

Kendall alleges she was videotaped by plaintiff Jahan Ashtiani as Lise Kendall entered the gate to her home, defendant Kendall filed a Motion to Shorten Time for Hearing and Preliminary Injunction. This Court denied the Motion for Preliminary Injunction on May 2, 2008.

Plaintiffs filed a motion for summary judgment and only as to defendants' claims of assault and IIED due to *res judicata* following Magistrate Judge Eugene A. Marano's failure to find probable cause in the criminal prosecution against Jahan Ashtiani. That motion was denied at the conclusion of oral argument on May 20, 2008.

Also argued on May 20, 2008, was defendants/counter-plaintiffs' motion to dismiss plaintiffs' malicious prosecution claims. That motion was taken under advisement. Defendants/counter-plaintiffs' motion to dismiss is now at issue.

II. ANALYSIS.

A. Standard of Review.

Defendants/counter-plaintiffs seek dismissal of the malicious prosecution claim pursuant to I.R.C.P. 12(b)(6) and I.R.C.P. 56. Because affidavits have been filed, the motion to dismiss is actually a motion for summary judgment. Idaho Rule of Civil Procedure 56 sets forth that, in considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). Summary judgment must be denied if reasonable persons could reach

differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). The standard for reviewing a dismissal for failure to state a cause of action pursuant to I.R.C.P. 12(b)(6) is the same as the standard for reviewing a grant of summary judgment. See *Idaho Schools For Equal Educ. v. Evans*, 123 Idaho 573, 578, 850 P.2d 724, 728 (1993); *Rim View Trout Co. v. Department of Water Resources*, 119 Idaho 676, 677, 809 P.2d 1155, 1156 (1991). The grant of a 12(b)(6) motion will be affirmed where there are no genuine issues of material fact and the case can be decided as a matter of law. See *Moss v. Mid-American Fire and Marine Insurance Co.*, 103 Idaho 298, 302, 647 P.2d 754, 758 (1982); *Eliopulos v. Idaho State Bank*, 129 Idaho 104, 107-08, 922 P.2d 401, 404-05 (Ct.App.1996).

2. Defendants/counter-claimants' Motion to Dismiss Plaintiffs' Malicious Prosecution Claims.

In a successful action for malicious prosecution, the plaintiff must show: (1) that there was a prosecution; (2) that it terminated in favor of plaintiff; (3) that the defendant was the prosecutor; (4) that the defendant was actuated by malice; (5) that there was a want of probable cause; and (6) that damages were sustained. *Howard v. Felton*, 85 Idaho 286, 290, 379 P.2d 414, 416 (1963). Actions for malicious prosecution are disfavored and limited by requiring the plaintiff to show establish each of the six elements. *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988). In such an action, the district court determines whether the defendant had probable cause for the action and if there are no disputed facts as to the investigation made by the defendant or concerning the defendant's conduct in pursuing the lawsuit, the district court can resolve issues of probable cause as a matter of law. *Badell*, 115 Idaho 101, 103, 765 P.2d 126, 128; *Shannahan v. Gigray*, 131 Idaho 664, 667, 962 P.2d 1048, 1051 (1998).

For purposes of their motion to dismiss only, defendants/counter-claim plaintiffs do not address the issue that there was a prosecution, that this prosecution terminated in favor of plaintiff Jahan Ashtiani, that defendants were the prosecutors, that defendants were actuated by malice, or that damages were sustained. Instead, both defendants/counter-plaintiffs and plaintiffs focus their arguments on the probable cause element.

Defendants/counter-plaintiffs argue that (a) the defense of “advice of counsel” applies in the instant case and that this defense is equivalent to a showing of probable cause (Brief Supporting Defendants/Counter-Plaintiffs Kendalls’ and Serabias’ Motions for Dismissal and Sanctions, p. 3), and (b) that an independent finding of probable cause by a magistrate precludes as a matter of law that there was a want of probable cause where there was full disclosure to the Magistrate. *Id.* at p. 5. Plaintiffs argue that the defendants/counter-claim plaintiffs are not entitled to the “advice of counsel” defense because they have not given a full and fair statement to the attorney of all facts, and that an issue of fact exists as to whether defendants/counter-claim plaintiffs provided false information to the prosecuting attorney. Plaintiffs Response to Defendants’ Motions for Dismissal, pp. 5-11. Plaintiffs also posit that there was no full disclosure made to the second Magistrate who determined there was probable cause against Jahan Ashtiani (Judge Barry E. Watson) and thus, that Magistrate’s finding of probable cause does not preclude a malicious prosecution claim. *Id.* at pp. 11-13. Defendants’ counter-plaintiffs argue this finding of probable cause by Magistrate Judge Watson “on its face, defeats Plaintiff Jahan Ashtiani’s malicious prosecution claim.” Kendalls’ and Serabias’ Reply Brief in Support of Motion to Dismiss, p. 4.

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A. There is an Issue of Material Fact as to Defendants/Counter-Plaintiffs' "advice of counsel" defense.

In *Howard v. Felton*, the court established that the defense of advice of counsel is equivalent to a showing of probable cause and that, therefore, this defense generally precludes an action for malicious prosecution. *Howard*, 85 Idaho 286, 291, 379 P.2d 414, 417. Advice of counsel is only a defense to an action for malicious prosecution when it appears that the prosecution was initiated in reliance in good faith on advice given after a full and fair statement to the attorney of all facts. *Dawson v. Mead*, 98 Idaho 1, 5, 557 P.2d 595, 599 (1976); *Allen v. Moyle*, 84 Idaho 18, 24-25, 367 P.2d 579 (1961). The advice of counsel relied upon must come from an independent, disinterested attorney. *Howard*, 85 Idaho 286, 291, 379 P.2d 414, 417.

The Court, in *Lowther v. Metzker*, stated that if a party makes full, fair, and complete disclosure to an attorney and is then advised by the attorney to institute the prosecution, an action for malicious prosecution fails even if the attorney was "mistaken as to the rectitude of such procedure." *Lowther v. Metzker*, 69 Idaho 115, 119, 203 P.2d 604, 606 (1949). The disclosures made must be full and fair and, "the mere statement of the prosecutor, in giving evidence in his defense, that he made a full and fair disclosure of all acts to his counsel, is not conclusive." *Id.*; citing *Douglas v. Kenney*, 40 Idaho 421, 233 P. 878 (1925).

Defendants/counter-claim plaintiffs cite *Rowles v. Country Kitchen Intl.*, 99 Idaho 259, 580 P.2d 862 (1978), as being factually similar. The *Rowles* case also dealt with a vehicular assault here in Coeur d'Alene, leading the prosecutor to file charges against appellant after interviewing the victims/respondents. 99 Idaho 259, 260, 580 P.2d 862, 863. In *Rowles*, the Court ruled in favor of the victims/respondents on summary

judgment, having found that once there was an investigation and the victims were interviewed by the prosecuting attorney who then prepared a formal criminal complaint, at the time of that preparation, the victims' judgment was superseded by that of the prosecutor. 99 Idaho 259, 261, 580 P.2d 862, 864.

Although the defendants/counter-plaintiffs' statements that they made full and fair disclosure to Prosecutor Rosen are not conclusive, Rosen investigated the matter extensively before making an independent decision to prosecute. Affidavit of Denise L. Rosen, pp. 8-9, ¶16. And where, as here, the criminal prosecution is the result of an independent decision of the prosecutor to proceed, it is this independent decision to proceed with a criminal charge against the plaintiff that shields the defendant from liability for malicious prosecution under Idaho law. *Gowin v. Altmiller*, 663 F. 2d 820 (9th Cir. 1981). In *Gowin*, the prosecutor's decision amounted to probable cause and negated the essential element of want of probable cause necessary to bring the cause of action for malicious prosecution. 663 F.2d 820, 823. Unlike the present case, the involvement of the defendant in *Gowin* was limited to bringing a letter to the sheriff who, in turn, took it to the prosecutor and the prosecutor then filed a criminal complaint. *Id.* However, *Gowin* did not address the situation claimed by plaintiffs in this case, when the defendant allegedly lies to the prosecutor.

Plaintiffs, citing *Allen v. Moyle*, 84 Idaho 18, 367, P.2d 579 (1961), argue that defendants/counter-plaintiffs provided "false information" to Deputy Prosecutor Denise Rosen, and thus, did not make a full and fair disclosure to Deputy Prosecutor Rosen. Plaintiffs' Response to Defendants' Motions for Dismissal, pp. 5-11.

Defendants/counter-claim plaintiffs argue that "Plaintiff Jahan Ashtiani provides no admissible evidence or support for this bare allegation" that Lise Kendall's and

Katherine Serabia's report to police that Jahan Ashtiani attempted to hit them with his truck while turning a corner in Harbor View Estates was false, even though Jahan Ashtiani's affidavit states just that. Kendalls' and Serabias' Reply Brief in Support of Motion to Dismiss, p. 5. Defendants/counter-claim plaintiffs then argue: "Plaintiff Jahan Ashtiani provides no admissible evidence or support for this bare allegation." This Court is at a loss to understand defendants/counter-claimants' argument. Since when did "*I didn't do it*" become an inadmissible claim? What other *evidence* would defendants/counter-claimants want? Defendants/counter-claim plaintiffs, citing *Rowles*, argue that the truth of what they told Deputy Prosecutor Denise Rosen is not material, and they are entitled to the advise of counsel defense, regardless of whether they lied to Denise Rosen or regardless of whether Jahan Ashtiani's version creates a dispute of material fact on that issue. *Id.*, pp. 6-7. But close inspection of defendants/counter-claimants' argument shows that while they cite *Rowles* and argue *Allen* is not on point, their argument still centers on their claim that Jahan Ashtiani's denial that he did this, his "one-sentence conclusory allegation contained in a self-serving affidavit does not create a genuine issue of material fact, nor does restating the same assertion in a Statement of Disputed Facts." *Id.*, p. 7. That in itself, is a conclusory argument by defendants/counter-claimants. Defendants/counter-claim plaintiffs in their briefing do not discuss *Rowles* and *Allen*. Defendants/counter-claim plaintiffs then engage in an extensive review about how thorough and independent Deputy Prosecutor Rosen's review was. *Id.*, pp. 8-25. That is all well and good, but it does not change the fact that there is a dispute of material fact as to whether Jahan Ashtiani in fact did what Lise Kendall and Katherine Serabia claim he did.

Rowles dealt with the following situation. Rowles went to Country Kitchen and

ordered a cup of coffee. Two employees of Country Kitchen, Cormican and Bergeron asked Rowles what he was smoking. Rowles took offense and left, without drinking or paying for his coffee. Cormican and Bergeron attempted to keep Rowles from leaving the parking lot in his car. Rowles left with Cormican on the hood of his car (there was a dispute as to whether Cormican came to be there by being struck or by voluntarily jumping on Rowles' hood in attempt to keep him from leaving), and "Rowles proceeded onto a four-lane highway and was driving at 20-25 miles per hour when Cormican jumped off, sustaining injuries for which he was later hospitalized." 99 Idaho 259, 260. Given those facts, does the dispute as to "how" Cormican came to be on the hood of Rowles' car really matter? Is it material how Cormican came to be on the hood of Rowles' car, when Rowles then drives down a four-lane highway at 20-25 miles per hour and won't stop with Cormican on his hood? No matter how or why Cormican came to be there, you simply don't continue to engage in the conduct engaged in by Rowles. The issue of fact in the present case is Jahan Ashtiani says he did not drive his truck toward Lise Kendall and Katherine Serabia. That is not just a material issue, it is *the* material issue in this case, and it is in dispute. Defendants/counter-plaintiffs argue that this issue of material fact "how Cormican came to be on the hood of the car", was resolved by the Idaho Supreme Court holding "the prosecuting attorney's statement of full and fair disclosure was un rebutted." Kendalls' and Serbias' Reply Brief in Support of Motion to Dismiss, p. 6. A reading of *Rowles* shows that while the Idaho Supreme Court noted the dispute of fact (99 Idaho 259, 260), they made absolutely no further comment on it. The only logical conclusion is that the disputed fact, for obvious reasons, was not material. The opinion in *Rowles*, after noting the dispute of fact, never returns to discuss it.

Defendants/counter-claim plaintiffs then argue that *Allen v. Moyle*, 84 Idaho 18, 267 P.2d 579 (1961) is “completely distinguishable, and in no way like this case.” Kendalls’ and Serbias’ Reply Brief in Support of Motion to Dismiss, p. 7. However, all defendants/counter-plaintiffs do is regurgitate the argument that Jahan Ashtiani’s statement in his affidavit that “Defendants lied” is inadmissible. *Id.* This Court has already discussed why such statement by Jahan Ashtiani is admissible. *Allen* does indicate that the “advice of counsel” defense is not available in a malicious prosecution claim if you lie to the police or to the prosecutor. As noted by plaintiffs, “if the record shows that a substantial question of fact exists as to whether respondent had stated to counsel all the material facts known to him the motion for summary judgment should not have been granted.” Plaintiffs’ Response to Defendants’ Motions for Dismissal, p. 8, citing *Allen v. Moyle*, 84 Idaho 18, 24, 367 P.2d 579, 583 (1961). As further noted by plaintiffs:

When a party knowingly provides false information, “an intelligent exercise of the officer’s discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information.” Restatement (Second) of Torts § 653 cmt. G (1977).

Plaintiffs’ Response to Defendants’ Motions for Dismissal, p. 9.

Jahan Ashtiani has created a material issue of fact for the jury to decide, as to whether defendants are entitled to the defense of “advice of counsel” on the plaintiffs’ claims of malicious prosecution.

B. Was full and fair disclosure made to the Magistrate such that a finding of probable cause was proper?

In an action for malicious prosecution, the advice of counsel defense also encompasses full and fair disclosure to a magistrate. *Howard*, 85 Idaho at 293-294. In fact, “no valid reason exists for distinguishing between full disclosure to a magistrate

and full disclosure to the prosecuting attorney in regard to defense of an action for malicious prosecution.” *Id.* at 293. Therefore, the analysis as to whether defendants/counter-plaintiffs properly gave full and fair disclosure of all facts to the Magistrate would be analogous to the analysis above. Additionally, there is the question as to whether Prosecutor Rosen has fully and fairly disclosed all facts to the Magistrate and whether the decision as to probable cause was an independent decision of a disinterested Magistrate.

Probable cause is information that would lead a person of ordinary care and prudence to believe to entertain an honest and strong suspicion that another person is guilty. *Herrold v. Idaho State School for the Deaf and Blind*, 112 Idaho 410, 412, 732 P.2d 379, 381 (Ct. App. 1987); *State v. Alger*, 100 Idaho 675, 603 P.2d 1009 (1979). In a malicious prosecution action, the determination of probable cause is viewed in light of the facts and circumstances that were apparent at the time the prosecution commenced. *Herrold*, 112 Idaho 410, 412, 732 P.2d 379, 381. So, “a failure of proof at the preliminary hearing does not determine whether probable cause did or did not exist at the time the complaint was filed.” *Herrold*, 112 Idaho 410, 413. 732 P.2d 379, 382.

Plaintiffs state that Prosecutor Rosen’s decision at the second preliminary hearing before Magistrate Watson, to provide only defendant/counter-plaintiffs’ police report and an affidavit of a deputy involved, and not the material submitted by plaintiff Jahan Ashtiani, was less than full and fair disclosure. Plaintiffs’ Response to Motions for Dismissal, p. 12. Prosecutor Rosen herself states that because of her years of experience, she is able to recognize that letters from potential defendants and their family members or friends are often biased. Affidavit of Denise L. Rosen, pp. 8-9, ¶16. Plaintiffs posit that Rosen failed to make full and fair disclosure to Magistrate Watson

and that this failure is evidenced by the fact that he found probable cause and Magistrate Marano did not, and that “Judge Marano was the only judge to be provided with a full disclosure of the facts at the preliminary hearing.” Plaintiffs’ Response to Motions for Dismissal, p. 12. There appears to be an issue of fact as to whether Magistrate Watson was given full disclosure of all the evidence available. In any event, even if there were full disclosure, *if* the defendants are lying about the events in question, they are not entitled to knowingly provide false information to the prosecutor, who in turn provided that information to two magistrates, and then benefit from the “advice of counsel” defense to the plaintiffs’ claims of malicious prosecution.

III. ORDER.

IT IS HEREBY ORDERED, for the reasons set forth above, defendants/counter-plaintiffs’ Motion to Dismiss Plaintiffs’ Claim of Malicious Prosecution based on the “advice of counsel” defense is **DENIED**.

Entered this 27th day of June, 2008.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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