**UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

TAMMY FISHER,

**Appellant,** Case No. 16-1335

v.

BRIAN KOOPMAN, et al.

**Appellee.**

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**On Appeal from the United States District Court**
**For the District Court of Colorado**
**D.C. No. 1:15-cv-00166-WJM-NYW**

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# APPELLANT'S OPENING BRIEF

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Respectfully submitted,

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**ORAL ARGUMENT IS NOT REQUESTED**

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## PRIOR OR RELATED APPEALS

None.

Plaintiff-Appellant Tammy Fisher, by and through her attorney, Randall R. Meyers, for her opening brief, states:

## I. STATEMENT OF JURISDICTION

The United States District Court for the District of Colorado has jurisdiction over this matter pursuant to 28 U.S.C. §1331 (federal question). This case involves a civil rights malicious prosecution claim against Brian Koopman, a Loveland police detective, relating to the submission of an affidavit for search of phone records in conjunction with an investigation into alleged criminal conduct of Tammy Fisher. Additionally, the case involves state tort claims. The investigation and any prosecution were terminated prior to the filing of criminal charges.

Appellees, defendants below, moved to dismiss Fisher's malicious prosecution claims and her state tort claims through summary judgment. [Doc. No. 46, *Motion and Brief in Support of Summary Judgment,* filed 11/09/15]. Subsequently, the District Court granted defendant's motion [Doc. No. 77, *Order Granting Summary Judgment,* entered 8/01/16]. This appellate court's jurisdiction derives from 28 U.S.C. §1291.

This appeal ensues, seeking review of the District Court's order granting the Motion for Summary Judgment. [Doc. No. 83, *Notice of Appeal* filed 8/17/16].

## II. STATEMENT OF THE ISSUES

A. Whether the District Court erred in granting Koopman's Motion and Brief in Support of Summary Judgment based on the summary judgment standards set forth under existing law.

B. Whether the District Court erred by denying Fisher's motion to amend her complaint on the grounds of futility finding malicious prosecution claims can only be sustained in seizure cases, not search cases.

C. Whether the District Court erred as a matter of law in finding that §1983 malicious prosecution is only viable if charges were actually filed.

D. Whether the District Court erred as to the pleading standards for willful and wanton behavior under Colorado law

E. Whether the District Court erred in its reading of Colorado state law on malicious prosecution and further, if the court is correct, in not finding Appellant has a viable Fourteenth Amendment Due Process claim.

F. Whether the District Court erred as to its findings on Tortious Interference With A Business Relationship.

G. Whether the District Court erred as to its findings on Abuse of Process.

H. Whether the District Court erred in its findings as to Negligent Hiring, Supervision and Retention.

## III. STATEMENT OF THE CASE

Fisher initiated this action with a Complaint filed in state court against the Defendants [Doc. # 2 *Complaint and Jury Demand*, filed 1/09/2015, removed and filed in federal court 1/23/2015]. The original Complaint asserted two claims under 42 U.S.C. §1983 for alleged violations of Fisher's constitutional rights under

the Fourteenth Amendment to the U.S. Constitution. Those claims stemmed from an investigation conducted by Koopman as a detective with the Loveland Police Department and the overarching lack of training and supervision by Hecker, as the Police Departments Chief, and the City of Loveland. The Complaint also included a variety of state tort claims against both defendants. The claims for relief in the Complaint included: (1) a Fourteenth Amendment Due Process claim for Malicious Prosecution, asserted against all defendants; (2) a Fourteenth Amendment claim for failure to train and/or supervise, against Hecker in his individual and official capacity, which failure allegedly caused the constitutional violations alleged in the Complaint. Claims against the City of Loveland, Colorado are official capacity claims.

The action was removed to the U.S. District Court for Colorado by defendants. [Doc. No. 1, *Notice of Removal* filed 1/23/15]. On August 17, 2016, the District Court granted the summary judgment motion of the defendants [Doc. No. 77, *Order Granting Motion for Summary Judgment*].

Prior to the summary judgment conclusion and after the complaint had been filed, Fisher filed a Motion for Leave to File First Amended Complaint [Doc. 31, 5/20/15]. The Motion was referred to Magistrate Judge Nina Wang by the District Court. On July 7, 2015, the Magistrate issued her recommendation that the motion

should be denied [Doc. 40]. Fisher's motion sought, in parts pertinent to this appeal, to modify Fisher's first claim to incorporate a Fourth Amendment violation for malicious prosecution and a Fourth Amendment violation for failure to train and supervise, i.e., Malicious Prosecution under the Fourth and Fourteenth Amendments. [Doc. No. 31, *Motion for Leave to File Plaintiff's Amended Complaint and Jury Demand* filed 5/20/15].

Essentially, and erroneously, the magistrate determined the amendment would be futile since malicious prosecution under the Fourth Amendment was only viable if there was a seizure of the person. Fisher filed an objection to the Magistrate's recommendation arguing that the Fourth Amendment encompassed searches as well as seizures and to argue otherwise was illogical [Doc. 41]. The District Court issued an Order overruling Fisher's objection and thereby affirming the Magistrate's Recommendation, relying on this Court's rulings in both ***Novitsky v. Aurora*** and ***Becker v. Kroll***, 494 F.3d 904 (10th Cir. 2007) [Doc. 45].

## IV. STATEMENT OF FACTS

Plaintiff Tammy Fisher was an employee with the City of Loveland, Colorado beginning in 1997, serving first as a community service officer until 2000, after which she became a police officer. She retired from her position as a

police officer in October 2012, after 15 years of service. Plaintiff was also married at the time and remains so, to Jeff Fisher, a former Sergeant with the Loveland Police Department (LPD). The Loveland Police Department's Chief was, at the time, Luke Hecker. (Chief Hecker has since retired and Sergeant Jeff Fisher is now employed as a Commander with the Lafayette, Colorado Police Department).

In April 2013 the Loveland Police Department executed a search warrant at the Loveland home of Stan and Lisa Romanek for the crime of Sexual Exploitation of a Child (child pornography).

Prior to the 2013 search, however, Fisher , as a police officer, had responded to the Romanek residence one time on a harassment call. The harassment call was unrelated to the 2013 search and other Loveland Police officers had also previously responded to the Romanek home on similar calls. In March 2013, Fisher was more formally introduced to Lisa Romanek by a mutual friend who was a ten year volunteer with the LPD.

In early April 2013, Fisher introduced her husband, then-Sergeant Jeff Fisher, to the Romanek's since Fisher felt her husband would find Stan Romanek's work on extraterrestrials interesting. This introduction resulted in a single dinner engagement between the Romanek and Fisher families on April 2, 2013.

During the execution of the 2013 search warrant of the Romanek home, Lisa Romanek allegedly commented to Loveland police officer Paul Arreola, and other law enforcement personnel present, that the Romaneks were friends with Loveland police Sergeant Jeff Fisher and his wife Tammy Fisher. Appellee Koopman ("Koopman"), a detective who was part of the Romanek investigation, was familiar and on friendly terms with both Fisher and her husband. Koopman told Fisher after the 2013 search that Lisa Romanek had advised police that Fisher warned Lisa Romanek of the current investigation and search, as well as a prior dropped "investigation" originating in 2009 occurring while Fisher was still a member of the Loveland Police Department. Fisher admitted the prior investigation but denied any comment regarding the current one. She was no longer an LPD officer and had no knowledge of the current investigation.

These comments by Koopman came during an unannounced and unsolicited "visit" by Koopman at the Fisher home when only Fisher was present. Presumably, the "visit" was initiated by Koopman to advise her of the statements made by Lisa Romanek and to solicit Fisher's assistance in making a pretext phone call to the Romanek's to aid in the investigation. In reality, Koopman was actually conducting an investigation into whether Fisher had warned the Romanek's of the impending search. Based on information gained by Koopman, he started an

investigation and sought charges against Fisher.

Meanwhile, during the investigation into Fisher, an internal police department investigation was also launched against Sergeant Jeff Fisher based on his alleged acquaintance with the Romaneks, Fisher's alleged comments to the Romaneks about the investigation, and the fact that, during the investigation, it was discovered that Stan Romanek's computer had files erased by a hard drive cleaner called C Cleaner. As it turned out, then Loveland Police Sergeant Scott Highland, (since resigned), was the lead investigator on the 2013 Romanek investigation, and had also installed, on the Fisher computer, some two years prior, the same C Cleaner program found on Romanek's computer. C Cleaner is a common and free computer download and can be accessed and downloaded via the internet. The internal investigation into Jeff Fisher was subsequently closed with no negative action taken against him other than being denied a promised promotion to a lieutenant's position within the Loveland Police Department. It is the denied, but promised, promotion that led to Jeff Fisher's departure from the Loveland Police Department.

Pursuant to Koopman's investigation into Fisher and Lisa and Stan Romanek, Koopman submitted sworn affidavits for both the arrest of Mr. Romanek and search of his residence as well as for the search of Fisher's cell

phone records. Koopman allegedly made false statements, along with unsupported assumptions, in his Romanek Affidavit. Without question, Koopman also made false, misleading, and otherwise inaccurate statements in the search warrant affidavit that he submitted to a judicial officer for Fisher's cell phone records. He also failed to include exculpatory evidence in his possession. Eventually, and although vastly at odds with the alleged charges in the search warrant affidavit, Koopman submitted to the Larimer County District Attorney a request to file a charge of Second Degree Official Misconduct against Tammy Fisher. A request the district attorney eventually declined, purportedly on statute of limitation grounds. Fisher, however, had information that the filing rejection and the grounds therefore was concocted by the Larimer DA and Koopman. During this entire episode and both before and after, Luke Hecker was Loveland's Chief of Police and the one most directly responsible for Koopman's conduct, training, and supervision.

Both Koopman and Hecker were previously named defendants in another Section 1983 filing alleging similar conduct against Koopman. That case is ***Myers v. Koopman***, Civil No. 09-cv-02802, 2012, WL5456410 (D. Colorado 2012), which is currently pending trial in March 2017. This Court may recall the case based on its ruling in ***Myers v. Koopman***, 738 F.3d 1190 (10th Cir. 2013).

Because there is a history of similar conduct by Koopman with the Loveland Police Department, Fisher also initiated action against Hecker and the City of Loveland for failure to adequately train and/or supervise department subordinates to, among other things, (a) conduct proper investigatory procedures; (d) properly prepare affidavits for arrest/search warrants; (e) properly conduct a search pursuant to a warrant; (f) prevent perjury; (g) prevent malicious prosecution.

In light of the duties and responsibilities of Defendant Hecker, who exercises control over his respective Department personnel charged with investigating and pursuing criminal activity, the need for scrutiny and specialized training and supervision regarding the above detailed problems was so obvious and the inadequacy of the training and supervision provided was so likely to result in the violation of constitutional and other legal rights, such as those described herein, that Defendant Hecker's failure to train and supervise amounted to deliberate indifference to the constitutional and legal rights of the public, including Tammy Fisher, with whom the Department comes in contact. It was apparent it constituted a "*de facto*" policy of Hecker and the department.

Defendant Hecker, the policymaker of the law enforcement department, had either no policies governing, or long-standing department wide customs, policies and/or actual practices that allowed: (a) improper preparation of an affidavit for a

warrant; (b) perjury; (c) malicious prosecution; (d) improperly pursuing an arrest/charges prior to determining the legitimate existence of probable cause.

These customs, policies, and/or actual practices (including any lack thereof) consciously approved by Defendant Hecker, as the policymaker of the respective law enforcement department, represent a deliberate choice to follow a course of action made from among various alternatives, and were a moving force behind the constitutional and tort violations at issue, as detailed below.

As further indicia of bad faith, in the course of the litigation of federal case 09CV2802, Defendant Hecker is on record as commending Defendant Koopman's work product as "good police work". Subsequently, during the course of this investigation, Hecker again reaffirmed his support for Koopman and his confidence in Koopman's work. This reaffirmation came despite the similarity of the allegations made in each investigation and the apparent need for training and supervision of Koopman.

Moreover, Koopman had also confided in another Loveland police employee, of rank within the police department, that Fisher would not be arrested but that "he [Koopman], Daniel MacDonald, and Cliff [Larimer County District Attorney's Office] had to be creative to come up with something", exhibiting both

a conscious guilty knowledge of the nature of his conduct and also adding a conspiratorial aspect to it.

Defendant Koopman also advised this same police official that Fisher would probably lose her job and that he [Koopman] had asked MacDonald [Larimer County District Attorney's Office] for a favor in "no-filing" the case for him, further exhibiting a conscious guilty knowledge of the nature of his conduct.

The police official also stated that all detectives who work with Koopman know that he works a case to come up with the outcome he wants. This trait is similar to those traits Koopman employed in Case No. 09CV2802.

Another police official who has worked closely with Koopman in the past also has stated that Koopman was dishonest and that the particular police official would not sign anything that Koopman worked on because the official did not trust him. Further, this official refuses to be part of the cases based on concerns of retaliation.

Against this backdrop of events, Fisher filed the present action which leads to this appeal.

## V. SUMMARY OF THE ARGUMENTS

Initially, the District Court erred in determining Koopman's motion was properly pled. Of the 62 "material facts" offered in support of his motion, approximately half are not material at all. A significant number would be inadmissible as hearsay and/or legal conclusions. A likewise significant number are Koopman's own statements and are self-serving, conclusory, and conjecture.

The Tenth Circuit has long recognized the legal viability of a §1983 malicious prosecution claim. ***Taylor v. Meacham***, 82 F.3d 1556 (10th Cir. 1996) ("Reconciling these various cases, we conclude that our circuit takes the common law elements of malicious prosecution as the "starting point" for the analysis of a Section(s) 1983 malicious prosecution claim, but. . . . . .") , ***Pierce v. Gilchrist***, 359 F.3d 1279 (10th Cir. 2004) ("This Court has previously held that officers who conceal and misrepresent material facts to the district attorney are not insulated from a §1983 claim for malicious prosecution . . . . . .") , ***Wilkins v. DeReyes***, 528 F.3d 790 (10th Cir. 2008) ("Our cases suggest a §1983 malicious prosecution claim need not always rest on the right to be free from unreasonable searches and seizures under the Fourth Amendment. As we have previously noted, a plaintiff's § 1983 malicious prosecution claim may also encompass procedural due process violations."), ***Mondragon v. Thompson***, 519 F.3d 1078 (10th Cir 2008) ("After the

institution of legal process, any remaining constitutional claim is analogous to a malicious prosecution claim."). Tenth Circuit case law further recognizes that such a claim can rest upon both the Fourth and Fourteenth Amendments to the U.S. Constitution. ***Wilkins***, fn5. The viability of a malicious prosecution claim under both the Fourth and Fourteenth Amendments is likewise recognized. Moreover, the ***Wilkins*** court acknowledges that a malicious prosecution claim can be based on other constitutional violations, fn6. "Other "explicit constitutional right[s]" could also conceivably support a § 1983 malicious prosecution cause of action, *see* Michael Avery et al., *Police Misconduct: Law and Litigation* § 2:14 & n. 5 (2007 Westlaw; POLICEMISC database) (collecting cases), although the Supreme Court specifically excluded substantive due process as the basis for a malicious prosecution claim. ***Albright v. Oliver***, 510 U.S. 266, 274–75, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994)".

Unlike the facts in ***Wilkins***, Fisher has alleged a constitutional violation in support of her malicious prosecution theory which is one based on the Fourth Amendment's distinct protection against unreasonable searches.

The record shows that Fisher sought to amend her complaint to include a claim for malicious prosecution under the Fourth and Fourteenth Amendments, finding legal support for the amendment (see ***Wilkins*** and ***Myers***). However, the

District Court erroneously denied the amendment based on futility, finding that a malicious prosecution claim is only supported under the Fourth Amendment in seizure cases, not those wherein the complaint is for an unlawful search.

The District Court's dismissal of Fisher's claim under the Fourteenth Amendment may likewise be erroneous. ***Becker v. Kroll***, 494 F.3d 904 (10th Cir. 2007) stands for the principle that if there is an adequate state remedy, a Fourteenth Amendment malicious prosecution will not lie in Colorado. Tenth circuit courts cite ***Hewitt v. Rice,*** 154 P.3d 408 (Colo.2007) to support the premise that Colorado has such a state remedy. However, Colorado also has the Colorado Governmental Immunity Act (CGIA) which effectively *precludes* a claim of malicious prosecution unless willful and wanton behavior is shown on the part of the public employee, granting employees qualified immunity. Protections under the Due Process clause of the U.S. Constitution are not dependent on whether a violator acts willfully and wantonly. Some jurisdictions have found that the impediment of this grant of immunity nullifies the "adequacy" of a state remedy. The United States Court of Appeals for the Seventh Circuit found as such in ***Julian v. Hanna,*** 732 F.3d 842 (2013). In considering the issue, the Seventh Circuit found that Indiana provided for a state claim for malicious prosecution but also opined that because under state law the state actors were granted absolute immunity, the state

did not provide an adequate state alternative. Granted, Colorado's immunity is qualified as opposed to absolute yet it is still an impediment that dilutes a person's right to due process. Here, Fisher filed a state claim for malicious prosecution which was dismissed by the District Court, thereby depriving Fisher of her rights to due process. The District Court never considered the adequacy of the state alternative.

Since Fisher was denied a Fourth Amendment claim grounded in malicious prosecution on legally incorrect grounds and further had her state court claims erroneously dismissed by the District Court, improperly granting Koopman's Motion for summary judgment, this appeal ensues. For those reasons below stated, Fisher respectfully requests this Court reverse the District Court's ruling.

## VI. ARGUMENT

### A. The District Court erred in granting Koopman's Motion and Brief in Support of Summary Judgment based on the summary judgment standards.

Fisher reviews the record to determine whether, in a summary judgment action, the moving party has met its burden. *See* ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). See also, ***Gunn v. Gorden,*** 2015 WL 5773750 (D. Utah 2015) (Not reported in F. Supp.3d).

Koopman's motion falls short of its burden insofar as a substantial portion of the "material facts" it identifies are, in fact, not material at all. Keeping in mind Fisher's complaint and the issues raised therein, Fisher asserts that of the 62 material facts quoted, material facts 1, 5, 13-21, 25, 31-32, 40, 42-43, 48-49, 51-53, 55, 58-59, 60, and 62 are not material, or are only arguably material, to the issues raised in Fisher's complaint. The first inquiry, of course, is to determine which facts are material. Irrelevant facts are not germane to the inquiry of "genuineness" for purposes of summary judgment. ***Anderson*** at 248. If Koopman's motion is filled substantially, as is the case here, with facts immaterial to the issues raised, it negatively impacts the integrity of the motion.

Additionally, Fisher finds that "material facts" 3-4, 6, 8-9, 16, 19-20, 26, and 40-41 are either in the nature of hearsay or represent a legal conclusion and are otherwise inadmissible. Paragraphs 17, 22, 28, 34-35, and 43 are facts that are either self-serving, conclusory, or conjecture and should not form an adequate basis for a motion for summary judgment.

Some of Koopman's statement of material facts also involve the competing credibility of plaintiff and defendants and is a sign that an issue of material fact exists. ***Gunn***.

Moreover, material fact number 57 misrepresents the record, as recognized by the District Court in its argument dismissing Fisher's fifth state claim for Tortious Interference With A Business Relationship (Koopman's "material fact" claimed Plaintiff admitted there was no impact on her employment from Koopman's misconduct). This is untrue as Fisher was suspended temporarily pending her employer's investigation.

## B. Federal Claims

### 1. The District Court Erroneously Concluded That Fisher's Request For Amendment of Her Complaint Was Futile Since Her Claim Was An Illegal Search Rather Than Seizure.

On May 20, 2015, Fisher filed a Motion for Leave to file her First Amended Complaint [Doc #31, filed 5/20/15]. The matter was referred to Magistrate Wang and her Recommendation was entered, recommending denial of Fisher's Motion [Doc#40, filed 7/07/15]. Fisher thereafter filed her timely objection to the Recommendation [Doc # 41, filed 7/17/15]. On October 28, 2015 the District Court entered its Order Overruling Plaintiff's Objections To Magistrate Judge's Recommendation [Doc #45]. In essence, the portion of the Court's order Fisher now appeals is its finding that a claim for malicious prosecution will only lie if it is "based on a seizure by the state – arrest or imprisonment." (Citing the language in ***Becker v. Kroll***, 494 F.3d 904,914 (10th Cir. 2007). To further support its finding,

the District Court also cites ***Novitsky v. Aurora***, 491 F.3d 1244, 1258 (10th Cir. 2007), emphasizing the language, "caused [Plaintiff's] continued confinement or prosecution." [Doc#45].

It is already settled that Fisher was not arrested or imprisoned during this event. In fact, it is also not disputed that Fisher was even charged with a crime (the activity being complained of having terminated without charges). However, it is also settled that Koopman, and the Loveland Police Department, conducted a criminal investigation, presented possible (false) charges to a court to obtain a search warrant, and formally submitted a criminal charge to the district attorney. Fisher believes this a prosecution within the language of ***Novitsky***.

In the course of its Order, the District Court did acknowledge that ***Becker*** is suggestive of the fact that a malicious prosecution claim can be founded on an unreasonable search, or seizure, of property. Fisher agrees. First, there is no logic in dissecting search and seizure for purposes of Fourth Amendment malicious prosecution. Fisher finds no authority, and the District Court cites none, that holds malicious prosecution is only supported in seizure cases as opposed to search cases. **Becker** uses the term seizure to address property interests and perhaps this lead to the ruling by the District Court.

To the contrary, the Tenth Circuit holds the opposite. In ***Gillihan v. Shillinger,*** 877 F.2d 935 (10th Cir. 1989), this court stated, "Section 1983 does not distinguish between personal liberties and property rights, and a deprivation of the latter without due process gives rise to a claim under §1983," citing ***Lynch v. Household Finance Corporation,*** 92 S.Ct. 1113 (1972).

To the extent the District Court implies that a Fourth Amendment claim must first be filed from which a plaintiff can then launch a Fourth Amendment malicious prosecution claim (see Doc #45, fn2, page 5), this is not correct. A malicious prosecution claim can be grounded in the Fourth Amendment without an accompanying claim for a violation of the Fourth Amendment (see ***Myers v. Koopman***).

Fisher asserts that the Tenth Circuit recognizes Fourth Amendment malicious prosecution claims. Fisher's complaint challenged Detective Koopman's probable cause for the search of her cell phone records and, consequently, the institution of legal process, a requirement of Tenth Circuit law. ***Wilkins v. DeReyes***, 528 F.3d 790 (10th Cir. 2008), see also, fn5. Unlike the District Court's apparent conclusion, the denial of Fisher's Motion for Leave to Amend was not futile and should have been granted.

**2. The District Court May Have Erred When It Dismissed The Fourteenth Amendment Due Process Claim On The Ground A State Remedy Was Available To Afford Relief.**

The District Court did two things that are Section 1983 related in its order on summary judgment. First, it wrongfully denied Fisher's motion to amend her complaint and, second, the District Court dismissed Fisher's Fourteenth Amendment malicious prosecution claim.

Fisher does not disavow ***Becker***. However, the Tenth Circuit has not analyzed, within the framework of a Section 1983 claim, what constitutes an *adequate* state remedy as was contemplated by the ***Becker*** Court.

Fisher argues that rather than summarily dismiss her Fourteenth Amendment due process claim, the District Court should have questioned whether an adequate state remedy was available. Citing ***Hewett v. Rice*** does little more that acknowledge that Colorado recognizes a state claim for malicious prosecution. But as argued earlier, Colorado also grants a qualified immunity to state employees accused of the commission of tort like offenses. Granted, the immunity is qualified and not absolute but it does require a party to take an extra, and burdensome step, in showing willful and wanton behavior. Does Colorado's Governmental Immunity Act (CGIA), with its preclusive effect, raise an impermissible barrier? Protections under the Due Process clause of the U.S.

Constitution are not dependent on whether a state actor acted willfully and wantonly. Some jurisdictions have found that the impediment of this grant of immunity nullifies the "adequacy" of a state remedy. The United States Court of Appeals for the Seventh Circuit found as such in ***Julian v. Hanna,*** 732 F.3d 842 (2013). In considering the issue, the Seventh Circuit found that Indiana provided for a state claim for malicious prosecution but also opined that because under state law the state actors were granted absolute immunity, the state did not provide an adequate state alternative. Granted, Colorado's immunity is qualified as opposed to absolute yet it is still an impediment that dilutes a person's right to due process. Here, Fisher filed a state claim for malicious prosecution which was dismissed by the District Court for lack of a showing of willfull and wanton behavior, thereby depriving Fisher of her rights to due process. The District Court never considered the adequacy of the state alternative.

The U.S Supreme Court, and the Tenth Circuit, has recognized that a state's post-deprivation tort remedy satisfies the procedural requirements of the Due Process Clause. ***Parratt v. Taylor***, 451 U.S. 527 (1981), ***Becker v. Kroll***, 494 F.3d 904 (10th Cir. 2007). Neither case directly confronts the adequacy issue.

**3. The District Court Erred When It Dismissed Fisher's Fourteenth Amendment Charge Against Hecker and the City of Loveland**

The District Court also dismissed Fisher's 1983 claim against Hecker and the City of Loveland contending that since her Fourteenth Amendment claim for malicious prosecution was not viable, there was no known constitutional violation to support her claim for training and supervision.

Fisher does not dispute the District Court's interpretation of the applicable law, however, does argue that the court erred in denying her Motion for Leave to Amend (which would have established a viable constitutional violation). Neither does she surrender her challenge as to whether there is an adequate state alternative under ***Parratt, Becker***.

**4. The District Court Erred In Concluding That A Malicious Prosecution Claim Cannot Lie Unless Charges Are Filed.**

The District Court found, in its Order Granting Summary Judgment [Doc #77, at page 15, ¶ 2, that "Plaintiff cannot sustain a malicious prosecution claim where no criminal charges were filed against her".

This represents an added dimension to Tenth Circuit law on Section 1983 malicious prosecution. The District Court cites no authority for its position, and Fisher finds none. Colorado, at least, finds that something less than a criminal charge will support a state claim for malicious prosecution. ***Walford v. Blinder, Robinson & Co., Inc.***, 793 P.2d 620 (Colo.App. 1990). ***Walford*** was an arbitration case wherein the court was left to the issue of whether an arbitration

proceeding could form the basis of a malicious prosecution claim. In ***Walford***, the court expressed a more expansive view of those types of cases sufficient to support a claim for malicious prosecution, declining to limit itself to the more obvious definition of "proceedings," as Koopman asserts.

### C. State Tort Claims

#### 1. The District Court Misinterpreted the Applicable Pleading Standards For Willful and Wanton Behavior Under the CGIA.

As noted by the District Court, the well-established principle of review under a Motion for Summary Judgment is that all evidence and reasonable inferences are to be viewed in the light most favorable to the non-moving party (citing ***Adler v. Wal-Mart Stores, Inc.,*** 144 F.3d 664 (10th Cir. 1998)). Further, according to the District Court, all factual ambiguities are resolved against the moving party (citing ***Houston v. Nat'l Gen. Ins. Co***., 817 F.2d 83 (10th Cir. 1987)). [Doc. #84 at 2].

An elemental sufficiency analysis under Colorado's CGIA begins with a review of the complaint. The specific factual basis must be stated in the complaint. C.R.S. § 24-10-110(5)(a). The District Court's order intimated it had reviewed Fisher's complaint and found it deficient, at least as to pleading a specific factual basis. Fisher disagrees. Specifically, in Fisher's Third Claim For Relief

(malicious prosecution) she both pled willful and wanton behavior and set forth those specific acts she alleged constituted the willful and wanton behavior. She alleged Koopman caused a criminal proceeding and investigation to be initiated by the use of false or otherwise fictitious information, that he knew he lacked probable cause and commented to as much to other law enforcement officials.

A review of the complaint filed shows that this is exactly what Fisher did. Fisher's complaint is replete with those acts that Koopman undertook that gives rise to her complaint. Fisher's complaint, considering the allegations true, adequately cites a specific factual basis for each of the state court claims she has alleged.

Although willful and wanton conduct is not defined in the CGIA, this Court has, on multiple occasions, given life to the phrase through definition. "Willful and wanton conduct is purposeful conduct committed recklessly that exhibits an intent consciously to disregard the safety of others. Such conduct extends beyond mere unreasonableness". ***Squires v. Goodwin*****,** 829 F.Supp.2d 1062 (10th Cir. 2011). *See also* ***Stamp v. Vail Corp*****.,** 172 P.3d 437 (Colo. 2007) wherein it was said that, "Conduct is willful and wanton if it is a dangerous course of action that is consciously chosen, with knowledge of facts, which to a reasonable mind creates a strong possibility that injury to others will result".

**2. The District Court Misreads Hewitt v. Rice as to the Elements for Malicious Prosecution**

Perhaps most troubling to Fisher is the District Court's individual analysis as to the required elements for malicious prosecution under state law. (identified in ***Hewitt v. Rice***, 154 P.3d 408 (Colo.2007)). Troubling because, as Fisher reads it, it seems to parrot Koopman's argument in his Motion for Summary Judgment. Perhaps the Court is too anxious to dismiss Fisher's claim, but it seems that what ***Hewitt*** actually refers to is that "prior action" means the action which gives rise to a malicious prosecution claim, not one separate and distinct. The District Court seems to wantonly add definition to ***Hewitt's*** ruling in a manner that the ***Hewitt*** court did not do. Moreover, Koopman's attempt to define Fisher's claim out of existence does not help either, choosing to narrow the term "action" down to "criminal or civil proceedings" by citing ***Walford v. Blinder, Robinson & Co., Inc.,*** 793 P.2d 620 (Colo.App. 1990). Even so, the record is clear enough to identify Koopman's actions as those in pursuit of criminal charges. ***Walford*** actually stands for a premise contrary to that of Koopman and is of no support to his position.

**3. The District erred In Its Findings on Tortious Interference With A Business Relationship**

As Fisher argued above, Koopman stated as a material fact to this claim, that Fisher acknowledged that she suffered no impact from Koopman's actions. However, as the District Court so finds in its review of the record, Fisher claims she was suspended from her employment. Thus, the record shows, as the District Court found, that there is a factual dispute as to whether Fisher suffered any negative impact from Koopman's actions. Since there is a factual dispute regarding a material fact, this should have prevented the District Court from dismissing this claim.

**4. The District Court erred in its findings on Abuse of Process**

The District Court cites two reasons for its finding that Fisher's claim of Abuse of Process must fail. First, it opines that there was no "judicial proceeding" as identified as an element of the offense. Fisher's counter argument is, of course, that an application for a warrant does, in fact, amount to a judicial proceeding. The District Court does not offer it opinion as to what it thinks may be required for a judicial proceeding within the context of a claim for Abuse of Process. Fisher argues that the mere application for a warrant, which we know constitutes legal process, is sufficient. (See ***Young v. Davis***, 554 F.3d 1254 (10th Cir. 2009), citing ***Wilkins v. DeReyes***, 528 F.3d 790 (10th Cir. 2008), finding that an application for an arrest warrant constitutes legal process.

As its second point, the District Court finds that Fisher has not substantiated any improper purpose underlying Koopman's actions. Yet, the pursuit of a warrant by the use of false, misleading, and incomplete facts cannot possibly be said to occur for proper purposes, constitutes malice, and willful and wanton behavior.

**5. The District Court erred in its findings as to Negligent Hiring, Supervision, Retention as well as its Findings on Vicarious Liability and Respondeat Superior**

The District Court addressed Fisher's claim as to Negligent Hiring, Supervision, and Retention by asserting that since Hecker did not hire Koopman, Fisher's entire claim must fail. The torts of Negligent Hiring, Supervision and Retention are separate and distinct torts as opposed to a single tort. All three are generally negligence claims and all three are recognized in Colorado. See ***Connes v. Molalla Transport System, Inc.***, 831 P.2d 1316 (Colo. 1992) and ***DeStefano v. Grabrian***, 763 P.2d 275 (Colo.1988). Thus, the District Court erred when it dismissed solely on the basis of Fisher's admission that Hecker did not hire Koopman. It failed to address the torts of negligent supervision and retention.

Further, the District Court dismissed Fisher's claims eight through twelve in a similar and summary fashion using the argument Fisher failed to show willful and wanton behavior thus giving immunity through the CGIA.

Fisher's counterargument to the immunity question was addressed previously in Section 5.

## VII. STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Counsel does not believe oral argument would be materially helpful to the Court in its determination of the issues presented by this appeal.

## VIII. CONCLUSION

The District Court's Order, granting Defendant's Motion for Judgment on the Pleadings, should be reversed. For those reason previously argued, the District Court failed to analyze the Motion for Summary Judgment appropriately, made an erroneous legal conclusion regarding malicious prosecution search/seizure, and incorrectly found the requirement for a criminal charge in malicious prosecution cases. The District Court also misapplied and misinterpreted state tort issues as more fully identified above.

Respectfully submitted this 1st day of December, 2016.

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Patricia Ortiz Legal Assistant

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By: /s/ Patricia Ortiz
Patricia Ortiz Legal Assistant

## CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, I electronically filed the foregoing Opening Brief using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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