



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN SMITH,)	
)	
Plaintiff Below-Appellant,)	No. 559, 2018
)	
v.)	Trial Court Below:
)	
FIRST STATE ANIMAL CENTER)	Superior Court
AND SPCA, KATELYN PEPPER,)	The Hon. E. Scott Bradley
SANDRA GALLOWAY, DAVID)	C.A. No. S15C-12-025 ESB
HULSE, KEVIN USILTON, MARY)	
PALACIO, and SHERRI)	
WARBURTON,)	
)	
Defendants Below-Appellees.)	

**PLAINTIFF/BELOW APPELLANT JOHN SMITH'S
CORRECTED OPENING BRIEF**

JORDAN LAW, LLC

/s/ Brian T.N. Jordan
BRIAN T.N. JORDAN
DE Bar ID No.: 5501
704 N. King St., Suite 600
Wilmington, DE 19801
P: (302) 472-4900
F: (302) 472-4920
brianjordan@jordanlaw-llc.com

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NATURE OF PROCEEDINGS

John and Nancy Smith sued Defendants for false arrest/false imprisonment, malicious prosecution, intentional infliction of emotional distress, and for violations of their Constitutional rights under 42 *U.S.C.* § 1983 for damages arising from the way Defendants treated the Smiths and their family pet, Millie, after Millie and a neighbor's dog, Spike, got into a fight.¹

The individual Defendants are Animal Control Officers (ACO) working for Defendant Kent County Society for the Prevention of Cruelty to Animals (KCSPCA).² Defendants charged the Smiths with Maintaining a Dangerous Animal under 11 *Del. C.* § 1327.³ Nancy Smith was also charged with Owning a Dog While at large Bites a Person under 11 *Del. C.* § 908.⁴ Mr. Smith (Smith) was charged with Hindering Prosecution under 11 *Del. C.* § 1244.⁵ Mrs. Smith pleaded guilty, but the charges against Mr. Smith were dropped.

¹ A0014-A0031.

² A0014-A0031.

³ A0063-A0074.

⁴ A0070.

⁵ A0064.

Defendants moved to dismiss the complaint.⁶ The parties briefed the issues.⁷ The trial court granted the motion to dismiss Mrs. Smith's claims but denied the motion to dismiss Smith's claims.⁸

After discovery, Defendants moved for summary judgment.⁹ Smith answered.¹⁰ Defendants filed a reply.¹¹ The trial court asked the parties to supplement their briefs with answers to six questions the trial court had.¹² The trial court granted the motion for summary judgment.¹³ It adopted the findings of fact it made in its order on Defendants' motion to dismiss.¹⁴ The trial court found Defendant ACOs were authorized to swear out arrest and search warrants as part of their power to enforce animal welfare laws.¹⁵ This power included the authority to enforce laws that touch

⁶ A0032-A0038.

⁷ A0075-A0117.

⁸ Exhibit B.

⁹ A0118-A0153.

¹⁰ A0154-A0196.

¹¹ A0344-A0365.

¹² Exhibit C; Exhibit D; A0336-A0405.

¹³ Exhibit A.

¹⁴ *Id.*

¹⁵ *Id.*

on an investigation of the animal welfare laws such as hindering prosecution.¹⁶ Consequently, the trial court found Smith was not falsely arrested/false imprisonment because Defendant ACOs had the authority to arrest him and the magistrate-issued arrest warrant was a complete defense.¹⁷ Likewise, the trial court found no malicious prosecution because the facts showed Smith was “unwilling to cooperate with [Defendant ACOs’] investigation and was stymying their ability to enforce the animal welfare laws.”¹⁸ Finally, the trial court found Defendant ACOs were entitled to qualified immunity on Smith’s § 1983 claim because a reasonable ACO would have been unclear about her arrest powers in 2015.¹⁹ Defendant KCSPCA was entitled to qualified immunity because Smith could not identify any “policy, custom, or decision that led to the purported violation of his rights under the federal constitution.”²⁰

Smith appeals the trial court’s entry of summary judgment on his § 1983 claim, his false arrest/false imprisonment claim, and his malicious prosecution claim.²¹

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Smith is not appealing the trial court’s ruling on his intentional infliction of emotional distress claim.

SUMMARY OF ARGUMENT

1. The existence of probable cause and Defendant ACOs arrest authority are central to Smith's § 1983 claim, his false arrest/false imprisonment claim, and his malicious prosecution. The trial court erred when it entered summary judgment on Smith's § 1983 claim because a genuine dispute of material fact existed regarding the existence of probable cause to charge Smith with hindering prosecution. Smith provided enough evidence to rebut the presumption created by the magistrate-issued arrest warrant. The trial court further erred when it found Defendant ACOs were entitled to qualified immunity because the scope of their arrest power was unclear in 2015. Finally, the trial court erred when it said Smith did not provide proof of any policy that would make Defendant KCSPCA liable. Defendant KCSPCA is liable under § 1983 because its policy was to have no policy.

2. The trial court erred when it ruled Smith's arrest was lawful because Defendant ACOs had not graduated from a COPT-approved police academy. The trial court further erred when it ruled the magistrate-issued arrest warrant created a complete defense to the false arrest/false imprisonment claim. The arrest warrant created only a *prima facie* case or rebuttable presumption in favor of probable cause. It was not the incontrovertible decision the trial court said it was.

3. The trial court erred when it resolved a genuine dispute over Defendant

ACOs' motive that should have gone to a jury. Smith produced enough evidence to question if Defendant ACOs were careless or recklessly indifferent to Smith's constitutional rights.

STATEMENT OF FACTS

Smith described his ordeal neatly: “I was arrested. I’ve never even been pulled over for a speeding ticket. My dog broke loose. We settled this with the neighbors. And all of a sudden our property is being seized, we’re prevented from seeing our property, and my wife and I are being arrested, on Good Friday, no less. We’re strong Christians. We’re church-going people. Arresting us on Good Friday? How despicable.”²² At the time, Smith did not know he was not alone in being mistreated²³ or that Defendant KCSPA hired animal control officers with no law enforcement experience²⁴ and provided them with no training or policies on the use of force.²⁵

Mr. Smith’s ordeal began on March 16, 2015, after Millie slipped her leash. When he arrived home he saw a notice was left on his garage door.²⁶ He called the number and spoke to Defendant ACO Katelyn Pepper.²⁷ Pepper discussed quarantining Millie for rabies, but Smith advised he would not speak unless his

²² A0214.

²³ A0253-55.

²⁴ A0257-63.

²⁵ A0268-69.

²⁶ A0275-80.

²⁷ *Id.*

attorney was present.²⁸ Defendant Pepper did not ask to speak with Mrs. Smith and she did not speak to any other witnesses that day.²⁹ In fact, she never tried to speak to Mrs. Smith and she never spoke to any witnesses about what happened.³⁰ After her phone call with Smith, Defendant Pepper advised her boss, Defendant Lieutenant Mary Palacio that Smith wanted his attorney present for any discussions.³¹

On March 18, 2015, Lieutenant Palacio drove to Savannah Animal Hospital.³² She learned that Spike was not current on his rabies vaccine but that Millie was.³³ Despite Smith's request that his attorney be present, Defendant Palacio called Mr. Smith on March 18, 2015, and again on March 19, 2015, and again on March 20, 2015.³⁴ Defendant Palacio said she called Smith to discuss quarantining Millie for rabies, but she had known by March 18, 2015, that Millie was current on her vaccine.³⁵

²⁸ *Id.*

²⁹ A0269-270

³⁰ *Id.*

³¹ A0270.

³² A075-80.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Defendant Palacio returned to headquarters with documents from the Spike/Millie incident. She delivered the documents to Defendant ACO Captain Sherri Warburton, the head of the Animal Control Division at Defendant KCSPCA.³⁶ Defendant Warburton was responsible for training and hiring and determining which dogs qualified as potentially dangerous dogs.³⁷ At some point before March 20, 2015, Defendant Warburton decided Millie qualified as a potentially dangerous dog.³⁸ She ordered Defendant Palacio and Defendant ACO Lieutenant David Hulse to seize Millie from the Smiths' home.³⁹

Defendant Hulse was in charge of Kent County.⁴⁰ When he was ordered to seize Millie, he had no knowledge of the underlying reason for the seizure.⁴¹ Defendant Hulse was no stranger to seizing dogs.⁴² In 2009, Defendant Hulse arrived at a home to seize a dog without a warrant.⁴³ The pet-owner asserted his right to an

³⁶ A0290; A0295.

³⁷ A0288; A0291.

³⁸ A0294.

³⁹ A0296-7.

⁴⁰ A0305.

⁴¹ A0306.

⁴² A0253-55.

⁴³ *Id.*

attorney, but Defendant Hulse refused to respect that.⁴⁴ He used his truck to block the pet-owner's driveway.⁴⁵ Defendant Hulse's then-supervisor filed a hindering prosecution charge against the pet owner.⁴⁶

Before seizing Millie, Defendant Palacio scheduled an appointment for March 20, 2015, at 8:00 a.m. with Smith's attorney, John Brady, Esq., to review the rabies quarantine procedure.⁴⁷ Defendant Palacio did not tell Mr. Brady that she and Defendant Hulse were actually planning to seize Millie.⁴⁸ While traveling to the Smiths' home, Defendant Palacio spoke to Mrs. Smith on the phone to advise the pair would be late.⁴⁹ Mr. Brady then called Defendant Palacio to tell her he had to leave because of a court appointment.⁵⁰ At that point, Defendant Hulse took the phone and revealed to Mr. Brady that he and Defendant Palacio were actually planning to seize Millie when they arrived at the Smiths' home.⁵¹ Mr. Brady responded they could not

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ A0203; A0253-55.

⁴⁸ A0277.

⁴⁹ A0275-80.

⁵⁰ *Id.*

⁵¹ *Id.*

seize Millie without a warrant.⁵²

When Defendants Palacio and Hulse arrived at the Smiths' home, Smith refused to surrender Millie without a warrant.⁵³ Defendants Hulse and Palacio, Defendant ACO Sergeant Sandra Galloway, and an unknown Delaware State Trooper arrived a few hours later with a warrant.⁵⁴ The warrant had the wrong date on it and was also post-dated.⁵⁵ Although Smith could not confirm its authenticity, he still surrendered Millie.⁵⁶ While standing on the Smiths' front porch, Defendant Hulse told the Smiths he had "stuff on [them], they had other stuff."⁵⁷

After Defendants seized Millie, they took her to their kennel. On March 25, 2015, while Millie was confined at Defendants' kennel, Mr. Brady filed a Writ of Prohibition in Superior Court challenging Defendants' authority to seize and impound her.⁵⁸

On March 31, 2015, 15 days after the incident occurred, Defendant Pepper

⁵² *Id.*; A0204.

⁵³ A0275-80.

⁵⁴ *Id.*

⁵⁵ A0309-14.

⁵⁶ A0275-80.

⁵⁷ A0205-6.

⁵⁸ A0054-A0061

traveled to Kent County to prepare an arrest warrant for hindering prosecution against Smith.⁵⁹ Defendant Pepper had never been trained to prepare an arrest warrant.⁶⁰ Before Defendant KCSPCA hired her, Defendant Pepper had no law enforcement experience and she never received any training other than a 90 day probationary period.⁶¹ In fact, Defendant KCSPCA knew Defendant Pepper had no experience because it wrote on her resume “does not know laws” and “no on courts.”⁶² She thought it was unusual that she was writing the arrest warrant instead of one of the more experienced officers.⁶³ Defendant Pepper also raised concerns about her lack of knowledge and whether they were doing things correctly.⁶⁴

The arrest warrant claims that “on or about the 16th day of MARCH, 2015,” Smith “did hinder prosecution by delaying the investigator to question his wife . . . about the circumstances of their K-9, MILLIE , . . . involved in running loose, biting a person, and attacking another K-9.”⁶⁵ Despite the charge, the affidavit of probable

⁵⁹ A0271.

⁶⁰ A0268.

⁶¹ A0268-69; A0292-3; A0257-63.

⁶² A0263.

⁶³ A0272.

⁶⁴ *Id.*

⁶⁵ *Id.*

cause acknowledges that Smith requested an attorney and it never states Smith prevented Defendants from talking to Mrs. Smith.⁶⁶ Ultimately, the Department of Justice dropped the charges against Smith.

⁶⁶ *Id.*

ARGUMENT

I. DEFENDANTS VIOLATED SMITH'S FOURTH AMENDMENT RIGHTS BECAUSE THEY HAD NO PROBABLE CAUSE TO ARREST HIM FOR HINDERING PROSECUTION.

A. QUESTIONS PRESENTED

Did the trial court err when it found probable cause existed to arrest Smith for hindering prosecution and the Defendants were entitled to qualified immunity because the laws of arrest were unclear in 2015?

The probable cause issue and qualified immunity issues were preserved in Plaintiff's Answering Brief at A0178-A0183, A0192-A0193, A0195-6, and in its Supplemental Letter at A0398-400.

Qualified immunity for Defendant KCSPCA on grounds that no policy was presented was not preserved because Defendant KCSPCA did not present it in its Opening Brief or its Supplemental Letter to the trial court.

B. SCOPE OF REVIEW

This Court reviews a Superior Court's grant of summary judgment *de novo*.⁶⁷ This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitle the movant to judgment as a matter of law."⁶⁸

⁶⁷ *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 632 (Del. 2013).

⁶⁸ *Id.* (citations omitted).

C. MERITS OF ARGUMENT

Defendants violated Smith's civil rights because they had no probable cause to arrest him for hindering prosecution. A 42 U.S.C. § 1983 claim does not create a substantive right but rather "imposes civil liability upon any person who, acting under color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or the laws of the United States." That means Smith must 1) identify a federal right and 2) show Defendants were acting under color of state law. Smith also has to show Defendants are not entitled to qualified immunity because they violated a clearly established right. A clearly established right is one that is "clear to a reasonable official that his conduct was unlawful in the situation he confronted." Here, the trial court erred when it entered summary judgment after concluding Defendant ACOs had probable cause to arrest Smith for hindering prosecution.

1. **The Fourth Amendment Protects a Person's Right to be Free Unlawful Arrests.**

Smith's arrest for hindering prosecution violated the Fourth Amendment's guarantee to be free of unreasonable seizures. The Fourth Amendment secures a person's right to be free from unreasonable seizures, which means a seizure requires a warrant or probable cause. Probable cause is a logical belief supported by facts and

circumstances, that a crime has been, is being, or will be committed.⁶⁹ It is more than a hunch and more than reasonable suspicion.⁷⁰ In a civil case, the existence of probable cause is a mixed question of fact and law.⁷¹ A magistrate-issued arrest warrant creates a *prima facie* case of probable cause; it does not create an incontrovertible ruling.⁷² The burden then shifts to the plaintiff to produce sufficient facts to rebut the presumption of probable cause.⁷³ If the plaintiff can rebut the presumption then a jury should resolve the factual dispute, but if the plaintiff cannot summary judgment is inappropriate.⁷⁴

It is undisputed Smith was arrested for hindering prosecution under 11 *Del. C.* § 1244. Defendant Pepper charged Mr. Smith with hindering prosecution because he, “on or about the 16th day of MARCH, 2015, . . . did hinder prosecution by delaying the investigator to question his wife . . . about the circumstances of their K-9 . . .

⁶⁹ See e.g. *Harris v. State*, 806 A.2d 119, 130 (Del. 2002).

⁷⁰ *Id.*

⁷¹ See *Stidham v. Diamond State Brewery, Inc.*, 21 A.2d 283, 286 (May 27, 1941); *Lengle v. Dukes*, 1982 Del. Super. LEXIS 757 (Del. Super. Ct. June 9, 1982); *Boulden v. Turner*, 2007 Del. Super. LEXIS 529 (Del. Super. Ct. April 12, 2007).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

involved in running loose, biting a person, and attacking another K-9.”⁷⁵ At the time of his arrest, Defendants did not identify which subsection of § 1244 Smith violated. Later, the trial court asked the parties to provide a supplemental brief identifying which facts in the affidavit established probable cause for the charge of hindering prosecution, Defendants identified subsection (a)(4) as the charge.⁷⁶

2. There Was No Probable Cause to Arrest Smith for Hindering Prosecution.

The trial court adopted Defendants’ position that “Plaintiff consistently used his desire to have his attorney present to avoid any contact with the ACOs and obstruct the course of their investigation. While Plaintiff may have had the right to have an attorney present, a citizen cannot obstruct an investigation by simply invoking his

⁷⁵ *Id.*

⁷⁶ Section 1244(a)(4) provides:

(a) A person is guilty of hindering prosecution when, with intent to prevent, hinder or delay the discovery or apprehension of, or the lodging of a criminal charge against, a person whom the person accused of hindering prosecution knows has committed acts constituting a crime, or is being sought by law-enforcement officers for the commission of a crime, the person accused of hindering prosecution:

...

- (4) Prevents or obstructs, by means of force, intimidation or deception, anyone from performing an act which might aid in the discovery or apprehension of the person or in the lodging of a criminal charge against the person[.]

desire for counsel.”⁷⁷ The trial court said probable cause existed because Smith “affirmed the factual substance of the affidavit: he was suspicious of the investigation and wary of cooperating with the ACOs.”⁷⁸ It later characterized Smith as “unwilling to cooperate with [Defendants’] investigation and was stymying their ability to enforce the animal welfare laws – *i.e.*, he was hindering prosecution.”⁷⁹

The trial court’s conclusion probable cause existed is not supported by the record or the law. The trial court was correct that Smith affirmed the “factual substance of the affidavit” but the problem is the affidavit contains no facts showing Smith hindered prosecution. It shows the following:

- March 16, 2015: Smith called Defendant Pepper, listened to her explain the rabies quarantine, got angry, and said he wanted to speak to his lawyer;
- March 18, 2015: Defendant Palacio called Smith, who again asserted his right to counsel and provided Mr. Brady’s contact information; Defendant Palacio called Mr. Brady and scheduled a meeting at the Smith home for March 20, 2015;
- March 19, 2015: Defendant Palacio *again* called Smith to discuss the case

⁷⁷ A0373-A0374.

⁷⁸ Exhibit A.

⁷⁹ *Id.*

and he again asserted his right to counsel;

- March 19, 2015: Defendants determined they would seize Millie as a potentially dangerous dog;
- March 20, 2015: Defendant Palacio called the Smith home and spoke to Nancy Smith. Defendant Palacio advised she and Defendant Hulse were *en route* but she did not tell Mrs. Smith they were going to seize Millie. Defendant Hulse then spoke to Mr. Brady to advise they were coming to seize Millie, to which Mr. Brady advised they would need a warrant. When Defendants Palacio and Hulse arrived without a warrant, Mr. and Mrs. Smith refused to turn over Millie. Defendant Galloway obtained a search warrant and the Smiths then turned over Millie; and
- The affidavit closes by saying Defendants had still been unable to obtain a statement from Mrs. Smith.⁸⁰

Standing alone, the affidavit lacks any suggestion Smith hindered prosecution unless refusing to talk without counsel present to the people investigating you is a crime and not a Constitutional right. As to Mrs. Smith and 11 *Del. C.* § 1244(a)(4), the affidavit contains no claims that Smith prevented or obstructed any of Defendant ACOs from speaking with Mrs. Smith. The affidavit itself acknowledges Defendants spoke to

⁸⁰ A0063-A0068.

Mrs. Smith and that she greeted them when they arrived at her home. The affidavit alone raises questions about where, exactly, there was any hint that Smith was hindering prosecution.

The record developed during discovery only reinforces the genuine factual dispute over probable cause. It was revealed that Mrs. Smith called Defendants after they seized Millie to ask about her condition.⁸¹ After Millie was seized, Mr. Brady filed a writ challenging Defendants' authority to seize Millie.⁸² It was not until March 31, 2015, a few days after Smith challenged Defendants' powers and eleven days after Defendants determined Millie was a potentially dangerous dog, that they filed charges against the Smiths. Defendants knew Defendant Pepper had no legal experience and had no received no training on the laws of arrest, but they put the responsibility for filing the hindering prosecution charge on her.⁸³ The hindering prosecution charge was filed at the direction of a lieutenant, Defendant Hulse, who was previously involved in a hindering prosecution charge against a person who asserted his right to counsel.⁸⁴ Defendant Pepper also had her own concerns about why she, a rookie

⁸¹ A0278-A0279.

⁸² A0054-A0061.

⁸³ A0271-2.

⁸⁴ A0253-A0255.

officer with no legal training and only six months experience, was being told to file the charges on a case she had no involvement in other than a brief phone call 15 days earlier. Ultimately, Mr. and Mrs. Smith turned themselves in to the police.

Incidentally, Smith's suspicions and wariness of Defendant ACOs were borne out. They continued to call him despite knowing he asked to have counsel present, which Defendant ACOs knew to be true. Although they billed the March 20, 2015 meeting as one to discuss the rabies and quarantine procedure, Defendants had determined they would seize Millie but did not tell the Smiths until Defendant ACOs were *en route* to the Smith home. Even if Smith's suspicions were unfounded, that alone is not probable cause that he hindered prosecution. What Defendants and the trial court overlooked is no one can be compelled to help the State investigate that person, or, more importantly, a person cannot be charged with hindering prosecution for asserting the very rights designed to protect someone from the State's police powers. Therefore, the Court should reverse the trial court's entry of summary judgment on Smith's § 1983 claim.

3. Defendant ACOs Are Not Entitled to Qualified Immunity Because the Right to Be Free From Unreasonable Seizures is a Clearly Established Right.

There is no question the Fourth Amendment's protection against unreasonable seizures is a clearly established right. A clearly established right is one that is

“sufficiently clear that every reasonable official would have understood that what he is doing violates that right. The right implicated in this case is the right to be free from arrest without probable cause, which, despite its breadth, is a bedrock constitutional principle and a clearly established right.”⁸⁵

The trial court acknowledged that if Defendant ACOs “did not have actual authority to swear out . . . arrest warrants for violations of Delaware’s animal welfare laws, Smith is able to show that Defendants’ conduct violated his constitutional right to be free from unlawful search and seizure.”⁸⁶ The trial court then said, however, this constitutional right was not clearly established in 2015 because the laws on Defendant ACOs arrest authority were unclear. Therefore, a reasonable ACO would not know “his conduct was unlawful in seeking to obtain . . . the arrest warrant for Smith for violations of the animal welfare laws and the related charge of hindering prosecution.”⁸⁷ The trial court’s decision is wrong 1) because it uses the wrong standard for Defendant ACOs or 2) because it does not address Smith’s second claim that the arrest lacked probable cause.

The first problem with qualified immunity involves the standard used by the

⁸⁵ *Mazuka v. Rice Twp. Police Dep’t*, 655 Fed. Appx. 892, 894 (3d Cir. 2016) (*citations omitted*).

⁸⁶ Exhibit A.

⁸⁷ *Id.*

trial court. When a police officer is “charged under § 1983 for false arrest[,] [he] is not entitled to qualified immunity if ‘a reasonably well-trained officer in [defendant’s] position would have known that [the] affidavit [in support of the arrest warrant] failed to establish probable cause and that [the officer] should not have applied for the warrant.’”⁸⁸ In 2015, a reasonable ACO certified to use the arrest authority would have attended a COPT approved academy, and pass a “Basic Curriculum” that requires two hours of instruction on the Constitution and Bill of Rights, twenty hours of instruction on the Delaware Criminal Code, and at least forty hours of instruction on the Laws of Arrest, Laws of Evidence, and Search and Seizure. None of Defendant ACOs in this case attended any academy or otherwise received *any* instruction on the laws of arrest. This distinction is important because a reasonable ACO would have been instructed on the law and known what power she had.

The second problem with the trial court’s decision is it fails to address whether the Defendant ACOs would be entitled to qualified immunity if they arrested Smith without probable cause. In cases involving probable cause, “[d]efendants will not be

⁸⁸ *Gleeson v. Robson*, 2005 U.S. Dist. LEXIS 43310 *54 (M.D. PA May 6, 2005) *citing* *Malley v. Briggs*, 475 U.S. 335, 345 (1986); *see also* *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d. Cir. 2004) (“*For a constitutional right to be clearly established, its contours ‘must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.’*”) *citing* *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.”⁸⁹ In a similar § 1983 case, a police officer obtained an arrest warrant charging the respondents with drug possession based on ambiguous comments overheard on an intercepted telephone call.⁹⁰ The Court first refused the petitioner police officer’s effort to convert qualified immunity into absolute immunity because a magistrate has issued the arrest warrant.⁹¹ The Court found no such immunity existed at common law to protect someone “who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.”⁹² Neither were there any policy reasons to create absolute immunity, because, “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁹³

⁸⁹ *Malley*, 475 U.S. at 341.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 340.

⁹³ *Id.* at 341.

This is one of those cases where “plainly incompetent” defendants are not entitled to qualified immunity because no reasonable ACO or law enforcement officer would have charged Smith with hindering prosecution without any probable cause. As mentioned, Defendant Pepper had no legal experience before she was hired and Defendant KCSPCA knew that because it wrote that on her resume. Despite that, Defendant KCSPCA provided her no real training on the laws of arrest and she had never issued a hindering prosecution ticket before. She followed Defendant Hulse’s directions but he had not training either.

4. Defendant KCSPCA Is Not Entitled to Qualified Immunity.

As mentioned in the Question Presented, this issue was not raised during the summary judgment stage, but the trial court nonetheless found Defendant KCSPCA could not be liable under § 1983 because Smith did not show a policy in place connecting Defendant ACOs’ conduct with a Defendant KCSPCA policy. Generally, the Supreme Court of the United States has held that practices, policies and regulations of a law enforcement department may not be relied upon as evidence of whether a seizure was objectively reasonable under the Fourth Amendment.⁹⁴

As was discussed during the summary judgments and in this brief, it is undisputed that the Defendant ACOs did not receive any training from any entity

⁹⁴ See *Wren v. United States*, 517 U.S. 806, 815-16 (1996).

regarding its arrest powers, the laws of arrest, or a suspect's Fourth Amendment rights. Although not presented to the trial court because it had not been raised, Defendant KCSPCA did attest that it had no policy in place on how Defendant ACOs determined which charges to press or how to enforce the law.⁹⁵ In other words, Defendant ACOs acted in accordance with Defendant KCSPCA's lack of a policy. The lack of any policy on these matters is the reason Defendant ACOs made the unlawful arrest. In other words, Defendant KCSPCA's lack of a policy was its policy.

⁹⁵ A0406-20

II. THE TRIAL COURT ERRED WHEN IT ENTERED SUMMARY JUDGMENT ON SMITH’S FALSE ARREST/FALSE IMPRISONMENT CLAIM BECAUSE DEFENDANTS HAD NO ARREST POWER AND NO PROBABLE CAUSE TO CHARGE SMITH WITH HINDERING PROSECUTION.

A. QUESTIONS PRESENTED

Did the trial court err when it ruled Defendant ACOs had arrest authority despite not graduating from a COPT-approved police academy and when it found the arrest warrant was a complete defense to the false arrest/false imprisonment claim?

This issue was preserved in Smith’s Answering Brief at A0172-7, A0189-0192, A0192-3, and in Smith’s Supplemental Letter at A0391-5 and A0398-400.

B. SCOPE OF REVIEW

This Court reviews a Superior Court’s grant of summary judgment *de novo*.⁹⁶ This review extends to both “the facts and the law in order to determine whether or not the undisputed facts entitle the movant to judgment as a matter of law.”⁹⁷

C. MERITS OF ARGUMENT

Defendant ACOs arrest of Smith was unlawful because they lacked the authority to arrest him and, as explained in Section I, they lacked probable cause to charge him with hindering prosecution. False arrest and false imprisonment are functionally the

⁹⁶ *Davis*, 80 A.3d at 632.

⁹⁷ *Id.* (citations omitted).

same tort that require the plaintiff to show (a) a restraint that is both (b) unlawful and (c) against his will. The trial court first concluded an ACO, as a general matter, has the ability to enforce the laws, but the trial court did not address the undisputed fact none of the Defendant ACOs had graduated from a COPT-approved school and therefore could not lawfully arrest anyone. The trial court also found “finding of probable cause is a complete defense to state law tort claims for false imprisonment.” The Court should reverse the entry of summary judgment on Smith’s false arrest/false imprisonment claim because Defendant ACOs’ arrest was unlawful and an arrest warrant does not provide a complete defense to the claim.

1. The Hindering Prosecution Arrest Was Unlawful Because Defendant ACOs Were Not Certified to Arrest Anyone.

Defendant ACOs were not authorized to exercise police powers when they arrested Smith for hindering prosecution. The Court has already recognized “the General Assembly enacted 11 Del. C. ch. 84 establishing a comprehensive regulatory scheme to train police officers[,]” which “precluded anyone who did not meet the training requirements from enforcing the laws of the State.”⁹⁸ The General Assembly granted the Council on Police Training (COPT) exclusive authority to set the minimum qualifications a person must hold before he or she is certified to arrest and

⁹⁸ See *Christopher v. Sussex County*, 77 A.3d 951, 962 (Del. 2013).

enforce the laws of Delaware.⁹⁹ At a minimum, a person must attend a COPT approved academy, and pass a “Basic Curriculum” created by the COPT that requires two hours of instruction on the Constitution and Bill of Rights,¹⁰⁰ twenty hours of instruction on the Delaware Criminal Code,¹⁰¹ and at least forty hours of instruction on the Laws of Arrest, Laws of Evidence, and Search and Seizure.¹⁰² Any “[p]olice officers of the State or any county or municipality or the University of Delaware or Delaware State University which do not meet the requirements of this chapter and the criteria as established by the Council shall not have the authority to enforce the laws of the State.”¹⁰³ When these laws are read in conjunction, they show the General Assembly identified a variety of professions as having police powers, but made clear that only a graduate from a COPT-certified police academy could enforce the law.

None of the Defendant ACOs are police officers or law enforcement as defined in the Code. Even if the trial court is correct that an ACO, in general, has the power to swear out warrants, none of these specific Defendant ACOs could lawfully exercise

⁹⁹ 11 *Del. C.* § 84 *et seq.*

¹⁰⁰ C1-800-801 §16.5.

¹⁰¹ C1-800-801 §16.9.

¹⁰² C1-800-801 §16.23.

¹⁰³ 11 *Del. C.* § 8410(a).

that power. It is undisputed none of Defendant ACOs were COPT-certified as required by Delaware law or received any instruction from any authority on the Constitution, the Bill of Rights, or the laws of arrest, evidence, or search and seizure. It is undisputed that when Defendant Pepper was interviewed, she had no legal experience, and Defendants took no steps to fill that gap. Neither can these Defendant ACOs rely on the power granted lay persons to swear out an arrest warrant. The hindering prosecution arises from an investigation led by Defendant KCSPCA, it was led by Defendant ACOs, the affiant was “OFC PEPPER” and OFC PEPPER (00026) OF DELAWARE ANIMAL CARE & CONTROL,” and the affidavit was signed by “Ofc. Katelyn M. Pepper 26.”¹⁰⁴ It may be an ACO’s job is “the equivalent of a police officer’s job with respect to the investigation of and enforcement of the traffic and criminal codes[,]” but until a person graduates from a COPT-approved academy she is not authorized to enforce any laws.

2. The Arrest Warrant Does Not Create A Complete Defense to the False Arrest/False Imprisonment Claim.

As described above, a magistrate-issued arrest warrant does not create an absolute defense to Smith’s false arrest/false imprisonment claim. The trial court cited a federal case, *Tuppeny v. City of Wilmington*, 2015 U.S. Dist. LEXIS 36539 (Dist.

¹⁰⁴ A0063-A0068.

Of Del. March 24, 2015), which cited *Tyburnski v. Groome*, 1980 Del. Super. LEXIS 146 (Del. Super. Ct. Jan. 28, 1980), for the principle that a finding of probable cause creates a complete defense. *Tuppeny*, however, also cited *Groman v. Township of Manalapan*, a case from the Third Circuit Court of Appeals that reversed an entry of summary judgment on a false arrest claim against a police officer.¹⁰⁵ Analyzing the claim through the lenses of a § 1983 claim, the *Groman* court first acknowledged “where the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.”¹⁰⁶ That claim “is grounded in the Fourth Amendment's guarantee against unreasonable seizures.”¹⁰⁷ Like *Stidham*,¹⁰⁸ *Boulden*¹⁰⁹ and *Lengle*¹¹⁰, *Groman* then said the existence or not of probable cause was an issue the “plaintiffs would have to demonstrate at trial that the police lacked probable cause to arrest Groman.”¹¹¹ In other words, whether probable cause exists is a question of fact for the jury.

¹⁰⁵ *Groman v. Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995)

¹⁰⁶ *Id.* at 636 (*citation omitted*).

¹⁰⁷ *Id.* (*citations omitted*).

¹⁰⁸ 21 A.2d 283.

¹⁰⁹ 2007 Del. Super. LEXIS 529.

¹¹⁰ 1982 Del. Super. LEXIS 757.

¹¹¹ 47 F.3d at 634.

Here, there was a genuine dispute of material fact over whether Mr. Smith was “stymying [Defendants’] ability to enforce the animal welfare laws”¹¹² or exercising his constitutional rights under the Fourth Amendment and Sixth Amendment. The first time Plaintiff spoke with Defendant Pepper, he requested his attorney be present. Despite knowing of that request, Defendant Palacio continued to contact Plaintiff. Plaintiff continued to assert his right to have counsel present. Neither did he prevent Defendant ACOs from speaking to Mrs. Smith. On March 20, 2015, Defendant Hulse called the Smith home and spoke directly to Mrs. Smith. At that point, Defendants knew their investigation had morphed from a rabies quarantine to a potentially dangerous dog case but they did not inform Plaintiff or his attorney until they were *en route* to seize Millie. Even then, Plaintiff only refused to release Millie until Defendants obtained a warrant. Once presented with the warrant, Plaintiff turned over Millie. Finally, Mrs. Smith called Defendant KCSPCA to ask about Millie, but Defendant KCSPCA’s representative did not question Mrs. Smith about the March 16, 2015 incident.

¹¹² Exhibit A.

III. A JURY SHOULD HAVE DECIDED WHETHER DEFENDANT ACOS WERE CARELESS OR CONSCIOUSLY INDIFFERENT TO SMITH'S CONSTITUTIONAL RIGHTS WHEN THEY CHARGED HIM WITH HINDERING PROSECUTION.

A. QUESTIONS PRESENTED

Did the trial court err when it resolved a factual dispute over whether probable cause existed and whether Defendant ACOs were careless or recklessly indifferent to Smith's constitutional rights?

This issue was preserved in Smith's Answering Brief at A0192-5.

B. SCOPE OF REVIEW

This Court reviews a Superior Court's grant of summary judgment *de novo*.¹¹³ This review extends to both "the facts and the law in order to determine whether or not the undisputed facts entitle the movant to judgment as a matter of law."¹¹⁴

C. MERITS OF ARGUMENT

The trial court erred when it resolved a genuine factual dispute regarding Defendant ACOs' motive for filing a hindering prosecution charge and the wanton disregard Defendant ACOs showed for Smith's constitutional rights. A malicious prosecution claim requires the plaintiff to show 1) the defendant filed 2) a prior suit

¹¹³ *Davis*, 80 A.3d at 632.

¹¹⁴ *Id.* (citations omitted).

3) with malice but 4) without probable cause, 5) that was resolved in the plaintiff's favor, but 6) that still caused damages.¹¹⁵ The only elements at issue are whether Defendant ACOs acted with malice but without probable cause. The lack of probable cause has been detailed above. Here, there was enough evidence for a jury to determine if Defendant ACOs 1) acted with an improper motive or not or 2) whether Defendant ACOs were simply careless or acted with wanton disregard for Smith's constitutional rights.

Malice is the difference between carelessness and reckless indifference. For an act to have been done in such a way as to form the basis of a suit for malicious prosecution the act must have been done with a wrongful or improper motive or with a wanton disregard of the rights of that person against whom the act is directed.¹¹⁶ In the context of a punitive damages claim, the Court has defined wilful or wanton disregard as conduct that "reflect[s] a 'conscious indifference' or 'I don't care' attitude."¹¹⁷ The Court has also described it, recklessness, which is "an awareness, either actual or constructive, of one's conduct and a realization of its probable

¹¹⁵ 21 A.2d at 284.

¹¹⁶ *Id.* at 285.

¹¹⁷ *Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891 (Del 1983).

consequences[.]”¹¹⁸

The trial court should have allowed a jury to determine if Defendant ACOs were careless or recklessly indifferent. Questions regarding a defendant’s motive or state of mind are usually reserved for the jury unless “the facts permit reasonable persons to draw but one inference.”¹¹⁹ For example, in *Porter v. Turner*, the Court affirmed the trial court’s decision denying a directed verdict because the plaintiff was able to show the defendant faced a red light for eight seconds but still accelerated his tractor trailer “at a controlled intersection where other traffic was present.”¹²⁰ That evidence was enough to raise a question regarding the defendant’s conduct.¹²¹ In contrast, when the plaintiff could only show the defendant “simply failed to notice the red light as he approached it[.]” the Court agreed with the trial court’s ruling that the plaintiff had shown only negligence.¹²²

The evidence here gives rise to a genuine factual dispute over Defendant ACOs’ state of mind that a jury should have resolved. The record shows the decision to

¹¹⁸ *Jardel Co. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).

¹¹⁹ *Id.* at 527 citing *Eustice v. Rupert*, 460 A.2D 507, 509 (Del. 1983).

¹²⁰ 954 A.2d 308, 313 (Del. 2008).

¹²¹ *Id.*

¹²² *Estate of Rae v. Murphy*, 956 A.2d 1266, 1270 (Del. 2008).

charge Smith with hindering prosecution was filed by Defendant Pepper who had a single phone call with Smith that he initiated 15 days earlier, and it was filed at the direction of her supervisor Defendant Hulse who had previously filed a hindering prosecution charge after the person asserted his Sixth Amendment right to counsel. Defendant Pepper also had her own concerns about why she, a rookie officer with no legal training and only six months experience, was being told to file the charges on a case she had no involvement in other than a brief phone call. After that phone call, it is undisputed Defendant Palacio spoke with Mrs. Smith and that Mrs. Smith called to speak to Defendant KCSPCA's representatives, which casts doubt on Defendants claim Smith prevented them from speaking to his wife. A jury should resolve whether that evidence shows wanton disregard for Smith's constitutional rights. Therefore, the Court should reverse the trial court's entry of judgment on Smith's malicious prosecution claim.

CONCLUSION

For the foregoing reasons, Smith respectfully requests that the Court reverse the Superior Court's decision entering summary judgment on his 42 U.S.C. § 1983 claim, his false arrest/false imprisonment claim, and his malicious prosecution claim and remand the matter for trial.

JORDAN LAW, LLC

/s/ **Brian T.N. Jordan**

BRIAN T.N. JORDAN

DE Bar ID No.: 5501

704 N. King St., Suite 600

Wilmington, DE 19801

P: (302) 472-4900

F: (302) 472-4920

brianjordan@jordanlaw-llc.com

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