No. 22-35640

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TAMARA ELISE RUBIN,

Plaintiff-Appellant,

v.

STATE OF OREGON, ET AL

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:19-cv-01277-IM
Hon. Karin J. Immergut

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff Tamara Rubin filed this action against defendants the State of Oregon and state officials Kris Kalanges, Mark Kleyna, Michael Glenn, and Karen Ertel, in the United States District Court for the District of Oregon, alleging violation of her federal constitutional rights under the Fourth, Fifth, and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, as well as violation of state laws prohibiting malicious prosecution and abuse of process. The district court had subject matter jurisdiction over plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and supplemental jurisdiction over plaintiff's state-law claims pursuant to 28 U.S.C. § 1367(a). All defendants consented to waive immunity from suit under the Eleventh Amendment. ER-72.

Defendants moved for summary judgment on all of plaintiff's claims. The district court granted defendants' motion and entered judgment dismissing plaintiff's action with prejudice. ER-4-23. Within 30 days of entry of judgment, plaintiff timely filed her notice of appeal. ER-166-168. This court has jurisdiction over plaintiff's appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred in holding that there was no evidence that defendant Kalanges deliberately fabricated evidence in violation of the Fourteenth Amendment when he continued his investigation of plaintiff even after he had actual or constructive notice that plaintiff was innocent, and that conduct caused the deprivation of plaintiff's liberty.
2. Whether the district court erred when it held that Kalanges' unlawful conduct was protected by witness immunity and qualified immunity.

STATEMENT OF THE CASE

The following facts were either undisputed at summary judgment or, if disputed, are recounted in the light most favorable to plaintiff, the non-moving party.

I. Historical Facts

A. DOJ begins investigating LSAF and plaintiff

In March 2016, plaintiff and LSAF received a Civil Investigative Demand ("CID") from the Oregon Department of Justice ("DOJ") Charitable Activities Section. ER-26. The CID requested documents relating to the foundation's finances as part of an investigation into the "oversight of the organization's assets and the proper financial management." ER-144-18-24. The CID directed further inquiries to DOJ financial

investigator Kris Kalanges, who conducted DOJ's investigation. ER-31, ¶ 12; ER-48, ¶ 26. As part of this investigation, Kalanges analyzed what he claimed was the total dollar amount of payments purportedly made by LSAF to or for the benefit of plaintiff. ER-144[1] at 19-2; ER-31, ¶ 14; ER-48, ¶ 28. Kalanges characterized this analysis as "basically a spreadsheet showing the cash flows between Lead Safe and the Rubins' bank accounts. So it was not a conclusion as to what those cash flows meant, what they involved." ER-135:10-13, ER-139:23-140:15, and ER-142:9-11.

In fact, according to Kalanges, his analysis and investigation reached no conclusion, because he "didn't have sufficient documents to make a conclusion." ER-136:16-20. "I lacked an explanation as to what – what gave rise to the transactions, what was the purpose of them[.]…. I couldn't come to any conclusion without additional information." ER-136:23-84:7 and 139:23-140:15. Kalanges stated that the transactions he examined may have been "appropriate business records," but that he "didn't have sufficient information to conclude one way or the other."ER-154:25-155:3. "If I had information, additional information, that helped me to clarify and understand those transactions taken from the bank

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[1] All references to Kalanges Depo refer to the excerpt of the transcript of Kalanges' deposition testimony at ER 82-104. The original page and line numbers of the deposition transcript are used in order to more readily direct the reader to the specific portions of the transcript that are referenced.

statement, I would look at them differently, I would interpret them differently." ER-150:20-24.

Kalanges requested financial records from plaintiff in order to assess the propriety of financial transactions between plaintiff and LSAF. Kalanges asked plaintiff for "this information, these documents to be put into a format, an accounting system, in which I could then audit it and arrive at some sort of conclusion about what was the purpose of these transactions, what was their character, was there anything excessive here or not, are these proper transactions." ER-143:5-11. Kalanges asked plaintiff for "this information, these documents to be put into a format, an accounting system, in which I could then audit it and arrive at some sort of conclusion about what was the purpose of these transactions, what was their character, was there anything excessive here or not, are these proper transactions." ER-143:5-11. According to Kalanges, he needed this information in order to form any conclusions based on his analysis. ER-140:16-21. According to Kalanges, the kind of information he needed and was waiting for was "the kind of information that [plaintiff later] provided to the IRS[.]" ER-151:1-3. Plaintiff provided DOJ with financial records in response. ER-31, ¶ 13; ER-48, ¶ 27; ER-141:2-6, 14-20.

Through his analysis, Kalanges concluded that plaintiff received nearly $500,000 in "income" from LSAF between 2011 and 2016. ER-79:4-19.

Kalanges forwarded the results of his investigation to the Oregon Department of Health and Human Services ("DHS") and the IRS. ER-32, ¶ 17; ER-49, ¶ 32. ER-148:10-14.

B. DHS and Michael Glenn Start Investigating Plaintiff Based on DOJ's Investigation.

On June 13, 2016, DHS Investigator Michael Glenn opened an administrative DHS investigation based on his review of "a completed investigation report from Kris A. Kalanges…that showed DHS Client Tamara Elise Rubin and her husband Leonard Rubin, have received payments to or for the benefit of themselves an amount of approximately $450,248.13 from Lead Safe America." ER-32, ¶ 19; ER-49, ¶ 34. According to Glenn, "Kris A. Kalanges from Oregon DOJ did a detailed financial analysis of Lead Safe America Foundation's (LSAF) bank records between April 2011 through March 2016. The purpose of the analysis was to determine the total dollar amount of payments made wither [sic.] to or for the benefit of Tamara and Leonard Rubin and their family. See ER-88. "I received a completed investigation report from Kris A. Kalanges … that showed [plaintiff] and her husband Leonard Rubin, between 2011 and 2016 have received payments to or for the benefit of themselves an amount of approximately $450,248.13 from Lead Safe America. In reviewing Rubin's DHS benefit history, the association to or the payments from Lead Safe America was never accurately reported. ER-87.

The DHS investigation concluded that plaintiff's family had received an overpayment in public benefits. ER, ¶ 21; ER-50, ¶ 36.

On May 15, 2017, Glenn drafted a "Criminal Report" summarizing his investigation of plaintiff. Glenn concluded his report with a "Criminal Referral for Prosecution," stating, "I will submit the investigation and evidence to the Multnomah County District Attorney's office for consideration of criminal prosecution." Glenn then forwarded his report to the district attorney for Multnomah County (the "County") for prosecution. ER-90.

C. IRS Audit

In May 2017, the same month that Glenn forwarded his report to the County, the IRS notified plaintiff it was auditing her tax returns from 2013-2015 and proposing that plaintiff owed $500,000 in additional taxes based on excess benefit transactions she received from LSAF during those years. For the next sixteen months, the IRS conducted its audit of plaintiff. ER-91-92.

The issue before the IRS was whether LSAF made any unreported payments to or for the benefit of the Rubins. ER-91. The IRS began its audit by making many of the same allegations that Kalanges here did, namely that plaintiff comingled funds with LSAF, paid personal expenses out of LSAF accounts, wrote checks and made transfers to herself from LSAF accounts, and reimbursed herself for expenses that did not satisfy the Treasury Regulations and therefore constituted personal

economic benefits from LSAF. ER-94. The IRS auditor reviewed the same transactions (payments, debits, transfers, and cash withdrawals from the LSAF bank and PayPal accounts), financial analysis, and documents as the DOJ and DHS used to determine whether they were made to or for the benefit of plaintiff. ER-91.

The IRS concluded that LSAF did not make the payments to plaintiff alleged by Mr. Kalanges and relied on by DHS to determine overpayments. *Id.* As explained in a September 14, 2017, letter from tax attorney Leila E. Vaughan, who represented plaintiff with regards to the IRS audit: "The auditor's goal was to determine whether any expenses or transactions of the Foundation were 'excess benefit transactions,' i.e., transactions for your benefit that were not approved by the Board of Directors of the Foundation or whether they were expenses in furtherance of the Foundation's tax-exempt purpose and adequately substantiated. As a result of documentation provided to the auditor in July, August and September, as well as access to your records during our meeting…you will receive a letter from the IRS that finalizes her determination that there were no excess benefit transactions. In addition, no discrepancy adjustment should be issued by the IRS with respect to any of your tax returns." See ER-98.

On October 5, 2017, at 8:25 am, plaintiff sent two letters to Mark Kleyna, the DOJ attorney working with Kalanges on his investigation. The first letter, from plaintiff, was provided "to follow up on our…investigation into transaction

between the Foundation and myself" and asserted that "the IRS investigated the same transactions to determine whether there were any excess benefit transactions or compensation" and "concluded that there were [none]." ER-97. The second letter plaintiff sent was the September 14th letter from tax attorney Vaughan.

Later on October 5, 2017, plaintiff sent Mr. Kleyna a second email: "Please review the attached and forward as necessary. Consistent with my attorney's letter (emailed to you this morning), today I received the attached letter from the IRS notifying me that no excess benefit transactions were found." ER-100. Attached to this email was a letter, dated October 3, 2017, from IRS Director of Exempt Organizations Examinations to plaintiff, stating that, "[b]ased on our audit,…there is no change to your tax liability." ER-102.

On October 6, 2017, plaintiff followed-up by email with Mr. Kleyna and Mr. Kalanges. Plaintiff wrote, "I am writing to confirm that you got the second email I sent yesterday…I will follow up a.s.a.p. regarding the additional requested documentation." ER-103. Mr. Kleyna responded the same day, confirming that "[w]e have received your email and attached letter" and adding that "the conclusions of the Internal Revenue Service auditor described in Ms. Vaughan's letter do not appear to agree with this office's analysis…In order for us to be able to reconcile

these different conclusions, we would have to review all documents relevant to the IRS's determinations." *See* ER-24.

On October 16, 2017, attorney Phil Bezanson of Bracewell LLP, emailed Mr. Kleyna and Mr. Kalanges: "I'm in the process of being retained…I understand you have an open request for [the IRS] materials…and I expect Ms. Rubin will be able to provide those[.]" ER-105. Mr. Bezanson requested a phone conferral for the following day.

On October 17, 2017, Mr. Bezanson spoke by phone with Mr. Kleyna and Mr. Kalanges. Mr. Kleyna asked Mr. Bezanson to provide: (i) documentation addressing the loan repayments and reimbursements, (ii) the documentation substantiating the loans and expenses, (iii) correspondence between Ms. Vaughan and the IRS, and (iv) a set of auditable books (the "IRS material"). Mr. Bezanson agreed to provide the requested materials. ER-92.

On November 8, 2017, Mr. Bezanson emailed Mr. Kleyna and Mr. Kalanges: "I'm planning to provide IRS-related and other financial materials to you this week. The materials include Quickbooks files for LSAF that have been prepared by a bookkeeper, not by Tamara." ER-105. Kalanges confirmed that he received and read this email. ER-149:20-25.

On November 10, 2017, Mr. Bezanson emailed Mr. Kleyna and Mr. Kalanges again. ER-105. The letter contained a hyperlink to access the IRS materials, as

well as a letter to "be read in connection with the materials." That letter stated: "As we discussed…we are producing copies of correspondence and other materials Ms. Rubin and her counsel have provided to and received from the [IRS] along with the financial data you requested." "The materials we are producing….demonstrate that the Rubins did not receive any improper financial benefits from the Lead Safe America Foundation and are summarized at Rubin 000917-000920." ER-108. Mr. Bezanson then sent Mr. Kleyna and Mr. Kalanges a separate email with the password. See ER-110. Kalanges and Kleyna admit that they received (and sent) the October and November emails above. ER-33. Mr. Kalanges claims that he did not read Mr. Bezanson's November 10th email until November 13, 2017, because he was out of the office on November 10th, which was an official state holiday (Veterans Day), and did not return to the office until Monday, the 13th. ER-27. Defendants told plaintiff that Mr. Kleyna was also out the week that Mr. Bezanson forwarded the IRS material.

E. Multnomah County's Criminal Prosecution of Plaintiff

On November 13, 2017, an indictment was returned in Multnomah County Case Number 17CR75385, charging plaintiff with nine Class C felonies (seven counts of felony Theft in the First Degree and two felony counts of welfare fraud), based on allegations that she received income or benefits from LSAF that she failed to report on her applications for, and/or while receiving, Medicaid and

SNAP benefits. ER-33, ¶ 27; ER-52, ¶ 50. Kalanges and Glenn were the only two witnesses before the grand jury. ER-121 and133:4-14.

On November 28, 2017, officers from the Multnomah County Sheriff's office arrested plaintiff at home while she was sitting with her son at the kitchen table. On November 29, 2017, plaintiff was booked into Multnomah County jail and arraigned. ER-34, ¶ 30; ER-53.

Plaintiff was charged with in state court with nine Class C felonies (seven counts of felony Theft in the First Degree and two felony counts of welfare fraud), based on allegations that she received income or benefits from LSAF that she failed to report on her applications for, and/or while receiving, Medicaid and SNAP benefits. ER-33, ¶ 27; ER-52, ¶ 50.

Plaintiff pleaded not guilty to all charges.

On December 21, 2017, at defendant Kleyna's request, Mr. Bezanson, provided the password for the QuickBooks files, which were a subset of the documents Mr. Bezanson had previously produced. Defendants deny the password to the Quickbooks subset of documents had previously been provided. Defendant Kleyna thanked Mr. Bezanson for sending the password. ER-34, ¶ 34; ER 52-53, ¶ 60.

F. The Case Against Plaintiff Falls Apart

Following her arrest, plaintiff retained an attorney to defend her from the County's charges. Plaintiff's attorney requested relevant discovery materials from

the DA and the DA provided materials in response. ER-117. In a February 8, 2018, phone conferral with the Multnomah County Deputy District Attorney ("DDA"), plaintiff's attorney informed the DDA that it appeared the County's discovery responses were incomplete and that, in particular, the IRS materials that plaintiff provided to DOJ in October 2017, had not been produced. See ER-121, ER-55, ¶ 62.

On February 9, 2018, plaintiff's attorney met with Mr. Kalanges, Mr. Glenn, and the County deputy district attorney ("DDA"). ER-81. At this meeting, Kalanges admitted that he "had reviewed some, but not all, of the documents provided" by plaintiff beginning in October 2017. ER-35, ¶ 37; ER-55, ¶ 64. According to plaintiff's attorney, Mr. Kalanges admitted that he had withheld the IRS conclusions and the substantiating financial records from DHS and the DA. 3 See ER-82-83.

On February 12, 2018, plaintiff provided the DA with significant discovery and information showing that Ms. Rubin had been wrongfully charged. ER-81.

On March 8, 2018, plaintiff's attorney sent DDA Leineweber a letter outlining plaintiff's complete defense to all charges in the case and seeking dismissal of the prosecution. ER-111-116. Along with the letter, plaintiff's attorney included materials showing that (1) defendants incorrectly calculated plaintiff's income and resources based on incomplete information, and (2) based on corrected income

calculations, plaintiff was at all relevant times eligible for the medical and SNAP benefits she received. See ER-111-116.

On March 14, 2018, plaintiff's attorney sent a letter to the DDA demanding that the state provide any and all exculpatory material, including but not limited to the substantive financial documents supporting the financial summaries and analysis of Mr. Kalanges and the DHS findings that the Rubins were ineligible for the benefits they received. ER-117-118. At that point, Kalanges had not provided or even informed DHS or the DA that he had in his possession the exculpatory financial documents directly undermining Mr. Kalanges' preliminary and unsubstantiated findings. The DA forwarded the discovery request to defendants. *Id*.

On April 11, 2018, the state produced additional discovery consisting of some of Mr. Kalanges' working papers (e.g., Excel workbooks) summarizing the financial transactions and some but not all of the financial statements Mr. Kalanges relied upon when conducting his analysis. Key documents, however, were still missing. See ER-82-83.

On April 30, 2018, frustrated with the unexplained, slow pace of the County's response to the complete defense from the charges that plaintiff's attorney had submitted nearly three months prior, plaintiff's attorney sent the DA a final exhortation to drop the charges or provide the missing discovery. Along with

this email, plaintiff's attorney submitted a draft motion to compel discovery and supporting memorandum that she indicated she would soon be filing. ER-76-86.

On May 10, 2018, the DA dismissed all counts against plaintiff. ER-27. On May 11, 2018, plaintiff provided Multnomah County and the Oregon DOJ and DAS with a Tort Claim Notice pursuant to ORS 30.275 based on the allegations above. ER 119-122.

II. Procedural Facts

On December 30, 2021, defendants moved for summary judgment.

On January 29, 2022, plaintiff filed her opposition. ECF 83.

Plaintiff argued, *inter alia*, that the evidence in the record, viewed in the light most favorable, establishes a genuine dispute of material fact as to plaintiff's claim that Kalanges unlawfully and deliberately fabricated evidence in violation of the Fourteenth Amendment.

The district court granted summary judgment for defendants on plaintiff's claim, holding that "there is no sign that Defendant Kalanges fabricated evidence" or that his conduct evinced deliberate indifference or shocks the conscience. ER-15-17.

SUMMARY OF THE ARGUMENT

The district court erred in holding that there was no evidence that defendant Kalanges deliberately fabricated evidence in violation of the Fourteenth Amendment because Kalanges continued his investigation of plaintiff even after he

had actual or constructive notice that plaintiff was innocent, and that conduct caused the deprivation of plaintiff's liberty.

The court also erred when it held that plaintiff's claim against Kalanges was barred by witness immunity and qualified immunity.

STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc). Viewing the evidence in the light most favorable to the nonmoving party, the court determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Socal Recovery, LLC v. City of Costa Mesa*, 56 F4th 802, 812 (9th Cir 2023).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT HELD THAT THERE IS NO EVIDENCE THAT DEFENDAN T KALANGES DELIBERATELY FABRICATED EVIDENCE.

The district court held that there is no evidence that Kalanges deliberately fabricated any evidence, and that Kalanges' allegedly unlawful conduct does not evince deliberate indifference or shock the conscience. ER-15-17.

A. The District Court erred when it held that there is no evidence that Kalanges continued his investigation despite actual or constructive knowledge of plaintiff's innocence.

The district court held that there is no evidence in the record that Kalanges fabricated evidence. The district court is incorrect. Here, the evidence in the record, viewed in the light most favorable to plaintiff, establishes a genuine dispute of material fact as to plaintiff's claim that Kalanges and Kleyna unlawfully and deliberately fabricated evidence.

The Fourteenth Amendment prohibits the deliberate fabrication of evidence by a state official. *Devereaux*, 263 F.3d at 1074–75 (en banc). To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty. *Costanich v. Dep't of Soc. & Health Servs*., 627 F.3d 1101, 1111 (9th Cir. 2010).

The first element can be established by circumstantial evidence, for example, evidence that officials "continued their investigation of [a person] despite the fact that they knew or should have known that he was innocent[.]" *Spencer v. Peters*, 857 F3d 789, 793 (9th Cir 2017) (quoting *Devereaux*, 263 F.3d at 1076) (brackets in *Spencer*). "Mere careless[ness] is insufficient, as are mistakes of tone, and errors concerning trivial matters." *Spencer*, 857 F3d at 798 (internal citations and quotation marks omitted) (brackets in original).

The district court here based its holding that "there is no sign that Defendant Kalanges fabricated evidence" on evidence in the record regarding Kalanges'

awareness of the IRS results, their relationship to his own investigation, and the County's prosecution of plaintiff. ER-115. First, the district court pointed to what it cited as Defendant Kalanges' deposition testimony, to conclude that Kalanges subjectively "believed that the IRS audit had 'nothing to do with' his investigation." Second, the district court noted that "Kalanges did not learn of the IRS audit or have access to that information until after he had completed his analysis, sent it to Defendant Glenn, and testified to the grand jury." *Id.*

The district court is wrong on both points. First, the deposition testimony cited by the district court is that of Defendant Glenn, not Defendant Kalanges. Specifically, in response to the question, "Was the entire IRS investigation related to the same topic of your investigation?", Glenn testified, "No. It had nothing to do with it." ER-166. When asked, next, "Was the entire IRS investigation similar to the investigation that Kris Kalanges conducted?", Glenn responded, "I have no idea." According to the actual deposition testimony of Kalanges, the kind of information that plaintiff provided to the IRS was the kind of information he needed and was waiting for. ER-51:1-3.

In addition to Kalanges' own testimony, there is other evidence in the record to support the conclusion that Kalanges knew about the IRS audit and the purported exculpatory results before the county arrested and charged plaintiff and that Kalanges intentionally hid the exculpatory IRS material from the County. For

example, Kalanges himself forwarded the results of his investigation to the IRS. ER-32, ¶ 17; ER-49 , ¶ 32. ER-148:10-14. The IRS audit was nearly identical in its scope and the materials reviewed. Kalanges received repeated notifications from multiple sources that the IRS audit exonerated plaintiff. Kleyna and Kalanges received a letter from tax attorney Ms. Vaughan, a letter from the IRS, and emails from plaintiff and her counsel on October 5th, October 6th, and October 16th, all promising the delivery of essential materials—exactly those kind of materials that defendants had requested from plaintiff—as well as a phone conferral with plaintiff's counsel Mr. Bezanson.

In short, contrary to the district court's conclusion that Kalanges believed the IRS audit had nothing to do with his investigation, a reasonable juror could conclude that Kalanges knew or should have known that the IRS audit was highly relevant to his investigation and the County's prosecution of plaintiff.

Yet defendants continued their investigation and failed to share that information or the supporting materials with the DA prior to plaintiff's arrest and then for another five months after plaintiff's arrest. Defendants only produced the records once they had been caught red-handed, at which point the County realized that it had no case and dropped all the charges.

A reasonable juror could conclude based on the above that Kalanges deliberately fabricated evidence because he continued the investigation of plaintiff

despite the fact that he knew or should have known that she was innocent." Under the standard, that is enough to show (at least a disputed question of fact as to whether) Kalanges deliberately fabricated evidence in violation of the Fourteenth Amendment.

B. Evidence in the record shows that Kalanges' unlawful conduct caused plaintiff's deprivation of liberty.

To prevail on a § 1983 claim of deliberate fabrication, a plaintiff must also prove the deliberate fabrication caused the plaintiff's deprivation of liberty. *Costanich,* 627 F.3d 1101, 1111. Fabricated evidence does not give rise to a claim if the plaintiff cannot "show the fabrication actually injured her in some way." Id. To establish causation, the plaintiff must show that (a) the act was the cause in fact of the deprivation of liberty, meaning that the injury would not have occurred in the absence of the conduct; and (b) the act was the 'proximate cause' or 'legal cause' of the injury, meaning that the injury is of a type that a reasonable person would see as a likely result of the conduct in question." *Spencer* 857 F.3d at 798.

"As to what constitutes an injury, a § 1983 plaintiff need not be convicted on the basis of the fabricated evidence to have suffered a deprivation of liberty—being criminally charged is enough*." Caldwell v. City of S.F.*, 889 F.3d 1105, 1115 (9th Cir. 2018) (citing NINTH CIR. JURY INSTR. COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS, § 9.33 (2017) ("The defendant [name]

deliberately fabricated evidence that was used to [[criminally charge] [prosecute] [convict]] the plaintiff.") (brackets in instruction)).

Kalanges initiated the criminal proceedings here. He referred his investigation and analysis to DHS and the IRS. The record shows that Kalanges analysis was the determining factor in the DHS and, therefore DA's, investigations.

The district court, though, held that because plaintiff also possessed the IRS materials, Kalanges did not violate the law. ER-16. But *Caldwell* makes clear that a section 1983 deprivation of liberty exists when an individual is criminally charged. Here, plaintiff was subjected to arrest, incarceration, and months of continued prosecution to which she would not have been subjected had Kalanges not deliberately fabricated evidence. That is sufficient.

"Typically, in constitutional tort cases the [f]iling of a criminal complaint immunizes investigating officers ... because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Caldwell*, 889 F.3d at 1115 (internal quotation marks omitted). But, if "a plaintiff establishes that officers either presented false evidence to or withheld crucial information from the prosecutor, the plaintiff overcomes the presumption of prosecutorial independence and the analysis reverts back to a normal causation question." *Id*., at 1116.

Here, Kalanges withheld crucial information when he knowingly failed to furnish the IRS material to DHS and the DA.

The district court also held that Kalanges' conduct did not shock the conscience or evince deliberate indifference. ER-115. "Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions. The same facts that show that Kalanges and Kleyna deliberately fabricated evidence shows that K and K exhibited a deliberate indifference. "To violate substantive due process, official conduct must 'shock[] the conscience.'" *Leon v. Tillamook Cnty. Sch. Dist.*, No. 3:17-440-PK, at *25 (D.Or, May 11, 2018) (quoting *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)). Whether official conduct shocks the conscience "depends on context." *Gantt v. City of L.A.*, 717 F.3d 702, 707 (9th Cir. 2013). As noted above, there is "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux*, 263 F.3d at 1074–75. "Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience." *Wilkinson v. Torres,* 610 F.3d 546, 554 (9th Cir. 2010). Acting with "deliberate indifference to or reckless disregard for an accused's rights" is "consistent with the standard imposed in the substantive due process context, in which government action may violate due process if it 'shocks the conscience.'" *Gantt v. City of L.A.*, 717 F3d 702, 707-

08 (9th Cir 2013). Here, then, the evidence that shows that Kalanges deliberately fabricated evidence is also sufficient to shock the conscience.

C. The District Court erred when it held that Kalanges' unlawful conduct was protected by immunity.

The district court held that Kalanges is immune from claims based on grand jury testimony. The district court reasoned that grand jury testimony is subject to absolute immunity and that, because—in the district court's view—all of plaintiff's claims rest in part on the allegation that Kalanges gave false or incomplete testimony to the grand jury, those claims are barred. The district court also held that Kalanges is protected by qualified immunity. The court erred on both points.

1. *Absolute Witness Immunity*

Witnesses, including government official witnesses, are accorded absolute immunity from liability for testimony before a grand jury. *Lisker v. City of Los Angeles*, 780 F.3d 1237, 1241 (9th Cir. 2015) (citing *Rehberg v. Paulk*, 566 US 356, 359 (2012)). *See also Paine v. City of Lompoc*, 265 F.3d 975, 980 (9th Cir. 2001); *Spurlock v. Satterfield,* 167 F.3d 995, 1001–04 (6th Cir. 1999). Absolute witness immunity also extends to preparatory activities "inextricably tied" to testimony, such as conspiracies to testify falsely. *Lisker*, 780 F.3d at 1241.

Immunity for pre-testimony conduct, however, "is not limitless." *Id.*, at 1242 (quoting *Paine*, 265 F.3d at 981). "Absolute witness immunity does not shield an out-of-court, pretrial conspiracy to engage in non-testimonial acts such as

fabricating or suppressing physical or documentary evidence or suppressing the identities of potential witnesses." *Paine* 265 F.3d at 983. A government official does not acquire absolute immunity for unprotected conduct by later testifying before a grand jury. "The detectives' ultimate testimony does not serve to cloak these actions with absolute testimonial immunity; if it did, they would be rewarded for compound[ing] a constitutional wrong." *Lisker*, 780 F.3d at 1243 (internal quotation marks and citations omitted); *accord Spurlock*, 167 F.3d at 1001 ("[W]hen defendants have dual roles as witness and fabricator, extending protection from the testimony to the fabricated evidence would transform the immunity from a shield to ensure candor into a sword allowing them to trample the statutory and constitutional rights of others.") (internal quotation marks and citations omitted).

Here, witness immunity does not protect Kalanges "non-testimonial acts such as fabricating…evidence[.]" *Paine*, 265 F.3d at 983. Because, as analyzed above, there is evidence in the record sufficient to permit a reasonable juror to conclude that Kalanges deliberately fabricated evidence before the grand jury ever took place, immunity does not extend to those unlawful acts or omissions. Similarly, immunity does not protect evidence of additional unlawful action taken by Kalanges after the grand jury concluded; namely, his ongoing failure and refusal to provide the exculpatory materials he had, which the county was

requesting and which, once provided, prompted the county to dismiss all charges against plaintiff.

2. *Qualified Immunity*

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2080 (2011) (citation omitted). Regarding the first element, plaintiff has argued above that Kalanges violated plaintiff's Fourteenth Amendment rights. Regarding the second element, as noted above, there is "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux*, 263 F.3d at 1074–75. Qualified immunity does not extend to Kalanges' unlawful conduct.

CONCLUSION

For the reasons above, plaintiff respectfully requests that this Court reverse the district court's grant of summary judgment for defendants on her claim that Kalanges violated the Fourteenth Amendment, and remand to the district court.

Date: February 17, 2023

Zack Duffly

/s/ Zack Duffly
Zack Duffly

Attorney for Appellant Tamara Elise Rubin

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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9th Cir. Case Number(s) 22-35640

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☒ I am unaware of any related cases currently pending in this court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-35640

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ADDENDUM OF ADDITIONAL AUTHORITIES

Page(s)

Statutes

Constitutional Provisions

Other

Civil action for deprivation of rights

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

U.S. Const. amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion

against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

9.33 Particular Rights—Fourteenth Amendment—Due Process—Deliberate Fabrication of Evidence

As previously explained, the plaintiff has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. The Fourteenth Amendment protects against being subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the defendant. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

For the plaintiff to prevail on [his][her] claim of deliberate fabrication of evidence, the plaintiff must prove [at least one of] the following element[s] by a preponderance of the evidence:

> [The defendant [*name*] deliberately fabricated evidence that was used to [[criminally charge][prosecute][convict]] the plaintiff.]
>
> *or*
>
> [The defendant [*name*] continued [his] [her] investigation of the plaintiff despite the fact that [he] [she] knew that the plaintiff was innocent, or was deliberately indifferent to the plaintiff's innocence, and the results of the investigation were used to [[criminally charge][prosecute][convict]] the plaintiff.]
>
> *or*
>
> [The defendant [*name*] used techniques that were so coercive and abusive that [he][she] knew, or was deliberately indifferent, that those techniques would yield false information that was used to [[criminally charge][prosecute][convict]] the plaintiff.

"Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions.

[If the plaintiff proves that the defendant deliberately fabricated evidence that was used to [criminally charge][prosecute][convict] the plaintiff, then the plaintiff is not required to prove that the defendant knew the plaintiff was innocent or was deliberately indifferent to the plaintiff's innocence.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.9.

In *Devereaux v. Abbey*, the Ninth Circuit stated that in order to establish deliberate fabrication of evidence, a plaintiff:

> must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [the plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information.

263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court held that "there is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Id*. at 1074-75 (emphasis added).

Not all inaccuracies in an investigative report give rise to a constitutional claim. "Mere carelessness is insufficient, as are mistakes of tone. Errors concerning trivial matters cannot establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot show the fabrication actually injured her in some way." *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017) (citations and internal quotations omitted); *see also O'Doan v. Sanford*, 991 F.3d 1027, 1046 (9th Cir. 2021) (confirming *Devereau v. Abbey* but noting technical inaccuracy is not fabrication).

The Ninth Circuit has not specifically considered a case involving the use of fabricated evidence to prosecute when a criminal defendant was acquitted, or the charges dismissed. However, other courts have held that such evidence may not be used to prosecute or convict an individual. *See*, *e.g*., *Devereaux*, 263 F.3d. at 1075 ("the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution"); *Cole v. Carson*, 802 F.3d 752, 768 (5th Cir.2015) ("a victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted"). Thus, the instruction should be modified depending on whether the plaintiff was criminally charged, prosecuted, or convicted based on fabricated evidence. This instruction includes prosecution as a means to satisfy the three elements for a trial court to consider.

"Typically, in constitutional tort cases the '[f]iling of a criminal complaint immunizes investigating officers . . . because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time.'" *Caldwell v. City & Cnty. of San Francisco*, 889 F.3d 1105, 1115 (9th Cir. 2018) (quoting *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008)). However, the presumption can be overcome if a plaintiff establishes that officers "either presented false evidence to or withheld crucial information from the prosecutor." *Id*. at 1116. At that point, "the analysis reverts back to a normal causation question" and the issue again becomes whether the constitutional violation caused the plaintiff's harm. *Id*.

The deliberate fabrication of evidence implicates "the fundamental due process right to a fair trial." *Richards v. County of San Bernadino*, 39 F.4th 562, 572 (9th Cir. 2022). This is true "regardless of the plaintiff's innocence or guilt . . . the right to a fair trial is impinged either way." *Id.* Accordingly, rather than a but-for causation standard, the appropriate standard of causation is the "materiality causation standard," under which causation is established if the

plaintiff "can show a reasonable likelihood that the allegedly fabricated [] evidence could have affected the judgment of the jury." *Id.* at 573-74.

An official's deliberate fabrication of evidence or use of perjury also violates the rights of a parent or child when introduced in a civil dependency proceeding. "[G]overnment perjury and knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts . . .. There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." *Hardwick v. Vreeken*, 844 F.3d 1112, 1120 (9th Cir. 2017).

Imposing a deliberate indifference or reckless disregard for an accused's rights or for the truth standard is appropriate in the substantive due process context. *See Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1089 (9th Cir. 2009).

Deliberate indifference encompasses recklessness. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), noted that the "deliberate indifference" standard, at least in the context of a Fourteenth Amendment failure to protect claim, requires the plaintiff "to prove more than negligence but less than subjective intent—something akin to reckless disregard." *See Gantt*, 717 F.3d at 708 (concluding no error in portion of instruction stating "deliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions"); *see also Tatum v. Moody*, 768 F.3d 806, 821 (9th Cir. 2014) (approving alternative instruction that also encompassed recklessness).

Revised Dec. 2022

CERTIFICATE OF SERVICE

I hereby certify that I served Plaintiff's APPELLANT'S OPENING BRIEF on Respondents' Counsel, Denise Fjordbeck, on 2/17/2023 by email to denise.fjordbeck@doj.state.or.us

Dated this 17th of February 2023.

/s/ Zack Duffly

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