IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Appeal Docket No.: A-001397-23

APPEALED FROM

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – SOMERSET COUNTY

SAT BELOW: HON. ZAHID N. QURAISHI, USDJ
HON. KEVIN M. SHANAHAN, JSC
HON. VERONICA ALLENDE, JSC

Case No. SOM-L-1212-22

NOAH MOSLEY,

APPELLANT,

V.

STATE OF NEW JERSEY, COUNTY OF MIDDLESEX, ANDREW CAREY, TVI DOLINGER, BINA DESAI, OFFICER CHARLES ZUNDEL, DET. MICHAEL CARULLO, JOHN DOE PROSECUTOR(S), JANE DOE PROSECUTOR(S), JOHN DOE POLICE OFFICER(S), JANE DOE POLICE OFFICER(S), JOHN DOE(S), JANE DOE(S), UNKNOWN PERSON(S),

APPELLEE(S)

BRIEF OF APPELLANT

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TABLE OF CONTENT

Page

TABLE OF CONTENT

Page

TABLE OF CONTENT

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Page

[1] For some reason, the trial court provided duplicate opinions, one dated February 15, 2023 and this present one dated February 16, 2023. The February 16, 2023 opinion is a duplicate opinion.

TABLE OF CONTENT

TABLE OF JUDGMENTS, ORDERS AND RULINGS (Cont'd)

Appendix Page

STATEMENT OF ITEMS ON SUMMARY JUDGMENT (R. 4:46-2)

TABLE OF CONTENT

STATEMENT OF ITEMS ON SUMMARY JUDGMENT (Cont'd)

Appendix Page

TABLE OF APPENDIX VOLUME I

Appendix Page

TABLE OF CONTENT

VOLUME I (Cont'd)

Appendix Page

[2] For some reason, the trial court provided duplicate opinions, one dated February 15, 2023 and this present one dated February 16, 2023. The February 16, 2023 opinion is a duplicate opinion.

TABLE OF CONTENT

VOLUME I (Cont'd)

Appendix Page

TABLE OF APPENDIX VOLUME II

TABLE OF CONTENT

VOLUME II (Cont'd)

Appendix Page

TABLE OF AUTHORITIES

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

TABLE OF CONTENT

TABLE OF AUTHORITIES (Cont'd)

Authority **Page**

PROCEDURAL HISTORY

On or about October 13, 2020, Appellant filed his complaint in the Superior Court of New Jersey, Law Division, Middlesex County (Docket No. MID-L-007160-20). **Aa1 to Aa44.**[1]

Defendants Zundel, Carullo, and Township of Edison removed this matter to federal court on or about December 14, 2020 based on the federal claims alleged against all the Defendant in Counts XI-XV, docketed as Noah Mosely v. State of New Jersey, et al., 3:20-cv-18885-ZNQ-DEA. The removal terminated the state court action in Middlesex County.

While in federal court, multiple motions to dismiss the Complaint in lieu of an answer were filed by the Defendants seeking to dismiss Appellant's claims, which was decided on August 31, 2022. **Aa45 to Aa64.** On that date, the federal court dismissed Appellant's federal claims and remanded the counterpart state claims back to the Superior Court of New Jersey, Law Division in Middlesex County for lack of jurisdiction pursuant to 18 U.S.C. 1367(c)(3). Id.

For reasons contrary to R. 4:3-2 and R. 4:3-3, without motion, without a hearing or opportunity to be heard, the case was transferred to Somerset County on

[1] **Aa** denotes Appellant Appendix. The Appendix page numbers for this brief are in red ink to distinguish it from some of those submission that contain page numbered appendixes or exhibits.

or about September 7, 2022. **Aa287**. The case was docketed as SOM-L-1212-22 on October 17, 2022. **Aa277-79** (Somerset Docket Sheet).

On November 29, 2022, the State of New Jersey and its Defendant employees, Carey, Dolinger, and Desai moved to dismiss the remaining State claims alleged against them in Appellant's complaint. **Aa277.**

On February 15, 2023 (filed on February 16, 2023), the trial court granted the State's motion to dismiss the remaining State claims with prejudice. **Aa65-66**.

On March 2, 2023, Appellant moved for reconsideration, see **Aa279**, and on April 14, 2023 the trial court denied Appellant's motion for reconsideration. **Aa124-25**; **Aa278.**

On April 11, 2023, upon motion by Appellant, the Honorable Pedro J. Jimenez, Jr., J.S.C. entered an Order finally vacating the judgment of conviction for Appellant's violation of probation (VOP) and dismissed the judgment of conviction (JOC) against Appellant with prejudice. **Aa224-25**.

Appellant subsequently served a Notice of Claim in May of 2023 on multiple defendants, including the Defendants in the present matter. Appellant is subject to file an Amended Complaint in this matter given the most recent disposition of the criminal proceeding in Appellant's favor and, now, pending the outcome of this appeal as the outcome of this appeal will determine whether an amended complaint is required or the filing of an entirely new action.

On October 16, 2023, Defendant Edison Township and its Defendant members moved for Summary Judgment. **Aa279**.

On December 1, 2023, the trial court granted summary judgment and dismissed the state claims against Edison Township with prejudice. **Aa279**.

All claims against Defendants Middlesex County and its Defendant employees were dismissed with prejudice. **Aa62-64**.

STATEMENT OF FACTS

For purposes of this appeal, Appellant will rely on and incorporates herein the Statement of Facts found by the trial court in its December 1, 2023 opinion granting the Edison Defendants' motion for Summary Judgment. **Aa267-69.**

> The underlying basis of this matter stems from Plaintiff's September 7, 2014 arrest. Plaintiff's Complaint alleges the following: Defendant Officer Charles Zundel was patrolling in an unmarked police patrol vehicle when he reported that he observed who he believed to be Plaintiff Noah Mosley engage in what Defendant Zundel believed to be a drug transaction with a man in a minivan. Defendant Zundel witnessed a man in a blue Mercedes get into a minivan with another suspect and then get out.
>
> Defendant Zundel reported that he instructed the man in the minivan to stop when the blue Mercedes sped away from the altercation. Defendant Zundel reported he discovered two bundles of suspected narcotics in plain view of the minivan suspect's driver side floor. Defendant Zundel subsequently arrested the suspect and upon questioning him discovered that the suspect was purchasing heroin from an individual named "Black." Defendant Zundel identified Plaintiff as the driver of the Mercedes after an observation of a DMV photo, which Plaintiff alleged was a false identification.
>
> Plaintiff further alleges that on September 8, 2014, Defendant Carullo prepared reports and drafted a criminal complaint against Plaintiff,

implicating him as a criminal suspect in the drug transaction. Defendant Carullo, relying on information from the self-prepared reports, is alleged to have subsequently obtained a warrant for Plaintiff's arrest. Plaintiff was arrested on September 12, 2014. Importantly, Defendant Carullo did not witness the underlying incident himself.

Plaintiff's Complaint further alleges that between September 19, 2014, and January 15, 2015, the Office of the Middlesex County Prosecutor commenced an action that resulted in the finding that Plaintiff was violated his probation terms due to this incident, which resulted in Plaintiff being sentenced to a term of imprisonment for five years. Defendant Carullo's testimony was admitted at Plaintiff's trial over Plaintiff's hearsay objections, even though Defendant Carullo had no personal knowledge of the allegations.

On August 11, 2015, charges were proffered against Plaintiff resulting from the September 7, 2014, incident. The charges were formalized in a True Bill of Indictment issued by a Grand Jury.

Plaintiff went to trial on that Indictment, and on January 23, 2018, a jury returned a verdict of Not Guilty on all charges. Plaintiff successfully appealed his probation violation before the New Jersey Supreme Court on March 6, 2018.

On March 6, 2018, the New Jersey Supreme Court reversed the lower court's decisions that resulted in Plaintiff's violation of his probation. Importantly, this is the date determined by Judge Shanahan and the district court as the accrual date for the majority of the tort-based claims in Plaintiff's Complaint. As for Plaintiff's Slander and Libel claims, the date of the amended judgment of conviction was determined to be the accrual date, which was October 13, 2018.

On April 14, 2023, in the criminal case that is the subject of this civil action, the Honorable Pedro J. Jimenez, J.S.C., entered an Order officially vacating the judgment of conviction for Plaintiff's violation of probation (VOP) and dismissed the VOP with prejudice. Plaintiff prepared a notice of claim for all Defendants pursuant to N.J.S.A. 59:8-1, et seq.

On May 19, 2023, Plaintiff emailed a copy of the Notice of Claim to the attorneys representing the Defendants in this action. On May 24, 2023,

> Plaintiff served all Defendants with the Notice of Claim. This was the first and only record of Plaintiff serving the Defendants with a Notice of Claim. Plaintiff has waited six months in accordance with N.J.S.A. 59:8-1, et seq., and states that an amended complaint is forthcoming.
>
> The remaining pending state law claims against Defendants are listed as Counts I-X of Plaintiff's Complaint and include False Arrest/False Imprisonment (Count I), Injurious Falsehood (Count II), Libel/Libel Per se (Count III), Slander/Slander Per Se (Count IV), Negligence (Count V), Common Law Conspiracy (Count VI), Intentional Infliction of Emotional Distress (Count VII), Negligent Infliction of Emotional Distress (Count VIII), Negligent Hiring Supervision or Retention (Count IX), and N.J. Civil Rights Conspiracy under N.J.S.A. 10:6-2 (Count X).

Id.

LEGAL ARGUMENT

Standard of Review

Motion to Dismiss:

Pursuant to R. 4:6-2(e), this Court applies a plenary standard of review from a trial court's decision on a motion to dismiss. Sickles v. Cabot Corp., 379 N.J. Super. 100, 105-06 (App. Div. 2005). Appellate courts have "cautioned that legal sufficiency requires allegation of all the facts that the cause of action requires." See Cornett v. Johnson & Johnson, 414 N.J. Super. 365, 385 (App. Div. 2010), aff'd and modified, 211 N.J. 362 (2012); and see Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012)("the essential facts supporting plaintiff's cause of action must be presented…conclusory allegations are insufficient in that regard").

However, this Court owes no deference to the trial court's conclusions. Rezeem Fam. Assocs., LP v. Borough of Millstone, 423 N.J. Super. 103, 114 (App. Div. 2011). In fact, this Court's task is to liberally review the pleadings in order to "ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem. Park, 43 N.J. Super. 244, 252 (App. Div. 1957)).

Motion for Reconsideration:

The standard of review for denial of reconsideration is whether the trial court abused its discretion. Triffin v. Johnston, 359 N.J. Super. 543, 550 (App. Div. 2003). "Reconsideration itself is 'a matter within the sound discretion of the [c]ourt, to be exercised in the interest of justice[.]'" Palombi v. Palombi, 414 N.J. Super. 274, 288 (App. Div. 2010) (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990)). Reconsideration "should be utilized only for those cases that fall into that narrow corridor in which either **1)** the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or **2)** it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid.

The standard of review on a motion for reconsideration is more deferential and this Court will not disturb a judge's denial of a motion for reconsideration

absent a clear abuse of discretion. Pitney Bowes Bank, Inc. v. ABC Caging Fulfillment, 440 N.J. Super. 378, 382 (App. Div. 2015).

Motion for Summary Judgment:

Summary judgment is proper when the motion record shows "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). A genuine issue of material fact exists when the motion materials, "viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).

The appellate court's review of a trial court's summary judgment order is de novo. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016)(citing Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012)). As a result, the trial court's analysis is not entitled to any special deference. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

POINT I: THE TRIAL COURT'S DETERMINATION THAT APPELLANT'S MALICIOUS PROSECUTION CLAIMS ACCRUED WHEN HIS CRIMINAL CASE WAS REVERSED BY THE SUPREME COURT AND WERE, THEREFORE, BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS UNDER N.J.S.A. 2A:14-2 WAS IN ERROR AND CONTRARY TO DECADES OF SETTLED LAW HOLDING THAT THE CLAIM CARRIES A SIX-YEAR STATUTE OF LIMITATIONS. (Raised Below - **Aa123-24**; 1T12-22 to 14-9; **Aa169-70**; 2T13-15 to 15-2).

On February 15, 2023, the trial court granted the State Defendants' motion to dismiss Appellant's complaint on two grounds, concluding in pertinent part:

> Therefore, I will dismiss the -- all the complaints on statute of limitations grounds except for the libel and slander complaint. But I will dismiss those complaints for failure to file a notice of tort claim.

Aa85; 1T[2]19-19 to 23. See also **Aa10-11**; 2T20:23 to 21:1.

As discussed in the points, sub judice, the trial court's findings are in error. With respects to the Statute of limitations, the trial court found that Appellant's Complaint alleged ten State claims:

> The ten State law claims include false imprisonment, false arrest and imprisonment, Count One; injurious falsehood, Count two; libel-slander per se, Count Three; libel, libel per se; slander, slander per se, Count Four; negligence, Count Five; criminal conspiracy, Count Six; intentional infliction of emotional distress, Count Seven; negligent infliction of emotional distress, Count Eight; negligent hiring and supervision, Count Nine; and Civil Rights Conspiracy under N.J.S.A. 10:6-2, Count 10.

Aa76-77; 1T10:23 to 11:6. See also **Aa97**; 2T11:11-20.

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[2] 1T denote transcript of Hon. Kevin Shanahan's Decision on the State's Motion to Dismiss Dated Feb 15, 2023;
2T denotes a duplicate of Judge Shanahan's Feb 15, 2023 decision. However, this transcript is dated Feb 16, 2023;
3T denotes transcript of Judge Shanahan's Decision on Mosely's Motion to Reconsider, Dated April 14, 2023'
4T denotes transcript of Hon. Veronica Allende's Decision on Edison's Summary Judgement Dated Dec 1, 2023..

Except for the defamation claims in Count One and Two, the federal court found that Appellant's remaining claims were in, in fact, malicious prosecution claims. See federal court op. at p. 6-10; **Aa-52-56**. The Defendants agreed and the State Court found the same. See trial court op. at **Aa78-79**; 1T12-22 to 14-9; **Aa99-100**; 2T13-15 to 14-16.

However, in dismissing Appellant malicious prosecution claims, the trial court stated in pertinent part:

> The Plaintiff argues that -- the Plaintiff argues in its moving papers that the claims are not barred by the Statute of Limitations because, um, they're malicious prosecution claims arising from transgressions occurring during the criminal proceeding, that they're therefore malicious prosecution claims. And he points to two very old cases, Cabakov v. Thatcher, 27 New Jersey Super 404, at 409, Appellate Division 1953, and Earl versus Winne, 14 New Jersey 119, at 132, 1953, for the proposition that there's a six-year Statute of Limitations. That's clearly not correct given the clear findings of N.J.S.A. 2A:14-2.
>
> At oral argument the Plaintiff abandoned that argument and advanced the continuing violation theory, continuing tort theory, pointing to the fact that the actions of the State with regard to the Amended Judgment of Conviction were a continuing effort to maliciously prosecute the Plaintiff.
>
> The Court disagrees. That's a separate and distinct event. And I agree with Defendants that all the counts except for the libel and slander counts, only as they relate to the Judgment of Conviction, are barred by the Statute of Limitations.

Aa100-01; 2T14-3 to 15-2.

Appellant never abandoned his six-year statute of limitations argument for malicious prosecution claims argument and moved for reconsideration. **Aa279**. On

April 14, 2023, the Court denied Appellant's request for reconsideration, commenting in pertinent part:

> Defend -- plaintiff argues that their reconsideration is warranted because in the Court's original opinion they used an incorrect standard to determine the accrual date for plaintiff's malicious type prosecution claims and be they -- that the Court incorrectly supplied it to your statute of limitations. And the Court dismissal of the plaintiff's claim based upon failure to file a notice of tort claim was improper.
>
> A review of the moving papers indicate that the same arguments are being made here are the arguments that were made in the Court's first opinion. The standard of review for reconsideration of motions is whether or not the court based its decision on palpably indirect or irrational basis or didn't -- or failed to consider or appreciate significance of probative component evidence. See Cummings versus Bahr, 295 N.J. Super., 374 at 385 (Appellate Division, 19 1996).
>
> Defendant argues, Court agrees that the plaintiff's two main arguments the State claims that are presented in the Complaint misstate the law for the reasons contained in the Court's original finding of fact and conclusion of law which I adopt and incorporate here.

Aa121; 3T13-1 to 21.

Appellant agreed with the federal court and state trial court that his state claims are, in essence, malicious prosecution claims. Major v. Maguire, 224 N.J. 1, 26 (2016)("[A] reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundamentals of a cause of action may be gleaned even from an obscure statement of the claim, opportunity being given to amend if necessary.'"). However, the trial court was both legally and discretionarily in error when it rejected, both on Defendants' motion to dismiss as well as on Appellant's request for reconsideration, well settled law holding accrual date for malicious

prosecution claims are determined by the date the prosecution actually "terminates," in Appellant's favor as well as settled law holding that that malicious prosecution claims have a six-year statute of limitations.

As shown below, this Court should reverse.

A. The Accrual Date For Malicious Prosecution Claims Are Determined By The Date The Prosecution Actually "Terminates," Not By The Date The Case Is Reversed On Appeal, Requiring Reconsideration.

In addressing this issue, the Court found that March 6, 2018, the date the New Jersey Supreme Court ruled in Appellant's criminal case in his favor, see State v. Mosley, 232 N.J. 169 (2018), was the accrual date on Appellant's malicious prosecution claims. Settled law, however, says otherwise.

Under New Jersey law, in a claim for malicious prosecution, a plaintiff has the burden to establish "(1) that the criminal action was instituted by the defendant against the plaintiff, (2) that it was actuated by malice, (3) that there was an absence of probable cause for the proceeding, and **(4) that it was terminated favorably to the plaintiff.**" Helmy v. City of Jersey City, 178 N.J. 183, 190 (2003)(Emphasis added); see also LoBiondo v. Schwartz, 199 N.J. 62, 89 (2009); and Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 393-94 (2009).

Under federal law, the added element that "plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal

proceeding," is also required. Johnson v. Knorr, 477 F.3d 75, 82 (3d Cir. 2007), quoting Estate of Smith v. Marasco, 318 F.3d 497, 521 (3d Cir. 2003).

For accrual purposes, however, both State and Federal law require favorable "termination" of the case against Appellant, with "termination" being the operative word. Michaels v. State of N.J., 955 F. Supp. 315, 324 (D.N.J. 1996), quoting Smith v. Holtz, 87 F.3d 108, 113 (3rd Cir. 1996)(With respects to accrual of malicious prosecution claims under 42 U.S.C. § 1983, "'so long as success on [a § 1983] claim would imply the invalidity of a conviction in a pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist.'").

The date that a cause of action under § 1983 accrues, however, is a matter of federal law. See Wallace v. Kato, 549 U.S. 384, 388 (2007); Estate of Lagano v. Bergen Cty. Prosecutor's Office, 769 F.3d 850, 860 (3d Cir. 2014). Federal law rejects the New Jersey Supreme Court's reversal of Defendant's VOP as an accrual date. Michaels v. State of N.J., 955 F. Supp. 315, 325 (D.N.J. 1996). In fact, under federal law, "a reversal of a conviction on evidential grounds and remand of the criminal proceedings — the precise factual scenario here — did not represent a favorable termination…" Michaels v. State of N.J., 955 F. Supp. 315, 325 (D.N.J. 1996).

Smith v. Holtz, 87 F.3d 103, supra., is dispositive. In that case, the Third Circuit rejected the defendants' argument that the § 1983 claim accrued when the conviction was initially reversed and remanded. Id. at 110, 113. The court reasoned that if the Appellant had brought his § 1983 claim before the criminal charges were dismissed, success on that claim would have necessarily implied the invalidity of a future conviction on the still pending criminal charges. Id. at 112-13.

As a result, the court held that the plaintiff's § 1983 claim did not accrue until the Supreme Court of Pennsylvania ordered the dismissal of all criminal charges. Id. at 113. See Michaels, 955 F. Supp. at 324; Kossler v. Crisanti, 564 F.3d 181, 186-87 (3d Cir. 2009); Ginter v. Skahill, 298 F. App'x. 161, 163 (3d Cir. 2008) ("Claims alleging malicious prosecution do not accrue until charges are dismissed.")(citing Montgomery v. DeSimone, 159 F.3d 120, 126 (3d Cir. 1998); Rose v. Bartle, 871 F.2d 331, 348 (3d Cir. 1989). And see McDonough v. Smith, 588 U.S. ___, ___, 139 S. Ct. 2149, 2158 (2019)(There is not "'a complete and present cause of action,' to bring a malicious prosecution "challenge to a criminal proceeding while those criminal proceedings are ongoing.").

Thompson v. Clark, 142 S. Ct. 1332, 1335 (2022) is also dispositive. In Thompson, the prosecutor effectuated a favorable termination of the case when he "dismiss[ed]" the charges against Thompson, id., at 1335, causing "the criminal prosecution [to] end[] without a conviction." Id. at 1341.

To further explain—within two years of the dismissal of the charges against him, Thompson filed a malicious prosecution claim pursuant to 42 U.S.C. § 1983. Id. at 1336. The claim was dismissed on statute of limitation grounds because there was no indication that Thompson was innocent, so he appealed. Id. The Second Circuit affirmed. Id. Thereafter, the United States Supreme "Court granted certiorari to resolve the split" between circuits as to whether "favorable termination requires some affirmative indication of innocence" or whether "favorable termination occurs so long as the criminal prosecution **ends** without a conviction." Id. (Emphasis added).

In finding that "dismissal" of the charges was enough to trigger the accrual date, the Thompson court "h[e]ld that a Fourth Amendment claim under § 1983 for malicious prosecution does not require the Appellant 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." Id. at 1341.

Thompson eliminated the need for a show of "innocence" as a way to define "favorable," see id. at 1335 ("This case requires us to flesh out what a favorable termination entails."), supports Appellant's position that a reversal alone is not enough to "terminate" a case as Thompson's case was actually terminated by way of a "dismissal." Id. at 1335 ("To maintain that Fourth Amendment claim under § 1983, a plaintiff such as Thompson must demonstrate, among other things, that he

obtained a favorable termination of the underlying criminal prosecution. Cf. Heck v. Humphrey, 512 U.S. 477, 484 [] (1994)").

Under Heck v. Humphrey, 512 U.S. 477 (1994), a plaintiff is barred from bringing a claim pursuant to 42 U.S.C. § 1983 if a judgment in his favor would demonstrate or imply the invalidity of a criminal conviction. Id. at 486-87. See also, Torres v. Fauver, 292 F.3d 141, 147 (3d Cir. 2002). The purpose of the Heck doctrine is to promote the "finality and consistency" of criminal investigations by avoiding "parallel litigation" and "the creation of two conflicting resolutions arising out of the same or identical transaction." Heck, 512 U.S. at 484-85 (citations omitted).

In other words, Heck's holding and purpose is mindful of the trial-error rule. The trial-error rule allows the prosecution "to retry a defendant where the conviction is reversed due to 'trial error' such as 'incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct.'" McMullen v. Tennis, 562 F.3d 231, 237 (3d Cir. 2009) (quoting Burks v. United States, 437 U.S. 1, 15 (1978)). See also State v. Tropea, 78 N.J. 309, 313-15 (1978)(Citing Burks, 437 U.S. at 16 and Greene v. Massey, 437 U.S. 19 (1978), decided on the same day. Those cases (Burks in the federal sphere and Greene as to state court proceedings) make it clear that a remand for a new trial is proper where reversal of a criminal conviction is predicated on trial error.

Here, Appellant's VOP conviction was reversed due to an "error' attributable to the erroneous admission of unreliable and prejudicial evidence. State v. Mosley, 232 N.J. 169 (2018). Pursuant to the trial error rule, Appellant's VOP was not terminated upon the Supreme Court's reversal of the appellate division's decision. Tropea, supra.

In other words, Heck and it progeny cases, including Thompson and those State cases cited herein stand for the proposition that, unless the VOP charge was dismissed, Appellant remained in a state of "continuing jeopardy." Justices of Boston Mun. Ct. v. Lydon, 466 U.S. 294, 308 (1984); State v. Johnson, 436 N.J. Super. 406, 421 (App. Div. 2014)(citing State v. Abbati, 99 N.J. 418, 425-26 (1985)).[3]

In this case, the New Jersey Supreme Court did not "order[] the dismissal" of the VOP charged against Appellant. State v. Mosley, 232 N.J. 169 (2018). The Supreme Court merely "reverse[d] the Appellate Division judgment that upheld defendant's probation violation." Id. at 174, 192. In other words, while the Supreme Court's reversal was favorable to Appellant, it did not "terminate" the

[3] It should be noted that "[t]he State bears the burden of proving the [VOP] charges by a preponderance of the evidence." State v. Mosley, 232 N.J. 169, 182 (2018), quoting State v. Reyes, 207 N.J. Super. 126,137 (App. Div. 1986). Because the burden of proof in a VOP hearing is lower than that of the "beyond a reasonable doubt" burden of proof in the criminal trial, an acquittal did not bar re-prosecution of the VOP. N.J. Div. of Child Prot. & Permanency v. J.R.-R., 248 N.J. 353, 376 n.11 (2021)("To prove an allegation by the preponderance of the evidence, a party must convince [the factfinder] that the allegation is more likely true than not true.").

case. The case was subsequently remanded to the trial court for further proceedings. Id.

Contrary to the state trial court's and the federal court's finding, the accrual date for Appellant's malicious prosecution claims were not triggered by the New Jersey Supreme Court's reversal of the Appellate Division's affirmance. See Mosley, 232 at 174, 192. Therefore, the trial court's conclusion on Defendants' motion to dismiss and on Appellant's reconsideration, that a reversal of a conviction constitutes a favorable termination of the action was in error and requires reversal. See General Motors Corp. v. City of Linden, supra.

B. The Trial Court's Finding that the Statute of Limitations for a Malicious Prosecution Claim is Two Years Pursuant to N.J.S.A. 2A:14-2's Time Limitations for Personal Injury Claims is Contrary to Settled Law, Holding That a Malicious Prosecution Claim is Subject to a Six-Year Statute of Limitations Consistent with N.J.S.A. 2A:14-1a.

As quoted above, the trial court incorrectly determined that Appellant's malicious prosecution claim was governed by a two-year statute of limitations. **Aa78-79**; 1T12-12 to 13-20. The trial court further found in pertinent part:

> **The record is crystal clear that the Complaint was filed on October 13th, 2020. And the accrual date with this -- for the underlying malicious prosecution claims was in March of 2018**. Given the -- given the fact that the bar of the statute of limitations appears on the base of the Complaint, it can be asserted as a failure to state a claim upon which relief can be granted. See Rappeport versus Flitcroft, 90 N.J. Super. 578 at 581 (Appellate Division, 1966). The statute of limitations for personal injury, as I

> said, is governed by N.J.S.A. 2A:14-4[4] in determining **when a cause of action for <u>personal injury</u> accrues**, the Court must inquire as to when the parties seeking to bring the action is aware of the injury or reasonably should have been aware of the injury. Mancuso versus Neckles, 163 N.J. 26, 33 to 35 (2000).

Aa80; 1T14-6 to 22. (Emphasis added).

Relying on <u>Earl v. Winne</u>, 14 N.J. 119, 132 (1953), Appellant espoused that the New Jersey Supreme Court's distinct treatment of malicious prosecution claims for statute of limitation purposes is still authoritative. <u>Id.</u> Indeed, no published New Jersey case has specifically overruled <u>Earl</u>'s holding that malicious prosecution claims carry a six-year statute of limitations period.

Appellant brought his malicious prosecution claims under both the Federal Civil Rights Act, 42 U.S.C. § 1983 and under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c). In highlighting this fact, Appellant is not unmindful that "[t]he statute of limitations for claims under the NJCRA is two years[,]" <u>Lapolla v. Cty. of Union</u>, 449 N.J. Super. 288, 298 (App. Div. 2017)(citing N.J.S.A. 2A:14-2(a))[5] and that the two-year statute of limitations is the same when applied to Appellants' federal civil rights claims. <u>Freeman v. State</u>, 347 N.J. Super. 11, 21-22 (App. Div. 2002). However, NJCRA "is a means of vindicating substantive rights **and <u>is not</u>**

[4] N.J.S.A. 2A:14-4 governs actions related to leases. It is presumed that the Court meant to say N.J.S.A. 2A:14-2, the statute of limitations governing personal injury actions.

[5] The <u>Lapolla</u> Court stated in dicta and without explanation that NJCRA has a two-year statute of limitations, consequently categorizing the Act as a personal injury claim. The New Jersey Supreme Court has not qualified this dicta and settled law in the area provides a contrary view.

a source of rights itself." Gormley v. Wood-El, 218 N.J. 72, 98 (2014). (Emphasis added).

The question, therefore, remains as to whether a malicious prosecution claim has a two-year statute of limitations. Settled law stands for the proposition that Appellant's malicious prosecution claim has a six-year statute of limitations. Earl, 14 N.J. at 132. In concluding that holding, Earl undertook a historical analysis of New Jersey's successive statute of limitations dating back to February 7, 1779, with the enactment of the "Act for the Limitation of Actions." Id. at 129-132.

Throughout the decades following Earl, New Jersey jurisprudence has clarified the distinctions that govern and trigger the applicable statute of limitations. Lautenslager v. Supermarkets General Corp., 252 N.J. Super. 660 (Law Div. 1991); Montells v. Haynes, 133 N.J. 282 (1993); Labree v. Mobil Oil Corp., 300 N.J. Super. 234 (App. Div. 1997); McGrogan v. Till, 167 N.J. 414 (2001); Balliet v. Fennell, 368 N.J. Super. 15 (App. Div. 2004).[6]

[6] This distinction has not gone unnoticed:

Ramsey v. Dintino, Civil Action No. 05-5492 (JAG), 19 (D.N.J. Mar. 30, 2007)("Unlike Plaintiff's other state law causes of action, Plaintiff's claim for malicious prosecution is subject to a six-year statute of limitations. Winne, 14 N.J. at 131-132."); Sanders v. Div. of Children & Family Servs., DOCKET NO. A-3720-14T2, 26 (App. Div. Jul. 26, 2017)("In addition, a six-year statute of limitations applies to malicious prosecution and abuse of process claims. Earl v. Winne, 14 N.J. 119, 132 (1953)."); Egg Harbor Assocs., LLC v. Vill. Supermarkets, Inc., DOCKET NO. A-0053-18T4, 5 n.3 (App. Div. Jan. 13, 2020)("Plaintiff did not dispute the six-year statute of limitations applied to each of its tort claims. See N.J.S.A. 2A:14-1; see also Earl v. Winne, 14 N.J. 119, 132 (1953)(stating malicious abuse of process claims governed by six-year statute of limitations)").

In Lautenslager, supra., the appellate division picked up the historical analysis of New Jersey's statute of limitations where Earl left off. After discussing the evolution of case law in the area both pre and post Earl jurisprudence and finding a split in authority, the court undertook an independent analysis of the statute of limitations question. Id. at 665.

Looking to the common law concepts of "action on the case" and "trespass vi et armis," the court attempted to trace the roots of New Jersey's two tort statutes of limitations that are at issue here, N.J.S.A. 2A:14-1 and N.J.S.A. 2A:14-2. The court concluded that an action of trespass was historically to redress injuries caused by the direct application of force, and that the language of N.J.S.A. 2A:14-2, the two-year statute, was intended to apply to this type of action. Id. The court also concluded that the six-year limitation of N.J.S.A. 2A:14-1 was intended to cover indirect injuries in the nature of actions on the case. Id.

In 1993, only two years after Lautenslager, the New Jersey Supreme Court in Montells v. Haynes, supra, was compelled to bring to an end an ongoing disagreement within the Appellate Division, as well as within the federal courts, concerning whether the two-year statute of limitations in N.J.S.A. 2A:14-2 or the six-year statute of limitations in N.J.S.A. 2A:14-1 applied to actions brought under the New Jersey Law Against Discrimination (LAD). N.J.S.A. 10:5-1, et seq.

After first concluding that a single statute of limitations should apply to all claims filed in the Superior Court founded on the Law Against Discrimination (LAD), the Court turned to a consideration of the appropriate limitations period. It stated that its focus was on the nature of the injury, not the legal theory of the claim. Montells, 133 N.J. at 291.

The Court noted that the Legislature has separated 'injury to the person' from 'tortious injury to the rights of another' and effectively distinguished personal injuries involving physical or emotional harm from those involving economic harm. Ibid. It also observed that **courts have historically treated "tortious injury to the rights of another," one of the categories within the six-year statute of limitations**, "as applying primarily to actions for economic loss." Id. at 291-92. (Emphasis added)

Actions for legal malpractice, engineering malpractice, claims for lost wages based on wrongful discharge, and appropriation of a person's likeness and name for the commercial benefit of another fall within this category and are subject to the six-year limitation period of N.J.S.A. 2A:14-1. Ibid. (citations omitted).

Ultimately, the Court held that the two-year "personal injury" statute of limitations governs all LAD claims filed in the Superior Court. Id. at 292. In doing so, it relied on the Legislature's declaration of policy concerning the consequences of discrimination which identified physical and emotional distress, severe physical

and emotional trauma, anxiety, career, and familial adjustment problems as injuries caused by and associated with acts of discrimination. Ibid. The Court observed that each of **these injuries is considered an injury to the person and at common law would be subject to the two-year statute of limitations**. See ibid..

Several years later, the New Jersey Supreme Court returned to the issue of which statute of limitations should govern a cause of action in McGrogan v. Till, supra. In McGrogan, the plaintiff commenced a legal malpractice action against the attorney who represented him in a criminal prosecution. McGrogan, 167 N.J. at 418.

The Court rejected the notion that legal malpractice in the context of a criminal prosecution primarily inflicts an injury to the person due to a loss of liberty flowing from incarceration and the loss of their civil rights and would allow the civil action to be commenced within two years. Id. at 416. The Court held that a single statute of limitations applies to legal malpractice actions, irrespective of the specific injuries asserted. Id. at 417.

The McGrogan Court clarified that its focus on the "nature of the injury" in Montells "was not centered on the gravamen of an individual complaint, but on the typical injuries in LAD claims generally." Id. at 421. The McGrogan Court continued:

> The holdings in Montells and Labree [v. Mobil Oil Corp., 300 N.J. Super. 234 (App. Div. 1997)(a retaliatory discharge claim)] recognize that in the

> analysis of which statute of limitations period should apply to a cause of action, the concept of "nature of the injury" is not to be subjected to a complaint-specific inquiry. The "nature of the injury" is used to determine the "nature of the cause of action" or the general characterization of that class of claims in the aggregate. That analysis precedes resolution of the question of which statute of limitations applies to a type of cause of action, and does not contemplate an analysis of the specific complaint and the injuries it happens to allege.

Id. at 422-23.

The McGrogan Court, therefore, concluded that the legal malpractice action is grounded in negligence and **the gravamen of the action is injury to the rights of another**—triggering a six-year statute of limitations under N.J.S.A. 2A:14-1. Id. at 424-25.

Clearly, the historical analysis, dating back well over three centuries of New Jersey jurisprudence, governing which statute of limitations are applicable to a particular cause of action reveals that the gravamen of the action—whether the tortious injury is considered "an injury to the person" or "an injury to the rights of another"—is the deciding factor.

Indeed, it is the New Jersey Supreme Court's rationale in McGrogan that highlights the gravamen of a malicious prosecution claim, acknowledging the "holding that [the 'gist['] of **malicious-prosecution action is injury to personal rights, not personal injuries**, because ['][s]ubsequent arrest and imprisonment are matters of damage but not necessary to be sustained in order to give right to the

action of malicious prosecution.[']" McGrogan, 167 N.J. at 423, quoting Kearney v. Mallon Suburban Motors, Inc., 23 N.J. Misc. 83, 88 (Essex Cty. Ct. 1945).

In essence, for centuries, New Jersey jurisprudence has categorized a malicious prosecution claim, not as a personal injury claim but as an "injury to personal rights." Id. As such, malicious prosecution claims fall under the six-year statute of limitations governed by N.J.S.A. 2A:14-1.

Accordingly, the federal Court and the trial court's conclusion otherwise was erroneous and, upon a denial of Appellant's request for reconsideration, see **Aa124-25**, was palpably incorrect and an abuse of discretion, requiring reversal.

POINT II: THE TRIAL COURT ERRED IN FINDING THAT APPELLANT'S CLAIM AGAINST THE STATE FOR LIBEL AND SLANDER SHOULD BE DISMISSED FOR FAILURE TO FILE A NOTICE OF CLAIM PURSUANT TO THE TCA, IN AS MUCH AS THOSE CLAIMS WERE THE OBJECT OF AND IN FURTHERENCE OF APPELLANT'S CIVIL RIGHTS CONSPIRACY CLAIM. (Raised Below – **Aa81**; **Aa85**; 1T15:19-24; 1T19:14-23**; Aa121-22**; 3T13:1 to 14-3).

In dismissing Appellant's defamation claims, the trial court reasoned that Appellant failed serve Defendants with a Notice of Claim. **Aa81**; **Aa85**; 1T15:19-24; 1T19:14-23. The Court subsequently denied Appellant's motion for reconsideration, relying on its previous ruling. **Aa121-22**; 3T13:1 to 14-3. However, Appellant completed a Civil Case Information Statement required for the filing of this action, which reflected in pertinent part:

Please check off each applicable category:… Title 59? NO.

Aa44.

Title 59 is "[t]he New Jersey Tort Claims Act, N.J.S.A. 59:1-1, et seq., effective July 1, 1972." Wright v. State, 169 N.J. 422, 435 (2001). Appellant filed this action as both a malicious prosecution and civil rights action and not a TCA action. See Civil Case Information Statement. **Aa44**. As such, Appellant was not required to file a Notice of Claim. See Cty. Concrete Corp. v. Town of Roxbury, 442 F.3d 159, 174 (3d Cir. 2006)("It is true that the NJTCA's notice requirements do not apply to federal claims, including § 1983 actions, or to state constitutional torts." (internal citations omitted)); see also Owens v. Feigin, 947 A.2d 653, 654 (2008) (holding that notice requirement does not apply to claims under the New Jersey Civil Rights Act).

As a civil rights and malicious prosecution action, all of Appellant's individual substantive claims are individually "constitutional tort[s]." Wildoner v. Borough of Ramsey, 316 N.J. Super. 487, 505 (App. Div. 1998). Because Appellant's complaint is not filed pursuant to the TCA, a notice of claim was not required. Feigin, supra.

Appellant is not unmindful that a Notice of Claim is required under the TCA for claims against public entities and their employees. Feinberg v. State, D.E.P., 137 N.J. 126, 134 (1994); N.J.S.A. 59:8-3. However, as espoused above,

Appellant's Complaint was not filed pursuant to the TCA but as a Federal and Civil Rights action. In other words, all the State claims alleged in Appellant's complaint are "underlying wrongs" and "overt acts" bound together within two distinct conspiracies: The New Jersey's common law Civil Conspiracy (Count VI) and New Jersey's Civil Rights Conspiracy (Count X). See i.e., Main St. at Woolwich, LLC v. Ammons Supermarket, Inc., 451 N.J. Super. 135, 153 (App. Div. 2017)("[I]f plaintiffs have sufficiently pled claims for tortious interference or malicious abuse of process, either may serve as the underlying tort required for a claim for civil conspiracy.").

Before remanding all State claims (Counts I through 10) to the jurisdiction of this Court, the federal Court specifically found that Appellant's individual State claims (which, individually, would ultimately be governed by the TCA) underlying his "State Conspiracy" claim has not yet accrued, commenting in pertinent part:

> Plaintiff's cause of action for the "**State Conspiracy" claim…accrued upon the state trial court's alleged failure to correctly amend Plaintiff's Judgment of Conviction; as such, they accrued on October 17, 2018** and thus were timely by the date of filing the complaint, October 13, 2020. At this point, however, the allegedly incorrect Judgment of Conviction has not yet been declared invalid by a state tribunal, implicating Heck, 512 U.S. 477, 487 (1994)…

Aa55-56; QURAISHI op. at p. 9-10.

The federal court then dismissed the applicable federal claims without prejudice pending the invalidation of the JOC by a "state tribunal" (Counts XIII,

XIV and XV). Id. Since the federal court did not retain jurisdiction of the State Claims, it did not dismiss those claims but remanded the matter to this Court for resolution. **Aa57,62**; id. at p. 11,16.

In accordance with the federal Court's findings, as to the "[']State Conspiracy[']] claim" against the State Defendants in their "official capacity," those claims have not yet accrued. **Aa55-56**; id at p. 9-10.[7]

Nevertheless, citing Gazzillo v. Grieb, 398 N.J. Super. 259, 264 (App. Div. 2008), Appellant espoused that a notice of claim is not required for those claims that are alleged against a Defendant in his or her "individual capacity" because the claim does not seek redress against the Defendant as an employee nor against the Defendant's employer.

In 1994, the TCA was amended to target individuals being sued in their "official capacities" as public employees. Velez v. City of Jersey City, 180 N.J. 284 (2004). In that amendment, the statute, for the first time, included suits against individuals as public employees in its notice of claims provision. Id. at 291. Said another way, a suit against a person that must be subject to the TCA is one that is against a person who is being sued as a public employee. Therefore, requiring a

[7] It is imperative that in addressing the TCA, the Court's analysis of Appellant's claims are properly analyzed under the distinct legal theories—both under the TCA and the New Jersey Civil Rights Act. (NJCRA). While Appellant's State claims may be subject to the TCA individually and as torts underlying Appellant's "State Conspiracy" claim (Count 6), none of the individual torts, including the "State Conspiracy" claim (Count 6) are subject to the TCA as torts underlying Appellant's New Jersey Civil Rights Conspiracy Claim (Count X). Owens v. Feigin, 194 N.J. 607, 613-14 (2008)(holding the notice requirements of the TCA do not apply to claims brought under the New Jersey Civil Rights Act); Fuchilla v. Layman, 109 N.J. 319, 337-38 (1988).

TCA notice of claim in order to file suit against a public employee who is being sued personally or in his or her individual capacity, automatically converts an "individual capacity" suit into a "official capacity" suit—successfully voiding "individual capacity" claims.

Accordingly, Appellant's claims against the public employee Defendants in their individual or personal capacity are not subject to the TCA and that, contrary to the trial court's position, those "official capacity" claims that are subject to the TCA have not yet accrued.

As a result, the trial court's dismissal of Appellant's defamation claims and denial of Appellant's request for reconsideration was in error.

For the above reasons, Appellant's defamation claims should not have been dismissed, requiring reversal.

POINT III: THE TRIAL COURT ERRED IN GRANTING THE EDISON TOWNSHIP DEFENDANT'S SUMMARY JUDGMENT MOTION BASED UPON THE SAME ERRONEOUS APPLICATION OF THE STATUTE OF LIMITATIONS AND THE TCA NOTICE OF CLAIM REQUIREMENT PREVIOUSLY APPLIED BY THE TRIAL COURT ON THE STATE'S MOTION TO DISMISS APPELLANT'S COMPLAINT. (Raised Below – **Aa241-48;** 4T9:1 to 16:3, **Aa250-60**; 4T18:5 to 28:18; **Aa270-76**).

Here, Judge Allende granted the Edison Township Defendants' motion for summary judgment, adopting the previous erroneous ruling of Judge Shanahan finding that Appellant's State claims, with the exception of the libel and slander

counts, was filed beyond the statute of limitations. **Aa270-72**. And, that Appellant's claims for libel and slander must be dismissed for failure to serve the public entities with a Notice of Claim. **Aa273-74**.

Judge Allende adopted those findings, over Appellant's objection, 4T9:1 to 16:3, 4T18:5 to 28:18, reasoning that it was in her discretion to do so based upon the so-called "law of the case doctrine." **Aa270-74**. Therefore, Appellant will not belabor this Court with a recitation of the arguments espoused in Points I and II sub judice but will incorporate them herein to the extent they are applicable to the Judge Allende's findings that Appellant's libel and slander claims were not supported by the filing of a Notice of Claim pursuant to the TCA and that the remaining State claims were filed beyond the statute of limitation. See Point I and Point II, sub judice.

Judge Allende also found that Appellant provided no evidence supporting the conspiracy claims alleged in his Complaint. **Aa274-76**. This finding was inconsistent with the purpose of the rule governing summary judgment. The summary judgment rule set forth in Rule 4:46–2 "serve[s] two competing jurisprudential philosophies": first, "the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case," and second, to guard "against groundless claims and frivolous defenses," thus saving the resources of the parties and the court. Brill v. Guardian Life Ins. Co. of

Am., 142 N.J. 520, 541-42 (1995) (quoting Robbins v. Jersey City, 23 N.J. 229, 240-41 (1957)). In light of the important interests at stake when a party seeks summary judgment, the motion court must carefully evaluate the record in light of the governing law, and determine the facts in the light most favorable to the non-moving party. R. 4:46–2(c).

For purposes of the Court's review related, the Court must "accept as true" the complaint's factual assertions. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)(The Court "must accept as true all the evidence which supports the position of the party defending against the motion and must accord him the benefit of all legitimate inferences which can be deduced therefrom."). The motion court draws all legitimate inferences from the facts in favor of the non-moving party. R. 4:46–2(c); see also Durando v. Nutley Sun, 209 N.J. 235, 253 (2012) (noting "courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion" (quoting Costello v. Ocean Cty. Observer, 136 N.J. 594, 615 (1994))); Brill, 142 N.J. at 536 (explaining "[o]n a motion for summary judgment the court must grant all the favorable inferences to the non-movant").

Further, it is well settled that, "[g]enerally, summary judgment is inappropriate prior to the completion of discovery." Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (citing Velantzas v.

Colgate-Palmolive Co., 109 N.J. 189, 193 (1988)). Accordingly, when "'critical facts are peculiarly within the moving party's knowledge,' it is especially inappropriate to grant summary judgment when discovery is incomplete." Velantzas, 109 N.J. at 193 (quoting Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981)). "Where discovery on material issues is not complete the respondent must, therefore, be given the opportunity to take discovery before disposition of the motion." Pressler & Verniero, cmt. 2.3.3 on R. 4:46-2. For example, a motion for summary judgment should be adjourned to allow the non-moving party an opportunity for discovery as to facts first disclosed in a recent deposition. Lenches-Marrero v. L. Firm of Averna & Gardner, 326 N.J. Super. 382, 387-88 (App. Div. 1999).

Here, discovery had not yet began and the Edison Defendants provided no evidence outside of Appellant's complaint to support its request for summary judgment. The Edison Defendants merely argued that they did nothing wrong. **Aa237-39**; 4T5:11 to 7:16. Yet, contrary to the New Jersey Supreme Court's finding of facts supporting Appellant's claims, see State v. Mosley, 232 N.J. 169 (2018) and the finding of both the federal district court, see **Aa55-56**; Op. at p. 9-10, the trial court, see **Aa72-73**; 1T6:11-13; 1T6:20 to 7:17, including Appellant's Statement of Material Facts, see **Aa126-232**, Judge Allende agreed with the Edison Defendants—ignoring almost a century of New Jersey jurisprudence requiring that she rule otherwise. Larner v. Montclair, 99 N.J.L. 510, 512 (1924)("[T]he judge has the power to determine the sufficiency of the facts set up by the defendant, and **his conclusions that they are not sufficient should not be set aside unless the sufficiency clearly appears**."); Birkenfeld v. Ginsburg, 106 N.J.L. 377, 379 1929); and see Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107 (2019)(A complaint should be dismissed only where it "states no claim that supports relief, and discovery will not give rise to such a claim.")..

In as much as the Edison Defendants provided no evidence supporting summary judgment and Plaintiff's Statement of Material Facts, this Court should determine that Judge Allende's find that Appellant provided no prove supporting the allegations in his Complaint erroneous and an abuse of discretion.

There is one additional area regarding the trial court's findings that deserves attention. Judge Allende never assessed the significance of the April 11, 2023, Order vacating Appellant's judgment of conviction on the VOP in the criminal case and dismissing that VOP with prejudice. See **Aa224-25**.

Appellant argued before Judge Allende in pertinent part:

> In vacating the VOP judgment of conviction and dismissing the VOP, Judge Jiminez found in pertinent part:
>
> > "I have attached the Order I am filing on eCourts today concerning the defendant's motion.
> >
> > It accounts for the fact that the Court vacated the defendant's conviction on the VOP via its decision in State v. Mosley.
> >
> > It also serves as the Court Order reflecting same as none was ever filed before documenting this decision.
> >
> > This Order also corrects and eliminates the "JOC" filed before and after the Court's decision since neither of them accurately reflected the status of this case after the Court's decision (i.e., you cannot have a "JOC" on a conviction that was vacated).
> >
> > A Judgement of Dismissal cannot be entered on this case as this case was brought to an end by the defendant successfully completing his term of probation he was originally sentenced to.

> **This case was a tragedy and injustice of EPIC proportions.** My hope is that this Order will finally bring it to an end, though I suspect Mr. Mosley will have to live with unpleasant memory for the rest of his life."
>
> See Judge Jiminez's email attached hereto, incorporated herein and made a part hereof as **Exhibit B**. (Emphasis added).

Statement of Material Facts at ¶ 14**; Aa130-32**.

Appellant argued that the Order vacating the JOC and dismissing the VOP with prejudice finally terminated the case against Appellant favorably and triggered the true accrual date. Id. Judge Allende rejected the importance of the criminal court's final disposition of the JOC and VOP by contradicting and overruling both the federal court and Judge Shanahan's findings related to malicious prosecution, commenting in pertinent part:

> Plaintiff argues that because the judgment of conviction was vacated and VOP was dismissed on April 14, 2023, that April 14, 2023, became the true accrual date to initiate Plaintiff's claims. As articulated during oral argument, the basis of Plaintiff's argument is that it wasn't until the underlying conviction was fully resolved and that matter terminated favorably to Plaintiff that his causes of actions accrued. **However, the legal authority to support Plaintiff's argument comes from the law specifically regarding a malicious prosecution action—which is not presently before the court.**

Aa270. (Emphasis added).

> Compare, however, the federal court's previous findings, in pertinent part:
>
> Here, **Plaintiff's malicious prosecution-related claims easily fall into the sphere of Heck** because his allegations arise from the use of false testimony in a criminal proceeding. (Compl. ¶¶ 23, 24, 35.). **Insofar as Plaintiff's claims are analogous to the tort of malicious prosecution**, the accrual date

> will be the date the violation of probation charge "ended without a conviction."

Aa55; Op at p. 9, quoting Thompson v. Clark, 142 S.Ct. 1332, 1341 (2022). (Emphasis added).

Also compare Judge Shanahan's findings in pertinent part.

> **The record is crystal clear that the Complaint was filed on October 13th, 2020. And the accrual date with this -- for the underlying malicious prosecution claims was in March of 2018**.

Aa80; 1T14-6 to 9.

As stated above, both Judge Quraishi in the federal court and Judge Shanahan in the State Court found that, with the exception of libel and slander claims, Appellant's State claims were malicious prosecution claims. Therefore, it appears that Judge Allende's subsequent finding that there were no malicious prosecution claims alleged in Appellant's complaint indicates that the trial court believed that the "law of the case" doctrine requiring the trial court to follow the federal and state court's previous rulings, only when it supported dismissing Appellant's complaint.

Simply, in order to dismiss Appellant's complaint, the claims were interpreted as malicious prosecution claims for purposes of invoking a two-year statute of limitations. When it became clear that a six-year statute of limitations was the correct governing limitation, malicious prosecution suddenly disappears from the complaint and the trial court's purview.

To highlight this point, the Judge Allende further found in pertinent part:

> Defendants argue that the accrual date of the statute of limitations of Plaintiff's claims as applied to them are no different than that of their co-defendants. **This court and the district court have both previously held that the accrual date for Plaintiff's cause of action, with exception to the libel and slander claims, was March 6, 2018**. This is the date that the New Jersey Supreme Court reversed Plaintiff's violation of probation charge, and which he should have known or discovered an actionable claim. Plaintiff filed the Complaint for this matter on October 13, 2020. The cause of action became untimely on March 6, 2020. **The court here respects the decisions made by Judges Shanahan and Quraishi and finds that Plaintiff's current causes of action accrued on March 6, 2018**, for all of the same reasons stated in their respective orders.

Aa272; Op. at p. 8. (Emphasis added).

To the contrary, Judge Quraishi found the following in pertinent part:

> Plaintiff's cause of action for the "State Conspiracy" claim (Count X), "Abuse of Process" claim (Count XIII), "Conspiracy to Violate Plaintiff's Civil Rights" claim (Count XIV), and "Negligent Failure to Prevent Civil Rights Violation" (Count XV) **accrued upon the state trial court's alleged failure to correctly amend Plaintiff's Judgment of Conviction; as such, they accrued on October 17, 2018 and thus were timely by the date filing the complaint, October 13, 2020.**

Aa55-56; Op. at p. 9-10. (Emphasis added).

And, finally, Judge Allende found, contrary to Judges Qurashi and Shanahan, that malicious prosecution claims have a six-year statute of limitations—and, again, contrary to both Judges, found that Appellant did not file a malicious prosecution claim, commenting:

> **The tort of malicious prosecution has a six-year statute of limitations. Earl v. Winne, 14 N.J. 119, 132 (1953).** A cause of action for malicious prosecution does not accrue until there has been "a favorable termination of

> the criminal proceeding." Muller Fuel Oil Co. v. Ins. Co. of N. Am., 95 N.J. Super. 564, 577 (App. Div. 1967) (addressing the accrual for "statute of limitations [purposes and finding that it] does not begin until such termination"). In the complaint currently pending, **Plaintiff has not filed a separate malicious prosecution claim. Thus, Plaintiff's reliance on this standard fails.**

Aa271; Op. at p. 7. (Emphasis added).

As indicated above, both the federal and state court erroneously determined that the statute of limitations for malicious prosecution was two-years. **Aa55-56**; **Aa78-81**. In essence, Judge Allende's ruling was confusing and contradictory, not only with respects to her own rulings but also with respects to the ruling of the federal court as well as Judge Shanahan, a co-equal on the bench in State Court.

For the above reasons, the Court's order granting the Edison Township Defendants' motion for summary judgment should be reversed.

POINT IV: IN THE EVENT THIS COURT REVERSE AND REMANDS, THIS COURT SHOULD DIRECT THAT THE CASE BE RETURNED TO ITS PROPER VENUE, MIDDLESEX COUNTY, WHERE ORIGINALLY FILED AND THE TRIAL COURT SHOULD BE DIRECTED NOT TO ALLOW COUNSEL FOR THE EDISION TOWNSHIP DEFENDANTS TO ENGAGE MULTIPLE REPRESENTATION IN LIGHT OF THE CLEAR CONFLICT INHERENT IN THAT REPRESENTATION. (Partially Raised Below – **Aa52-53**; **Aa236-37; Aa239-40;** 4T4:23 to 5:10; 4T7:20 to 8:25)

Decisions relating to a change in venue "will not be disturbed on appeal except upon a showing of an abuse of discretion." State v. Harris, 282 N.J. Super.

409, 413 (1995)(citing State v. Marshall, 123 N.J. 1, 76 (1991)). Here, the transfer of venue was inappropriate.

Rule 4:3-2 provides venue "shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant."

Under Rule 4:3-3(a), "[i]n actions in the Superior Court[,] a change of venue may be ordered by the Assignment Judge or the designee of the Assignment Judge of the county in which venue is laid." Rule 4:3-3(a)(2) states the Assignment Judge may order a change of venue "if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid."

However, these rules do not allow changes of venue, sua sponte, but require a motion wherein the moving party bears the burden of demonstrating good cause for such change. Pressler & Verniero, cmt. on R. 4:3-3.

On the other hand, Judges must avoid actual conflicts of interest as well as the appearance of impropriety in order "to promote confidence in the integrity and impartiality of the Judiciary." DeNike v. Cupo, 196 N.J. 502, 507 (2008). In matters of conflict or impropriety, the Administrative Office of the Court has issued policy statements allowing venue transfer without motion. Thus R. 4:3-2 and R. 4:3-3 must be exercised in service to Policy #5-15 which states that "the Assignment Judge…shall take appropriate action to avoid any appearance of

impropriety. Appropriate action includes, but is not limited to, changing the venue of the matter, if permitted,[ ] **or otherwise insulating the individual from the matter**." State ex rel. M.P., 450 N.J. Super. 539, 547 (App. Div. 2017).

The Order transferring venue to Somerset County indicates that transfer was "necessary in the interests of justice to avoid the appearance of impropriety." **Aa268**. However, no statement of reasons or findings indicating what facts were relied upon by the Court that reflected an "appearance of impropriety." In essence, it is not clear from the Order why or upon what supporting grounds the matter was transferred.

Nevertheless, this Court has mandated that when the trial court intends to transfer venue, sua sponte, it "should provide the parties with five-days' notice of its intention and an opportunity to be heard. If there is an objection, the judge should conduct a hearing, explaining, to the extent ['']practicable,['] the judiciary employee's, or his or her family member's, involvement in the matter, and the job functions of that employee that create particularized reasons why a remedy short of transfer is impracticable." State ex rel. M.P., 450 N.J. Super. at 552-53.

Indeed, the "Policy anticipates that its goals may be served by something less drastic than a transfer of venue. Specifically, ['']insulating the [court employee] from the matter.['']" Id. at 551-52 (quoting Policy #5-15, supra, at 3.). Here, the transferring court providing no facts supporting the need for transfer. Further,

there was no notice or opportunity to be heard on the transfer issue—including exploring less drastic measures than transfer. Id.

For the above reasons, the transfer of venue was an abuse of discretion requiring reversal. State ex rel. M.P., supra.

Turning now to the multiple representations of the Edison Defendants… In both Federal and State Court, Appellant objected to the multiple representation of Defendant's Edison Township and the individual police officers, Charles Zundel and Michael Carullo, by the Weiner Law Group LLP. **Aa52-53**; **Aa236-37; Aa239-40**.

In federal court, Appellant argued that the local rules of this Court provide that New Jersey Court rules shall govern the conduct of attorneys who appear in this Court. See Rule 6 (as amended), Rules of the United States District Court for District of New Jersey. Rule 1:14 of the New Jersey Court rules incorporates the Disciplinary Rules of the Code of Professional Responsibility adopted by the American Bar Association.

Thus, District Courts are led to the applicable disciplinary rule DR5-105. That rule provides that "a lawyer may represent multiple clients [only] if it is obvious that he can adequately represent the interest of each." United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978), quoting ABA Code of Professional Responsibility DR5-105(C).

Appellant made clear that Defendants Zundel and Carrulo's interests are conflicting in that Zundel falsified his police report and trial testimony against Defendant. Compl at ¶¶23-24,27-29,32. Carrulo, in the absence of personal knowledge, however, testified before the grand jury based upon the false information in Zundel's report. Because Carrulo's false testimony was not based upon his involvement in the investigation or arrest of Defendant but based upon the result of Zundel's false report, both Zundel and Carrulo have conflicting interest.

Simply, Carrulo's interest in exculpating himself by pointing the finger at Zundel by saying that he unknowingly relied on Zundel's falsified report is a probable conclusion. As a result, Appellant reasoned that Zundel and Carrulo must, therefore, find new counsel.

The federal court, unfortunately, did not address the multiple representation and inherent conflict.

Upon remand to the State Court, Appellant objected again to defense counsel's multiple representation of Township of Edison and all of the individual codefendant employees as being prohibited by RPC 1.7(b)(1), RPC 1.8(k) and RPC 1.8(l).

These rules reflect "'the fundamental understanding that an attorney will give complete and undivided loyalty to the client' [and] 'should be able to advise the client in such a way as to protect the client's interests, utilizing his professional

training, ability and judgment to the utmost.'" J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 223 (App. Div. 2006) (alteration in original) (quoting State ex rel. S.G., 175 N.J. 132, 139 (2003)).

Further, a conflict of interest may preclude a lawyer from representing co-defendants. See In re Petition for Review of Op. 552 of the Advisory Comm. on Prof'l Ethics, 102 N.J. 194, 208 (1986) (recognizing potential conflict of interest in representing co-defendants in the context of municipal government and its officers); Kramer v. Ciba-Geigy Corp., 371 N.J. Super. 580, 602-05 (App. Div. 2004) (discussing conflicts of interest in the joint representation of a corporation and individual defendants).

Appellant argued that in this case, there has been no conflict assessment, conflict waiver or any proffered statements on the record indicating that counsel's multiple representation has been undertaken within the governing, RPC, Court Rules and common law.

In the absence of the Edison Defendant's counsel satisfying explicit obligations related to conflict mitigation, his continued representation remains impermissible.

As such this Court should direct that the Edison Township Defendant's hire separate lawyers.

CONCLUSION

For all of the foregoing reasons stated above, this Court should vacate the judgement of the trial court and remand the case with instructions to reinstate Appellant's claims and to conduct a hearing the issue of venue transfer, with a focus on whether measures other than transfer can mitigate the "appearance of impropriety."

Respectfully submitted,

s/Isaac Wright, Jr., Esq.
Attorney ID #015092008

NOAH MOSLEY, **Plaintiff/Appellant,** **v.** **STATE OF NEW JERSEY, COUNTY OF MIDDLESEX, TOWNSHIP OF EDISON, ANDREW CAREY, TZVI DOLINGER, BINA DESAI, OFFICER CHARLES ZUNDEL, DETECTIVE MICHAEL CARULLO, JOHN DOE PROSECUTOR(S), JANE DOE PROSECUTOR(S), JOHN DOE POLICE OFFICER(S), JANE DOE POLICE OFFICER(S), JOHN DOE(S), JANE DOE(S), UNKNOWN PERSON(S),** **Defendants/Respondents.**	**SUPERIOR COURT OF NEW JERSEY** **APPELLATE DIVISION** **Appellate Docket No. A-001397-23** **Civil Action** **Law Division: Somerset County** **Trial Court Docket No.:** **SOM-L-1212-22** **Sat Below:** **Honorable Veronica Allende, J.S.C.**

AMENDED BRIEF OF DEFENDANTS/RESPONDENTS TOWNSHIP OF EDISON, POLICE OFFICER CHARLES ZUNDEL, AND DETECTIVE MICHAEL CARULLO IN RESPONSE TO APPEAL FROM DECEMBER 1, 2023 SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

PRELIMINARY STATEMENT

This is an appeal by Plaintiff, Noah Mosley, from a summary judgment entered in favor of defendants Township of Edison, Edison Police Officer Charles Zundel, and Edison Detective Michael Carullo (the "Edison defendants") on December 1, 2023. While plaintiff has cured most of the numerous procedural deficiencies noted by the Court after plaintiff filed his initial Brief and Appendix, other deficiencies remain. Moreover, plaintiff has included in his amended Brief and Appendix significant substantive additions (which were not authorized by the Court), including the presentation of issues not previously raised. At a minimum, these portions of plaintiff's amended Brief and Appendix, relating primarily to belatedly raised conflict of interest and venue issues, should be stricken.

Plaintiff also argues for the first time in his amended Brief that summary judgment was premature because discovery was not complete. Finally, plaintiff's amended Brief and Appendix demonstrate the inadequacies of his response to the Edison defendants' particularized and documented Statement of Material Facts, which plaintiff does not seriously challenge.

On the merits, plaintiff's arguments challenging the grant of summary judgment in favor of the Edison defendants is based on a mischaracterization of the pleadings and misstatements of the applicable law:

- Plaintiff did not assert a malicious prosecution claim in his Complaint.

- In any event, the applicable statute of limitations for a malicious prosecution action is two years, not six years, and plaintiff has abandoned any such argument.
- This case does not involve a continuing violation.
- The trial court properly applied the law of the case doctrine to the accrual of plaintiff's claims.
- Accrual occurs when the plaintiff knows or has reason to know of the injury which is the basis of his action.
- Finality exists for malicious prosecution accrual when there is a direct appeal and no remand. Here, there was no remand.
- Plaintiff erroneously conflated malicious prosecution analysis and double jeopardy analysis. Moreover, plaintiff's double jeopardy analysis is flawed.
- Plaintiff's libel and slander claims should be dismissed for failure to timely file a notice of tort claim.

***

The trial court's Order granting summary judgment in favor of the Edison defendants should be affirmed.

PROCEDURAL HISTORY[1]

Plaintiff's Complaint. Plaintiff, Noah Mosley, commenced this action on October 13, 2020 in the Superior Court of New Jersey, Law Division, County of Middlesex (Docket No. L-007160-20), naming as defendants the State of New Jersey and various State individuals, the County of Middlesex, the Township of Edison, Edison Police Officer Charles Zundel, Edison Detective Michael Carullo, and various fictitious individuals. (Aa1-43).

The Complaint asserted claims for false arrest/false imprisonment(Count I), injurious falsehood (Count II), libel/libel per se (Count III), slander/slander per se (Count IV), negligence (Count V), conspiracy (Count VI), intentional infliction of emotional distress (Count VII), negligent infliction of emotional distress (Count VIII), negligent hiring, supervision, or retention (Count IX), New Jersey civil rights conspiracy under N.J.S.A. 10:6-2 et al. (Count X), false arrest/false imprisonment under 42 U.S.C. §1983 (Count XI), false statement in accusatory instrument under 42 U.S.C. §1983 (Count XII), abuse of process under 42 U.S.C. §1983 (Count XIII), conspiracy to violate plaintiff's civil rights under 42 U.S.C §1985 (Count XIV), and negligent failure to prevent civil rights violation under 42 U.S.C §1986 (Count XV). The Complaint did not assert a claim for malicious prosecution. Id.

[1] The Edison defendants include this more comprehensive Procedural History, as plaintiff's Procedural History is cursory and incomplete.

Removal. The case was removed to federal court on December 14, 2020 and docketed as Mosley v. State of New Jersey et al., 3:20-cv-18885 – ZNQ-DEA. (Aa266; Da1-3).

Judge Quraishi's Ruling. By Opinion (Aa47-64) and Order (Aa45-46) filed on August 31, 2023, the Honorable Zahid N. Quraishi, U.S.D.J. granted the motion to dismiss filed by the Edison defendants; granted the motion for judgment on the pleadings filed by the County of Middlesex; and granted in part and denied in part the motion to dismiss filed by the State Defendants. Id. Judge Quraishi held with respect to the Edison defendants' statute of limitations argument that:

> The statute of limitations for federal claims brought pursuant to 42 U.S.C. § 1983 in this district is the statute of limitations for a personal-injury tort in New Jersey. While state law controls the statute of limitations, federal law controls when the cause of action accrues.
>
> In general, federal courts apply the discovery rule for determining when a § 1983 cause of action accrues. Under the rule, the action accrues when a plaintiff knew or should have known the wrongful act or omission resulted in damages. However, a deferred-accrual rule instead applies when a § 1983 claim relies on an invalidated sentence . . . . [F]ederal courts consider what tort the plaintiff's claims are most akin to and apply principles from those tort cases. In such situations, the court must look to when the case was "favorably terminated," *i.e.*, when "the prosecution terminate[d] without a conviction."

(Aa54-55) (citations omitted).

Applying these principles, Judge Quraishi held, by analogy, that the date of accrual for any malicious prosecution claim asserted by plaintiff would be March 6, 2018, when plaintiff's rights were clarified by a New Jersey Supreme Court decision

reversing plaintiff's conviction, not by the formal amendment of his Judgment of Conviction. (Aa55). Judge Quraishi rejected plaintiff's argument that the continuing violations doctrine applied, noting that while continual unlawful acts can serve as the basis of a continuing violation, continual ill effects from an original violation (as here) cannot. (Aa56).

Judge Quraishi consequently dismissed plaintiff's federal claims with respect to the Edison defendants with prejudice, but declined to exercise supplemental jurisdiction over plaintiff's remaining state claims. (Aa57).

Judge Shanahan's Rulings. On February 15, 2023, the Honorable Kevin M. Shanahan, A.J.S.C. dismissed plaintiff's Complaint against the State defendants with prejudice (Aa65-66) for the reasons set forth on the record on February 15, 2023. (Aa67-86; Aa87-108).

Pertinently, Judge Shanahan held that plaintiff's reliance on two very old cases for the proposition that New Jersey has a six-year statute of limitations for malicious prosecution actions is clearly incorrect given the findings of N.J.S.A. 2A:14-2. (Aa79). Judge Shanahan also noted that plaintiff abandoned this argument at oral argument and instead advanced a continuing violation theory, which is inapplicable because plaintiff was relying on "a separate and distinct event." (Aa79-80). Judge Shanahan pointed out that an action accrues "if the plaintiff is aware of facts [that] would alert a reasonable person [to] the possibility of an actual claim.

Medical or a legal certainty is not required." (Aa80-81).

Finally, Judge Shanahan rejected plaintiff's Tort Claims Act notice argument because libel and slander arising out of the filing and judgment of conviction are not constitutional claims and therefore are covered by the Act. (Aa84).

Judge Shanahan denied a motion by plaintiff for reconsideration on April 14, 2023. (Aa109-123; Aa124-125).

Judge Allende's Ruling. Following oral argument (Aa233-262), the Honorable Veronica Allende, J.S.C. entered an Order and Opinion on December 1, 2023 granting defendants Township of Edison, Zundel, and Carullo summary judgment dismissing all remaining counts of plaintiff's Complaint with prejudice. (Aa263-276). That Order is the subject of plaintiff's appeal with respect to the Edison defendants. (Aa284).

Judge Allende applied the law of the case doctrine, based on the rulings by both Judge Quraishi and Judge Shanahan, and held that the accrual date for plaintiff's cause of action, with the exception of plaintiff's libel and slander claims, was March 6, 2018 – the date that the New Jersey Supreme Court reversed plaintiff's violation of probation charge when "he should have known or discovered an actionable claim". (Aa271-272). Judge Allende further held that plaintiff's libel and slander claims were barred by the New Jersey Tort Claims Act since:

> Plaintiff has not demonstrated that [he] served a notice of a tort claim within the 90 days of the accrual date as provided by N.J.S.A. § 59:8-8

> or within the discretionary year thereafter as provided by § 59:8-9. Plaintiff's counsel has indicated that they filed a Notice of Claim as of May of 2023, however this is well over two years following the accrual date for these claims.

(Aa274). Judge Allende pointed out: "A claimant is forever barred from recovering against a public entity or employee if two years have elapsed since the accrual date of the claim. N.J.S.A. 59-8-8." (Aa273).

Finally, Judge Allende held that defendants were entitled to summary judgment as to plaintiff's civil conspiracy counts because "Plaintiff has failed to identify any conduct or agreement between any of the Defendants that would suggest that they colluded to deny Plaintiff his rights and privileges." (Aa275).

Plaintiff's Appeal. Plaintiff filed a Notice of Appeal and a Case Information Statement on January 9, 2024. (Aa280-85). After failing to correct noted deficiencies, plaintiff's appeal was dismissed on February 9, 2024. In response to plaintiff's Motion to Vacate Dismissal and Reinstate Appeal, the Court entered an Order on February 29, 2024 vacating the dismissal. Plaintiff successfully moved to extend the time to file his Brief and Appendix, which were filed on June 2, 2024. After receiving multiple Deficiency Notices, plaintiff filed his amended Brief and Appendix on July 22, 2024, which was approved on July 24, 2024. However, plaintiff did not correct all of the deficiencies previously noted, and, as importantly,

added substantive matters (*e.g.*, arguments and case law) to his amended Brief[2] and raised new issues – conflict of interest and venue – which were not properly raised before or addressed by the trial court.

STATEMENT OF FACTS

Plaintiff has not included the Edison defendants' Statement of Material Facts ("SMF's") in his Appendix.[3] For purposes of this appeal, the Edison defendants shall rely upon the Statement of Material Facts submitted in support of their motion for summary judgment and shall incorporate herein the facts found by Judge Allende in her December 1, 2023 Order.

The Township of Edison is a public entity and municipal corporation as defined in N.J.S.A. 59:1-3 (Aa3, at ¶7), and hence the New Jersey Tort Claims Act defines the parameters within which recovery for tortious injury may be had against the Township of Edison. (Aa266; Da79-80 (SMF 1)).

Plaintiff's Complaint was filed October 13, 2020 in the Superior Court of New Jersey, Law Division, Middlesex County under Docket No: MID-L-7160-20 comprised of fifteen (15) Counts, and asserts claims against all defendants under New Jersey State law as violations of the Fourth and Fourteenth Amendments to the

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[2] Examples of such changes appear on pages 1, 29-32, 36-39, and 42 of Plaintiff's amended Brief.

[3] The Edison defendants' Statement of Material Facts and supporting documents are included in defendants' accompanying Appendix. (Da4-8; Da9-163).

United States Constitution under Title 42 of the United States Code §§ 1983, 1985 and 1986. (Aa1-43; Da12-55 (SMF 2)). On December 14, 2020, the case was removed to the United States District Court for the District of New Jersey, Trenton Vicinage. (Aa266; Da1-3 (SMF 3)).

On August 31, 2022, District Judge Zahid N. Quraishi dismissed plaintiff's federal claims, Counts XI-XV, and remanded Counts I-X back to the state court for lack of jurisdiction pursuant to 18 U.S.C. § 1367(c)(3). (Aa45-64; Da56-58 (SMF 4)). In his August 31, 2022 Opinion accompanying his Order dismissing plaintiff's federal claims, Judge Quraishi stated that "Insofar as Plaintiff's claims are analogous to the tort of malicious prosecution, the accrual date will be the date the violation of probation charge "ended without a conviction" and hence the plaintiff's cause of action "accrued on March 6, 2018, the date the New Jersey Supreme Court reversed Plaintiff's violation of probation charge." (Aa55; Da68 (SMF 5)).

On October 17, 2022, the remaining Counts of plaintiff's Complaint were remanded to the Superior Court of New Jersey, Law Division, Somerset County under Docket No: SOM-L-1212-22. (Aa266 (SMF 6)). Thereafter, on October 27, 2022, the Edison defendants filed an Answer and Separate Defenses in state court. (Da78-102 (SMF 7)).

On January 9, 2023, the Superior Court dismissed plaintiff's Complaint with prejudice as to the defendants, State of New Jersey, Andrew Carey, Tzvi Dolinger,

and Bina Desai. (Aa266; Da103-105 (SMF 8)). The original order was vacated on procedural grounds but was affirmed on February 16, 2023, by Judge Shanahan. (Aa266). Specifically, Judge Shanahan found, as did the district court, that the accrual date for Plaintiff's cause of action was March 6, 2018 "as it was clear that Plaintiff knew of that, or should have known of that cause of action at the March date that's referenced by the Federal Court," and His Honor dismissed the plaintiff's Complaint with prejudice. (Aa266; Da153, at 16:14-20 (SMF 9)).

Plaintiff subsequently filed a motion for reconsideration of the Court's decision to dismiss the Complaint with prejudice as to the above referenced co-defendants on March 2, 2023. (Aa124-125; Da162-163 (SMF 10)). The reconsideration motion was denied on April 14, 2023. Id.

Plaintiff acknowledges that on August 11, 2015 the charges that were proffered against him as a result of the alleged incident of September 7, 2014 were formalized in a True Bill of Indictment issued by a Grand Jury, and he asserts that he went to trial on that Indictment, and that on January 23, 2018 a jury returned verdicts of Not Guilty on all charges. (Aa268; Da22-23, at ¶¶32-38 (SMF 11)).

Plaintiff recounts that an appeal of his probation violation was successful before the Supreme Court of New Jersey on March 6, 2018 (Da24, at ¶40), but the only factual allegation that he offers in the Complaint to have occurred within two (2) years of the date on which his Complaint was filed, October 13, 2020, relates to

conduct on the part of the trial court and Assistant Middlesex County Prosecutor Dolinger concerning the subsequent amendment of a Judgment of Conviction on October 17, 2018. (Da24-25, at ¶¶41-44 (SMF 12)).

Plaintiff does not offer, directly nor by implication, any factual support in his Complaint for the thesis that defendants, Township of Edison, Police Officer Charles Zundel or Detective Michael Carullo had any involvement whatsoever after he asserts that he was acquitted of all charges formalized in the August 11, 2015 Indictment. (See Da12-55 (SMF 13)).

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Plaintiff's responses to the Edison defendants' Statement of Material Facts did not refute any of the cited material facts. Plaintiff admitted SMF's 1, 6, and 7. SMF's 2, 3, 4, 5, 8, 9, 10, 11, and 12 simply related the substance of plaintiff's Complaint, and of various Court decisions and Orders. Plaintiff's response to SMF 13 was argumentative – as plaintiff asserted a legal rather than a factual conclusion.

Plaintiff submitted no Counter-Statement of Material Facts.

ARGUMENT

POINT I

PLAINTIFF'S AMENDED BRIEF AND APPENDIX SHOULD BE DISMISSED DUE TO HIS CONTINUED NON-COMPLIANCE WITH AND DISREGARD FOR THE COURT RULES.

Plaintiff's filing repeatedly ignores appellate court rules. For example:

- Rule 2:6-1(a)(1) ("Required [Appendix] Contents") provides in relevant part

that: "If the appeal is from a disposition of a motion for summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except that briefs in support of and in opposition to the motion shall be included only as permitted by subparagraph (2) of this rule." (emphasis added). Notwithstanding, plaintiff has not included the Edison defendants' Statement of Material Facts and the Edison defendants' supporting documents in his Appendix; he only includes his responses without recitation of the Statement of Material Fact to which he is responding. (Aa126-133).

- Rule 2:6-2(a)(6) requires that: "For every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling is located or if the issue was not raised below a statement indicating that the issue was not raised below." (emphasis added). See State v. Kyles, 132 N.J. Super. 397, 400 (App. Div. 1975):

> [D]efendant's brief fails to mention, as required by R. 2:6-2(a), that this point was not presented below. The requirement of this rule is, by its very language, "mandatory." The consequences of the failure to object below is provided by R. 1:7-2.

Rule 1:7-2 provides in relevant part that: "For the purpose of reserving questions for review or appeal relating to rulings or orders of the court . . . , a party, at the time the ruling or order is made or sought, shall make known to the court specifically the action which the party desires the court to take or the party's objection to the action

taken and the grounds therefor." (emphasis added). See also Gilborges v. Wallace, 153 N.J. Super. 121, 143 (App. Div. 1997) ("[w]hile we recognize that we might permit the issue to be raised anew, we consider that in this case the interests of injustice do not permit the further delay which will follow injection of this new issue with possible further appeals with respect thereto."), aff'd in part, rev'd in part 78 N.J, 342 (1978). (emphasis added).

The Court should similarly rule here. While in Point IV of his Brief plaintiff claims that the issues of venue and conflict of interest were "Partially Raised Below", that is simply not true. The purported support cited by plaintiff in the heading of Point IV of his Brief (Aa52-53, Aa236-37, Aa239-40, 4T4:23 to 5:10, 4T7:20 to 8:25) shows two things:

- Venue was not even mentioned by plaintiff in these appendix/transcript references; and
- Conflict of interest, albeit referenced in oral argument, was not addressed by the trial court. See Selective Ins. Co. of Am. v. Rothman, 208 N.J. 580, 586 (2012) ("we do not suggest that counsel's reference to the . . . question during oral argument was sufficient to require the Appellate Division to address it.").

Furthermore, neither of these "issues" was identified by plaintiff as an issue on appeal in his Civil Case Information Statement filed in connection with this appeal earlier this year. (Aa280-85).

Plaintiff's woefully belated claims as to these issues should be barred. In any event, they are both meritless. See Points VI and Point VII infra.

POINT II

STANDARD OF REVIEW

Plaintiff's initial Brief as filed on June 2, 2024 contained a three-page argument point entitled "Standard of Review". (Pb5-7). In his amended Brief, plaintiff improperly included an additional lengthy section on the standard of review in this case. (Pb29-32). That addition was improper as it afforded plaintiff nearly an additional two months to prepare his Brief beyond the time frame prescribed by this Court.

Notably, plaintiff also added an argument in his amended Brief that he had not made in his original Brief – *i.e.*, that discovery was not complete when the Edison defendants moved for summary judgment. (Pb30-32). However, plaintiff never raised the issue in opposition to defendant's motion for summary judgment. Instead, he now seeks to raise it for the first time on appeal.

Although plaintiff cites Wellington for the proposition that "generally, summary judgment is inappropriate prior to the completion of discovery" (Pb30), the Appellate Division made clear (in the same paragraph plaintiff cites) that "a plaintiff 'has an obligation to demonstrate with some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of

action.'" Wellington v. Est. of Wellington, 359 N.J. Super. 484, 496 (App. Div. 2003) (quoting Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977)).

Plaintiff's opposition to the Edison defendants' motion for summary judgment was flawed for another fundamental reason as well. Rule 4:46-2(b) ("Requirements in Opposition to Motion [for Summary Judgment]") states:

> A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record. (emphasis added)

Plaintiff did not come close to complying with that requirement.

An appellate court reviews an order granting summary judgment de novo, and in accordance with the same standard as the motion judge. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). The Court must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law. Id. (citing Rule 4:46-2(c) and Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). In conducting this review, the Court must keep in mind that "an issue of fact is genuine only if,

considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)(citing Rule 4:46–2(c)). The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action. Id.

Rule 4:46-2(c) provides in pertinent part that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or an order as a matter of law." Summary judgment is designed to "pierce the allegations of the pleadings" and to demonstrate that the facts were contrary to what was alleged. See Judson v. Peoples Bank & Tr. Co. of Westfield, 17 N.J. 67, 75 (1954).

In Brill the New Jersey Supreme Court was guided by the United States Supreme Court's upholding of summary judgment in Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Brill, 142 N.J. at 530. Read together, these cases adopted a federal summary judgment standard that requires a motion judge to engage in an analytical process which parallels the standard for directed verdict pursuant to New Jersey Court Rule 4:37-2(b) (*i.e.*, whether the

evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law). Brill, 142 N.J. at 534.

As the New Jersey Supreme Court noted in Brill, "[t]he thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541. Such circumstances exist here. As is clear from the Edison defendants' Statement of Material Facts and plaintiff's response thereto, defendants' motion for summary judgment involves no genuine issues of material fact and plaintiff's Complaint against the Edison defendants should be dismissed as a matter of law. "[P]rotection is to be afforded against groundless claims and frivolous defenses, not only to save antagonists the expense of protracted litigation but also to reserve judicial manpower and facilities to cases which meritoriously command attention." Id. at 541-42.

POINT III

PLAINTIFF HAS NOT ASSERTED A MALICIOUS PROSECUTION CLAIM IN HIS COMPLAINT; IN ANY EVENT, THE APPLICABLE STATUTE OF LIMITATIONS ON SUCH CLAIMS IS TWO YEARS, NOT SIX YEARS.

Plaintiff's Complaint

Judge Allende correctly pointed out in her December 1, 2023 Opinion in this case that: "In the complaint currently pending, Plaintiff has not filed a separate malicious prosecution claim." (Aa271). Consequently, plaintiff cannot proceed with

a malicious prosecution claim.

Plaintiff misconstrues the decisions in this matter regarding the nature of his claims. Plaintiff argues that "[e]xcept for the defamation claims in Count One and Two, the federal court found that Appellant's remaining claims were, in fact, malicious prosecution claims . . . and the State Court found the same. (Pb9) (emphasis added; citations omitted). On the contrary, the excerpts cited by plaintiff show that these courts referred to plaintiff's claims not as malicious prosecution claims but, analogously, as malicious prosecution related claims: (Aa55) (Judge Quraishi) ("Insofar as Plaintiff's claims are analogous to the tort of malicious prosecution . . ."") (emphasis added); (Aa78; Aa99) (Judge Shanahan) ("[T]he Federal Court held that the plaintiff's allegations were malicious – malicious prosecution related claims and that they were untimely as of March 6th, 2020."). In short, these courts looked to the statute of limitations applicable to analogous New Jersey state law claims to determine the statute of limitations for plaintiff's federal claims. See Estate of Lagano v. Bergen Cnty. Prosecutor's Off., 769 F.3d 850 (3d Cir. 2014), cited by plaintiff (Pb12):

> In determining the length of the statute of limitations for a claim arising under § 1983, courts must apply the limitations period applicable to personal-injury torts in the State in which the cause of action arose. Wallace v. Kato, 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). In New Jersey, where Lagano's claim arose, personal injury claims are governed by a two-year statute of limitations. N.J. Stat. Ann. § 2A:14-2.

Id. at 859.

None of the courts in this matter found that plaintiff had asserted a malicious prosecution claim.

Abandonment

Judge Shanahan found in his February 15, 2023 Opinion that plaintiff had abandoned at oral argument his claim that New Jersey had a six-year statute of limitations for malicious prosecution claims and advanced instead a continuing violation theory. (Aa79; Aa99-100). Judge Shanahan was correct.

> [T]he Federal Court held that the plaintiff's allegations were … malicious prosecution related claims and they were untimely as of March 6th, 2020 … .
>
> ***
>
> [Plaintiff's moving papers] point to two very old cases, Cabakov [v.] Thatcher, 27 N.J. Super. 404, 409 (App. Div. 1953) and Earl [v.] Winne, 14 N.J. 119, 132 (1953) for the proposition that there's a six-year statute of limitations. That's clearly not correct given the clear findings of N.J.S.A. 2A:14-2.
>
> At oral argument, the plaintiff abandoned that argument and advanced the continuing violation theory, continuing tort theory, pointing to the fact that the actions of the State with regard to the amended judgment of conviction were a continuing effort to maliciously prosecute the plaintiff.

Id. Plaintiff's malicious prosecution argument has been waived. See Quigley v. KPMG Peat Marwick, LLP, 330 N.J. Super. 252, 267 (App. Div. 2000) ("[W]aiver is defined as the voluntary and intentional relinquishment of a known and existing

right, [and] [t]hus, waiver presupposes full knowledge of the right and intentional surrender.") (citations omitted).

Nor does a continuing violation exist here. See, e.g., Cowell v. Palmer Twp., 263 F.3d 286, 292 (3d Cir. 2001) (in order to benefit from the doctrine, a plaintiff must establish more than the occurrence of isolated or sporadic acts); Thomasian v. N.J. Inst. Of Tech., 2009 WL 260791 at *2 (D.N.J. Feb. 3, 2009) (continuing wrong applies when an individual is subject to a "continual, cumulative pattern of tortious conduct"); Lipschultz v. Logan Assistance Corp., 50 F.Appx. 528, 530 (3d Cir. 2002) ("A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation.").

The Applicable Statute of Limitations

Relying on two antiquated cases (Earl v. Winne, 14 N.J. 119 (1953) and Cabakov v. Thatcher, 27 N.J. Super. 404 (App. Div. 1953), plaintiff argues that a two-year statute of limitations for malicious prosecution actions is "contrary to decades of settled law holding that the claim carries a six-year statute of limitations." (Pb, Point I). As Judge Shanahan accurately pointed out, however, in his February 15, 2023 Opinion in this case:

> [Plaintiff] points to two very old cases, Cabakov versus Thatcher, 27 N.J. Super. 404 at 409 (Appellate Division, 1953) and Earl versus Winne, 14 N.J. 119 at 132 (1953) for the proposition that there's a six-year statute of limitations. That's clearly not correct given the clear findings of N.J.S.A. 2A:14-2.

(Aa79) (emphasis added).

POINT IV

THE TRIAL COURT DID NOT ERR IN APPLYING THE LAW OF THE CASE DOCTRINE WITH RESPECT TO THE ACCRUAL OF PLAINTIFF'S CLAIMS.

Law of the Case

In her December 1, 2023 Order in this case, Judge Allende pointed out that the issue of when plaintiff's cause of action accrued was decided by both Judge Quraishi and Judge Shanahan and held therefore that "the law of the case doctrine is applicable." (Aa271). More particularly, Judge Allende found that both Judge Quraishi and Judge Shanahan held that the accrual date for plaintiff's cause of action, with the exception of plaintiff's libel and slander claims, was March 6, 2018, "the date that the New Jersey Supreme Court reversed Plaintiff's violation of probation charge, and which he should have known or discovered an actionable claim." (Aa272).

The law of the case doctrine "is a non-binding rule intended to 'prevent relitigation of a previously resolved issue'" in the same case. State v. K.P.S., 221 N.J. 266, 276 (2015) (quoting Lombardi v. Masso, 207 N.J. 517 (2011)). It is triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue. Lombardi, 207 N.J. at 539. Under the doctrine, decisions of law made in a case should be respected by all other lower or equal courts

during the pendency of that case." Id. at 538 (quoting Lanzet v. Greenberg, 126 N.J. 168, 192 (1991). Judge Allende properly applied the law of the case doctrine in the matter at bar.

Accrual Generally

Federal law governs the accrual of plaintiff's federal claims. See Wallace v. Kato, 549 U.S. 384, 388 (2007); Montgomery v. De Simone, 159 F.3d 120, 126 (3d Cir. 1998); Silver Enters., Inc. v. Twp. of Freehold, 2008 WL 4068156, at *3 (D.N.J. Aug. 22, 2008). Federal law provides that a Section 1983 claim accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the section 1983 action." Genty v. Resol. Tr. Corp., 937 F.2d 899, 919 (3d Cir. 1991) (emphasis added). Accord Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994); Ormsby v. Luzerne Cnty. Dep't of Pub. Welfare, 149 F.Appx. 60, 62 (3d Cir. 2005).

Accrual principles are essentially the same under New Jersey law. See, e.g., Lopez v. Swyer, 62 N.J. 267, 272 (1973) (the statute of limitations begins to run when the injured party discovers, or by an exercise of reasonable diligence should have discovered, that he/she may have a basis for an actionable claim). See also Mancuso v. Neckles, 163 N.J. 26, 29-30 (2000).

Accrual in the Context of Malicious Prosecution Cases

In applying accrual principles to a malicious prosecution action, plaintiff

relies on cases that support defendants' position, not plaintiff's. (Pb11-17). In short, plaintiff's appellate brief makes the case why March 6, 2018 – the date when the New Jersey Supreme Court in State v. Mosley, 232 N.J. 169 (2018) reversed the Appellate Division's judgment that upheld defendant's probation violation – is the accrual date for any malicious prosecution action.

Contrary to plaintiff's argument (Pb17), the New Jersey Supreme in Mosley did not "remand[][the matter] to the trial court for further proceedings." Its ruling was dispositive and complete. See, e.g., Id. at 174 ("We are constrained to reverse the Appellate Division judgment that upheld defendant's probation violation."); Id. at 192 ("We reverse the judgment of the Appellate Division that affirmed defendant's VOP charge.").

Many of the cases cited by plaintiff (Pb11-12) simply recite the requirements for malicious prosecution, but do not address the favorable termination requirement. See, *e.g.*, Helmy v. City of Jersey City, 178 N.J. 183 (2003); Johnson v. Knorr, 477 3d. 75 (3d Cir. 2007); Est. of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003); Brunson v. Affinity Fed. Credit Union, 199 N.J. 381 (2009). Notably, however, in Brunson the New Jersey Supreme Court emphasized, as have federal courts, that malicious prosecution is a disfavored cause of action:

> [T]he law does not look with favor upon actions for malicious prosecution; it does not encourage them. The reason is embedded deeply in our jurisprudence. The courts must be freely accessible to the people. Extreme care must be exercised so as to avoid the creation of a

> reluctance on their part to seek redress for civil or criminal wrongs for fear of being subjected to a damage suit if the action results adversely.

Id. at 395 (citations omitted). See Land v. Helmer, 843 F.Supp.2d 547, 550 (D.N.J. 2012) ("Malicious prosecution is an avowedly disfavored cause of action."); see also Stolinski v. Pennypacker, 772 F.Supp.2d 626, 640 (D.N.J. 2012) (cataloging the numerous expressions of disfavor). LoBiondo v. Schwartz, 199 N.J. 62 (2009), cited by plaintiff (Pb11), is a malicious abuse of process case, not a malicious prosecution case.

In Heck v. Humphrey, 512 U.S. 477 (1994), the United States Supreme Court held that:

> One element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused. This requirement "avoids parallel litigation over the issues of probable cause and guilt ... and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." Furthermore, "to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit." This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack. We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.
>
> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose

> unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Id. at 484-87 (emphasis added; citations and footnotes omitted). See also Torres v. Fauver, 292 F.3d 141, 147 (3d Cir. 2002).

Here, finality exists because plaintiff's conviction was reversed on direct appeal and there was no remand. Plaintiff relies on two cases in an effort to circumvent the consequences of the reversal of his conviction on March 6, 2018: Smith v. Holtz, 87 F.3d 108 (1996) and Michaels v. State of N.J., 955 F.Supp. 315 (D.N.J. 1996). Both, however, are readily distinguishable factually, and underscore the correctness of defendants' accrual argument. Unlike this case, both Smith and Michaels involved a remand of the reversal of a conviction. As Judge Barry said in Michaels:

> By using the term "reversal," the Supreme Court could not have intended to establish a bright-line rule whereby *any* reversal of a criminal conviction acts as a favorable determination. Clearly, some

> "reversals" connote "finality," while others do not. The Third Circuit agreed when it held in *Smith* that a reversal of a conviction on evidential grounds and remand of the criminal proceedings – the precise factual scenario here – did not represent a favorable determination within the spirit of Heck.

955 F.Supp. at 325 (emphasis added; citations omitted). See also Id. at n.8 ("where an appellate court 'reverses' the conviction and remands for a new trial, termination would logically await a verdict in the criminal proceedings, a dismissal of the charges, or the like"). What was at issue in Michaels and Smith was "not an outstanding conviction but the potential for a future conviction following a retrial." Id. at 324. That is not the case here.

Plaintiff attempts to evade the required result by conflating malicious prosecution analysis and double jeopardy analysis. More particularly, plaintiff argues, without any support, that Heck's holding and purpose is "mindful" of the trial-error rule, which allows the prosecution to retry a defendant where the conviction is reversed due to trial error. (Pb15). Yet plaintiff admits that "a remand for a new trial is proper where reversal of a criminal conviction is predicated on trial error." Id. (emphasis added) (citing Burks v. United States, 437 U.S. 1 (1978) and Greene v. Massey, 437 U.S. 19 (1978). There was, of course, no remand here (as there was in Smith and Michaels).

As importantly, plaintiff fails to acknowledge the difference drawn between "trial error" and "evidentiary insufficiency" in the double jeopardy cases he cites.

See, e.g., McMullen v. Tennis, 562 F.3d 231 (2010), where the Third Circuit stated that:

> The Fifth Amendment to the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause is applicable to the states through the Fourteenth Amendment. It is also well established that the Clause's "general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." The prosecution therefore is free to retry a defendant where the conviction is reversed due to "trial error" such as "incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct."
>
> In Burks v. United States and Greene v. Massey, the United States Supreme Court expressly recognized an exception to this "trial error" rule in cases where the reviewing court overturned the conviction because the evidence was insufficient to sustain a guilty verdict.

Id. at 237 (emphasis added; citations omitted). The aforementioned exception rests on two closely related considerations. First, a reversal for evidentiary insufficiency is considered to be the equivalent of an acquittal. Secondly, Burks and Greene implement the principle that the double jeopardy clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. Id. In Burks the Supreme Court specifically distinguished a reversal on account of "evidentiary insufficiency" from a reversal for "trial error", explaining that:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

437 U.S. at 15 (emphasis added). See also State v. Tropea, 78 N.J. 309, 314 (1978), where the New Jersey Supreme Court said: "Those cases (Burks in the federal sphere and Greene as to state court proceedings) make it clear that although a remand for a new trial is proper where reversal of a criminal conviction is predicated on trial error, the double jeopardy clause forbids a second trial where the conviction has been overturned due to a failure of proof at trial." (emphasis added).

Notwithstanding plaintiff's groundless effort to describe the reversal of his conviction as based on trial error (Pb at 16), the New Jersey Supreme Court in Mosley reversed plaintiff's conviction because of "evidentiary insufficiency" and did not remand the matter. See 232 N.J. at 174:

> In the unusual circumstances of this case, the hearsay presented through his testimony was insufficient to prove the new underlying substantive offense that was the premise for defendant's probation violation and sentence. We are constrained to reverse the Appellate Division judgment that upheld defendant's probation violation. (emphasis added).

See also Id. at 192 ("We hold that defendant was denied a hearing that met due process requirements."). For that reason and given the double jeopardy bar, plaintiff was simply wrong when he argued to the trial court on December 1, 2023 that: "When the Supreme Court or the Appellate Division reverses a conviction, that case doesn't go away because the prosecutor has the right to retry the case. It doesn't end." (Aa244, at 12:13-17).

Finally, plaintiff's reliance on Thompson v. Clark, 596 U.S. 36 (2022) to support his accrual argument (Pb13) is a non sequitur. Plaintiff argues that Thompson "supports Appellant's position that a reversal alone is not enough to 'terminate' a case as Thompson's case was actually terminated by way of a 'dismissal'". Id. But there was no reversal in Thompson because there was no conviction in Thompson. The charges against Thompson were dismissed before trial, Id. at 39, (at an earlier accrual point) and there could be no reversal. The facts of cases are important, not sound bites taken out of context.

In sum, any claim for malicious prosecution in this case would have accrued on March 6, 2018. At that point, plaintiff clearly knew or had reason to know that he had a basis for an actionable claim.

POINT V

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT PLAINTIFF'S LIBEL AND SLANDER CLAIMS SHOULD BE DISMISSED FOR FAILURE TO TIMELY FILE A NOTICE OF TORT CLAIM.

Under N.J.S.A. 59:8-8, a claimant asserting a tort claim against a public entity or public employee must serve a notice of tort claim within 90 days of the date on which the cause of action accrued. If the claimant fails to file a notice of tort claim within 90 days, N.J.S.A. 59:8-9 permits the court, in its discretion, to extend the deadline within a year after the accrual date "provided that the public entity or the public employee has not been substantially prejudiced thereby," and "provided that in no event may any suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.". See also H.C. Equities, LP v. Cnty. of Union, 247 N.J. 366, 383 (2021) (holding that if a plaintiff files a notice of tort claim beyond the allotted time provided by the statute, "the court is without authority to relieve a plaintiff from his failure to have filed a notice of claim, and a consequent action at law must fail") (citations omitted).

Plaintiff does not contend that he served a notice of tort claim on the Edison defendants within the allotted 90 days or within the discretionary one-year period. Both the District Court and the state Court have held that the accrual date for plaintiff's cause of action was on March 6, 2018, and that more than two years passed before plaintiff filed a notice of tort claim. Thus, plaintiff's state law tort claims are

barred as a matter of law and the trial court's dismissal of those claims with prejudice should be affirmed.

Plaintiff cannot avoid the applicability of the New Jersey Tort Claims Act by arguing that his libel and slander claims were part of a civil rights conspiracy. Pb26 ("[A]ll the State claims alleged in Appellant's complaint are 'underlying wrongs' and 'overt acts' found together within two distinct conspiracies: The New Jersey's common law Civil Conspiracy (Count VII) and New Jersey's Civil Rights Conspiracy (Count X).'"). The trial court did not err in holding, based on the uncontested record, that "Plaintiff has failed to identify any conduct or agreement between any of the Defendants that would suggest that they colluded to deny plaintiff his rights and privileges." (Aa356). See LoBiondo v. Schwartz, 199 N.J. 62, 102 (2009), where the New Jersey Supreme Court held that to prove a civil conspiracy, plaintiff must demonstrate the following:

> [A] combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or an injury upon another, and an overt act that results in damage.

(emphasis added). Here, plaintiff's allegations (set forth in Count VI and Count X) fail to identify any conduct or agreement by the Edison defendants to have colluded with each other to deny plaintiff's rights and privileges.

Plaintiff's libel and slander claims were properly dismissed with prejudice as

a matter of law.

POINT VI

PLAINTIFF'S CONFLICT OF INTEREST ARGUMENT IS NOT PROPERLY A SUBJECT OF THIS APPEAL, AND THE RELIEF PLAINTIFF SEEKS IS IN ANY EVENT TOTALLY UNWARRANTED.

Plaintiff argues in Point IV of his Brief that in the event the Court reverses and remands, the trial court should be directed not to allow all Edison defendants to engage the same counsel. (Pb39-41). Not only is that argument meritless, but it should be rejected for a variety of other reasons as well, including that:

- No order was entered by the trial court with respect to the issue;
- No record was developed below with respect to the issue;
- Plaintiff did not raise this issue as an issue on appeal in his Civil Case Information Statement filed in connection with the subject appeal; and
- Plaintiff is posing a hypothetical and improperly asking this Court to render an advisory opinion.

***

"It is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion." Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (emphasis added) (quoting Do–Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001) (collecting cases). See also Macfadden v. Macfadden, 49 N.J. Super. 356 (App. Div.

1958):

> [I]t is from the judgment, and not the opinion, that appeal is taken. The written conclusions or opinion of a court do not have the effect of a judgment. From them no appeal will lie. 'It is only what a court adjudicates, not what it says in an opinion, that has any direct legal effect.'"

Id. at 359 (emphasis added). While an appeal from a final judgment raises the validity of all interlocutory orders that were previously entered in the trial court, In re Carton, 48 N.J. 9, 15 (1966),[4] here there was no interlocutory order addressing the issue, nor was there any opinion addressing the issue belatedly raised on appeal.

Indeed, no record was developed before the trial court with respect to conflict of interest. See Pressler & Verniero, Current N.J. Court Rules (2024) (Gann), cmt. 1 to Rule 2:5-4(a) ("It is, of course, clear that in their review the appellate courts will not ordinarily consider evidentiary material which is not in the record below . . . .").

Furthermore, plaintiff's hypothetical request for an advisory opinion from this Court violates basic principles of judicial jurisprudence. See, e.g., Zamboni v. Stamler, 199 N.J. Super. 378, 383 (App. Div. 1985), where the Appellate Division noted as follows in rejecting a similar request:

> [T]he issue presented is purely hypothetical at this point. We will not render advisory opinions or function in the abstract; nor will we decide a case based upon facts which are undeveloped or uncertain. *See* New Jersey Ass'n for Retarded Citizens v. Dept. of Human Serv., 89 *N.J.* 234, 241, 445 *A.*2d 704 (1982) ; Crescent Pk. Tenants Assoc. v. Realty

[4] See also Sutter v. Horizon Blue Cross Blue Shield of N.J., 406 N.J. Super. 86, 106 (App. Div. 2009); Ricci v. Ricci, 448 N.J Super. 546, 567 (App. Div. 2017).

> Eq. Corp. of N.Y., 58 *N.J.* 98, 107, 275 *A.*2d 433 (1971) ; New Jersey Turnpike Auth. v. Parsons, 3 *N.J.* 235, 240, 69 *A.*2d 875 (1949) . (emphasis added; footnote omitted).

See also DeBenedictis v. State, 381 N.J. Super. 233, 240 (App. Div. 2005) (same).

Plaintiff's belated and unperfected conflict of interest argument should be disregarded. See also Point I supra.

POINT VII

PLAINTIFF'S BELATED VENUE ARGUMENT IS NOT ONLY TIME-BARRED, IT IS TOTALLY WITHOUT MERIT.

The transfer Order of which plaintiff now complains for the first time in his amended Brief and Appendix (Aa287) was entered more than 23 months ago, was not referenced as an issue in plaintiff's Case Information Statement, was not addressed in plaintiff's initial Brief filed on June 2, 2004, and was not included in plaintiff's original Appendix filed on June 2, 2024. Clearly, it should not be considered by this Court. See also Point I supra.

Moreover, plaintiff's arguments in support of that belatedly raised issue are absolutely devoid of merit.

- Plaintiff argues that in the transfer Order there was "no statement of reasons or findings indicating what facts were relied upon by the Court that reflected an 'appearance of impropriety'" and that "it is not clear from the Order why or upon what supporting grounds the matter was transferred." (Pb38). However, Assignment Judge Toto expressly stated in his Order Transferring Venue to Somerset County the

Court Rules, Code Policies and/or Directives upon which he relied: "R. 1:12-1(e), (g); R. 4:3-3(a); Canon 2, Code of Judicial Conduct; Canon 3, Code of Judicial Conduct for Judiciary Employees' Administrative Office of the Court ('AOC') Directive #11-18; and/or AOC Policy #5-15 (as adopted by the Supreme Court")." Rules 1:12-1(e) and (g) provide that: "The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if the judge . . . (e) is interested in the event of the action [or] (g) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." (emphasis added). Certainly, an assignment judge in a county where two of the named defendants in a litigation are the county and a municipality in the county has discretion *sua sponte* to transfer the litigation to another county. See N.J. Ct. R. 4:3-3(a) ("In actions in the Superior Court a change of venue may be ordered by the Assignment Judge … if there is a substantial doubt that a fair and impartial trial can be had in the country where venue is laid.")

- Plaintiff acknowledges in his amended Brief that decisions relating to a change of venue will not be disturbed on appeal except upon a showing of an abuse of discretion. (Pb36-37) (citing State v. Harris, 282 N.J. Super. 409 (1995) and State v. Marshall, 123 N.J. 1 (1991). Clearly, there was no abuse of discretion here.

- Finally, plaintiff argues that:

  > [T]his Court has mandated that when the trial court intends to transfer venue, sua sponte, it "should provide the parties with five-days' notice

> of its intention and an opportunity to be heard. If there is an objection, the judge should conduct a hearing, explaining, to the extent [']practicable,['] the judiciary employee's' or his for her family member's, involvement in the matter, and the job functions of that employee that create particularized reasons why a remedy short of transfer is impracticable."

(Pb38) (emphasis added) (quoting State ex rel. M.P., 450 N.J. Super. 539, 553-53 (App. Div. 2017). The problem with this argument is that it does not apply to Civil Practice in the Superior Court. It applies only to Practice in the Chancery Division, Family Part. See Rule 5:19-1(b) (cited in M.P.).

CONCLUSION

Defendants/respondents Township of Edison, Police Officer Charles Zundel, and Detective Michael Carullo respectfully request that the trial court's December 1, 2023 Order granting summary judgment in their favor and dismissing plaintiff's Complaint be affirmed.

Respectfully submitted,

WEINER LAW GROUP LLP
Attorneys for Defendants Township of Edison, Police Officer Charles Zundel, and Detective Michael Carullo

By: *s/Alan J. Baratz*
Alan J. Baratz

Dated: September 5, 2024

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NOAH MOSLEY, Plaintiff-Appellant, v. STATE OF NEW JERSEY, COUNTY OF MIDDLESEX, ANDREW CAREY, TVZI DOLINGER, BINA DESAI, OFFICER CHARLES ZUNDEL, DET. MICHAEL CARULLO, JOHN DOE PROSECUTOR(S), JANE DOE PROSECUTOR(S), JOHN DOE POLICE OFFICER(S), JANE DOE POLICE OFFICER(S), JOHN DOE(S), JANE DOE(S), UNKNOWN PERSON(S). Defendants-Respondents.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001397-23 <u>Civil Action</u> On appeal from a final judgment of the Superior Court of New Jersey, Law Division, Somerset Vicinage Docket No. SOM-L-1212-22 Sat Below: Hon. Kevin M. Shanahan, A.J.S.C. Hon. Veronica Allende, J.S.C.

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS, STATE OF NEW JERSEY, ANDREW CAREY, TVZI DOLINGER, AND BINA DESAI SUBMITTED: September 17, 2024

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

STATUTES

CASES

TABLE OF APPENDIX

[1] As required by Rule 1:36-3, the undersigned certifies that he is unaware of any contrary unpublished opinions.

[2] As required by Rule 1:36-3, the undersigned certifies that he is unaware of any contrary unpublished opinions.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[3]

Appellant, Noah Mosley, appeals from two trial court orders concerning Defendants, State of New Jersey, Andrew Carey, Tvzi Dolinger, and Bina Desai (collectively "the State Defendants"): a February 15, 2023, order dismissing his civil rights complaint with prejudice (Pa65-66), and an April 14, 2023, order denying his subsequent motion for reconsideration. (Pa124-Pa125). Mosley also appeals from a December 1, 2023, order that granted summary judgment to co-defendants Township of Edison, Ofc. Charles Zundel, and Det. Michael Carullo (collectively "Edison Defendants"). (Pa263-Pa264).

Factual Background

1. Mosley's Violation of Probation Charge, Conviction, and Reversal on Direct Appeal.

On October 28, 2013, Mosley pleaded guilty to third-degree Unlawful Possession of a Controlled Dangerous Substance in violation of N.J.S.A. 2C:35-10. (Pa138; Pa229). The trial court sentenced Mosley to a probationary term instead of incarceration. Ibid.

Mosley was arrested eleven months later, while still on probation, on a

[3] Because the procedural history and counterstatement of facts are closely related, they are combined for efficiency and the court's convenience.

separate drug charge. (Pa8-Pa9).[4] As a result of that arrest, Mosley was charged with a violation of probation (VOP). (Pa9). Defendants, assistant prosecutors Tzvi Dolinger and Bina Desai, represented the State of New Jersey during the VOP proceeding. Ibid.

On January 15, 2015, the trial court found Mosley guilty of the VOP charge and sentenced Mosley to a term of five years' imprisonment, with a two-and-a-half-year period of parole ineligibility. (Pa10). The Appellate Division affirmed Mosley's VOP conviction on September 7, 2016. (Pa49). Mosley sought further review and on December 12, 2016, our Supreme Court granted certification to consider the limited issue of the trial court's acceptance of hearsay testimony. State v. Mosley, 228 N.J. 433 (2016). While his appeal to the Court was pending, Mosley served his remaining sentence, and in July 2017 was released from custody. (Pa12).

On March 6, 2018, roughly nine months after Mosley's release, the Court issued its decision. State v. Mosley, 232 N.J. 169, 191 (2018). The Court held that the underlying VOP proceeding was procedurally deficient because the State used hearsay evidence to sustain the VOP charge. Id. at 192. It thus reversed the Appellate Division judgment and vacated Mosley's VOP

[4] On January 23, 2018, Mosley was found not guilty of all criminal charges stemming from that September 12, 2014 arrest. (Pa49).

conviction.

After the Appellate Division judgment was vacated, the Middlesex County Probation Division submitted a notice to the trial judge withdrawing the VOP charges as of May 7, 2018. (Pa228).

2. Mosley's First Request for an Amended Judgment of Conviction

On September 5, 2018, six months after the Court vacated Mosley's VOP conviction, Assistant Public Defender Rachel Wagner, then-counsel to Mosley in the underlying criminal action, submitted a letter to the Judge Dennis V. Nieves of the Superior Court of New Jersey, Criminal Division, Middlesex Vicinage. (Pa226-Pa227). In that letter, Wagner acknowledged that Middlesex County Probation "had withdrawn the now-moot Violation of Probation." (Pa226) (emphasis added). As such, Wagner requested relief through an amended judgment of conviction. Ibid. Wagner also submitted proposed language that she suggested would be appropriate for the amended judgment of conviction. Ibid.

On October 17, 2018, Judge Nieves entered an amended judgment of conviction. (Pa229-Pa231). There is no evidence that Wagner ever filed any motions under Rule 1:13-1 to correct any clerical errors in the amended judgment of conviction. Ibid.

3. Federal District Court Civil Proceedings Before the Hon. Zahid N. Quraishi, U.S.D.J.

On October 13, 2020, more than two years after the New Jersey Supreme Court reversed Mosley's VOP conviction, Mosley filed a fifteen-count civil rights complaint—consisting of five federal and ten state causes of action—in the Superior Court of New Jersey, Middlesex Vicinage. (Pa1-Pa44). As to the State Defendants Mosley asserted that after his September 12, 2014 arrest by the Edison Township Police Department, the Prosecutor Defendants relied upon perjured testimony and police reports containing false information during the VOP proceeding, resulting in Mosley's VOP conviction. (Pa8; Pa9). Mosley further asserted that after his VOP conviction was vacated by the New Jersey Supreme Court, the Prosecutor Defendants interposed objections before the sentencing court which resulted in the sentencing court's amended JOC containing false assertions of fact. (Pa12-Pa13).

On December 14, 2020, the Edison Defendants removed the action to federal court based on federal question jurisdiction. (Pa50). Thereafter, the individual State defendants filed dispositive motions to dismiss Mosley's pleading in the district court. Ibid. They argued, in relevant part, that the State was entitled to Eleventh Amendment immunity, that the prosecutors were entitled to absolute prosecutorial immunity for their actions taken in the course of prosecuting Mosley's VOP charge, and that Defendants Andrew Carey, Bina

Desai, and Tzvi Dolinger were not "persons" subject to suit under § 1983 or the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2 (NJCRA). (Pa57).

On August 31, 2022, the Hon. Zahid N. Quraishi, U.S.D.J. of the District of New Jersey concurred with the State Defendants regarding these two immunity arguments. (Pa59-Pa62). The district court held that the three prosecutors–Dolinger, Desai, and County Prosecutor Carey–were each entitled to absolute prosecutorial immunity against Mosley's five federal claims in counts XI through XV. (Pa59-Pa62). The district court made specific factual findings that Mosley was suing those defendants for undertaking "core prosecutorial duties . . . and quasi-judicial actions to which absolute immunity attaches." (Pa60). Thus, with prejudice, the district court dismissed the five federal claims against the prosecutors in their official and individual capacities. (Pa61; Pa62). The district court declined the exercise of federal jurisdiction over the remaining state claims against the State Defendants in counts I through X and returned those claims to state court, under 28 U.S.C. § 1367(c)(3). (Pa62).

The district court also decided the Edison Defendants' dismissal motion on the same date. (Pa52-Pa57).[5] Because the Edison Defendants did not move

[5] The district court also granted the separate dismissal motion of Defendant, County of Middlesex, on the same date. (Pa45-Pa46). Mosley has not appealed the County of Middlesex's dismissal (Pa280-Pa285). Thus, it is not pertinent to the present appeal.

for dismissal under any immunity doctrines, the district court addressed the substantive grounds of their dismissal motion, particularly their statute of limitations affirmative defenses. (Pa54).

First, the district court held that Mosley's "malicious prosecution-related claims" against the Edison Defendants for the VOP conviction accrued on March 6, 2018, the date of the New Jersey Supreme Court's decision reversing his VOP conviction because it was when his "violation of probation charge 'ended without a conviction.'" (Pa55) (quoting Thompson v. Clark, 596 U.S. 36, 49 (2022). The district court thus held that those claims did not begin to accrue when the state court entered an amended judgment of conviction on October 17, 2018, because Mosley's "rights were clarified by the New Jersey Supreme Court's decision, not by the amendment of his judgment." Ibid. That is, "[t]he prosecution terminated without a conviction for the narcotics charges on January 23, 2018 and for the violation of probation charge on March 6, 2018." Ibid. (internal footnotes omitted).

Consistent with the two-year statute of limitations for all Section 1983 claims, the district court dismissed, with prejudice, two of Mosley's federal claims as being time-barred: Count XI ("False Arrest/False Imprisonment") and Count XII ("False Statement in Accusatory Instrument"). The district court separately dismissed, without prejudice, Mosley's three remaining federal

claims against the Edison Defendants, over which the district court had original jurisdiction–Count XIII ("Abuse of Process"), Count XIV ("conspiracy to Violate Plaintiff's Civil Rights"), and Count XV ("Negligent Failure to Prevent Civil Rights Violation"). (Pa56). The district court held those three federal claims were "premature until the amended Judgment of Conviction is found invalid." Ibid.

4. State Court Civil Proceedings Before the Hon. Kevin M. Shanahan, A.J.S.C.

Upon the return of the action from federal district court to state court, the matter was transferred from the Superior Court of New Jersey, Middlesex Vicinage to the Superior Court of New Jersey, Somerset Vicinage. (Pa287). Mosley's ten remaining state law causes of actions at that time were as follows: Count I (False Arrest/Imprisonment), Count II (Injurious Falsehood), Count III (Libel/Libel Per Se), Count IV (Slander/Slander Per Se), Count V (Negligence), Count VI (Conspiracy), Count VII (Intentional Infliction of Emotional Distress), Count VIII (Negligent Infliction of Emotional Distress), Count IX (Negligent Hiring/Supervision/Retention), and Count X (N.J. Civil Rights Conspiracy). (Pa1-Pa43).

On November 29, 2022, State Defendants moved to dismiss, making the following arguments. Ibid. First, the argued that Mosley's failure to file a timely notice of claim, as required by the New Jersey Tort Claims Act ("TCA"),

N.J.S.A. 59:8-8, was fatal to all of his common-law tort claims to the extent that Mosley was alleging any in Counts I through IX of the complaint. (1T 5:5-15).[6] Second, they asserted that the three prosecutors were entitled to absolute prosecutorial immunity under the TCA (to the extent Mosley raised common-law tort claims), and the NJCRA (to the extent Mosley raised state constitutional claims), for the same reasons the district court found absolute prosecutorial immunity to apply as to Mosley's federal constitutional claims. (1T5:16-22). Third, they contended that neither the State nor the Prosecutor Defendants were "persons" subject to liability under the NJCRA. Finally, they argued that to the extent that Mosley's NJCRA constitutional malicious prosecution-related claims were otherwise cognizable against the State Defendants, such claims would be time-barred under the NJCRA because they accrued on March 6, 2018, when the New Jersey Supreme Court reversed Mosley's VOP conviction, and were thus filed approximately seven months too late. (1T 4:1-22).

Accordingly, on February 15, 2023, Judge Kevin M. Shanahan entered an order granting the State Defendants' motion in its entirety and dismissed them

[6] "1T" refers to the transcript of the February 15, 2023 oral opinion of the Judge Kevin M. Shanahan, A.J.S.C. on the State Defendants' dismissal motion, "2T" refers to the transcript of the April 14, 2023 oral argument and oral opinion of the Judge Kevin M. Shanahan, A.J.S.C. on Mosley's motion for reconsideration, and "3T" refers to the transcript of the December 1, 2023 oral argument before the Judge Victoria Allende, J.S.C.

with prejudice. (Pa65-Pa66). He did not rule on the State Defendants' immunity arguments. Ibid. Instead, the trial court found that Mosley's common-law tort claims, including the libel and slander claims, accrued, at the latest, on October 17, 2018. (1T 15:19-24). Because Mosley failed to file a notice of claim within ninety days of that date, the trial court found he failed to comply with the Tort Claims Act, N.J.S.A. 59:8-1 to -11 and could not pursue the state law claims alleged in counts II through IX. (1T 15:19-19:24).

As with the district court, the trial court separately found that Mosley's NJCRA claims concerning the VOP conviction accrued on March 6, 2018, the date the New Jersey Supreme Court reversed Mosley's VOP conviction. (1T 14:8-9). Thus, the trial court held that the constitutional claims were time-barred by the relevant two-year statute of limitations, and dismissed the remaining counts to the extent they could be read as asserting NJCRA malicious prosecution claims. (1T 14:3-15:18). On April 14, 2023, the trial court denied Mosley's motion to reconsider that dismissal order. (Pa124-Pa125). Mosely did not seek review of that interlocutory order.

5. Mosley's Second Request for an Amended Judgment of Conviction & State Court Civil Proceedings Before the Hon. Veronica Allende, J.S.C.

Meanwhile, on April 6, 2023, two months after Judge Shanahan granted the State Defendants' motion to dismiss, Mosley's counsel in this appeal filed a

notice of appearance in the closed criminal action docketed as State v. Noah Mosley, MID-13-001055. That same day, Mosley's counsel moved to dismiss the VOP charge in that criminal action (which had already been withdrawn over four years before by Middlesex County Probation), and to correct the judgment of conviction (for which no earlier motion to correct had ever been filed).

Eight days later, on April 14, 2023, the Hon. Pedro J. Jimenez, Jr. entered an order dismissing the withdrawn VOP charge with prejudice and vacating the October 17, 2018, amended judgment of conviction. (Pa134-Pa135).

On May 19, 2023, Mosley filed a notice of tort claim, (Pa143-Pa218), in which he asserted that the April 14, 2023, order "trigger[ed] a new accrual date on many of Defendant's Federal and State claims as well as raising new ones." (Pa147).

Despite the purported change in circumstances, Mosley did not file a motion seeking reconsideration of Judge Shanahan's then-interlocutory February 15, 2023, order that had dismissed the State Defendants. (Pa1-Pa287). Nor did Mosley file a motion to amend his pleading before the court with any of the purported newly accrued and revived federal and state claims. Ibid. Instead, seven months later, Mosley would first argue before the trial court, in opposition to the Edison Defendants' summary judgment motion, that "the order dismissing the case with prejudice triggered the true accrual date." (3T 28:15-18).

At oral argument on the Edison Defendant's summary judgment motion, the Judge Veronica Allende, J.S.C., questioned Mosley's counsel as to the legal significance of the April 14, 2023, order. (3T 21:2-24:4). Specifically, Judge Allende questioned counsel as to how the court order would alter Judge Shanahan's legal conclusion that Mosley's malicious prosecution first began to accrue on March 6, 2018, when the New Jersey Supreme Court reversed Mosley's VOP conviction. (3T 21:2-24:4). Counsel for Mosley could not provide Judge Allende with any controlling or persuasive authority to support his novel argument. (3T 24:16-28:19).

On December 1, 2023, Judge Allende granted the Edison Defendants' summary judgment motion and dismissed Mosley's remaining claims against the Edison Defendants. (Pa263-Pa264). In her accompanying letter opinion, Judge Allende held that Mosley's common law tort claims against the Edison Defendants were also barred by Mosley's failure to file a timely notice of claim. (Pa273-Pa276). Judge Allende separately held that under the "law of the case" doctrine, she would follow the March 6, 2018, accrual date that Judge Shanahan had earlier concluded was the accrual date for Mosley's malicious prosecution-related claims. (Pa271). Like Judge Shanahan, Judge Allende also held that Mosley's common law tort claims against the Edison Defendants were barred by Mosley's failure to file a timely notice of claim. (Pa273-Pa276).

Mosley's appeal followed on January 9, 2024. (Pa280-Pa285).

ARGUMENTS

POINT I

MOSLEY'S NOVEL STATUTORY INTERPRETATION OF THE NEW JERSEY TORT CLAIMS ACT'S NOTICE PROVISIONS HAS NO RECOGNIZED BASIS IN LAW AND IS AT ODDS WITH THE LEGISLATIVE INTENT OF THE TORT CLAIMS ACT. (Addressing Appellant's Point II & III.)

A trial court's decision to grant a motion to dismiss for failure to state a claim is subject to de novo review. Baskin v. P.C. Richard & Son, 246 N.J. 157, 171 (2021). Under that standard, while "[a] reviewing court must examine the legal sufficiency of the facts alleged on the face of the complaint, giving the plaintiff the benefit of every reasonable inference of fact[,]" dismissal is appropriate "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim." Ibid. (cleaned up).

Here, the trial court below correctly dismissed Mosley's common law torts claims against the State Defendants under counts I through IX, including Mosley's slander and libel claims, because those tort claims were subject to the TCA's procedural requirements and he failed to comply with its statutory notice provisions. (1T16:15-19:23). Those provisions require a claimant to serve a public entity with a notice of tort claim within ninety days of the accrual of their claims. N.J.S.A. 59:8-8. Here, however, Mosley failed to allege that he served

the State with any notice of claim before he filed suit on October 17, 2018. (Pa1-Pa43).

According to Mosley, the trial court erred in dismissing his slander and libel claims because "a notice of claim is not required for those claims that are alleged against a Defendant in his or her 'individual capacity." (Pb27). However, Mosley's argument is based on a reading of Gazzillo v. Grieb, 398 N.J. Super. 259 (App. Div. 2008) that is, at best, incomplete.

In Gazzillo, the plaintiff, a school board employee, alleged that another school board employee sexually assaulted her on property owned by the school board. Id. at 261. She "filed a claim for workers compensation benefits and notified the police," however, she failed to file a timely notice of claim against the school board or school board employee. Ibid. The trial court denied her motion for leave to file a late notice of claim finding the plaintiff failed to show extraordinary circumstances for her delay. Ibid.

A year later, the Gazzillo plaintiff filed a complaint against the employee who had assaulted her individually, without naming the school board as a fellow party. Ibid. The defendant moved for summary judgment, arguing that the plaintiff's claim was barred due to the denial of the plaintiff's motion for leave to file a late notice of claim. Id. at 261-62. The trial court agreed and granted summary judgment in his favor. Id. at 262.

The Appellate Division reversed and held that a notice of claim was unnecessary under the facts presented. Gazzillo, 398 N.J. Super. at 264. It rejected the argument that a notice of claim must be filed any time a plaintiff asserts a common law claim against a public employee and explained that there must be, as a initial matter, "some nexus between the wrong that is complained of and the defendant's public employment in order to mandate that a notice of claim be filed before suit may be instituted." Ibid. In examining that threshold question, the Gazzillo court found that a notice of claim was not necessary because there was no nexus between the wrong alleged and the defendant's public employment. See ibid. ("Here, as far as the record discloses at this point, it is purely accidental that plaintiff was assaulted on school grounds.").

Gazzillo is clearly distinguishable from the present facts. Here, in contrast to Gazzillo, there is a clear "nexus between the acts complained of" by Mosley and the individual State Defendants' public employment. Gazzillo, 398 N.J. Super. at 264; (Pa1-Pa43). Mosley alleges that Prosecutor Carey was "duly authorized with the power and responsibility to administrate the management and operations of the Middlesex County Prosecutor's Office *and at all times relevant to the matters complained of herein was acting in that capacity*." (Pa3) (emphasis added). Similarly, Mosley alleges that assistant prosecutors Dolinger and Desai were employed by the Middlesex County Prosecutor's Office and

"duly authorized with the power and responsibility to represent the State of New Jersey in the prosecution of individuals accused of crime within the State of New Jersey, jurisdiction of Middlesex County *and at all times relevant to the matters complained of herein was acting in that capacity.*" (Pa4) (emphasis added). He further alleges that, by writing "a criminal charging document that falsely accused Plaintiff of a serious crime," and "falsely maintaining on Plaintiff's public JOC that Plaintiff had pled guilty of VOP[,]" they are liable to him for slander and libel. (Pa17). Indeed, the entirety of Mosley's tort claims against Carey, Dolinger, and Desai arise from classic prosecutorial actions they undertook (or allegedly failed to undertake). (Pa1-Pa43).

In his brief, Mosley ignores the "some nexus" limitation of the Gazzillo holding. (Pb24-Pb28). Instead, he oversimplifies Gazzillo as holding that the notice of claim requirement depends on whether an individual employee is sued in their "individual capacity" or "official capacity." (Pb27-Pb28). Likewise, he relies on a similar misreading of our Supreme Court's ruling in Velez v. City of Jersey City, 180 N.J. 284 (2004). Ibid. Neither of those decisions stand for the proposition that would make a plaintiff's obligation to file a tort claims notice turn on how that plaintiff chooses to classify a defendant. See Gazzillo, 398 N.J. Super. at 259-65; Velez, 180 N.J. at 284-97 (2004).

The TCA itself does not and has never made such a distinction. See

N.J.S.A. 59:1-1 to 14:4. And ever since the 1994 amendment to N.J.S.A. 59:8-3, the TCA expressly states that the notice of claim requirement applies to any action to be brought thereunder "against a public entity or public employee." See id. (emphasis added). As Gazillo held, if a public employee is being sued for actions or inactions taken in the scope of their public employment with a public entity, such is subject to the TCA—including the procedural requirements of N.J.S.A. 59:8-3. See Gazzillo, 398 N.J. Super. at 264.

Mosley alternatively asserts that no notice of claim was required for his libel and slander claims because "those claims were the object of and in furtherance of appellant's civil rights conspiracy claim." (Pb24). He cites no authority to support the notion that libel and slander—two classic common law torts—could double as the underlying wrongs needed to establish a claim for civil conspiracy to violate constitutional rights guaranteed by the New Jersey Constitution and the NJCRA. (Pb24-Pb28).

The NJCRA provides in relevant part as follows:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State . . . may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [N.J.S.A. 10:6-2(c)]

Under a plain reading of the statute, causes of action arising under New Jersey common law fall outside the ambit of the NJCRA. See id. (affording legislative protection for "substantive rights, privileges or immunities secured by the Constitution or laws of this State"); see also N.J. Const. art. IV, § 7, ¶ 6 ("The laws of this State shall begin in the following style: 'Be it enacted by the Senate and General Assembly of the State of New Jersey.'").

Further, in Tumpson v. Farina, 218 N.J. 450 (2014), the Court held that the NJCRA "is modeled off of the analogous Federal Civil Rights Act, 42 U.S.C.A. § 1983." See id. at 474. Mosley's argument fairs no better under persuasive authority interpreting that federal statute. In the analogous context of Section 1983, the Third Circuit has held that "[t]o prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law 'reached an understanding' to deprive him of his *constitutional rights*." See Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 293-94 (3d Cir. 2018) (internal citation omitted) (emphasis added).

Because Mosley's second argument that no notice of tort claim was required for his libel and slander claims because "those claims were the object of and in furtherance of appellant's civil rights conspiracy claim" finds no support from recognized law, this court should also reject Mosley's secondary argument here. (Pb24).

POINT II

THE TRIAL COURT ALSO CORRECTLY HELD THAT MOSLEY'S MALICIOUS PROSECUTION-RELATED CLAIMS ACCRUED ON MARCH 6, 2018, AND, THEREFORE, ARE TIME-BARRED. (Addressing Appellant's Points I.A & III.)

This court should also affirm the trial court's finding that to the extent Mosley was asserting any malicious prosecution-related claims, they began to accrue on March 6, 2018. (1T 14:7-:15).

This court has held that "determining the date upon which a statute of limitations begins to run is an issue of law, subject to plenary review." See J.P. v. Smith, 444 N.J. Super. 507, 520 (App. Div. 2016) (internal citation omitted). Here, this court should affirm the trial court below and hold that Mosley's malicious prosecution claim accrued on March 6, 2018, when the Supreme Court reversed Mosley's VOP conviction on direct appeal, consistent with controlling and persuasive law. (Pa353).

Mosley's contrary assertion that his malicious prosecution claim did not begin to accrue until seven months later upon entry of an amended judgment of conviction memorializing that reversal has no basis in law. (Pb11-Pb17).

Our Supreme Court has repeatedly reaffirmed the principle that "[a] cause of action 'accrues' on the date when 'the right to institute and maintain a suit' first arose.'" See White v. Mattera, 175 N.J. 158, 164 (2003) (internal citations

omitted); see also Rosenau v. City of New Brunswick, 51 N.J. 130, 137 (1968) ("Our courts have identified the accrual of the cause of action as the date on which 'the right to institute and maintain a suit' first arose." (internal citations omitted)). Here, the date on which Mosley's "right to institute and maintain a suit" for malicious prosecution first arose, was March 6, 2018, the date of the Court's reversal of the judgment affirming his VOP conviction.

As of that date, Mosley had sufficient knowledge to establish the four elements of a prima facie malicious prosecution claim: "(1) a criminal action was instituted by this defendant against this plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff." See LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009) (internal citation omitted). And on that date, Mosley also had sufficient information to allege that his underlying conviction had been obtained through false statements and perjured testimony (Pa9; Pa13), thereby rebutting the presumption of probable cause created by his conviction and sentence. See Freeman v. State, 347 N.J. Super. 11, 26 (App. Div. 2002) ("Probable cause is established conclusively by a conviction, even if reversed on appeal, so long as the conviction was not obtained by 'fraud, perjury or other corrupt means.'" (internal citation omitted)); (Pa9) (alleging the named defendants "used the false and fabricated information that Defendant was a

criminal suspect to seek the revocation of Defendant's probation"; (Pa13) (alleging the named defendants "falsely stat[ed] to others, in police reports and testifying under oath[,] that Defendant illegally possessed and distributed drugs").

For these reasons, the trial court below correctly held that Mosley's NJCRA malicious prosecution claim accrued on March 6, 2018, consistent with controlling New Jersey authority which instructs that a malicious prosecution claim begins to accrue at the time of favorable termination. LoBiondo, 199 N.J. at 90; Freeman, 347 N.J. Super. at 26. Because Mosley's complaint was not filed until October 13, 2020, over two years after he had reason to know he had a basis to bring suit, the trial court below also correctly held that Mosley's malicious prosecution-related claims were time-barred by the applicable two-year statute of limitations. (Pa1-Pa43, Pa353).

In the court below, as on appeal, Mosley relies on the self-serving assertion that his malicious prosecution-related claims first began to accrue on October 17, 2018, a date that would be within the applicable two-year statute of limitations. (Pb11-Pb17). Indeed, Mosley gives dispositive weight to the fact that October 17, 2018, is when the trial judge entered its amended judgment of conviction in the criminal action on the date. (Pa226-Pa227, Pa229-231). However, Mosley does not cite any authority to explain why that specific date

would have greater weight here than March 6, 2018. (Pb11-Pb17). For example, Mosley cites no controlling or persuasive New Jersey authority that a reversal on appeal only triggers the relevant statute of limitations upon entry of an amended judgment of conviction. Ibid.[7] For these reasons, on appeal, Mosley has seemingly abandoned the argument that his malicious prosecution claim began to accrue when the amended judgment of conviction was entered. (Pa11-Pa17). Instead, Mosley now solely asserts that his malicious prosecution claims against the State Defendants did not accrue on March 6, 2018, citing federal decisional law concerning Heck v. Humphrey, 512 U.S. 477 (1994). Ibid.

Mosley's reliance on federal decisional law for his refashioned argument fails for two principal reasons.

First, controlling state authority and federal authority both provide that for *state* causes of action, the accrual date is a matter of *state* law. See Rosenau, 51 N.J. at 137 ("The Legislature has not specified when the cause of action shall be deemed to have accrued and the matter has therefore been left entirely to judicial interpretation and administration."); see also Rankin v. Smithburger,

[7] In written correspondence accompanying his April 14, 2023 judicial order in the related criminal action, the Hon. Pedro J. Jimenez, J.S.C. explained that "you cannot have a 'JOC' on a conviction that was vacated[]." (Pa219). Thus, rather than prepare an amended judgment of conviction as first requested by Mosley's counsel, the court simply ordered that the October 17, 2018 judgment of conviction be vacated. (Pa223; Pa224-Pa225).

2013 WL 3550894, at *12 (W.D. Pa. July 11, 2013) ("[S]tate law governs the accrual of state causes of action.") (internal citations omitted). Accordingly, Mosley's assertion that the Third Circuit decision of Smith v. Holtz, 87 F.3d 108 (3d Cir. 1996) is "dispositive," is without merit. (Pa13); Rankin, 2013 WL 3550894, at *12.

Second, Mosley's claim that the Heck deferred accrual rule applies to an anticipated future conviction, (Pb12-Pb13), is unsupported by Heck and was also expressly repudiated by the United States Supreme Court in Wallace v. Kato, 549 U.S. 384 (2007). In Heck v. Humphrey, 512 U.S. 477, the Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.
>
> [Id. at 486-87 (emphasis added).]

Here, where Mosley alleges that his conviction *was* reversed on direct appeal on March 6, 2018, on the face of the complaint, it would appear to be entirely inconsistent with Heck to hold that Mosley's malicious prosecution claim did not also accrue on March 6, 2018. (Pa12); Heck, 512 U.S. at 486-87 ("[A] § 1983 plaintiff must prove that the conviction or sentence has been

reversed on direct appeal . . . ."). In Wallace, a decision issued eleven years after Smith v. Holtz, 87 F.3d 108, the Court removed any doubt as to this understanding, clarifying that Heck bar only applies to "an '*outstanding* criminal judgment." See Wallace, 549 U.S. at 393 (emphasis added). As such, the Wallace Court labeled an argument seeking to extend Heck to claims that would impugn the validity of an anticipated future conviction both a "bizarre extension of Heck" and as "a principle that goes well beyond Heck[.]" Ibid.

The Third Circuit has recognized that its decision in Smith, whose holding was at odds with the Supreme Court's holding in Wallace, was abrogated by Wallace:

> Prior to the Supreme Court's decision in *Wallace*, this Court held that a claim that, if successful, would necessarily imply the invalidity of a potential conviction on a pending criminal charge was not cognizable under § 1983. *Smith v. Holtz,* 87 F.3d 108, 113 (3d Cir.1996), *abrogated by Wallace v. Kato*, 549 U.S. 384, 127 S.Ct. 1091.
>
> However, in *Wallace*, the Supreme Court expressly declined to hold that 'an action which would impugn an anticipated future conviction cannot be brought until that conviction occurs and is set aside.' Therefore, the cause of action accrues 'when the wrongful act or omission results in damages.'
>
> [Woodson v. Payton, 503 F. App'x 110, 112 (3d Cir. 2012) (cleaned up)]

For these reasons, Smith cannot constitute persuasive authority, let alone

controlling authority. See Wallace, 549 U.S. at 393; Woodson, 503 F. App'x at 112. Thus, this court should affirm the two trial courts below and find that Mosley's malicious prosecution-related claims began to accrue on March 6, 2018.

Even were this court to disagree with the trial courts below and find that Mosley's malicious prosecution related-claims did not accrue at that time, this court should still affirm the dismissal order based on a legally recognized secondary accrual date – May 7, 2018, the date the Middlesex County Probation Division formally withdraw Mosley's underlying VOP charge. (Pa228).

Longstanding New Jersey precedent holds that "an administrative dismissal is a favorable termination of a criminal proceeding for purposes of a malicious prosecution action." See Rubin v. Nowak, 248 N.J. Super. 80, 84 (App. Div. 1991); see also Hammill v. Mack Int'l Motor Truck Corp., 104 N.J.L. 551, 553 (1928) ("The withdrawal of the complaint was a sufficient termination of the proceeding [in an action for malicious prosecution].") (internal citations omitted). In Rubin, the court also held that an administrative dismissal creates a "presumption of favorable termination." See id. at 84 (internal citation omitted).

In his brief, Mosley does not address Rubin or the Middlesex County Probation Division's May 7, 2018 withdrawal of the VOP charge. (Pb1-Pb37).

However, at oral argument in the court below, counsel for Mosley made the unsupported assertion that the administrative withdrawal did not constitute a favorable termination because "[t]hat's an administrative decision by the pro- -- the Probation Department after, I guess, after the State has indicated somehow to them at some point that they're not going to proceed." (3T 6:1-:23); see also (3T 6:18-:20) ("[T]hat's an administration decision that—that did not actually terminate–- terminate the case . . . [.]"). Counsel's rank speculation in the court below had no basis in law or fact. Ibid. Moreover, as discussed below, counsel's argument was blatantly contradicted by controlling authority.

In State v. Johnson, 186 N.J. Super. 423 (App. Div. 1982), the court held that "[a] revocation proceeding is not part of the criminal process, but part of the corrections process." Id. at 431. Here, the Middlesex County Probation Division, the governmental agency empowered by law to bring the VOP charge against Mosley, later withdrew that underlying VOP charge on May 7, 2018, after Mosley's VOP conviction was vacated. See Johnson, 186 N.J. Super. at 431; (Pa228).

As below, Mosley offers no substantive argument that the Middlesex County Probation Division acted outside of its authority in withdrawing Mosley's VOP charge. (Pb1-Pb43). Similarly, Mosley fails to offer any substantive argument that would rebut the presumption that the administrative

withdrawal constituted a favorable termination. Ibid.

As such, were this court to disagree with the trial court's findings below that Mosley's malicious prosecution related claims first began to accrue at the time of our Supreme Court's reversal of Mosley's VOP conviction, then this court should find in the alternative that Mosley's said claims began to accrue on May 7, 2018. See Ellison v. Evergreen Cemetery, 266 N.J. Super. 74, 78 (App. Div. 1993) ("[A]n order or judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it.") (internal citations omitted).

POINT III

JUDGE ALLENDE CORRECTLY APPLIED THE "LAW OF THE CASE" DOCTRINE TO DISMISS COUNTS I THROUGH IX AND REJECTED MOSLEY'S ALTERNATIVE ARGUMENT THAT AN APRIL 14, 2023 COURT ORDER IN THE DISMISSED CRIMINAL ACTION "TRIGGERED THE TRUE ACCRUAL DATE." (Addressing Appellant's Point III.)

Judge Allende correctly applied the "law of the case" doctrine in determining that an April 14, 2023 court order, which vacated the amended judgment of conviction and dismissed the VOP charge, did not alter an earlier court's finding that Mosley's malicious prosecution claims first began to accrue on March 6, 2018, five years earlier, when the New Jersey Supreme Court reversed Mosley's VOP conviction on direct appeal. (Pa271). Mosley's argument–that the April 14, 2023, order "triggered the true accrual date"

(Pb33)–remains without merit or factual basis.

In his February 16, 2023, oral opinion on the State Defendants' motion to dismiss, Judge Shanahan held that Mosley's malicious prosecution claim accrued on March 6, 2018, when the New Jersey Supreme Court reversed his VOP conviction on direct appeal. (1T 14:8-9). After the State Defendants' motion was granted and Mosley's subsequent motion for reconsideration was denied, litigation continued solely between Mosley and the Edison Defendants, with the Edison Defendants later moving for summary judgment. (Pa278-Pa279). By then, Mosley had obtained a court order in the criminal action dismissing the VOP charge and vacating the earlier amended judgment of conviction. (Pa224-Pa225).

At oral argument on the Edison Defendant's summary judgment motion, the Judge Allende questioned counsel for Mosley as to how the court order was relevant to the legal issue of claim accrual and as to how the court order would alter Judge Shanahan's finding that the Mosley's malicious prosecution first began to accrue on March 6, 2018, at the time of the Court's reversal of Mosley's VOP conviction. (3T 21:2-24:4). Counsel could not provide the second trial court with any controlling or persuasive authority supporting his position. (3T 24:16-28:19).

Under those factual circumstances, the second trial court correctly

exercised its sound discretion and applied the "law of the case" doctrine as to the March 6, 2018 accrual date. (Pa271). Under the doctrine, "once an issue has been fully and fairly litigated, it ordinarily is not subject to relitigation between the same parties either in the same or in subsequent litigation." See State v. K.P.S., 221 N.J. 266, 277 (2015) (internal citation omitted). "[T]he law of the case doctrine is only triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue." Lombardi v. Masso, 207 N.J. 517, 539 (2011) (internal citations omitted).

Here, Mosley did not present any "new law or new facts" which would have warranted reconsideration of the first trial court's finding that Mosley's malicious prosecution claim accrued on March 6, 2018. See Rosenberg v. Otis Elevator Co., 366 N.J. Super. 292, 302 (App. Div. 2004). For example, even after entry of the April 14, 2023 court order in the criminal action, the first trial court's finding remained consistent with both state decisional law and United States Supreme Court precedent, which held that Mosley's malicious prosecution claims began to accrue on March 6, 2018, when the New Jersey Supreme Court reversed Mosley's VOP conviction on direct appeal. See Freeman, 347 N.J. Super. at 26; Wallace, 549 U.S. at 393; Woodson, 503 F. App'x at 112.

POINT IV

THE TRIAL COURT BELOW CORRECTLY HELD THAT MOSLEY'S COMMON LAW AND NJCRA MALICIOUS PROSECUTION CLAIMS WERE SUBJECT TO A TWO-YEAR STATUTE OF LIMITATIONS. (Addressing Appellant's Point I.A & III.)

The trial court below correctly held that Mosley's NJCRA malicious prosecution claim was subject to a two-year statute of limitations. (1T 13:9-20). Mosley's argument to the contrary—that, under Earl v. Winne, 14 N.J. 119 (1953), his common law and NJCRA malicious prosecution claims were subject to a *six-year* statute of limitations, (Pb17-Pb24) is without merit.

As to Mosley's common-law malicious prosecution claim, Mosley ignores that Earl was issued nineteen years before the Legislature enacted the TCA in 1972. The TCA provides explicitly that the statute of limitations for all common law tort claims against the State, New Jersey public entities, and New Jersey public employees is two years—without exception. See N.J.S.A. 59:8-8 ("The claimant shall be forever barred from recovering against a public entity or public employee if: . . . b. Two years have elapsed since the accrual of the claim . . . .").

Controlling and persuasive decisional law have interpreted provide that the two-year statute of limitations in N.J.S.A. 59:8-8 applies to *all* tort claims against the State, including common law malicious prosecution claims asserted

against public employees. See Thigpen v. City of E. Orange, 408 N.J. Super. 331, 343 (App. Div. 2009) (finding common law malicious prosecution cause of action against a defendant-New Jersey public entity and defendant-New Jersey public employees "clearly is subject to the TCA's requirements.") (internal citation omitted); accord Orefice v. Twp. of Lyndhurst, 2018 WL 5116952, at *1 (N.J. Super. Ct. App. Div. Oct. 22, 2018) ("Relying on [Thigpen], in which we held malicious prosecution claims are subject to the requirements of the Tort Claims Act, Judge Thurber concluded plaintiff's malicious prosecution claim was barred by the Act's two-year statute of limitations."); see also Stoeckel v. Twp. of Knowlton, 387 N.J. Super. 1, 22 (App. Div. 2006) (finding July 1, 1994 amendments to N.J.S.A. 59:8-8 and -9 abrogated earlier court decision that six-year statute of limitations applied to malpractice claims against publicly employed attorneys); see also Michaels v. State, 955 F. Supp. 315, 326 (D.N.J. 1996) ("Because the City of Newark is a public entity within the meaning of the New Jersey Tort Claims Act, however, all of plaintiff's state law claims asserted against it, including plaintiff's malicious prosecution claim, are subject to the Act's two-year statute of limitations, N.J.S.A. 59:8–8(b).").

The legislative enactment of N.J.S.A. 59:8-8(b) is significant. To the extent that any conflict exists between N.J.S.A. 59:8–8(b) and Earl, our Supreme Court has recognized that the duly enacted legislation controls. See Farmers

Mut. Fire Ins. Co. of Salem v. New Jersey Prop.-Liab. Ins. Guar. Ass'n, 215 N.J. 522, 545 (2013) ("Legislative enactments are never subservient to the common law when the two are in conflict with each other."). Thus, Earl is of no moment in the context of the TCA. Ibid.

Earl does not control the appropriate statute of limitations for Mosley's NJCRA claims either. Earl concerned a malicious prosecution claim arising under New Jersey common law. See Earl, 14 N.J. at 131. In contrast, Mosley's NJCRA constitutional malicious prosecution is a statutory cause of action arising under the NJCRA. (Pa1-Pa43). The federal district courts that have recognized an NJCRA constitutional malicious prosecution claim have analogized such a claim to an alleged violation of a plaintiff's substantive constitutional rights under art. I, ¶ 7 of the New Jersey Constitution, not a New Jersey common law malicious prosecution claim. See, e.g., Phillips v. New Jersey Transit, 2022 WL 462089, at *7 (D.N.J. Feb. 14, 2022); see also N.J. Const. art. I, ¶ 7 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."). New Jersey courts have also recognized constitutional rights as *personal* rights rather than property rights. See, e.g., State v. Novembrino, 105 N.J. 95, 145 (1987) ("This Court has frequently resorted to our own State Constitution in order to afford our citizens broader protection of certain personal

rights than that afforded by analogous or identical provisions of the federal Constitution.") (internal citations omitted); Matter of Grady, 85 N.J. 235, 264 (1981) ("[T]he constitutional right of reproductive autonomy is a right personal to the individual.") (internal citation omitted). Thus, the vindication of constitutional rights through the NJCRA is subject to the same two-year statute of limitations as other personal injury claims. N.J.S.A. 2A:14-2. This court has expressly stated as such. See Lapolla v. County of Union, 449 N.J. Super. 288, 298 (App. Div. 2017) ("The statute of limitations for claims under the NJCRA is two years.") (citing N.J.S.A. 2A:14–2(a)); see also Smith v. Datla, 451 N.J. Super. 82, 99 (App. Div. 2017) (noting "LAD, NJCRA, and Section 1983" are "all . . . subject to a two-year statute of limitations").

In his brief, Mosley first ignores Datla. (Pa1-Pa43). Mosley then seeks to evade Lapolla's statement that the NJCRA carries a two-year statute of limitations by dismissing it as "dicta" and a holding "without explanation." (Pa18). Mosley fails to explain, however, how the court's two published and considered statements as to a two-year statute of limitations for NJCRA claims is not controlling here. Ibid.; but see State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977) ("[T]he parties may not escape their initial obligation to justify their positions by specific reference to legal authority.").

For these reasons, this court should also hold that Mosley's NJCRA

constitutional malicious prosecution is subject to a two-year statute of limitations.

POINT V

THE STATE IS NOT SUBJECT TO SUIT AS TO MOSLEY'S REMAINING NJCRA CLAIMS IN COUNTS I & IX.

In addition to the above, there are other compelling legal grounds to affirm here. The Appellate Division has held that "[w]ithout cross-appealing, a party may argue points the trial court either rejected or did not address, so long as those arguments are in support of the trial court's order." State v. Eldakroury, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015)**;** see also Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984) ("[A]ppeals are taken from judgments, not opinions, and, without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial court's judgment.") (internal citation omitted). Here, the trial court's dismissal order can be sustained on the alternate grounds that the State has not waived its sovereign immunity from suit under the NJCRA.

In its motions to dismiss before the federal district court and the first trial court, the State argued in relevant part that it was entitled to common-law sovereign immunity from Mosley's constitutional claims as it was not a "person" within the meaning of 42 U.S.C. § 1983 or the NJCRA, thereby making the State not amenable to suit under either civil rights statute. (Pa58), (1T4:23-5:22).

Neither the federal district court nor the first trial court specifically addressed this affirmative defense in their orders or written opinions. (Pa47-Pa64), (1T 3:1-85:24). However, because "the question of the [State's] sovereign immunity clearly and plainly goes to the jurisdiction of the trial court," see Jacobson v. United States, 422 N.J. Super. 561, 567 (App. Div. 2011), this court should resolve that outstanding question. Cf. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) ("[O]ur appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available 'unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest.'") (internal citation omitted).

The NJCRA permits a person whose substantive rights have been violated to bring a statutory cause of action against "a person acting under color of law." N.J.S.A. 10:6-2. The law is settled that the statutory reference to a "person acting under color of law" does not include the State of New Jersey which is not a "person" within the meaning of the NJCRA. See Brown v. State, 442 N.J. Super. 406, 426 (App. Div. 2015), rev'd on other grounds, 230 N.J. 84 (2017). Persuasive federal authority has so similarly held. See Didiano v. Balicki, 488 F. App'x 634, 638 (3d Cir. 2012) (finding State not a "person" within the statutory meaning of the NJCRA). Moreover, this court has separately held that

the State remains entitled to sovereign immunity from claims arising under the NJCRA. See Brown, 442 N.J. Super. at 426 ("Given that the Legislature did not choose to include an express waiver of sovereign immunity in the Civil Rights Act and that the State enjoys immunity under the analogous § 1983, we conclude that the State is immune from a suit for damages under the Civil Rights Act."). In the present action, Brown is controlling. See Brown, 442 N.J. Super. at 426 ("[T]he State is immune from a suit for damages under the Civil Rights Act.").

For these reasons, this court can also affirm Judge Shanahan's dismissal of Mosley's state constitutional claims against the State in counts I & X, but on the alternative grounds that the State is not a "person" under the NJCRA and is also entitled to sovereign immunity. See N.J. Div. of Child Prot. & Permanency v. K.M., 444 N.J. Super. 325, 334 (App. Div. 2016) ("We may affirm the final judgment of the trial court on grounds other than those upon which the trial court relied.") (cleaned up).

POINT VI

THE PROSECUTOR DEFENDANTS ARE ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY FROM LIABILITY FOR MOSLEY'S REMAINING STATE CONSTITUTIONAL CLAIMS AND STATUTORY IMMUNITY UNDER THE TCA FROM LIABILITY FOR MOSLEY'S COMMON LAW TORT CLAIMS.

For the same reasons and authorities cited above in Point V, this court may also affirm the trial court's dismissal order on the alternate grounds that the

Prosecutor Defendants are entitled to absolute prosecutorial immunity against Mosley's constitutional claims and statutory prosecutorial immunity under the New Jersey Tort Claims Act against Mosley's remaining state common law tort claims.

In their motions to dismiss before the federal district court and Judge Shanahan, defendants Carey, Desai, and Dolinger each asserted absolute prosecutorial immunity against counts I and IX of Mosley's complaint under Section 1983, the NJCRA and the TCA. (Pa58; 1T 4:23-5:22).

The federal district court would grant the Prosecutor Defendants' motion on this ground under Section 1983, finding that each was entitled to absolute prosecutorial immunity from liability as to Mosley's federal claims. (Pa59-Pa62); (Pa61) (finding Carey's decision to prosecute the violation of probation charge constituted "a core prosecutorial role."); (Pa61-Pa62) (finding that Dolinger and Desai "were acting in-court, post-indictment, and in furtherance of fully litigating the charges.").

Upon transfer of the remaining state claims to state court, the State Defendants filed a motion to dismiss Mosley's remaining state claims, asserting an entitlement to absolute prosecutorial immunity. (1T 4:23-5:22). Judge Shanahan did not specifically resolve the legal issue of absolute prosecutorial immunity in his written opinion. (1T 3:1-85:24). However, because absolute

prosecutorial immunity, similar to qualified immunity, "is an immunity from suit rather than a mere defense to liability," controlling authority provides that the immunity question should "be decided early in the proceedings as possible, preferably on a properly supported motion for summary judgment or dismissal." See Wildoner v. Borough of Ramsey, 162 N.J. 375, 375, 387 (2000). For these reasons, this court can also resolve the legal issue of the Prosecutor Defendants' entitlement to absolute prosecutorial immunity from liability for Mosley's constitutional claims under the NJCRA and Mosley's state common law tort claims under the TCA.

A. The Prosecutor Defendants are entitled to absolute prosecutorial immunity from liability for Mosley's NJCRA constitutional claims.

This court should hold that the prosecutors' entitlement to common law absolute prosecutorial immunity to Mosley's federal constitutional claims under Section 1983 applies with equal force to Mosley's state constitutional claims under NJCRA. This court has held that "[g]iven their similarity, our courts apply § 1983 immunity doctrines to claims arising under the Civil Rights Act." Brown, 442 N.J. Super. at 425.

In Imbler v. Pachtman, 424 U.S. 409 (1976), the United States Supreme Court held that absolute prosecutorial immunity applies to activities "intimately associated with the judicial phase of the criminal process." See id. at 430; see also Kalina v. Fletcher, 522 U.S. 118, 125 (1997) (holding absolute prosecutorial

immunity applies where a prosecutor is "performing functions that require the exercise of prosecutorial discretion").

Here, each of the Prosecutor Defendants' alleged actions falls squarely into the category of activities "intimately associated with the judicial phase of the criminal process." See Imbler, 424 U.S. at 430. For example, Prosecutor Carey's alleged decision to initiate the VOP prosecution against Mosley, (Pa9), has been recognized by the Third Circuit as a "core" prosecutorial discretionary duty. See Kulwicki v. Dawson, 969 F.2d 1454, 1463-64 (3d Cir. 1992) ("The decision to initiate a prosecution is at the core of a prosecutor's judicial role. A prosecutor is absolutely immune when making this decision, even where he acts without a good faith belief that any wrongdoing has occurred.") (emphasis added). Similarly, as a matter of law, assistant prosecutors Dolinger and Desai would be entitled to absolute prosecutorial immunity for Mosley's allegation that the two "falsely, illegally, maliciously and unconstitutionally prosecut[ed] Plaintiff for a crime he did not commit." (Pa14); Kulwicki, 969 F.2d at 1465 (holding use of allegedly false testimony "in connection with the prosecution is absolutely protected" from liability under the doctrine) (citing Burns v. Reed, 500 U.S. 478, 485 (1991)).

For these reasons, this court should hold, similar to Mosley's federal constitutional claims, that the Prosecutor Defendants are entitled to absolute

prosecutorial immunity from liability as to Mosley's NJCRA constitutional claims. See Brown, 442 N.J. Super. at 425.

B. Under N.J.S.A. 59:3-8, the Prosecutor Defendants are separately entitled to statutory prosecutorial immunity from liability as to Mosley's common law tort claims under the TCA.

This court should find that the Prosecutor Defendants are also entitled to statutory prosecutorial immunity under N.J.S.A. 59:3-8 from liability for Mosley's state common law claims.

N.J.S.A. 59:3-8 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment." See id. The statutory provision has been recognized as a partial codification of the common law absolute prosecutorial immunity. See Aletta v. Bergen Cnty. Prosecutor's Off., 2024 WL 2744677, at *12 (N.J. Super. Ct. App. Div. May 29, 2024). Our courts have also recognized that the statutory prosecutorial immunity under N.J.S.A. 59:3-8 is narrower than its common law counterpart1, being limited by the statutory exception outlined in N.J.S.A. 59:3-14 ("Nothing in this act shall exonerate a public employee from liability if it is established that his conduct was outside the scope of his employment or constituted a crime, actual fraud, actual malice or willful misconduct.").

This statutory term 'actual fraud, actual malice or willful misconduct' has

been held to "connote commission of a forbidden act with actual knowledge that the act is forbidden." See Van Engelen v. O'Leary, 323 N.J. Super. 141, 151 (App. Div. 1999) (cleaned up); see also id. at 154 (emphasizing "[c]arelessness, unreasonable conduct or even noncompliance with substantive law" would not be the equivalent of such forbidden acts).

Here, Mosley has failed to plead any essential facts from which to reasonably infer that the Prosecutor Defendants' "conduct was outside the scope of [their] employment or constituted a crime, actual fraud, actual malice or willful misconduct." N.J.S.A. 59:3-14. Instead, Mosley only offers conclusory assertions of malice that fail to distinguish between the specific actions of any of the named defendants. (Pa19) ("Defendants knew the statements were false when they made them to third parties and to each other but maliciously made them in order to arrest, to violate Plaintiff's probation, to imprison Plaintiff against Plaintiff's will, to deprive plaintiff of his property and to ruin Plaintiff's reputation and livelihood."); (Pa25) ("Defendants committed the acts alleged herein maliciously, fraudulently and oppressively with the wrongful intention of injuring Plaintiff, from an improper and evil motive amounting to malice and in conscious disregard of Plaintiff's rights.").

Our Supreme Court has held that in deciding a Rule 4:6-2 motion to

dismiss, "the essential facts supporting plaintiff's cause of action must be presented [in the complaint] in order for the claim to survive" and that "conclusory allegations are insufficient in that regard." AC Ocean Walk v. Am. Guarantee & Liab. Ins., 256 N.J. 294, 311 (2024) (internal citations omitted). Thus, under controlling authority, Mosley's unsupported malice assertions are insufficient to defeat the statutory immunity to which the Prosecutor Defendants are entitled under N.J.S.A. 59:3-8.

To the extent that this court finds any of Mosley's factual allegations of malice to be sufficiently pleaded, so as to create a factual issue as to the applicability of the statutory prosecutorial immunity under N.J.S.A. 59:3-8, the State Defendants would request that this court remand these claims with direction for Mosley "precisely identify each instance forming the basis for his claims, including the specific defendant(s) alleged to be involved." See Aletta, 2024 WL 2744677, at *10.

CONCLUSION

For these reasons, this court should affirm Judge Shanahan's February 16, 2023, order granting the State Defendants' motion to dismiss, (Pa110-Pa111), and Judge Shanahan's April 14, 2023, order denying Mosley's motion for reconsideration of that dismissal order. (Pa205-Pa206).

Respectfully submitted,

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