

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

NORMAN LAUNI II,
Plaintiff,

v.

Case No.: 19-C-15

**THE HAMPSHIRE COUNTY PROSECUTING
ATTORNEY'S OFFICE, and
COUNTY OF HAMPSHIRE, WEST VIRGINIA, and
THE MORGAN COUNTY PROSECUTING
ATTORNEY'S OFFICE, and
COUNTY OF MORGAN, WEST VIRGINIA, and
THE MINERAL COUNTY PROSECUTING
ATTORNEY'S OFFICE, and COUNTY OF
MINERAL, WEST VIRGINIA, and
DAN JAMES Jr., individually and in his official
capacity as Prosecuting Attorney for Hampshire and
Morgan Counties, and JOHN OURS, individually and
in his official capacity as Special Prosecutor in Mineral
County, and CORPORAL SCOTT NAZELROD,
individually and in his official
capacity as a West Virginia State Trooper,**



**ORDER GRANTING PLAINTIFF'S MOTION FOR ENTRY OF ORDER
OF CERTIFICATION OF JUDGMENT**

Came the Plaintiff, Norm Launi, by counsel, Christian J. Riddell, and moved this Honorable Court for an Order of Certification of Judgment, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, as to the previously dismissed charges. Plaintiff further request that instant action be stayed and held in abeyance pending adjudication of Plaintiff's appeal.

In support of said motion, Plaintiff averred that Rule 54(b) provides as follows:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for

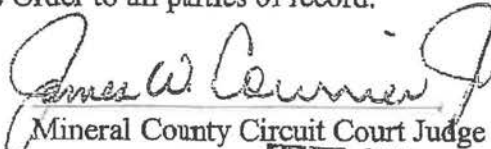
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delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Plaintiff avers that there is no just reason for delay as to the exercise of its appellate rights as to the dismissed causes of action, and, in fact, allowing said appeal to proceed immediately is manifestly in the interests of judicial economy. By prior Order of this Court, all Plaintiff's causes of action, save Plaintiffs Intentional Infliction of Emotional Distress ("IIED") claim against Defendant Dan James, have been dismissed and are subject to Plaintiff's right of Appeal. Said IIED claim is based, in large part, on the same contested facts as many of the dismissed causes of action. See Plaintiff's Amended Complaint, Exhibit A. As such, the possibility exists that Plaintiff could proceed on his IIED claim before a jury, try all facts relevant thereto, be successful on his appeal as to one or more of the dismissed causes of action, and then have to retry the same set of facts again before a new jury on the additional causes of action. Plaintiff submits that having two trials instead of one on the same contested set of facts is burdensome on both the parties and the Court and is contrary to the interests of judicial economy. Plaintiff further avers that no prejudice will be born against either party through a certification under Rule 54(b). The Court agrees with the averments on all counts.

WHEREFORE, upon consideration thereof, it is hereby ADJUDGED and ORDERED that the motion is GRANTED and an Order of Certification of Judgment shall be entered in this matter.

The Clerk is directed to send copies of this Order to all parties of record.


Mineral County Circuit Court Judge

TESTE COPY



Entered this 14th day of January, 2022.

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

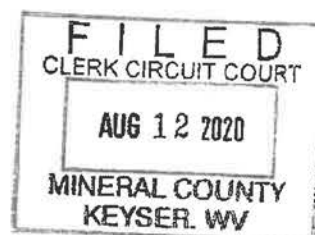
NORMAN LAUNI, II,
PLAINTIFF,

v.

CASE NO. 19-C-15 (Judge Courier)

THE HAMPSHIRE COUNTY
PROSECUTING ATTORNEY'S OFFICE,
and COUNTY OF HAMPSHIRE, WEST
VIRGINIA, and THE MORGAN COUNTY
PROSECUTING ATTORNEY'S OFFICE,
and COUNTY OF MORGAN, WEST VIRGINIA,
and THE MINERAL COUNTY PROSECUTING
ATTORNEY'S OFFICE, and COUNTY OF
MINERAL, WEST VIRGINIA, and DAN JAMES, JR.,
individually and in his official capacity as Prosecuting
Attorney for Hampshire and Morgan Counties, and
JOHN OURS, individually and in his official capacity
as Special Prosecutor in Mineral County, and
CORPORAL SCOTT NAZELROD, individually
and in his official capacity as a West Virginia State
Trooper,

DEFENDANTS.



ORDER ON MOTION TO DISMISS OF DEFENDANT DAN JAMES

This matter came before the Court upon consideration of Defendant Dan James's Motion to Dismiss for failure to state a claim upon which relief can be granted. After reviewing the written filings of the parties, considering the prior arguments of counsel, and thoroughly examining the issues before the Court, the Court FINDS the following:

- 1) On March 22, 2019, this matter was filed in the Mineral County Circuit Court following an agreed transfer of the case from the Circuit Court of Morgan County;
- 2) Plaintiff Norman Launi, II (hereafter "Plaintiff") alleges in his Complaint that he suffered damages from the acts or omissions of the various named defendants, including claims against Defendant Dan James (hereafter "Defendant James") of

Norman Launi II
Plaintiff
vs.
Hampshire County
Prosecuting Attorney's Office
Morgan County
Prosecuting Attorney's Office
Mineral County
Prosecuting Attorney's Office
Dan James, Jr.
John Ours
Corporal Scott Nazelrod

malicious prosecution; abuse of process; civil conspiracy with Defendants John Ours, Special Prosecuting Attorney for Mineral County (hereafter "Defendant Ours"), and Corporal Scott Nazelrod of the West Virginia State Police (hereafter "Defendant Nazelrod"); intentional infliction of emotional distress; and an alternative count of negligence;

- 3) The claims arise from the Plaintiff's prosecution in Mineral County for three counts of domestic battery and one count of domestic assault alleged to have been committed against Penny Hartman (hereafter "Ms. Hartman"), the Plaintiff's former girlfriend;
- 4) Defendant James was the prosecuting attorney for Hampshire County, West Virginia, from 2013 until his appointment as the prosecuting attorney for Morgan County, West Virginia, in September 2017;
- 5) Defendant Ours is the duly elected prosecutor of Grant County and was assigned by the West Virginia Prosecuting Attorney's Institute as the special prosecutor to handle the prosecution of Plaintiff in Mineral County after Mineral County Prosecuting Attorney F. Cody Pancake, III was recused from the case;
- 6) The Plaintiff alleges that he was maliciously prosecuted by Defendants James, Ours, and Nazelrod based on a personal vendetta against Plaintiff from Defendant James that began in late 2013;
- 7) Plaintiff alleges that Defendant James defamed him by, among other things, telling others that he had murdered his former partner in the Hampshire County Sheriff's Department, Captain Eckerson, in August 2016, and that he was involved in the disappearance of narcotics from law enforcement investigations;

- 8) Defendant Nazelrod was assigned from the state police to investigate the circumstances of Captain Eckerson's death;
- 9) In January 2017, Defendant James was contacted by Ms. Hartman, who stated that Plaintiff had committed domestic violence against her, and Defendant James then also referred these allegations for investigation to Defendant Nazelrod;
- 10) Ms. Hartman was arrested for telephone harassment on January 21, 2017, which on the same day was used by Defendant James as a basis to revoke her bond from another pending case;
- 11) Plaintiff contends that Defendant James improperly used this revocation of bond as a means of pressuring Ms. Hartman to pursue criminal charges against Plaintiff;
- 12) In the course of his investigation, Defendant Nazelrod found that the allegations by Ms. Hartman against Plaintiff did not actually occur in Hampshire County, but in Mineral County;
- 13) At the conclusion of his investigation, Defendant Nazelrod prepared a criminal complaint which was presented to a Mineral County magistrate, who found probable cause to charge Plaintiff with three counts of domestic battery and one count of domestic assault;
- 14) At the time of Defendant Ours' appointment to the case following the recusal of Prosecuting Attorney F. Cody Pancake, III, the criminal complaint against the defendant had already been accepted by the Mineral County magistrate and the matter was an active case before the Mineral County Magistrate Court;
- 15) Plaintiff alleges that Defendant James played a role in helping to suppress a portion of a recorded interview of the Plaintiff with Defendant Nazelrod;

- 16) Plaintiff also alleges that Defendant James conspired with Defendants Ours and Nazelrod to prosecute Plaintiff based on bad motives and despite knowing that Ms. Hartman did not want the prosecution to proceed;
- 17) The underlying criminal prosecution against the Plaintiff proceeded to trial in October 2017, and, after the magistrate denied a motion for judgment of acquittal, the matter was submitted to the jury, which, following a brief deliberation, found the Plaintiff not guilty;
- 18) After the present case was transferred to Mineral County, Defendant James, through counsel, filed a motion to dismiss the complaint based on Rule 12(b)(6) of the West Virginia Rules of Civil Procedure;

Based on these findings, the Court makes the following CONCLUSIONS:

- 1) In *Norfolk S. Ry. Co. v. Higginbotham*, 228 W.Va. 522, 721 S.E. 2d 541 (2011), the Supreme Court recited the factors necessary for proving the claim of malicious prosecution: 1) the prosecution was conducted to its termination and resulted in Plaintiff's discharge; 2) the prosecution was caused or procured by the Defendant; 3) the prosecution was without probable cause; and 4) the prosecution was malicious;
- 2) If a prosecution is based on probable cause, it cannot be malicious (see *Bailey v. Gollehon*, 76 W.Va. 322, 85 S.E. 556 (1915));
- 3) "Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process....It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant

ultimately prevailed on appeal or in a habeas corpus proceeding.” Franklin D.

Cleckley, et al, *Litigation Handbook on West Virginia Rules of Civil Procedure*, 8(c), at 213 (3d ed. 2008); *Mooney v. Frazier*, 225 W.Va. 358, 370 n. 12, 693 S.E. 2d 333, 345 (2010);

- 4) Prosecutors are absolutely immune “for their conduct in initiating a prosecution and in presenting the State’s case, insofar as that conduct is ‘intimately associated with the judicial phase of the criminal process.’” *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed. 2d 547 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. at 995, 47 L.Ed 2d 128 (1976));
- 5) Prosecutorial immunity also extends beyond actions taken in court proceedings, and includes “actions preliminary to the initiation of a prosecution and actions apart from the courtroom.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 272, 113 S.Ct. 2606, 125 L.Ed. 2d 209 (1993);
- 6) In *Broadnax v. Pugh*, No. 5:15-03736, 2017 U.S. Dist. LEXIS 191655, 9-13 (S.D. W.Va., Oct. 24, 2017) (Aboulhosn, M.J.), adopted, 5:15-cv-03736, 2017 U.S. Dist. LEXIS 191266, 2017 WL 5585630 (S.D. W.Va., November 20, 2017) (Berger, J.), the federal court found: “A prosecutor is acting within their role as an ‘officer of the court’ when performing tasks, such as (1) initiating a judicial proceeding, (2) presenting evidence in support of a search warrant application, (3) conducting a criminal trial, bond hearing, grand jury proceeding or pre-trial hearing, (4) engaging in ‘an out-of-court effort to control the presentation of [a] witness’ testimony,’ and (5) making a ‘professional evaluation of the evidence assembled by the police and

appropriate preparation for its presentation at trial or before the grand jury after a decision to seek an indictment has been made”;

- 7) Directing a law enforcement officer to conduct an investigation of possible criminal activity in order to pursue a prosecution, if warranted by the evidence gathered, clearly falls under these prosecutorial functions which are granted immunity;
- 8) Also, even if it could be proven that Defendant James continued to participate in the Plaintiff's prosecution after the case had been filed in Mineral County, the decision of whether an item of evidence is disclosable under *Brady v. Maryland*, 373 U.S. 83 (1963), is a prosecutorial function which is afforded absolute immunity. See *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994);
- 9) In addition, for a violation of *Brady* for failing to disclose exculpatory evidence, there must be a showing that the accused was somehow prejudiced by the failure to disclose;
- 10) In *Mead v. Shaw*, 2016 WL 316870, at 7,8 (W.D. N.C. Jan. 25, 2016), (citing *Fullwood v. Lee*, 290 F.3d 663, 685 (4th Cir. 2002)), the court found that a defendant is only prejudiced from a *Brady* violation if he is actually convicted, and the mere fact of having to endure a trial is not enough to equal prejudice;
- 11) In the present case, the Plaintiff was not convicted in his underlying criminal trial, so he therefore cannot be considered to have been prejudiced under *Brady*;
- 12) Also, in *Norfolk S. Ry. Co.*, a lack of probable cause is an essential element of a claim for malicious prosecution; however, here probable cause was found by the magistrate upon the submission of the criminal complaint and a second time when the magistrate

did not grant Plaintiff's motion for judgment of acquittal following the State's case and allowed the matter to proceed to the jury for consideration;

- 13) Even though Plaintiff complains that exculpatory evidence was purposefully left out of the criminal complaint, even if that information was included there would still remain enough evidence to establish probable cause;
- 14) The criminal complaint does not have to include all evidence favorable or exculpatory to the accused, and it is very common for an accused, especially in domestic violence cases, to have a different version of what happened from the alleged victim;
- 15) Based on the foregoing, the Plaintiff's claims for malicious prosecution must fail;
- 16) The abuse of process claim is premised on the claim that Defendant James maliciously directed a prosecution outside his jurisdiction, misused government resources, and moved to revoke Ms. Hartman's bond;
- 17) Ms. Hartman initiated the investigation into alleged criminal acts of Plaintiff when she notified Defendant James of the allegations; she reported the information she had to the prosecutor for Hampshire County, not Mineral; according to the complaint in this case, Plaintiff had resided in Hampshire County for portions of the time at issue in this case; and, therefore, it was reasonable for Defendant James to believe that the allegations occurred within his jurisdiction;
- 18) Upon receiving this information, Defendant James did what any prosecutor would do—he referred the matter to an officer to investigate the allegations of Ms. Hartman;
- 19) Defendant Nazelrod, as a state trooper, certainly was an appropriate officer to investigate these allegations;

- 20) When it was determined that the alleged crimes happened in Mineral County, and not Hampshire, Defendant Nazelrod properly submitted his criminal complaint to the magistrate in Mineral County for prosecution there by another prosecutor other than Defendant James;
- 21) As noted earlier, probable cause was essentially found twice in this case;
- 22) In this context, there is nothing to show that Defendant James misused government resources in initiating this prosecution;
- 23) Next a prosecutor's decision to revoke an accused's bond is clearly a prosecutorial function and must be afforded absolute immunity, even if it could be proven that the prosecutor had ulterior motives for doing so;
- 24) Therefore, Defendant James did not abuse process in this case;
- 25) Because there is no showing that Defendant James was liable for malicious prosecution or abuse of process, he cannot be liable for conspiring with others to commit the underlying malicious prosecution or abuse of process;
- 26) As to the allegation that Defendant James committed the act of Intentional Infliction of Emotional Distress (hereafter "IIED"), Plaintiff alleges that Defendant James conspired to: 1) maliciously prosecute him, 2) abuse process, 3) suppress exculpatory evidence, and 4) make material omissions from the narrative for probable cause; the Plaintiff further alleges that Defendant James made various statements to defame him;
- 27) The first four of the allegations to support IIED have already been addressed in the previous findings of immunity for Defendant James;

- 28) However, it might still be possible for the Plaintiff to prove IIED as it applies to defamatory statements against the Plaintiff which were allegedly made by Defendant James to others; these statements were made outside the scope of prosecutorial functions so as not to be entitled to absolute immunity;
- 29) Moreover, qualified immunity does not appear to be a valid protection in this case when the language of cases such as *WV State Police v. Hughes*, 238 W.Va. 406, 796 2d 193 (2017), is applied;
- 30) In *Hughes*, the Court reiterated that, "Under the doctrine of qualified immunity, the discretionary actions of government agencies, officials, and employees performed in an official capacity are shielded from civil liability so long as the actions do not violate a clearly established law or constitutional duty." *Id.*, page 198;
- 31) Making statements to law enforcement officials, members of an MDIT, or to the press could be viewed as discretionary actions of a prosecuting attorney, but these statements, if defamatory, would not be protected by qualified immunity because defamatory statements would violate clearly established law;
- 32) Additionally, Defendant James cannot claim immunity for these statements, if proven, under West Virginia Code 29-12A-1 et seq., "The Government Tort Claims and Insurance Reform Act";
- 33) West Virginia Code 29-12A-5 (b)(1), (2) provides immunity for an employee of a political subdivision unless the acts/omissions are outside the scope of employment or official responsibilities, or if they were malicious, in bad faith, or wanton or reckless;
- 34) In the present case, if statements are proven to be defamatory, they would be outside the scope of employment/official responsibilities;

35) Therefore, Defendant James is not entitled to immunity for all of the claims of IIED;

36) The Plaintiff further alleges that Defendant James was negligent in failing to stay within his jurisdiction and failing to avoid violations of state and federal law, that he breached that duty by engaging in an investigation outside of his jurisdiction, and that this breach was the proximate cause of the malicious prosecution;

37) The Court finds that Defendant James did not fail to stay within his jurisdiction in Hampshire County because he assigned the investigation to a state trooper, Defendant Nazelrod, who finished the investigation and, after determining that the alleged events occurred in Mineral County rather than Hampshire County, presented his criminal complaint to a Mineral County magistrate; at that point, Defendant James had no further involvement with the prosecution, which was assigned to a special prosecuting attorney;

38) Moreover, since the Court has previously determined that Defendant James is not liable for a malicious prosecution of Plaintiff, Defendant James therefore cannot be negligent in bringing about such malicious prosecution as alleged in the negligence count.

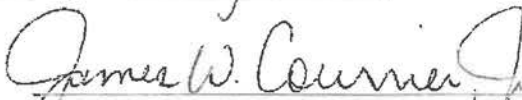
WHEREFORE, based on the above, the Court GRANTS Defendant James's motion to dismiss the claims against him of malicious prosecution, abuse of process, and civil conspiracy. The Court also GRANTS the motion to dismiss the portion of the count of IIED as it relates to malicious prosecution, abuse of process, suppression of evidence, and omission of information in the narrative for probable cause. However, the Court DENIES the motion to dismiss on the portion of the count of IIED as it relates to possible defamatory statements. The Court GRANTS the motion to dismiss as to the count of negligence.

Therefore, the Court ORDERS that all counts against Defendant James are dismissed, with the exception of the portion of the count alleging IIED which alleges defamatory statements.

The Court notes the objection of counsel to adverse rulings of the Court.

The Clerk is hereby directed to forward a copy of this Order to James W. Marshall, III and Adam K Strider; Christian Riddell and Dylan Batten; Tracey B. Eberling and Katherine M. Smith

ENTERED this the 12th day of August, 2020.


JUDGE JAMES W. COURRIER, JR.

TESTE COPY



Clerk Circuit/Family Court of Mineral County, WV

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

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as Special Prosecutor in Mineral County, and
CORPORAL SCOTT NAZELROD, individually
and in his official capacity as a West Virginia State
Trooper,

DEFENDANTS.



ORDER ON MOTION TO DISMISS OF DEFENDANT JOHN OURS

This matter came before the Court upon consideration of Defendant John Ours' Motion to Dismiss for failure to state a claim upon which relief can be granted. After reviewing the written filings of the parties, considering the prior arguments of counsel, and thoroughly examining the issues before the Court, the Court FINDS the following:

- 1) On March 22, 2019, this matter was filed in the Mineral County Circuit Court following an agreed transfer of the case from the Circuit Court of Morgan County;
- 2) Plaintiff Norman Launi, II (hereafter "Plaintiff") alleges in his Complaint that he suffered damages from the acts or omissions of the various named defendants, including claims against Defendant John Ours (hereafter "Defendant Ours") of

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malicious prosecution; abuse of process; and civil conspiracy (along with Defendants Dan James, former Hampshire County Prosecuting Attorney and now Morgan County Prosecuting Attorney (hereafter “Defendant James”), and Corporal Scott Nazelrod of the West Virginia State Police (hereafter Defendant Nazelrod”)); and an alternative count of negligence;

- 3) The claims arise from the Plaintiff’s prosecution in Mineral County for three counts of domestic battery and one count of domestic assault alleged to have been committed against Penny Hartman (hereafter “Ms. Hartman”);
- 4) Defendant Ours is the duly elected prosecutor of Grant County and was assigned by the West Virginia Prosecuting Attorney’s Institute as the special prosecutor to handle the prosecution of Plaintiff in Mineral County after Mineral County Prosecuting Attorney F. Cody Pancake, III was recused from the case;
- 5) At the time of Defendant Ours’ appointment to the case, the criminal complaint against the Plaintiff had already been accepted by a Mineral County magistrate and the matter was an active case before the Mineral County Magistrate Court;
- 6) As part of the prosecution of that case, Defendant Ours initiated a deposition of the alleged victim, “Ms. Hartman,” into which the Plaintiff alleges he and his attorney were induced into agreeing based on the understanding that the deposition was being taken to determine whether Ms. Hartman wanted to drop her allegations and the assurance that, if that was the case, the State would dismiss the prosecution;
- 7) Plaintiff further alleges that Defendant Ours knowingly withheld exculpatory evidence from him and his counsel, specifically this being a portion of a recorded interview between Plaintiff and Defendant Nazelrod;

- 8) Plaintiff also alleges that Defendant Ours conspired with Defendants James and Nazelrod to prosecute him based on bad motives and despite knowing that Ms. Hartman did not want the prosecution to proceed;
- 9) The underlying criminal prosecution against the Plaintiff proceeded to trial in October 2017, and, after the magistrate denied a motion for judgment of acquittal, the matter was submitted to the jury, which, following a brief deliberation, found the Plaintiff not guilty;
- 10) After the present case was transferred to Mineral County, Defendant Ours, through counsel, filed a motion to dismiss the complaint based on Rule 12(b)(6) of the West Virginia Rules of Civil Procedure;

Based on these findings, the Court makes the following CONCLUSIONS:

- 1) In *Norfolk S. Ry. Co. v. Higginbotham*, 228 W.Va. 522, 721 S.E. 2d 541 (2011), the Court recited the factors necessary for proving the claim of malicious prosecution: 1) the prosecution was conducted to its termination and resulted in Plaintiff's discharge; 2) the prosecution was caused or procured by the Defendant; 3) the prosecution was without probable cause; and 4) the prosecution was malicious;
- 2) If a prosecution is based on probable cause, it cannot be malicious (see *Bailey v. Gollehon*, 76 W.Va. 322, 85 S.E. 556 (1915));
- 3) "Prosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. ...It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant

ultimately prevailed on appeal or in a habeas corpus proceeding.” Franklin D.

Cleckley, et al, *Litigation Handbook on West Virginia Rules of Civil Procedure*, 8(c), at 213 (3d ed. 2008); *Mooney v. Frazier*, 225 W.Va. 358, 370 n. 12, 693 S.E. 2d 333, 345 (2010);

- 4) Prosecutors are absolutely immune “for their conduct in initiating a prosecution and in presenting the State’s case, insofar as that conduct is ‘intimately associated with the judicial phase of the criminal process.’” *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed. 2d 547 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. at 995, 47 L.Ed 2d 128 (1976));
- 5) Prosecutorial immunity also extends beyond actions taken in court proceedings, and includes “actions preliminary to the initiation of a prosecution and actions apart from the courtroom.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 272, 113 S.Ct. 2606, 125 L.Ed. 2d 209 (1993);
- 6) In *Broadnax v. Pugh*, No. 5:15-03736, 2017 U.S. Dist. LEXIS 191655, 9-13 (S.D. W.Va., Oct. 24, 2017) (Aboulhosn, M.J.), adopted, 5:15-cv-03736, 2017 U.S. Dist. LEXIS 191266, 2017 WL 5585630 (S.D. W.Va., November 20, 2017) (Berger, J.), the federal court found: “A prosecutor is acting within their role as an ‘officer of the court’ when performing tasks, such as (1) initiating a judicial proceeding, (2) presenting evidence in support of a search warrant application, (3) conducting a criminal trial, bond hearing, grand jury proceeding or pre-trial hearing, (4) engaging in ‘an out-of-court effort to control the presentation of [a] witness’ testimony,’ and (5) making a ‘professional evaluation of the evidence assembled by the police and

appropriate preparation for its presentation at trial or before the grand jury after a decision to seek an indictment has been made.”

- 7) Defendant Ours did not initiate the prosecution of Plaintiff in Mineral County, as the criminal complaint finding probable cause against Plaintiff had been issued prior to Defendant Ours being appointed by the West Virginia Prosecuting Attorney's Institute; the Court is well-familiar with the typical practice of said Institute to appoint the Grant County Prosecutor to cover cases in Mineral County when the Mineral County Prosecutor is unable to represent the State;
- 8) Even if Defendant Ours somehow orchestrated his appointment to handle Plaintiff's prosecution because of some prior grudge, the prosecutor is absolutely immune from liability for continuing a prosecution even if it is improperly motivated;
- 9) A prosecutor has discretion to decide to continue a prosecution, assuming it is based on probable cause, even if an alleged victim of the crime adamantly asserts that she does not wish to proceed, and this decision to proceed is clearly a prosecutorial function. See *Springmen v. Williams*, 122 F. 3d 211, 212-13 (4th Cir. 1997);
- 10) There is no evidence that Defendant Ours was aware of the portion of the Plaintiff's missing interview with Defendant Nazelrod, but, if he was, the decision of a prosecutor to turn over evidence is a prosecutorial function which is afforded absolute immunity. *Carter v. Burch*, 34 F. 3d 257, 263 (4th Cir. 1994);
- 11) Moreover, even if Defendant Ours was aware of the portion of the interview which was not turned over and intentionally withheld it from the Plaintiff, there still would be no cause of action against Defendant Ours in this case because there must be a

showing of prejudice towards the accused from the failure to disclose for there to be a violation of *Brady v. Maryland*, 373 U.S. 83 (1963);

- 12) Federal courts have found that an accused is only prejudiced from a *Brady* violation if he is actually convicted, and the mere fact of having to endure a trial is not enough to equal prejudice. *Mead v. Shaw*, 2016 WL 316870, at 7,8 (W.D. N.C. Jan. 25, 2016), citing *Fullwood v. Lee*, 290 F.3d 663, 685 (4th Cir. 2002);
- 13) In the present case, Plaintiff was not convicted in his underlying criminal trial, so he therefore cannot be considered to have been prejudiced under *Brady*;
- 14) Consequently, for all of the above reasons, Defendant Ours has absolute immunity for the claims of malicious prosecution;
- 15) Next, the abuse of process claim is premised on the claim that Defendant Ours improperly induced the Plaintiff and his counsel to agree to a deposition of alleged victim Ms. Hartman with an assurance that, if she indicated her desire to not prosecute the Plaintiff, Defendant Ours would dismiss the case;
- 16) Rule 15 of the West Virginia Rules of Criminal Procedure expressly provides for the taking of depositions in criminal prosecutions, and there is no requirement that the accused or his counsel has to agree to such deposition before the prosecutor can have it;
- 17) A prosecutor might use a deposition in a case where he is concerned that a witness might not appear for trial or might change testimony at trial, and the use of such deposition is clearly a prosecutorial function and can be viewed as “an out-of-court effort to control the presentation of [a] witness’ testimony”;

- 18) Consequently, Defendant Ours is afforded absolute immunity for using the deposition process in preparation for presenting his case or for determining if he wished to proceed;
- 19) Because Defendant Ours has absolute immunity for his actions in prosecuting Plaintiff, he cannot be liable for conspiring with others to commit the underlying malicious prosecution or abuse of process;
- 20) The Plaintiff further alleges that Defendant Ours was negligent in trying the case based on altered evidence, failing to turn over exculpatory evidence, and failing to conduct an appropriate investigation, with this negligence leading to Plaintiff's malicious prosecution;
- 21) Because the Court previously found that Defendant Ours was not liable for a malicious prosecution of Plaintiff, Defendant Ours likewise cannot be negligent in bringing about such malicious prosecution as alleged in the negligence count.

WHEREFORE, based on the above, the Court GRANTS Defendant Ours' motion to dismiss the claims against him of malicious prosecution, abuse of process, civil conspiracy, and negligence.

The Court notes the objection of counsel to adverse rulings of the Court. This matter against Defendant Ours is now ORDERED to be dismissed.

The Clerk is hereby directed to forward a copy of this Order to James W. Marshall, III and Adam K. Strider; Christian Riddell and Dylan Batten; Tracey B. Eberling and Katherine M. Smith.

ENTERED this the 12th day of August, 2020.

James W. Courrier, Jr.
JUDGE JAMES W. COURRIER, JR.

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[Signature]
Clerk Circuit/Family Court of Mineral County, WV

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

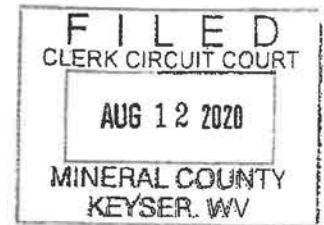
NORMAN LAUNI, II,
PLAINTIFF,

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CASE NO. 19-C-15 (Judge Courier)

THE HAMPSHIRE COUNTY
PROSECUTING ATTORNEY'S OFFICE,
and COUNTY OF HAMPSHIRE, WEST
VIRGINIA, and THE MORGAN COUNTY
PROSECUTING ATTORNEY'S OFFICE,
and COUNTY OF MORGAN, WEST VIRGINIA,
and THE MINERAL COUNTY PROSECUTING
ATTORNEY'S OFFICE, and COUNTY OF
MINERAL, WEST VIRGINIA, and DAN JAMES, JR.,
individually and in his official capacity as Prosecuting
Attorney for Hampshire and Morgan Counties, and
JOHN OURS, individually and in his official capacity
as Special Prosecutor in Mineral County, and
CORPORAL SCOTT NAZELROD, individually
and in his official capacity as a West Virginia State
Trooper,

DEFENDANTS.



ORDER ON MOTION TO DISMISS OF DEFENDANT CORPORAL SCOTT NAZELROD

This matter came before the Court upon consideration of Defendant Corporal Scott Nazelrod's Motion to Dismiss for failure to state a claim upon which relief can be granted. After reviewing the written filings of the parties, considering the prior arguments of counsel, and thoroughly examining the issues before the Court, the Court FINDS the following:

- 1) On March 22, 2019, this matter was filed in the Mineral County Circuit Court following an agreed transfer of the case from the Circuit Court of Morgan County;
- 2) Plaintiff Norman Launi, II (hereafter "Plaintiff") alleges in his Complaint that he suffered damages from the acts or omissions of the various named defendants, including claims against Defendant Corporal Scott Nazelrod (hereafter "Defendant

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Nazelrod”) of malicious prosecution; abuse of process; civil conspiracy (along with Defendants Dan James, former Hampshire County Prosecuting Attorney and now Morgan County Prosecuting Attorney (hereafter “Defendant James”), and John Ours, Grant County Prosecuting Attorney serving as Special Prosecuting Attorney for Mineral County (hereafter “Defendant Ours”)); and an alternative count of negligence;

- 3) The claims arise from the Plaintiff’s prosecution in Mineral County for three counts of domestic battery and one count of domestic assault alleged to have been committed against Penny Hartman (hereafter “Ms. Hartman”);
- 4) Defendant Ours is the duly elected prosecutor of Grant County and was assigned by the West Virginia Prosecuting Attorney’s Institute as the special prosecutor to handle the prosecution of Plaintiff in Mineral County after Mineral County Prosecuting Attorney F. Cody Pancake, III, was recused from the case;
- 5) At the time of Defendant Ours’ appointment to the case, the criminal complaint against the Plaintiff had already been accepted by the Mineral County magistrate and the matter was an active case before the Mineral County Magistrate Court;
- 6) During all relevant times for this case, Defendant James was the Prosecuting Attorney for Hampshire County until his appointment as Morgan County Prosecuting Attorney in September 2017;
- 7) Defendant Nazelrod is a corporal with the West Virginia State Police;
- 8) In January 2017, Defendant James received information from Ms. Hartman, the Plaintiff’s previous girlfriend, that she had been the victim of domestic violence from

the Plaintiff, and, thereafter, Defendant James directed Defendant Nazelrod to investigate Ms. Hartman's allegations against the Plaintiff;

- 9) Ms. Hartman filed for a Domestic Violence Protective Order (DVPO) against Plaintiff, which the Plaintiff contends was done at the direction of Defendant Nazelrod;
- 10) Plaintiff further alleges that Defendant Nazelrod also called the on-call magistrate to encourage him to grant Ms. Hartman's petition for a DVPO;
- 11) At some point in the investigation, it was determined that the alleged crimes happened in Mineral County, rather than Hampshire County;
- 12) In April 2017, at the conclusion of his investigation, Defendant Nazelrod presented a criminal complaint to a Mineral County magistrate alleging three counts of domestic battery and one count of domestic assault against Plaintiff;
- 13) The magistrate found probable cause on all four counts;
- 14) The Plaintiff alleges that the complaint presented by Defendant Nazelrod was defective in that it failed to include certain potentially exculpatory information that was provided to Defendant Nazelrod in a recorded interview with Plaintiff;
- 15) Plaintiff also contends that Ms. Hartman made multiple attempts to have the criminal case against Plaintiff dismissed, but that the State refused to do so;
- 16) Plaintiff further alleges that Defendant Nazelrod knowingly withheld exculpatory evidence from him and his counsel, specifically this being a portion of a recorded interview between Plaintiff and Defendant Nazelrod, and that this resulted in the magistrate verbally reprimanding Defendant Nazelrod for being negligent in his

duties; it should be noted that Plaintiff had his own recording of the portion of the interview that Defendant Nazelrod did not disclose;

- 17) The underlying criminal prosecution against the Plaintiff proceeded to trial in October 2017, and, after the magistrate denied a motion for judgment of acquittal, the matter was submitted to the jury, which, following a brief deliberation, found the Plaintiff not guilty;
- 18) Plaintiff contends that Defendant Nazelrod intimidated Ms. Hartman into continuing to prosecute Plaintiff despite her repeated efforts to dismiss the case and her testimony at trial in which she claimed the domestic violence never happened;
- 19) Plaintiff also states that every witness at the trial except Defendant Nazelrod testified that Ms. Hartman was not credible;
- 20) After the present case was transferred to Mineral County, Defendant Ours, through counsel, filed a motion to dismiss the complaint based on Rule 12(b)(6) of the West Virginia Rules of Civil Procedure;

Based on these findings, the Court makes the following CONCLUSIONS:

- 1) In *Norfolk S. Ry. Co. v. Higginbotham*, 228 W.Va. 522, 721 S.E. 2d 541 (2011), the Court recited the factors necessary for proving the claim of malicious prosecution: 1) the prosecution was conducted to its termination and resulted in Plaintiff's discharge; 2) the prosecution was caused or procured by the Defendant; 3) the prosecution was without probable cause; and 4) the prosecution was malicious;
- 2) If a prosecution is based on probable cause, it cannot be malicious (see *Bailey v. Gollehon*, 76 W.Va. 322, 85 S.E. 556 (1915));

- 3) Procurement of a prosecution can be established by: 1) advancing or actively assisting in the prosecution of a defendant that the law enforcement officer knows to be innocent or 2) the “assert[ion] [of] control over the pursuit of the prosecution.”
Norfolk S. Ry. Co. at 528.
- 4) While Plaintiff here alleges that he was innocent, there is no allegation that Defendant Nazelrod knew Plaintiff to be innocent and helped prosecute him anyway;
- 5) Also, there is no showing that Defendant Nazelrod did anything to control the prosecution other than doing what is typically expected from a law enforcement officer in a criminal case;
- 6) After Ms. Hartman initiated a complaint with Defendant James, Defendant Nazelrod was directed by the prosecuting attorney to investigate the matter, which included speaking with both Ms. Hartman and the Plaintiff and reviewing evidence; after concluding his investigation, Defendant Nazelrod presented a criminal complaint to a magistrate (but notably Plaintiff contends Defendant Nazelrod did not even draft the complaint); Defendant Nazelrod provided information to Ms. Hartman that she could seek a DVPO with a magistrate, and Defendant Nazelrod alerted the magistrate that the petition from Ms. Hartman was being sought; Defendant Nazelrod served Ms. Hartman with a subpoena; and he then testified at trial—all of these things are typical of law enforcement and do not indicate a control over the prosecution;
- 7) As to another factor in *Norfolk S. Ry. Co.*, probable cause was established when the magistrate reviewed the complaint and issued a warrant based on probable cause;
- 8) Probable cause was established a second time when the State’s case was presented, which included a recantation by Ms. Hartman and rigorous cross-examination by

counsel for the Plaintiff, and the motion for judgment of acquittal was denied and the magistrate allowed the case to proceed to the jury;

- 9) Although Plaintiff argues that Defendant Nazelrod failed to include information in his complaint that would have been exculpatory or otherwise positive for the Plaintiff, there would have still remained enough evidence to establish probable cause;
- 10) A law enforcement officer is not required to put the denials of culpability from the accused in the complaint, and it is exceedingly common, especially in domestic cases, to have an accused express a different version of the facts from the accuser;
- 11) This contradiction of evidence does not negate probable cause, and, here, there was plenty of other evidence to establish probable cause for the complaint;
- 12) To establish abuse of process, the Plaintiff must show that Defendant Nazelrod engaged in “the willful or malicious misuse or misapplication of [a] lawfully issued process to accomplish some purpose not intended or warranted by that process.” See *Wayne Cty. Bank v. Hodges*, 175 W.Va. 723, 726, 338 S.E. 2d 202, 205 (1985);
- 13) The Court expounded upon this principle in *Williamson v. Harden*, 214 W.Va. 77, 80, 585 S.E. 2d 369, 372 (2003), when it noted that “there must be...an intentional and willful perversion” of a lawful process that results in the “unlawful injury of another,” and in *Preiser v. MacQueen*, 177 W.Va. 273, 279 n. 8, 352 S.E. 2d 22, 28 n. 8 (1985) when it said “there is no liability [for abuse of process] where the defendant has done nothing more than carry out [a lawful] process to its authorized conclusion, even though with bad intentions”;
- 14) In the present case, Defendant Nazelrod conducted an investigation which led him to compile and file a criminal complaint against the Plaintiff in which probable cause

was found by a magistrate; he informed Ms. Hartman of her right to file for a DVPO, which is standard protocol for law enforcement in domestic violence cases, and contacted the magistrate to let him know that the Ms. Hartman wanted to file a petition for a DVPO, also standard practice, but otherwise had nothing to do with the issuance of the DVPO; and he served Ms. Hartman with a subpoena, also a standard practice of law enforcement;

- 15) The Court also finds no merit in the argument that the troopers exceeded their jurisdiction and abused process by serving Ms. Hartman in Mineral County, even though the troopers were assigned to a State Police detachment outside of Mineral County. First, these officers are state troopers and have jurisdiction in every county of the state. Second, even though the prosecution was occurring in Mineral County, Defendant Nazelrod was still the investigating officer for the case;
- 16) So, even if Defendant Nazelrod had bad intentions, he did nothing more than use standard process to its natural conclusion;
- 17) The Court concludes that there has been no showing of malicious prosecution or abuse of process against Defendant Nazelrod, and, therefore, because there is no underlying liability for these, there also cannot be a conspiracy to commit malicious prosecution or abuse of discretion;
- 18) The Plaintiff's alternate negligence claim is predicated on Defendant Nazelrod's failure to disclose and turn over evidence alleged to be exculpatory and failure to provide exculpatory facts in the criminal complaint;

- 19) For a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), for failing to disclose exculpatory evidence, there must be a showing that the accused was somehow prejudiced by the failure to disclose;
- 20) In *Mead v. Shaw*, 2016 WL 316870, at 7, 8 (W.D. N.C. Jan. 25, 2016), (citing *Fullwood v. Lee*, 290 F. 3d. 663, 685 (4th Cir. 2002)), the court found that a defendant is only prejudiced from a *Brady* violation if he is actually convicted, and the mere fact of having to endure a trial is not enough to equal prejudice;
- 21) In the present case, the Plaintiff was not convicted in his underlying criminal case, so he therefore cannot be considered to have been prejudiced under *Brady*;
- 22) Moreover, as discussed previously, an officer does not have an obligation to place all exculpatory or otherwise positive factors for the accused in his application for probable cause;
- 23) Consequently, the Plaintiff's negligence claim must also fail.

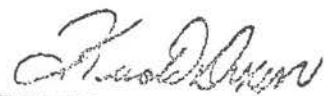
WHEREFORE, based on the above, the Court GRANTS Defendant Nazelrod's motion to dismiss the claims against him of malicious prosecution, abuse of process, civil conspiracy, and negligence.

The Court notes the objection of counsel to adverse rulings of the Court. This matter against Defendant Nazelrod is now dismissed.

The Clerk is hereby directed to forward a copy of this Order to James W. Marshall, III and Adam K Strider; Christian Riddell and Dylan Batten; Tracey B. Eberling and Katherine M. Smith.

ENTERED this the 12th day of August, 2020.


JUDGE JAMES W. COURRIER, JR.


Clerk Circuit/Family Court of Mineral Co.

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