

1 WASHOE COUNTY
DISTRICT ATTORNEY'S OFFICE

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6 ATTORNEY FOR RICHARD GAMMICK

7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**

9 * * *

10 JUDY ANN MIKOVITS,)

11 Plaintiff,)

12 vs.)

13 ADAM GARCIA, JAMIE MCGUIRE,)
14 RICHARD GAMMICK, GEOFF)
DEAN, THREE UNIDENTIFIED)
15 VENTURA COUNTY DEPUTY)
SHERIFFS, F. HARVEY)
16 WHITTEMORE, ANNETTE F.)
WHITTEMORE, CARLIE WEST)
17 KINNE, WHITTEMORE-PETERSON)
INSTITUTE, a Nevada Corporation,)
18 UNEVX INC., a Nevada Corporation,)
MICHAEL HILLERBY, KENNETH)
19 HUNTER, GREG PARI, and)
VINCENT LOMBARDI,)

20 Defendants.)

Case No. 2:14-CV-08909-SVW-PLA

**DEFENDANT GAMMICK'S
REPLY TO MOTION TO
DISMISS AMENDED
COMPLAINT**

21 Defendant Richard Gammick, District Attorney of Washoe County, Reno,
22 Nevada, by and through counsel Mary Kandaras, Deputy District Attorney, replies
23 to Plaintiff's Opposition (#128)¹ to his Motion to Dismiss the Amended Complaint
24 (#109) based upon its failure to state a claim upon which relief can be granted. In
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¹ Refers to the Court's docket numbers.

1 the alternative, defendant District Attorney Gammick seeks transfer of venue to the
2 District of Nevada because there is no personal jurisdiction over him.

3 This reply is based on the following Memorandum of Points and Authorities
4 and all pleadings and papers on file herein.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. CASE BACKGROUND**

7 Plaintiff Judy Anne Mikovits, (“plaintiff”), *pro se*, brings this action
8 pursuant to 42 U.S.C. §1983.

9 Plaintiff’s allegations arise from her termination as a researcher with the
10 Whittemore-Peterson Institute (WPI), located in Reno, Nevada, and subsequent
11 arrest (92 ¶54, ¶74). Plaintiff alleged that she was falsely accused of stealing
12 documents from WPI (92 ¶58). The only specific allegations against Gammick
13 are that WPI personnel “brought their political influence to the District Attorney
14 Richard Gammick, who allowed the charade to be given face value with no due
15 diligence to ascertain the veracity of the information. Gammick allowed Garcia
16 and Maguire to travel to California and advance a false case that would never have
17 been allowed had Gammick looked into the full circumstances prior to complying
18 with the wishes of Garcia and Maguire...” (92 ¶59). Plaintiff was arrested on
19 November 18, 2011 and detained until a hearing on November 22, 2011 (92 ¶103,
20 ¶106, ¶107).

21 The remaining allegations against Gammick are that his actions were in
22 furtherance a conspiracy (92 ¶135). It is alleged that he “controlled” activities of
23 law enforcement officers (92 ¶138, 139, 141, 144, 147, 149, 151, 153, 155).
24 Gammick allegedly “caused” Plaintiff to be arrested without a warrant (92 ¶157).

25 Gammick filed a Motion to Dismiss the Amended Complaint (#109).
26 Gammick contended that the complaint failed to state a claim. Gammick also urged

1 the application of the statute of limitations and doctrine of prosecutorial immunity
2 as a bar the Amended Complaint (Id.). In support of his position, Gammick
3 provided a copy of the criminal complaint dated November 17, 2011 (#109-1),
4 affidavit in support of arrest dated November 17, 2011 (#109-2) and dismissal of
5 action dated June 11, 2012 (#109-3). In the alternative, Gammick argued that the
6 venue be changed to the District of Nevada.

7 Plaintiff opposed the motion (#128). In support of the claim that Gammick
8 ‘participated in the conspiracy,’ plaintiff offered the new allegation that a witness
9 “was subjected to such a high level of harassment by Gammick, that he (the
10 witness) fled the country! The D.A. forced him to have periodic telephone contact
11 and threatened that if he fell out of touch, he would be arrested and jailed” (#128 at
12 16). In response to the statute of limitations argument, plaintiff claimed that her
13 injury constitutes a “continuing violation” or “continuous accrual” because of
14 alleged damage to her reputation and the fact that she does not have possession of
15 the laboratory notebooks, the ownership of which is disputed (#72 at 11 and 12).
16 Plaintiff contended that prosecutorial immunity does not apply because of
17 Gammick’s “willful scheme to deprive a citizen of their civil rights” (#128 at 16).

18 Throughout the plaintiff’s Opposition, she admitted that the “Whittemore
19 Consortium” lied to law enforcement (#128 at 11, 12, 16). She also admitted that
20 she was accused of stealing nineteen laboratory books and other property (#128 at
21 6 and 12). Plaintiff admitted that a court ordered her to return the laboratory books
22 in a civil case (#128 at 8). She also conceded that a bankruptcy court recognized a
23 claim filed by the Whittemores (#128 at 9).

24 Gammick reiterates the arguments presented in the motion to dismiss. Even
25 if her allegations are accepted as true, plaintiff has failed to present a colorable

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1 claim. She has not overcome the statute of limitations and prosecutorial immunity
2 defenses.

3 **II. COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE**

4 **A CLAIM**

5 Plaintiff's amended complaint fails to provide sufficient facts under a
6 cognizable legal theory. The allegations against Gammick are conclusory and
7 speculative. Accepted as true, these allegations do not state a claim against a
8 prosecutor.

9 **III. APPLICABLE DEFENSES PRECLUDE CLAIMS AGAINST**

10 **DISTRICT ATTORNEY GAMMICK**

11 **A. Statute of Limitations**

12 The Court may take judicial notice that the Washoe County District
13 Attorney's office dismissed the criminal complaint on June 11, 2012 (#109-3).
14 This shows that plaintiff's case is barred by the statute of limitations. Defendant
15 Gammick incorporates the arguments presented by defendant Geoff Dean in his
16 reply papers (#78).

17 There is no equitable doctrine that tolls the statute of limitations as to the
18 alleged actions of Gammick. "The continuing violation doctrine aggregates a series
19 of wrongs or injuries for purposes of the statute of limitations, treating the
20 limitations period as accruing for all of them upon commission or sufferance of the
21 last of them. Finally, under the theory of continuous accrual, a series of wrongs or
22 injuries may be viewed as each triggering its own limitations period, such that a
23 suit for relief may be partially time-barred as to older events but timely as to those
24 within the applicable limitations period." *Aryeh v. Canon Business Solutions, Inc.*,
25 55 Cal.4th 1185, 1192 (2013).

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1 To justify application of a “continuing violation” theory, the complaint must
2 identify a series of discrete, independently actionable alleged wrongs or a wrongful
3 course of conduct became apparent only through the accumulation of a series of
4 harms. *Aryeh* at 1198. This is not alleged with respect to Gammick, whose last
5 alleged contact with the plaintiff was on June 11, 2012.

6 To justify application of a “continuing accrual” theory, the complaint must
7 allege that there is a continuing or recurring obligation. The theory of continuous
8 accrual supports recovery only for damages arising from those breaches falling
9 within the limitations period. *Aryeh* at 1199. In this case, the complaint is silent on
10 any actions of Gammick after June 11, 2012.

11 Plaintiff claimed that the defendants began a chain of events that started in
12 September of 2011 and has continued without differentiation or separation to the
13 present day. Plaintiff alleged that she feels the “effects” of defendants’ conduct
14 even today because her name is not cleared and the defendants have her notebooks.
15 However, that is not the standard by which accrual is judged. The alleged conduct
16 of Gammick ended with the dismissal of her criminal complaint on June 11, 2012.
17 At that time plaintiff had knowledge of “misuse of legal process” as to Gammick
18 and the action had accrued. Plaintiff provided no legal basis as to why the settled
19 common law rules of accrual do not apply to her case.

20 **B. Prosecutorial Immunity**

21 The actions attributed to Gammick fall squarely within the prosecutorial
22 function and are intimately related to the judicial process. *See Imbler v. Pachtman*,
23 424 U.S. 409 (1976). Plaintiff alleged that Gammick “harassed witnesses,
24 participated in a fraudulent enterprise and caused an innocent person to be
25 incarcerated” (#128 at 16). However, this allegation does not deprive Gammick of
26 the application of prosecutorial immunity. *See Burns v. Reed*, 500 U.S. 478

1 (1991)(prosecutor’s actions in appearing before a judge and presenting evidence in
2 support of a motion for a search warrant clearly involved the prosecutor’s role as
3 advocate for the State, rather than his role as administrator or investigative officer).

4 In *Imbler v. Pachtman*, the Supreme Court established the functional test to
5 determine whether absolute or qualified immunity should apply to a prosecutor.
6 *Id.* at 430. If a prosecutor is acting in his role as an advocate of the State, he
7 receives absolute immunity. *Id.* at 431. The filing of a criminal complaint and the
8 dismissal of a case are prosecutorial functions. *See Kalian v. Fletcher*, 522 U.S.
9 118 (1997)(we examine the nature of the function performed, not the identity of
10 the actor who performed it).

11 Plaintiff conceded that the Whittemore defendants lied to Gammick (#92
12 ¶58, 59 and 60). Plaintiff alleged that Gammick should have exercised “due
13 diligence” to determine the veracity of the information (#92 ¶59). That Gammick
14 may have given credence to Whittemore and UNRPD evidence in his decision to
15 prosecute is covered by prosecutorial immunity under *Imbler*, 424 U.S. at 431. The
16 fact that a judge signed off on the arrest warrant, which was sworn out by a police
17 officer, shows there was probable cause (#128-2).

18 Plaintiff alleged that Gammick conspired to have her arrested and falsely
19 imprisoned. However, Gammick’s intent is not relevant to whether immunity
20 applies. “Intent should play no role in the immunity analysis.” *Ashelman v. Pope*,
21 793 F.2d 1072, 1078 (9th Cir.1986) (en banc); *see also McCarthy v. Mayo*, 827
22 F.2d 1310, 1315 (9th Cir.1987) (“The intent of the prosecutor when performing
23 prosecutorial acts plays no role in the immunity inquiry.”); *Lyghtle v. Breitenbach*,
24 139 Fed.Appx. 17 (10th Cir. 2005) . The functions performed by Gammick are
25 immune from liability.

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1 **IV. CONCLUSION**

2 Based upon the foregoing, District Attorney Gammick respectfully requests
3 that the case be dismissed in its entirety.

4 Dated: October 29, 2015.

5 WASHOE COUNTY
6 DISTRICT ATTORNEY'S OFFICE

7 By /s/ Mary Kandaras
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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of the Office of the District Attorney of Washoe County, over the age of 21 years and not a party to nor interested in the within action. I certify that on this date, the foregoing was electronically filed with the United States District Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

- Brian Warner Hagen
- Robert J Liskey
- Robert M Dato
- Sarah A Syed
- Michael R. Hugo
- James S. Eicher
- Paul B. Beach

Dated this 29th day of October, 2015.

/s/ C. Mendoza
C. Mendoza