally* D.E. 62, 63.)

[6] Specifically, Plaintiff's counsel conceded that the following counts should be dismissed: municipal and governmental liability pursuant to N.J. Stat. Ann. §§ 2C:30-2 and 2C:30-7 (Count 1); unreasonable and excessive force under 42 U.S.C. § 1983 (Count 2); negligent hiring (Count 6); official misconduct pursuant to N.J. Stat. Ann. § 2C:30-2 (Count 9); and personal liability against Defendant Geist (Count 10). (*Id.* at 19, 20, 31, 46, 48.) Likewise,

49.) For those reasons, among others,[7] this Court dismissed with and without prejudice the remaining claims in Plaintiff's Complaint. (*Id.* at 50–52.) This Court then listed on the record its rationale for the decision and, thereafter, issued an order setting forth the same.[8] (D.E. 91 at 50–54; D.E. 87; D.E. 97.) Notwithstanding Plaintiff's waiver of several claims, this Court permitted him an opportunity to amend his complaint to assert claims that were not deficient as a matter of law or barred by the two-year statute of limitations.[9] (D.E. 91 at 54.)

C. The Amended Complaint

On January 24, 2024, Plaintiff filed in this Court an amended complaint, which alleges the following three claims against Defendants Melchiorre and Geist: malicious prosecution under 42 U.S.C. § 1983; violation of New Jersey's Civil Rights Act ("NJCRA"), N.J. Stat. Ann. 10:6-1–2; and negligent and intentional infliction of emotional distress. (D.E. 90 ("Amended Complaint").) On February 6, 2024, Defendants filed a motion to dismiss the Amended Complaint. (D.E. 93 ("Second MTD").) On February 28, 2024, after having reviewed the Second MTD and the history

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Plaintiff's counsel admitted that, by failing to respond in his brief in opposition to then-Defendants' motion for judgment on the pleadings, the claims for conspiracy under 42 U.S.C. § 1985 (Count 4) and supervisor liability under 42 U.S.C. § 1983 (Count 5) had been waived. (*Id.* at 30.)

[7] This Court also noted on the record that other grounds existed for dismissing several of Plaintiff's claims, including that multiple claims were not properly pled causes of action, and that many claims were subject to New Jersey's two-year statute of limitations and thus would be time barred to the extent they accrued prior to June 17, 2020. (*See, e.g.*, *id.* at 16, 18, 20, 46.)

[8] The Order filed on January 10, 2024, erroneously stated "All counts against Defendants Geist and Melchiorre relating to conduct that allegedly occurred prior to June 17, 2020" were dismissed with prejudice. (D.E. 87.) Accordingly, after Plaintiff filed a motion for reconsideration, this Court amended the January 10, 2024 Order to state "All counts against Defendants Geist and Melchiorre are DISMISSED WITH PREJUDICE to the extent *they accrued prior to June 17, 2020*." (D.E. 90 (emphasis added).)

[9] Plaintiff has repeatedly insisted in his submissions that this Court arbitrarily chose June 17, 2020, as the date by which his claims must have accrued. Plaintiff filed his complaint on June 17, 2022 (D.E. 1), and a majority of his claims were subject to a two-year statute of limitations. *See Lloyd v. Ocean Twp. Counsel*, 857 F. App'x 61, 65 n.1 (3d Cir. 2021); *McCargo v. Camden Cnty. Jail*, 693 F. App'x 164, 165–66 & n.1 (3d Cir. 2017) (noting that claims brought pursuant to 42 U.S.C. § 1983 are subject to New Jersey's two-year statute of limitations); *Dique v. N.J. State Police*, 603 F.3d 181, 185 (3d Cir. 2010) ("The New Jersey two-year statute of limitations applies to section 1985 claims and runs from the date of each overt act causing damage to a plaintiff."). As such, any claims that accrued prior to June 17, 2020, are time barred.

of this litigation, this Court converted the motion into one for summary judgment. (D.E. 97.) On April 15, 2024, following a brief extension, the parties filed their respective motions: Defendants filed the MSJ, and Plaintiff filed a cross-motion to reopen discovery. (D.E. 105, 109.) The parties timely completed briefing.

III. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphases in original). A fact is only "material" for purposes of a summary judgment motion if a dispute over that fact "might affect the outcome of the suit under the governing law." *Id.* at 248. A dispute about a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The dispute is not genuine if it merely involves "some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). If the moving party meets this initial burden, the burden then shifts to the nonmovant who "must set forth specific facts showing that there is a genuine issue for trial." *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 288–89 (3d Cir. 2018) (quoting *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 268–69 (3d Cir. 2014)) The nonmoving party "must present more than just 'bare assertions, conclusory allegations or

suspicions' to show the existence of a genuine issue." *Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (quoting *Celotex Corp.*, 477 U.S. at 325). If the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which . . . [it has] the burden of proof[,]" then the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322–23. In considering a motion for summary judgment, this Court may not make credibility determinations or engage in any weighing of the evidence; instead, the nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 651, 656–57 (2014) (per curiam) (quoting *Anderson*, 477 U.S. at 255).

IV. DISCUSSION

Plaintiff's opposition to Defendants' MSJ relies in part on his argument that he needs additional discovery. This Court must address that preliminary argument before turning to the merits of Defendants' MSJ.

A. Motion to Reopen Discovery

Plaintiff's motion to reopen discovery is untimely, and in any event, it seeks discoverable information that is immaterial to the resolution of Defendants' motion for summary judgment.

Rule 16(b)(4) permits modifications to scheduling orders "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The good cause standard is not a low threshold, and the district court has broad discretion to control and manage discovery. *Morel v. Goya Foods, Inc.*, No. 20-5551, 2022 WL 3369664, at *2 (D.N.J. Aug. 16, 2022). In evaluating whether to grant a motion to reopen discovery, courts consider several factors, including: "(1) the good faith and diligence of the moving party, (2) the importance of the evidence, (3) the logistical burdens and benefits of re-opening discovery, [and] (4) prejudice to the nonmoving party." *Goldrich v.*

City of Jersey City, No. 15-885, 2018 WL 3360764, at *1 (D.N.J. July 10, 2018) (citing *Cevdet Aksut Ogullari Koll, STI v. Cavusoglu*, No. 14-3362, 2017 WL 3013257, at *4 (D.N.J. July 14, 2017)).

The foregoing factors weigh heavily against reopening discovery. First, Plaintiff has failed to demonstrate his diligence as the party moving to reopen discovery. On December 19, 2023—after having granted multiple extensions to the discovery schedule—then-Magistrate Judge Edward S. Kiel deemed discovery complete. (D.E. 85.) Rule 72(a) provides litigants, such as Plaintiff, 14 days to file objections to orders on nondispositive matters. Fed. R. Civ. P. 72(a). And Plaintiff has provided no persuasive reason for his failure to do so. Accordingly, he now "may not assign as error a defect in the order not timely objected to," nor can he claim that he acted with diligence. *Id.* Second, for reasons that will become apparent, the evidence that Plaintiff seeks is immaterial to the resolution of Defendants' motion for summary judgment.[10] Having found that the first two factors weigh heavily against reopening discovery, this Court denies Plaintiff's motion and turns to Defendants' MSJ.

B. Defendants' MSJ

[10] To the extent this application was made pursuant to Rule 56(d), it fails for similar reasons. Rule 56(d) permits a litigant who "cannot present facts essential to justify its opposition" to a motion for summary judgment to ask the district court to permit additional discovery. The Third Circuit "ha[s] interpreted this provision to require 'a party seeking further discovery in response to a summary judgment motion [to] submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained." *Pa. Dep't of Pub. Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (alteration in original) (quoting *Dowling v. City of Phila.*, 855 F.2d 136, 139–40 (3d Cir. 1988)). Here, although Plaintiff identifies what information he seeks—personnel records and files related to internal affairs investigations—he utterly fails to meet his burden of explaining why he had not sooner obtained the discovery or how, if received, it would preclude summary judgment. As mentioned, discovery was closed by then-Magistrate Judge Kiel on December 19, 2023, and Plaintiff failed to timely appeal that order. He cannot now use Rule 56(d) as a veiled attempt to raise an untimely appeal of that decision. In any event, Plaintiff provides no explanation of how the provision of personnel records and internal affairs investigations into Defendant Geist would preclude summary judgment. Consequently, this Court may consider Defendants' MSJ. *See Shelton v. Bledsoe*, 775 F.3d 554, 568 (3d Cir. 2015) ("If discovery is incomplete, a district court is rarely justified in granting summary judgment, unless the discovery request pertains to facts that are not material to the moving party's entitlement to judgment as a matter of law." (citing *Koplove v. Ford Motor Co.*, 795 F.2d 15, 18 (3d Cir. 1986))).

1. Malicious Prosecution (Counts 1 and 2)

Because Plaintiff has failed to set forth any prima facie evidence that Defendants acted without probable cause and with malice, the MSJ will be granted as to Counts 1 and 2.

To prevail on a claim for malicious prosecution, a plaintiff must establish: (1) a criminal proceeding was initiated against him, (2) without probable cause, (3) the criminal proceeding ended in the plaintiff's favor[11], (4) the defendant's acted maliciously or for a purpose other than bringing the plaintiff to justice, and (5) the plaintiff suffered a deprivation of liberty. *Lozano v. New Jersey*, 9 F.4th 239, 247 (3d Cir. 2021) (quoting *Harvard v. Cesnalis*, 973 F.3d 190, 203 (3d Cir. 2020)). Police officers who conceal or misrepresent material facts to the prosecutor or otherwise interfered with the decision to prosecute may be held liable for malicious prosecution. *Halsey v. Pfeiffer*, 750 F.3d 273, 297 (3d Cir. 2014).

a. *Probable Cause*

"Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 788 (3d Cir. 2000) (quoting *Orsatti v. N.J. State Police*, 71 F.3d 480, 482 (3d Cir. 1995)). This fact-intensive inquiry "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity"—it "is not a high bar." *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (citations omitted); *see also Givens v. Wal-Mart Stores, Inc.*, No. 22-2989, 2023 WL 7144628, at *2 (3d Cir. Oct. 31, 2023) (describing probable

[11] The Supreme Court has recently held that the favorable termination element of a malicious prosecution claim "does not require the plaintiff to show that the criminal prosecution ended with some affirmative indication of innocence. A plaintiff need only show that the criminal prosecution ended without a conviction." *Thompson v. Clark*, 596 U.S. 36, 49 (2022).

cause as a "relatively low bar"). The burden to establish a lack of probable cause rests with the plaintiff. *Land v. Helmer*, 843 F. Supp. 2d 547, 550 (D.N.J. 2012).

Where, as here, a plaintiff is arrested pursuant to a warrant executed by a neutral magistrate, "a plaintiff must establish first, that the officer, with at least a reckless disregard for the truth, made false statements or omissions that created a falsehood in applying for a warrant, and second, that those assertions or omissions were material, or necessary, to the finding of probable cause." *Geness v. Cox*, 902 F.3d 344, 356–57 (3d Cir. 2018) (cleaned up) (quoting *Dempsey v. Bucknell Univ.*, 834 F.3d 457, 468–69 (3d Cir. 2016)). "Omissions are made with reckless disregard only if an officer withholds a fact 'in his ken' that any reasonable person would have known . . . [is] the kind of thing the judge would wish to know." *Id.* (quoting *Dempsey*, 834 F.3d at 470). "[T]he focus is [on the] 'facts and circumstances within the officer's knowledge' at the time of the arrest, irrespective of later developments." *Id.* (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)).

Here, Plaintiff has presented no evidence to suggest that Defendants, with a reckless disregard for the truth, made any false statements to, or withheld information from, Officer Painchaud—the officer who filed the criminal complaint against Plaintiff. Conversely, the undisputed evidence before this Court indicates that there was probable cause to arrest Plaintiff for violating New Jersey's anti-stalking statute. That statute provides "A person is guilty of stalking . . . if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress." N.J. Stat. Ann. 2C:12-10(b). Specifically, the undisputed evidence suggests that: on July 1, 2019, Plaintiff drove by Defendant Melchiorre on multiple occasions, yelling at him and parking his car nearby; Defendant Melchiorre, fearing that he may be targeted by Plaintiff, called for backup; in turn, Officer Painchaud responded to the call and personally

observed Plainitff's behaviors; and Plaintiff fled when Officer Painchaud attempted to pull him over. Following this series of events—in conjunction with Plaintiff's recent history with Middlesex PD officers—Officer Painchaud filed a criminal complaint against Plaintiff.

Plaintiff attempts to rebut the foregoing facts with conclusory allegations and references to unrelated investigations. Neither is sufficient. For instance, Plaintiff surmises that Defendants Geist and Melchiorre were heavily and improperly involved in Officer Painchaud's efforts to obtain the warrant and the subsequent prosecution. In addition, Plaintiff insists that the affidavit of probable cause should have contained facts about the Middlesex Borough PD's years of interactions with and investigations into Plaintiff. The former argument is unsupported by any evidence, however; and it is axiomatic that a nonmoving party "must present more than just 'bare assertions, conclusory allegations or suspicions' to show the existence of a genuine issue." *Podobnik*, 409 F.3d at 594 (quoting *Celotex Corp.*, 477 U.S. at 325). Plaintiff's latter argument is wholly unpersuasive—the information is immaterial to a probable cause determination, and Plaintiff has not shown that Officer Painchaud even knew of Plaintiff's years-old encounters with Defendants.[12]

Consequently, Defendants' MSJ will be granted as to Counts 1 and 2.[13]

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[12] The undisputed facts also establish that Plaintiff was indicted by a grand jury. That "constitutes prima facie evidence of probable cause to prosecute," *Camiolo v. State Farm Fire & Cas. Co.*, 334 F.3d 345, 363 (3d Cir. 2003) (quoting *Rose v. Bartle*, 871 F.2d 331, 353 (3d Cir. 1989)), which Plaintiff could overcome at the summary judgment stage by "point[ing] to evidence that the grand jury indictment 'was procured by fraud, perjury or other corrupt means." *Outen v. Off. of Bergen Cnty. Prosecutor*, No. 12-123, 2013 WL 6054586, at *4 (D.N.J. Nov. 14, 2013) (quoting *Camiolo*, 334 F.3d at 363). Plaintiff has not done so.

[13] Plaintiff's argument that "clear and unambiguous evidence" of probable cause is needed to grant summary judgment is unfounded. The undisputed facts suggest that there was probable cause to arrest Plaintiff, and Plaintiff has failed to put forth any evidence to the contrary. To the extent there are any inconsistencies in the affidavit of probable cause, it is of little import because "the probable cause standard by definition allows for the existence of conflicting, even irreconcilable, evidence." *Dempsey v. Bucknell Univ.*, 834 F.3d 457, 468 (3d Cir. 2016) (citing *Wright v. City of Phila.*, 409 F.3d 595, 603 (3d Cir. 2005)). As such, a court evaluating probable cause at the summary judgment stage will only find a genuine issue of material facts when it "view[s] all . . . facts" and finds that a "reasonable jury could

b. *Malice*

This Court, in the alternative, grants Defendants' MSJ because Plaintiff has failed to present any evidence of malice. "Actual malice in the context of malicious prosecution is defined as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). "[C]ourts have required that 'a showing of actual malice . . . include at least some extrinsic evidence of malice, rather than relying only upon inference." *Severubi v. Boro. Sayreville*, No. 10-5707, 2011 WL 1599630, at *5 (D.N.J. Apr. 27, 2011) (quoting *Pittman v. Metuchen Police Dep't*, No. 08-2373, 2010 WL 4025692, at *8 (D.N.J. Oct. 13, 2010)).

Here, the undisputed evidence suggests that Officer Painchaud acted independently of either Defendant in initiating the arrest warrant, and Plaintiff has failed to provide any evidence indicating that Defendants Melchiorre or Geist acted with any improper purpose, let alone that they were involved in initiating the prosecution. Plaintiff cannot make such a showing by pointing to the mere fact that Defendants Melchiorre and Geist had previously investigated him and that they admitted that they were concerned about his history of stalking and harassing them.

Plaintiff has failed to present any evidence of Defendants' malicious intent, and therefore, summary judgment will be granted in Defendants' favor.[14]

2. Negligent and Intentional Infliction of Emotional Distress (Count 3)

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conclude that those facts, considered in their totality in the light most favorable to the nonmoving party, did not demonstrate a 'fair probability' that a crime occurred." *Id.* No such genuine issue of material fact exists here.

[14] "The NJCRA was modeled after 42 U.S.C. § 1983," and accordingly, courts in this District routinely "construe the NJCRA in terms nearly identical to . . . Section 1983." *Coles v. Carlini*, 162 F. Supp. 3d 380, 404 (D.N.J. 2015) (quoting *Chapman v. New Jersey*, No. 08-4130, 2009 WL 2634888, at *3 (D.N.J. Aug. 25, 2009)). Plaintiff does not explain how, if at all, Count 2 is distinguishable from Count 1. To the contrary, he has represented that the NJCRA claim overlaps with, or relies primarily on, the malicious prosecution claim. Consequently, Count 2 fails for the same reasons as Count 1.

Plaintiff's NIED and IIED claims fare no better. To prevail on a claim for negligent infliction of emotional distress ("NIED"), a plaintiff must demonstrate that (1) the defendant owed him or her a duty of reasonable care, (2) the defendant breached that duty, (3) that breach caused him or her to suffer severe emotional distress, and (4) the breach was the proximate cause of his or her injuries. *Johnson v. City of Hoboken*, 299 A.3d 856, 864 (N.J. Super. Ct. App. Div. 2023) (citing *Dello Russo v. Nagel*, 817 A.2d 426, 435 (N.J. Super. Ct. App. Div. 2003)). Meanwhile, an intentional infliction of emotional distress ("IIED") claim requires a plaintiff to establish that the defendant's actions were intentional or reckless, "extreme and outrageous," and "the proximate cause of plaintiff's emotional distress," and that "the emotional distress suffered by the plaintiff was so severe that no reasonable [person] could be expected to endure it." *Buckley v. Trenton Sav. Fund Soc.*, 544 A.2d 857, 863 (N.J. 1988) (internal citations omitted). Although the elements of the claims differ, they both are subject to a two-year statute of limitations. N.J. Stat. Ann. 59:1-1 to 12-3; N.J. Stat. Ann. 59:8-8; *see Lloyd v. Ocean Twp. Counsel*, 857 F. App'x 61, 65 at n.1 (3d Cir. 2021) (explaining that claims for NIED and IIED, among others, have a two-year statute of limitations). A claim accrues, and thus the two-year limitations period begins to run, "on the date on which the underlying tortious act occurred." *Ben Elazar v. Macrietta Cleaners*, 165 A.3d 758, 764 (N.J. 2017). For both NIED and IIED claims, the date of accrual is the date of the incident on which the claim is based took place. *See, e.g.*, *Mills v. Golden Nugget Atlantic City, LLC*, No. 19-19610, 2020 WL 3452101, at *6 (D.N.J. June 24, 2020); *Lloyd v. Ocean Twp. Council*, No. 19-600, 2019 WL 4143325, at *4 (D.N.J. Aug. 31, 2019).

Here, Plaintiff provides no evidence of misconduct by Defendants that occurred after June 17, 2020, which could serve as the basis of an NIED or IIED claim. Therefore, Count 3 is barred by the two-year statute of limitations.

Plaintiff insists that *Coello v. DiLeo*, 43 F.4th 346 (3d Cir. 2022) stands for the proposition that the accrual date of a malicious prosecution claim—which occurs when the criminal proceedings are favorably resolved—defers the accrual date of his other claims. Not so. The *Coello* Court held that this deferred-accrual rule applied only to "state [law] claims [that] resemble the malicious prosecution tort and thus could not have accrued until the state court vacated [the plaintiff's] conviction." *Id.* at 356 (citing *Bessasparis v. Twp. of Bridgewater*, No. A-1040-19, 2021 WL 1811637, at *7 (N.J. Super. Ct. App. Div. May 6, 2021) (per curiam)). Plaintiff's NIED and IIED claims hardly resemble a claim for malicious prosecution; indeed, they sweep much more broadly. To be sure, the claims relate to Defendants' "assault[ing Plaintiff], falsely arrest[ing] him, [lying] about the true events that occurred, retaliat[ing] against him, fabricat[ing] evidence and [initiating] false charges against him, intiat[ing] the malicious prosecution against him, . . . publicly humiliat[ing] and embarrass[ing] him," and for "act[ing] intentionally or recklessly with deliberate disregard of a high degree of probability that emotional distress will follow." (D.E. 90 ¶ 163.). Extending the *Coello* deferred-accrual rule to such a claim would render meaningless New Jersey's two-year statute of limitations on tort claims.

In sum, Plaintiff has not provided any evidence of either an NIED or IIED claim that accrued June 17, 2020 or later. Consequently, the claims are barred by New Jersey's two-year statute of limitations.[15]

[15] At the outset of this Opinion, this Court denied Plaintiff's motion to reopen discovery because, among other reasons, Plaintiff did not seek to discover evidence that would be material to the resolution of Defendants' MSJ. As should now be apparent, the personnel, disciplinary, and/or internal affairs records that Plaintiff seeks were immaterial to the foregoing analyses.

V. CONCLUSION

For the reasons set forth above Defendants' MSJ is **GRANTED**, and Plaintiff's cross-motion to reopen discovery is **DENIED**.[16] An appropriate order follows.

/s/ Susan D. Wigenton
SUSAN D. WIGENTON, U.S.D.J.

Orig: Clerk
cc: Stacey D. Adams, U.S.M.J.
Parties

[16] Plaintiff has failed to identify the names of the fictitiously named defendants. Therefore, this Court dismisses the fictitiously named defendants—John and Jane Does 1–10, ABC Corporations 1–10, and ABC Public Entities 1–10—pursuant to Rule 21. *McCrudden v. United States*, 763 F. App'x 142, 145 (3d Cir. 2019) ("The case law is clear that [f]ictitious parties must eventually be dismissed, if discovery yields no identities." (alteration in original) (quoting *Hindes v. FDIC*, 137 F.3d 148, 155 (3d Cir. 1998))); Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party.").

APPENDIX C

Order of the United States District Court
(August 2, 2024)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN FAKLA, Plaintiff, v. MATTHEW GEIST, *et al.*, Defendants.	Civil Action No: 22-4126 (SDW) (SDA) **ORDER** August 2, 2024

WIGENTON, District Judge.

This matter, having come before this Court on Defendants Matthew Geist and Mark Melchiorre's ("Defendants") motion for summary judgment pursuant to Federal Rule of Civil Procedure ("Rule") 56 (D.E. 105) and Plaintiff John Fakla's ("Plaintiff") cross motion to reopen discovery pursuant to Rules 16(b)(4) and 56(d) (D.E. 109), and this Court having carefully reviewed and considered the parties' submissions, for the reasons stated in this Court's Opinion dated August 2, 2024

IT IS on this 2nd day of August 2024,

ORDERED that Plaintiff's motion to reopen discovery is **DENIED**; and it is further

ORDERED that Defendants' motion for summary judgment is **GRANTED**; and it is further

ORDERED that the fictitiously named defendants are hereby **DISMISSED**.

SO ORDERED.

/s/ Susan D. Wigenton
SUSAN D. WIGENTON, U.S.D.J.

Orig: Clerk
cc: Stacey D. Adams, U.S.M.J.
Parties

APPENDIX D

Paone Dismissal Order (2021)

DEL VACCHIO O'HARA, P.C.
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STATE OF NEW JERSEY,	SUPERIOR COURT OF NEW JERSEY
	LAW DIVISION: MIDDLESEX COUNTY
Plaintiff(s),	IND#:19-10-01630
	PROS#: 19003232
vs.	
	Criminal Action
JOHN A FAKLA,	
	ORDER
Defendant(s).	

This matter having been opened to the Court on Tuesday, March 30, 2021 by Del Vacchio O'Hara, PC, Attorneys for defendant, John A. Fakla, in the presence of Assistant Prosecutor Brian D. Gillet, appearing on behalf of the State of New Jersey, in the above captioned matter, the Court having considered the proofs submitted and for good cause having been shown;

IT IS ON THIS 30TH day of MARCH 2021;

ORDERED that the Indictment captioned above is hereby dismissed with prejudice;

IT IS FURTHER ORDERED that the State's request for stay is denied;

IT IS FURTHER ORDERED that a true copy of this Order shall be served upon all parties to this action within 10 days of receipt hereof.

/s/ Joseph Paone
Joseph Paone, J.S.C.

APPENDIX E

Third Circuit Appeal Brief and Appendix, Volume I
(Submitted by Jordan P. Brewster)

U.S. District Court,
District of New Jersey Case Number: 22-cv-4126
Court of Appeal No.24-2610

IN THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

O

JOHN FAKLA

Plaintiff – Appellant

v.

MIDDLESEX BOROUGH, MATTHEW GEIST, AND MARK MELCHIORRE

Respondents – Appellee

O

ON APPEAL FROM THE UNTIED STATES DISTRICT COURT OF NEW JERSEY

O

APPELLANT'S BRIEF & APPENDIX VOL. I

Appendix, Volume II is filed separately
Oral Argument is Requested

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PLAINTIFF-APPELLANT'S RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioner-Appellant, John Fakla, is a natural person. As such, a corporate disclosure statement is not required. Federal Rules of Appellate Procedure, 26.1(a).

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JURISDICTIONAL STATEMENT

The United States District Court for the State of New Jersey has jurisdiction over this matter by virtue of 42 U.S.C. § 1983 ("Section 1983"). Therefore, this Court has jurisdiction over this timely appeal of a final decision of the United States District Court for the State of New Jersey pursuant to 28 U.S.C. § 1291. (See A, V1, p.1) notice of appeal filed September 2, 2024). (See A, V1, pp.2-3 - Final order dismissing plaintiff's Section 1983 claims).

STATEMENT OF THE ISSUES

I. Whether the District Court erred in not calendaring a motion day or a setting an official hearing date on a Motion for Sanctions pursuant to Rule 37.

II. Whether the District Court erred in conducting what was purported to be a status conference outside the presence of plaintiff's counsel, where plaintiff's counsel endeavored to attend, and was available, where *ex parte* communications were had between Magistrate Edward Kiehl and opposing Counsel with total disregard to plaintiff's counsel technical issue in violation of Cannon 2 2A, and Cannon 3 A3,A4 of the Judicial Code of Conduct the basis for which was used to deny a Motion for Sanctions pursuant to Rule 37.

III. Whether the District Court erred in setting an arbitrary date of June 17, 2020 as a statute limitations for a malicious prosecution claim where the prosecution concluded with prejudice on March 30, 2021 without providing any legal precedent

or basis for doing so.

IV. Whether the District Court erred in addressing the basis for plaintiff's malicious prosecution matter utilizing a *Heck v. Humphrey*, 512 US 477 (1994) analysis after the Supreme Court's Decision in *Thompson v. Clark*, 142 S. Ct. 1332 (2022).

V. Whether the District Court erred in dismissing the Middlesex Borough Police Department from the Complaint without any legal basis being provided or findings of fact that would support the dismissal of them as a party to a validly filed and cognizable malicious prosecution claim.

VI. Whether the District Court erred by not providing plaintiff's counsel evidence during a motion hearing on a dispositive motion in violation of Federal Rule of Civil Procedure 26 and judicial Cannons 3A(3) and 3B(4).

VII. Whether the District Court erred by calling for summary judgement where discovery had not been completed.

VIII. Whether the District Court erred in its factual findings as set forth in its summary judgment motion.

IX. Whether the District Court erred in its various conclusions of law in its Summary Judgment Opinion, including those regarding *Coello v. DiLeo*, 43 F.4th 346 (3rd Circuit 2022).

STATEMENT OF RELATED CASES

This case has not been before this Court previously. The Complaint filed in the District Court originally had additional defendants, that through the course of early motion practice led to the dismissal of these parties. Some of the parties ended up being sued in New Jersey State Court under Docket No. MID-L-1679-23.

STATEMENT OF THE CASE

The essential basis for this matter is soundly one in the area of malicious prosecution. From the filing of this matter in June of 2022 until November of 2023 the matter had been in suit with discovery ongoing. In August of 2023 discovery requests were sent to Defendant Middlesex Borough. These were never responded to. During a status conference in October of 2023, after defendants ("Defendants") missed a status conference, and had failed to respond to discovery for two months, Magistrate Edward Kiel ordered that the discovery was to be produced by October 25, 2023, or plaintiff ("Plaintiff") was granted leave to file for sanctions. This was put forth in an order from Magistrate Edward Kiel himself on October 12, 2023. (ECF Doc. 76). The Motion was filed by counsel for Plaintiff ("Counsel") on November 20, 2023 (ECF Doc. 79). Shortly afterward, on November 29, 2023, Judge Susan Wigenton was assigned to the case. Shortly thereafter, the Motion for Sanctions filed on November 20, 2023, was referred to Magistrate Kiel (ECF Doc.

82).

On December 19, 2023, there was to be a telephone status conference. Three days prior to the conference, counsel for the parties sent a status letter detailing the current state of discovery (ECF Doc. 83). On December 19, 2023, Plaintiff's counsel ("Counsel") tried to get on the status conference call and had technical difficulties. Within minutes Counsel got hold of a Court Clerk who said that the status conference had already happened, not more than ten minutes prior. Just prior to this call, Counsel had already called the judge's chambers to alert them and to get on the call with them and they told him it was concluded.

Unbeknownst to Plaintiff at the time, Defendants' Counsel and Magistrate Kiel conducted some sort of hearing *ex parte* without the presence of Counsel and violated judicial cannon. Later that day they issued an order denying the motion for sanctions without Counsel being heard. At no time was there any notification from the Court that the Motion for Sanctions was to be heard that day. No docket entry exists anywhere in the record notifying the parties of this at any time. (See A, V.1, pp.3-6).

After experiencing the technical problem, not allowing him to join the conference immediately, Counsel immediately posted a letter detailing the difficulty getting on the conference call. (ECF Doc. 84). Then, later that day, without ever having had the Motion for Sanctions docketed or provided any indication that

arguments would be heard or that the motion would be decided at a status conference, the Court issued its order denying sanctions and closing discovery, even though there was never a motion date set or any indication from the Court that a motion would be decided that day. Before Plaintiff could decide what to do about this abrupt and strange outcome, a hearing was set for a Motion on the Pleadings that was filed by the Defendants in April of 2023 was going to be heard before Judge Wigenton on January 9, 2024. (ECF Doc. 86).

On January 9, 2024, there was a hearing before Judge Wigenton, which was held in person. As the hearing unfolded, the Court started arbitrarily stating that any actions of the Defendants, relevant or not, before June 17, 2020 were barred (A, V.II pp.33-37). This was not supported by the facts plead in the Complaint showing that the Plaintiff was arrested on July 1, 2019 on the basis of the Complaints of Defendants, or took into account that certain facts were pled specifically to support a malicious prosecution claim that didn't accrue until March 30, 2021, the date of dismissal with prejudice, ending favorably for Plaintiff.

At some point during the hearing, the Judge read into the record what sounded like statements made by the prosecution in Plaintiff's prosecution from 2017 but was not included in the original order for Plaintiff's dismissal, which Plaintiff was provided the day the matter was dismissed with prejudice on March 30, 2021 (A, V.II, pp.32-38).

Counsel for Plaintiff did not believe that the Court was correct in asking for proof of innocence, and was confused by the line of questioning, as the standard had changed since the Supreme Court's Decision in *Thompson v. Clark*, 142 S. Ct. 1332 (2022). If indeed the judge did not know this and was asking for an analysis that is no longer necessary under recent Supreme Court rulings, this brings up the question of the judge's competency pursuant to Canon 3 and is obvious judicial error (A, V.II, pp.25-38).

Toward the end of the review of Plaintiff's Complaint the Court stated that it would allow a filing of some sort of amended complaint, even over the objections of defense counsel, but that it had to be done within fifteen days. With the short turnaround time, and with Counsel having not heard his Motion for Sanctions and/or to Compel Discovery to be heard, Counsel wanted to get the Court's position on his initial pleading and ask that he be afforded the opportunity to amend accordingly.

At no time did it seem to Counsel that the Court state that all Counts that dealt with the Defendants Melchiorre and Geist actions before the date of June 17, 2020 were explicitly dismissed with prejudice, it was merely cautioned against in an ambiguous manner and that was not made specifically made known by the Court. Even more confusing to everyone, was that the judge referred to orders of the Middlesex County Court dismissing an earlier prosecution in 2017, which the judge seemed like she was basing her ruling on, but then said that Plaintiff was barred from

referring to any future amended pleading (A, V.II, pp.34-37).

On January 10, 2024 Counsel received the Order of the Court (ECF Doc. 87) Unfortunately, the Court failed to file any legal opinion to back up its Order, so on its face, The Order is not comprehensible under any legal standard as it allowed the Plaintiff to file a Complaint for various civil rights violations, including malicious prosecution, while dismissing any counts that referred to events that constituted the basis for the malicious prosecution.

Further to the arbitrary dismissal with prejudice of all claims before June 17, 2020, the Order made no mention of the basis for the dismissal of any "alleged conduct" of the Defendants prior to June 17, 2020, and nowhere did it indicate that the amended pleading be filed with a marked-up copy or provide any other guidance or basis for its dictates. On its face, the Order contradicted controlling law, was in conflict with clear facts before the Court on January 9, 2024, and if followed seemed to lead to an absurd result of an amended complaint that would be meaningless and illusory. In fact, it was unclear as to why the Court did not simply dismiss all of Plaintiff's claims with prejudice on January 9, 2024, and be done with it, because the Order basically does that very thing, but in a non-direct and backend way.

On January 23, 2024, Plaintiff filed his Motion for Reconsideration (ECF Doc. 89) and the next day, January 24, 2024, filed an amended complaint (ECF Doc. 90) to stave off further dismissal of claims. The two steps were done in conjunction

with each other as Plaintiff's malicious prosecution claims were dependent on dates prior to June 17, 2020, hence why reconsideration was filed along with the amended complaint, which obviously had dates for liability prior to June 17, 2020, as the acts of malicious prosecution of the officers started for sake of the still cognizable malicious prosecution, on July 1 and 2 of 2019, with the arrest of Plaintiff.

On February 6, 2024, Defendants filed its Opposition to Plaintiff's Motion to Reconsider as well as a filing of a Cross-Motion to Dismiss Plaintiff's First Amended Complaint. (ECF Doc. 93). The Court docketed the Motions and demanded a response to the Defendants' Motion for February 13, 2024, providing Counsel with only seven days to respond to a dispositive motion. In Defendants' submission, Defendants attached what were averred as transcripts of the January 9, 2024, hearing.

On February 8, 2024, Counsel filed a Local Civil Rule 7.1 for the Cross-Motion as it called for dispositive relief. This was not granted or otherwise responded to. On February 9, 2024, strangely and for no known reason, the Clerk of the Court filed what was referred to as a "QC – Improper filing of Transcript" and stripped out the attached transcript pages appended to Defendants' counsel's moving papers filed on February 6, 2024 (A, V.I, p5).

Strangely, on February 28, 2024, without any basis, Judge Wigenton issued an order (A, V.I, p.11) granting Plaintiff's Motion for Reconsideration in as far as

amending the January 10, 2024 Order essentially rendering Plaintiff's amended Complaint moot, and then ordering, *sua sponte* and without any basis under the Federal Rules of Civil Procedure ("FRCP"), that the Defendant's Cross-Motion to amend be converted to a summary judgment motion. After this was done there were numerous submissions made toward the final outcome of summary judgment and a clear indication of bias on the part of the Court as to return dates for Plaintiff versus those for Defendants. The docket is clear as to all the various filings and evidence submitted. (*See generally*, A, V.I, pp. 5-6).

On August 2, 2024, the Court released its decision and Judge Wigenton's only legal opinion in the matter after having already been dismissed without basis in error of law valid and cognizable claims of Plaintiff. In the body of the Opinion there were numerous errors of fact and law that were immediately apparent to Counsel. On August 29, 2024, Plaintiff filed the instant Notice of Appeal for review by the Third Circuit.

SUMMARY OF ARGUMENT

The District Court erred and abused its discretion in making a series of decisions, orders, and opinions in this matter over the course of almost six to eight months. These decisions either directly violated the Rules of Civil Procedure, the Judicial Conduct Canons, relevant United States Supreme Court rulings, and/or the United States Constitution. As such, the Legal Argument below is multi-faceted and

will require an in depth analysis which delves deeply into the procedural record of this matter, which in and of itself, is a key part of the facts of this matter as what transpired at the District Court level was simply a continuation of the malicious prosecution that spawned this matter and a further violation of the relevant federal and state constitutional law underpinning the spirit and the body of 42 U.S.C. § 1983.

Aside from the lofty constitutional violations and violation of Untied States Supreme Court jurisprudence, the Legal Argument also includes a detailed analysis of the many violations and errors of law as to the FRCP, as well as the Canons of Judicial Conduct which dictate the proper behavior for federal court judges. To be sure, the following Legal Argument is not only a condemnation of the errors of law found in all the Court's decisions, but also of the behavior and lack of professionalism which caused a valid §1983 matter to be wrongfully dismissed without proper legal basis leaving the aggrieved with no choice but to go through the circuitous appellate system for redress of his grievances which should have resulted in a trial, not a dismissal.

As shown below, Plaintiff was clearly on time to file a malicious prosecution claim and any facts relevant to those claims, almost all of which occurred prior to June 17, 2020, which would obviously include the officer's lack of probable cause in placing the complaints that stood for the basis of the arresting officers report, should have never been excluded or dismissed. A clear and distinct error and obvious

example of fallacious reasoning by the Court setting the never substantiated date of June 17, 2020 as a date whereby any acts of the Defendants as to any and all counts of the Plaintiff's Complaint were barred.

ARGUMENT

I. District Court erred in not calendaring a motion day or a setting an official hearing date on a Motion for Sanctions pursuant to Rule 37

A. *Standard of Review*

FRCP 37 states that if a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. This motion may be made, among other reasons, if:

> (iii) a party fails to answer an interrogatory submitted under Rule 33; or
>
> (iv) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.
>
> (C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.
>
> (4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.
>
> (5) *Payment of Expenses; Protective Orders.*
>
> (A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the

party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions Sought in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the

failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(2) *Sanctions Sought in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

On December 19, 2023 what was purported to be a status conference was held outside the presence of Plaintiff's Counsel, where Plaintiff's Counsel endeavored to attend. During the conference *ex parte* communications were had between

Magistrate Edward Kiehl and opposing Counsel with total disregard to Plaintiff's Counsel technical issue in violation of Cannon 2 2A, and Cannon 3 A3, A4 of the Judicial Code of Conduct (A, V.II, pp.18-23).

Here, there is ample evidence of the fact that the discovery was closed, despite Plaintiff's clear indication that additional discovery was required. It is clear from the very beginning that Defendants refused to be forthcoming as to certain records. Eventually this led to the filing of a Motion for Sanctions and/or to Compel, based upon the Court's Order of October 25, 2023 which allowed same. This was filed on November 20, 2023. (See ECF Doc. 79). Shortly thereafter, District Judge Susan Wigenton was assigned to this matter. Not soon after that, on the next day, the Motion for Sanctions was referred to Magistrate Kiel. No motion hearing date, or any other informal communication was ever given by the Court to Plaintiff as to when the Motion for Sanctions would ever be heard. (See A, V.I, pp.3-6 -Docket Sheet, showing there was never any hearing date set for a Motion for Sanctions, or any notice provided to Plaintiff if or when any determination of the Plaintiff's Motion would be made).

It is clear that the Court failed to hear Plaintiff's Counsel and illicitly closed discovery and denied Plaintiff's Motion for Sanctions without basis. On this basis alone, the Court's decision to dismiss this matter based on Summary Judgment standard, especially under the circumstances that were set forth arbitrarily in a biased

manner by the Court from the appointment of Judge Wigenton to this matter up until today, is in error and contrary to law and should be reversed.

II. The District Court erred in setting an arbitrary date of June 17, 2020 as the date for which any acts of the Defendants would be cognizable

A. *Standard of Review*

A party that asserts a tort claim seeking damages from a public entity or public employee must comply with the New Jersey Tort Claim Act, which "establishes the procedures by which [such] claims may be brought." *D.D. v. Univ. of Med. & Dentistry of N.J.*, 213 N.J. 130, 146 (2013) (quoting *Beauchamp v. Amedio*, 164 N.J. 111, 116 (2000)). One such procedure "is the requirement that a timely pre-suit notification about the existence of the claim and its particulars be provided to the defendants." *Id.* N.J.S.A. 59:8-8 requires that within ninety days of the claim's accrual, an individual must file a "notice of claim" with the entity involved in the alleged wrongful act or the state Attorney General. If not, "[t]he claimant shall be forever barred from recovering against a public entity or public employee if . . . [t]he claimant failed to file with the public entity within 90 days of accrual of the claim except as otherwise provided in N.J.S.A. 59:8-9." N.J.S.A. 59:8-8.

Federal law determines the date that a *Bivens* claim accrues. *Peguero v. Meyer*, 520 F. App'x 58, 60 (3d Cir. 2013). A malicious prosecution claim accrues on the date that the underlying criminal proceeding is terminated in the plaintiff's favor. *Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989).

The statute of limitations itself (unlike accrual) is determined by state law. Because a Bivens claim is the "federal equivalent" of a claim under 42 U.S.C. § 1983, Bivens claims, like § 1983 claims, borrow the personal injury statute of limitations of the "applicable state." *Peguero*, 520 F. App'x at 60 ("A Bivens claim, like a claim pursuant to § 1983, is characterized as a personal-injury claim and thus is governed by the applicable state's statute of limitations for personal-injury claims.") (internal quotations and citations omitted) (*citing Wilson v. Garcia*, 471 U.S. 261, 275, 105 S. Ct. 1938 (1985) (holding that § 1983 claims are governed by the applicable state's statute of limitations)).

Here we have a clear dismissal date of March 30, 2021 with any order from the Court dismissing the indictment against Appellant with prejudice. According to the applicable standard that means that Plaintiff would have had to file a tort claim notice by June 28, 2021. In this case it was filed on June 24, 2021. (See ECF Doc. 1 - Plaintiff's Complaint, Exhibit A). According to the relevant standard for when a Complaint needed to be filed, based on the dismissal of the charges on March 30, 2021, a Complaint needed to be filed my March 30, 2023. In this case it was filed on June 17, 2022. As such, the malicious prosecution claim was filed promptly and within the relevant and appropriate timeframe.

In consideration of the proper and timely filing of Plaintiff's Complaint as to malicious prosecution, then the decision of the Court on January 10, 2024 (A, V.I,

p.10) and its February 28, 2024 decision (A, V.I, p.9) as to Appellant's Motion to Reconsider (A, V.II, pp.79-230) is contrary to this simple analysis. In fact, if one looks at the transcript of the hearing of January 9, 2024, the Court randomly and without providing any basis, starts discussing the date of June 17, 2020 as the date before which all acts of the defendants would be precluded for any and all counts in the Complaint, including the malicious prosecution (A, V.II, pp.34-36). This random, arbitrary, and unsubstantiated analysis from January 9, 2024 extends all the way into the Court's "reasoning" in the Summary Judgment decision and Opinion (A, V.I, pp.16-32).

Unfortunately, at the time of the Court's January 10, 2024 Order, there was no opinion ever rendered by the Court as to why or how, the date of June 17, 2020 would ever apply to any aspect of the malicious prosecution claim, which would naturally include the date of the arrest of the Appellant or July 1, 2019, the date the alleged malicious prosecution started, much less all the other years of malicious behavior evident from 2012 through 2021. Based on the Court's ruling, this lead to an absurd result. Furthermore, it was addressed at length in the Plaintiff's Motion to Reconsider (A, V.II, pp.79-230).

Instead of correcting this obvious deficiency and error, the Court doubled down and made sure that the Court's January 10, 2024 Decision made sure that all facts, no matter what claim it might have related to were arbitrarily dismissed with

prejudice. This then allowed the Court to author what was a one-sided Opinion at the end of a prolonged and tortuous motion phase, which purported to state that somehow Plaintiff didn't meet his burden when the Court, arbitrarily and without any legal basis, eliminated all consideration of any fact regarding the Defendants' prior to June 17, 2020, leading to a means-based analysis perpetrated by the Court starting with its erroneous decisions of January 10, 2024 and February 28, 2024.

Essentially, the January 10, 2024 Order which rose out of an arbitrary unsubstantiated proclamation by the Court of June 17, 2020 being a date which Plaintiff was barred from bringing any relevant facts up regarding his malicious prosecution, took shape and one can easily see the application of this flawed reasoning all the way through to the Summary Judgment Opinion. The Court's own Opinion shows that the paradox throughout, pointing to numerous dates before that date and not allowing Plaintiff the same courtesy. Plaintiff believes this to be clearly in error and that this matter should be remanded back to the Trial Court for further proceedings, at the very least, that facts prior to June 17, 2020 must be considered by any district judge reviewing this matter for dismissal should it be remanded.

III. The District Court erred in addressing the basis for Plaintiff's malicious prosecution matter utilizing a *Heck v. Humphrey*, 512 US 477 (1994) type analysis after the Supreme Court's Decision in *Thompson v. Clark*, 142 S. Ct. 1332 (2022) and conflating random facts provided by Defendants to stand for the false assertion that the prosecution against Plaintiff did not end favorably

The Court, in the one sole opinion authored by Judge Wigenton, barely gives

reference to *Thompson*, citing it only once, after much briefing by Plaintiff in a footnote on Page 11 of the Court's Opinion (A, V.I, p.26). This lack of reference to what is the seminal case on the issue of whether an underlying criminal charge is discharged favorably in the interest of the accused, as a threshold issue, should in and of itself, show *prima facie* evidence of error in the Court's decision to dismiss this matter on any sort of favorable outcome analysis that does not utilize this case.

Overall, the Court's Opinion, rests upon essentially three pillars: (1) The arbitrary dismissal of all acts of Defendants prior to June 17, 2020, regardless of the claim and its accrual analysis (See Section I. of this Brief above, *supra.*); (2) A complete ignorance of *Thompson*, as well as the Third-Circuit's decision in *Coello*; and (3) Cherry picking facts provided by Defendants from any relevant year to imply that Plaintiff did not receive a favorable outcome as defined by the Supreme Court of the United States (A, V.I, pp.26-1). The three go hand in hand as the Court simply ignores the Supreme Court's decision in *Thompson*, which clearly states that any deprivation of liberty is sufficient, which then leads to the natural progression of the Court misapplying the Third-Circuit's Opinion in *Coello*, which the Court was overturned on, where the Court mistakenly conflates the incarceration encountered by the Plaintiff in that matter as being necessary to ever enjoy the fruits of that decision, when *Thompson*, and all the law on malicious prosecution, considered any deprivation of liberty, to be enough to warrant liability under the relevant laws.

Additionally, the Court simply grabs any fact possible to make it seem that Plaintiff did not receive a favorable outcome when it is clear that these facts do not matter in a post-*Thompson* world.

A. *Standard of Review*

To demonstrate a favorable termination of a criminal prosecution for purposes of the Fourth Amendment claim under §1983 for malicious prosecution, a plaintiff need only show that his prosecution ended without a conviction. (*See Thompson v. Clark*, 142 S. Ct. 1332 (2021)). The Supreme Court in *Thompson* stated unequivocally:

> Because the American tort-law consensus as of 1871 did not require a plaintiff in a malicious prosecution suit to show that his prosecution ended with an affirmative indication of innocence, we similarly construe the Fourth Amendment claim under §1983 for malicious prosecution. Doing so is consistent, moreover, with "the values and purposes" of the Fourth Amendment. Manuel, 580 U. S., at 370. The question of whether a criminal defendant was wrongly charged does not logically depend on whether the prosecutor or court explained why the prosecution was dismissed. And the individual's ability to seek redress for a wrongful prosecution cannot reasonably turn on the fortuity of whether the prosecutor or court happened to explain why the charges were dismissed. In addition, requiring the plaintiff to show that his prosecution ended with an affirmative indication of innocence would paradoxically foreclose a §1983 claim when the government's case was weaker and dismissed without explanation before trial, but allow a claim when the government's evidence was substantial enough to proceed to trial. (*Thompson*, 48).

Under 42 U.S.C. § 1983, individuals may bring a civil lawsuit against those

who wrongfully initiated charges against them without probable cause by employing the tort of malicious prosecution. *Thompson*,142 S. Ct. at 1337-38 and see also, e.g., *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) (42 U.S.C. § 1983 "entitles an injured person to money damages if a state official violates his or her constitutional rights.")

In addition to a plaintiff's claims for malicious prosecution sounding in the Fourth Amendment, a plaintiff can state a claim by alleging that the defendant initiated the malicious prosecution in retaliation for the plaintiff's exercise of First Amendment rights. *See Merkle v. Upper Dublin School Dist.*, 211 F.3d 782, 798 (3d Cir. 2000) (holding school district superintendent not entitled to qualified immunity on plaintiff's claim "that [the superintendent], and through him the District, maliciously prosecuted Merkle in retaliation for her protected First Amendment activities"); *see also Losch v. Borough of Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984) ("[I]nstitution of criminal action to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983."). In a First Amendment retaliatory-prosecution claim, the plaintiff must plead and prove lack of probable cause (among other elements). *See Hartman v. Moore*, 126 S. Ct. 1695, 1707 (2006).

"[T]he question of probable cause in a section 1983 damage suit is one for the jury." *Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998) (discussing

Section 1983 claim for malicious prosecution). In *Losch v. Borough of Parkesburg*, 736 F.2d 903, 909 (3d Cir. 1984), the Court of Appeals stated that "defendants bear the burden at trial of proving the defense of good faith and probable cause" with respect to a malicious prosecution claim. However, cases such as *DiBella*, *Camiolo* and *Marasco* (none of which cites *Losch*) list the absence of probable cause as an element of the malicious prosecution claim, and thus indicate that the plaintiff has the burden of proof on that element. *See, e.g.*, *Camiolo*, 334 F.3d at 363 (holding that malicious prosecution claim was properly dismissed due to plaintiff's inability to show lack of probable cause); *Marasco*, 9 318 F.3d at 522 ("Because initiation of the proceeding without probable cause is an essential element of a malicious prosecution claim, summary judgment in favor of the defendants was appropriate on this claim.").

Pre-*Albright* caselaw defined the malice element "as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). Following Pennsylvania law, the Court of Appeals held in another pre-*Albright* case that "[m]alice may be inferred from the absence of probable cause." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993); *cf. Trabal v. Wells Fargo Armored Service Corp.*, 269 F.3d 243, 248.

In *Coello*, there were facts analogous to this matter, in that the facts stretch

back to 2007, when the matter was brought almost twenty years later after years of criminal prosecution that was eventually overturned. Although there was no conviction in this matter, there was a favorable termination as per *Thompson v. Clark*, 142 S. Ct. 1332, 1338–40 (2022). Also, similar to this matter Defendants brought a Motion to Dismiss pursuant to Rule 12 of the FRCP. When it came to the plaintiff's malicious prosecution claim the Court noted the following:

> Defendants ask us to impose a new rule cabining a plaintiff's ability to use *Heck* to overcome a statute-of-limitations defense: if a plaintiff waits too long to fulfill the prerequisite for claim accrual under *Heck*—that is, waits too long to get her conviction reversed, invalidated, expunged, etc.—she forfeits any civil claims that may accrue on favorable termination. In support, they refer us only to general principles underlying statutory limitations periods, such as the need to create "stability in human affairs" and "induce litigants to pursue their claims diligently so that answering parties will have a fair opportunity to defend."

Here, there has been a favorable determination, and no matter what was discussed in Court, *Thompson* is a clear overriding controlling decision, which was simply not followed. Plaintiff has shown a prima facie malicious prosecution case to the extent necessary at law based on the precedent of the United States Supreme Court and the Third Circuit precedent that is still good law after the *Thompson* decision was handed down. To be clear, we have an order dismissing the underlying criminal complaint of Defendants and the indictment of the Middlesex County Prosecutor's Office with prejudice (A, V.II, pp.1-2). Strangely, this Order, which

clearly is the one issued by the Court dismissing the case as noted on the Exhibit is the one that was filed on the Criminal Docket (A, V.II, p.1), was never discussed in the hearing or in any of the Orders dismissing out portions of Plaintiff's Complaint and barring any reference to any acts of the Defendants prior to June 17, 2020.

Nowhere during the January 9, 2024 hearing or in the January 10, 2024 Order does it refer to any of the language that the Court or Mr. Baratz were talking about that Mr. Baratz claimed dismissed the underlying criminal case. Further to that we have clear evidence of a lack of probable cause from the testimony of the officers that gave the complaints that were referenced in the Affidavit of Probable Cause, which could not be verified when asked. This lack of probable cause is enough to pass the relevant threshold tests for malicious prosecution under the relevant case law cited in Plaintiff's Amended Complaint and the other motions filed with the Court. As further stated, the question of probable cause is one for the jury once a facial showing is made, as has been made here, pursuant to *Mongomery v. De Disomone*, 159 F.3d 120, 124 (3rd Circuit 1998).

Here there would have been this facial showing had the Court not arbitrarily dismissed all claims for liability as to the acts of the Defendants, prior to the date June 17, 2020. Once again, this was a means-based strategy implemented by the Court to reach the final decision on August 2, 2024 that could conveniently not even reference in any way any of the facts in evidence before that date, as well as the

Plaintiff's analysis of same, clearly showing maliciousness and lack of probable cause clearly evident.

As far as malice is concerned, as was presented in Plaintiff's original opposition to Defendants' initial Motion to Dismiss, the malice element is defined as "as either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988). Following Pennsylvania law, the Court of Appeals held that "[m]alice may be inferred from the absence of probable cause." *Lippay v. Christos*, 996 F.2d 1490, 1502 (3d Cir. 1993); *cf. Trabal v. Wells Fargo Armored Service Corp.*, 269 F.3d 243, 248 (3d Cir. 2001) (applying New Jersey law in a malicious prosecution case arising in diversity).

Here, although there was no conviction, we have the initial charging compliant which then formed the basis for Plaintiff's arrest for what would them become the basis for the Middlesex County Prosecutor's indictment. Still, just the same, Plaintiff's civil claims as to the initiating complaint, filed by Defendant Melchiorre filed for what Plaintiff alleges as an improper and malicious purpose, could not have accrued earlier than the day on which those proceeding terminated in his favor. This outcome would do what the Court in *Coello* warned about when it said to do what the Court has done here would be cabining a plaintiff's ability to bring a malicious prosecution *ab initio* and render it a dead letter at law. Therefore,

the Court's decisions starting with the January 10, 2024, all the way through to the final Order are in error and must be reversed.

IV. Whether the District Court erred by calling for summary judgement where discovery had not been completed

Under FRCP 16(b)(4), under which a scheduling order "may be modified only for good cause and with the judge's consent." *See, e.g., J.G. v. C.M.,* 2014 U.S. Dist. LEXIS 56143, at *4 (D.N.J. Apr. 23, 2014) ("Federal Rule of Civil Procedure 16(b)(4) permits the modification of a scheduling order to reopen discovery for 'good cause.'"); *R. M. W. v. Homewood Suites*, 2012 U.S. Dist. LEXIS 201426, at *24 n.2 (D.N.J. June 28, 2012) (rejecting excusable neglect standard and applying Rule 16 on motion to reopen discovery); *e.g., Sweatman v. Coloplast Corp.*, 2020 U.S. Dist. LEXIS 78907, at *5-6 (D.S.C. May 5, 2020). Under Rule 16(b), "[a] finding of good cause depends on the diligence of the moving party. In other words, the movant must show that the deadlines cannot be reasonably met despite its diligence." *Globespanvirata, Inc. v. Tex. Instruments, Inc.*, 2005 U.S. Dist. LEXIS 16348, at *97 (D.N.J. July 11, 2005) (*quoting Rent-A-Center v. Mamaroneck Ave. Corp.*, 215 F.R.D. 100, 104 (S.D.N.Y. 2003) and citing FRCP 16 advisory committee's note ("The court may modify the schedule on a showing of good cause if [the deadlines] cannot be reasonably met despite the diligence of the party seeking the extension.")); *see, e.g., Konopca v. FDS Bank*, 2016 U.S. Dist. LEXIS 41002, at

*4 (D.N.J. Mar. 29, 2016) ("To show good cause, 'the moving party must demonstrate that a more diligent pursuit of discovery was impossible.'") (*quoting Alexiou v. Moshos*, 2009 U.S. Dist. LEXIS 81815, at *8, 2009 WL 2913960, *3 (E.D. Pa. Sept. 9, 2009)). "The 'good cause' standard is not a low threshold. Disregard for a scheduling order undermines the court's ability to control its docket, disrupts the agreed-upon course of the litigation, and rewards 'the indolent and cavalier.'" *J.G.*, 2014 U.S. Dist. LEXIS 56143, at *4-5 (*quoting Riofrio Anda v. Ralston Purina Co.*, 959 F.2d 1149, 1154-55 (1st Cir. 1992)).

While diligence is the centerpiece of the good cause analysis, some courts also assess "the importance of the evidence, [ ] the logistical burdens and benefits of re-opening discovery, [and] prejudice to the non-moving party." *J.G.*, 2014 U.S. Dist. LEXIS 56143, at *5 (*citing Marlowe Patent Holdings LLC v. Dice Electronics, LLC*, 293 F.R.D. 688, 701 (D.N.J. 2013)).

The Third Circuit has cited as an example of prejudice "the excessive and possibly irremediable burdens or costs imposed on [an] opposing party." *Adams v. Trs. of the N.J. Brewery Employees' Pension Tr. Fund*, 29 F.3d 863, 874 (3d Cir. 1994) (quoting Scarborough v. Eubanks, 747 F.2d 871, 876 (3d Cir. 1984)); see, e.g., *Martsolf v. Jbc Legal Grp., P.C.*, 2008 U.S. Dist. LEXIS 138714, at *23 (M.D. Pa. Mar. 13, 2008) (denying motion to reopen discovery because "reopening discovery would prejudice defendant through costs, time, and attorneys' fees to defend

discovery that plaintiff could have sought within case management deadlines").

In consideration of the foregoing, the Court's *sua sponte* conversion to summary judgment, was completely inappropriate and under no circumstances should have summary judgment been granted and the Plaintiff's Motion to reopen discovery have been denied. Although the Trial Court stated in its Opinion that there was a lack of diligence by Plaintiff, this argument is completely unsubstantiated as Plaintiff filed a Motion for Sanctions as the Court ordered in October of 2024. The fact that the Plaintiff did not address the inappropriate and violative Order of the Court of December 19, 2023. (A, V.I, pp.12-13) was deprioritized as there was a motion hearing on whether Plaintiff's claims would be dismissed (ECF Doc. 86).

Here the Plaintiff did all he could to preserve his rights but was denied discovery even after moving for sanctions and seeking to compel the production of discovery asked for during the pendency of the fact discovery period. Put simply, Plaintiff was diligent to the hilt but was denied a hearing on his motion for sanctions and/or to compel, a violation of FRCP 37.

The record is clear that good cause exists for this request as the unanswered discovery is highly relevant to this matter, especially when it comes to Matthew Geist's personnel records and the details of additional internal affairs investigations conducted on him while at Middlesex Borough. There is no prejudice to Defendants as the discovery is readily available and easily producible, the requests for which

Defendants' Counsel has been in receipt of since August 14, 2023, for which Defendants have simply ignored and instead have hid behind the mire of the procedural mess this case had become, likely intended as such, to obscure the clear fact that highly relevant evidence has been suppressed, withheld, and hidden from production in this matter, likely due to the damning nature of what this evidence would show.

Even with the Court's attempt to bifurcate Plaintiff's claims based upon an arbitrary date of June 17, 2020 for claims, thus cutting Plaintiff's claims into two chunks, the second chunk, the June 17, 2020 to present date portion, this evidence would still be highly relevant. Further, it goes to Plaintiff's arguments as to the vacation of the December 19, 2023 Order and the February 28, 2024 Order, as this information was desperately necessary for any respondent superior claim, as if personnel records showed a history of abuse by Geist, they would have faced liability. This means, discovery should have never ended until those documents were produced or Defendants' Answer was dismissed and/or sanctions issued for refusal to provide standard documents normally accorded to litigants in these types of matters, i.e., §1983 respondent superior/negligent hiring and retention, civil rights cases.

CONCLUSION

The District Court erred and abused its discretion in closing discovery,

denying Plaintiff's Motion for Sanctions without a hearing, and dismissing Plaintiff's Complaint in the Court's Orders of January 10, 2024, February 28, 2024, and August 2, 2024 and all the Orders should be reversed and the matter remanded.

The Plaintiff, therefore, respectfully requests that the District Court's Orders of December 19, 2023 closing discovery and denying sanctions, January 10, 2024 dismissal Order, February 28, 2024 dismissal Order, and August 2, 2024 dismissal Order be reversed.

Respectfully submitted,

Dated: November 18, 2024

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3RD Circuit Court of Appeals

Case No. 24-2610

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On Appeal from the United States District Court, District of New Jersey

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(Submitted by Jordan P. Brewster)

3RD Circuit Court of Appeals

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