6-7-2016

Elliott v. Olsen Respondent's Brief Dckt. 43971

IN THE SUPREME COURT OF THE STATE OF IDAHO

CANDACE (ANDI) W. ELLIOTT, Plaintiff/Appellant, v. BLAIR OLSEN, individually, and in his capacity as Jefferson County Sheriff, ROBIN DUNN, individually, and in his capacity as Jefferson County Prosecutor, JOHN CLEMENTS, individually, and in his capacity as a Jefferson County Deputy, AMELIA SHEETS, individually, and in her capacity as Jefferson County Deputy Prosecutor, JEFFERSON COUNTY SHERIFF'S DEPARTMENT, JEFFERSON COUNTY and COMMISSIONERS, Commissioner GERALD RAYMOND, individually, Defendants/Respondents.	Supreme Court Docket No. 43971 Jefferson County Case No. CV-2014-680

RESPONDENT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEFFERSON.

Honorable ALAN C. STEPHENS, District Judge, Presiding.

Candace (Andi) Elliott
2498 E 2100 N
Hamer, ID 83425
Email: straighttalkidaho@yahoo.com
Pro Se Plaintiff/Appellant

Blake G. Hall
Sam L. Angell
HALL ANGELL STARNES, LLP
1075 S. Utah Avenue, Suite 150
Idaho Falls, ID 83402
Telephone: (208) 522-3003
Fax: (208) 621-3008
Attorneys for Defendant/ Respondents

I. TABLE OF CONTENTS

II. TABLE OF CASES AND AUTHORITIES.....iii

III. STATEMENT OF THE CASE.....1
A. Nature of the Case.....1
B. Course of Proceedings.....1
C. Statement of Facts.....2

IV. ARGUMENT.....7
A. The District Court Properly Dismissed Appellant's Malicious Prosecution Claim.....9
1. The District Court applied the correct standard for dismissal of the state and federal malicious prosecution claims.....10
a. The District Court correctly held that the malicious prosecution claims should be dismissed as against Deputy Clements.....11
b. The District Court correctly held that the malicious prosecution claims should be dismissed as against prosecutors Robin Dunn and Amelia Sheets.....14
c. The District Court correctly held that the malicious prosecution claims should be dismissed as against Jefferson County, Jefferson County Commissioners, Jefferson County Sheriff's Office, Sheriff Olsen and Commissioner Raymond.....17
B. Appellant Has Improperly Referenced Materials Not Included in the Record on Appeal, and this Court must Ignore Such References.....18
C. The District Court Properly Granted Summary Judgment as to All Claims.....20
D. Appellant Did Not Raise Any Issue Regarding Discovery at the District Court Level.....21

V. ATTORNEYS' FEES.....22

VI. CONCLUSION.....23

CERTIFICATE OF SERVICE.....24

II. TABLE OF CASES AND AUTHORITIES

Cases

Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).....7,8
Randall v. Ganz, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975)..... 8
Michael v. Zehm, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953)..... 8
Sammis v. Magnetek, Inc., 130 Idaho 342, 346, 941 P.2d 314, 318 (1997..... 8
Woods v. Sanders, 150 Idaho 53, 57, 244 P.3d 197, 201 (2010)..... 8,21
Twin Falls Cnty. v. Coates, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003)..8,22
Lacey v. Maricopa Cnty., 693 F.3d 896, 919 (9th Cir. 2012).....10
Freeman v. City of Santa Ana, 68 F.3d 1180, 1189 (9th Cir.1995).....10
Brown v. Selfridge, 224 U.S. 189, 192, 32 S.Ct. 444, 446, 56 L.Ed. 727 (1912) 10
Howard v. Felton, 85 Idaho 286, 290, 379 P.2d 414, 416 (1963).....11
Buckley v. Fitzsimmons, 509 U.S. 259, 125 L. Ed.2d 209, 113 S. Ct. 2606 (1993).....14
Kalina v. Fletcher, 522 U.S. 118, 131, 118 S.Ct. 502 (1997)..... 15
Imbler v. Pachtman, 424 U.S. 409, 424-25, 96 S.Ct. 984 (1976)..... 15
Uribe v. Cohen, 2006 WL 2349567 (D. Conn. 2006)..... 15
Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978)..... 17,18
Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1110–11 (9th Cir. 2001)..... 17
Van Ort v. Estate of Stanewich, 92 F.3d 831, 835 (9th Cir. 1996).....17
Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996)..... 18
Kugler v. Nelson, No. 41039, 2014 WL 4197547, at *3 (Idaho Ct. App. Aug. 25, 2014).....18,19
Belk v. Martin, 136 Idaho 652, 660, 39 P.3d 592, 600 (2001).....19
State v. Murphy, 133 Idaho 489, 491, 988 P.2d 715, 717 (Ct.App.1999).....19
Crowley v. Critchfield, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007)..... 21
Hoppe v. McDonald, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982)..... 21
Bowles v. Pro Indiviso, Inc., 132 Idaho 371, 973 P.2d 142 (1999).....23

Statutes and Rules

Idaho Code § 6-610.....1
§ 1983 1,9,10,11,13,17
Idaho Appellate Rule 41.....22
Idaho Code § 12-117.....22
Idaho Code § 6-918.....22
Idaho Code Ann. § 6-918A (West).....22

III.
STATEMENT OF CASE

A. Nature of the Case:

On three separate occasions, the Jefferson County Prosecutor's Office charged Ms. Candace Elliott (Appellant) with trespass. Appellant pled guilty to the first charge in 2008, and received a withheld judgment. The second trespass was filed in 2009, and the charges against Appellant were dismissed by the prosecutor. In the third instance, the matter was resolved in July of 2013 when Appellant was acquitted of the charge following a bench trial. Following the acquittal, Appellant filed this lawsuit naming the Respondents and alleging various § 1983 and state law tort claims. The District Court granted summary judgment dismissing all of Appellants claims on December 31, 2015.

B. Course of Proceedings:

Appellant filed her *pro se* Complaint on September 16, 2014. Respondents filed a motion to dismiss pursuant to Idaho Code § 6-610 on October 23, 2015. The § 6-610 motion was heard on November 16, 2015. The District Court granted Respondents' motion to dismiss pursuant to § 6-610 on November 20, 2015. Respondent's filed a motion for summary judgment on November 12, 2015. A hearing was held on the motion for summary judgment on December 9, 2015. The District Court granted Respondents' motion for summary judgment and dismissed Appellant's Complaint with prejudice on December 31, 2015. A Judgment of dismissal was entered by the District Court on January 13, 2016. Appellant timely filed this appeal on February 4, 2016.

C. **Statement of Facts:**

1. Appellant is a resident of Jefferson County and the founder of an organization entitled "For the Love of Pets Foundations, Inc." (R. 482; *Dep. Elliott*, 110:4-5).

2. Jefferson County is political subdivision of the State of Idaho. Defendant Gerald Raymond was the Chairman of the Board of Commissioners for Jefferson County during all times relevant to this matter. Sheriff Blair Olsen was the elected Sheriff for Jefferson County during all times relevant to this matter. Respondent John Clements was a deputy for the Sheriff's Office at all times relevant to this matter. Robin Dunn was the elected prosecuting attorney for Jefferson County, and Amelia Sheets was his deputy prosecutor during all times relevant to this matter.

3. Appellant filed this lawsuit on September 16, 2014. (*Complaint*, pg. 57) The claims in this matter arise from three trespass charges issued against Appellant. The first trespass charge occurred in 2008, and Appellant pled guilty. (R. 707) The second trespass charge was filed in 2009, and was later dismissed by the prosecutor. (R. 707) The third trespass charge was issued on August 30, 2011. (R. 707) Appellant was acquitted from the trespass charge on July 2, 2013. (R. 707).

4. Appellant recounted that on July 24, 2011 she received a call from Bill Shurtliff (a resident of Jefferson County) indicating that there were horses located on the property of Dan Murdock and Kurt B. Young that were in poor condition. Mr. Shurtliff asked Appellant to go out and look at them.

5. Appellant has testified that after receiving the call from Mr. Shurtliff, she "drove down the road and saw these thin horses. And I got out and took pictures of them." (R. 475; *Dep. Elliott*, 67:3-25).

6. Appellant then testified that she noticed that Mr. Young was outside of his home taking pictures of Appellant while she was taking pictures of the horses. *Id.* Appellant said that she was "focused on the horses" and was not "paying a lot of attention to Mr. Young." *Id.* Mr. Young called in a trespass complaint to the Jefferson County Sheriff's Office against Appellant for being on his property without permission. This was the second time during the year that Mr. Young had called the Jefferson County Sheriff's Office and entered a complaint about Appellant trespassing on his property. (R. 489; *Dep. Elliott*, Ex. 4). Mr. Young had also called in a trespass complaint against Appellant on April 20, 2011. (R. 481; *Dep. Elliott*, 100:10).

7. At approximately the same time, Appellant called in a complaint of animal abuse against Mr. Young and Mr. Murdoch. Deputy John Clements was assigned to respond to both complaints. Deputy Clements first responded to Mr. Young's residence. He conducted a standard investigation. He spoke with Mr. Young, Mr. Murdoch and other witnesses including Klurissa Young. He had the witnesses fill out witness statements. He went to Mr. Murdock's property and investigated the animal abuse complaint. He took photographs of the horses and of the property. He accepted electronic photographs from Mr. Young on a thumb drive. According to Mr. Young, the photographs demonstrated that Appellant had been trespassing on his ground. Mr. Young then signed a citizen "trespass" complaint against Appellant. (R. 476; *Dep. Elliott*, 69-71).

8. In his written witness statement, Mr. Young said that "Appellant exited the car with a camera walking in front of my house taking pictures of Dan Murdock's House and Horses, she then parked the car right in front of my house which is on my property." (R. 486; *Dep. Elliott*, Ex. 3).

9. Deputy Clements then went to Appellant's home and spoke with Appellant and her husband regarding the animal abuse complaint. He accepted the photographs taken by Appellant of the incident. (R. 476; *Dep. Elliott*, 71:9-10)

10. After Deputy Clements gathered the information regarding the two complaints lodged with the Sheriff's Office on July 24, 2011, he turned all of the information over to the Jefferson County Prosecutor's office. (R. 462; *Aff. Clements*, ¶ 5)

11. The elected prosecutor for Jefferson County at the time was Robin Dunn. Mr. Dunn assigned his deputy Amelia Sheets to handle the incidents. (R. 459; *Aff. Sheets*, ¶ 2-3)(R. 480; *Dep. Elliott*, 91:9-13) Mr. Dunn has explained that he assigned Ms. Sheets to handle the case, and that he was not personally involved in the day-to-day prosecution of the case. Ms. Sheets made the charging decision without any input or influence from Mr. Dunn. Mr. Dunn explained that he did not hold any malice or ill-will toward the Appellant. (R. 440; *Aff. Dunn*, ¶ 1-5)

12. Ms. Sheets reviewed the information provided by Deputy Clements and determined that there was probable cause to issue a citation for trespass against Appellant. The probable cause arose from the fact that Appellant had trespassed on Mr. Young's property earlier in the year, and had returned to Mr. Young's property on July 24, 2011. Specifically, Ms. Sheets

noted that there was eyewitness testimony from Mr. Young memorialized in his written witness statement that Appellant had parked her car "on my property". Ms. Sheets issued the criminal complaint for trespass against Appellant based upon her training, experience, and the facts gathered by Deputy Clements. Ms. Sheets has stated that she did not hold any malice or ill will toward Appellant, and that she did not act with malice in making her charging decision. (R. 459; *Aff. Sheets*, ¶ 3-7)

13. The decision to charge Appellant was an exercise of Ms. Sheets' judgment and occurred in the course of carrying out her duties as a deputy prosecutor for Jefferson County. She was not influenced by any other Jefferson County official or employee in regard to her charging decision. (R. 459; *Aff. Sheets*, ¶ 6)

14. While Mr. Dunn did not make the charging decision in this case, he has since become familiar with the facts after the charging decision was made. It is his professional opinion that there was ample probable cause to issue a citation for trespass against Appellant. This is based upon the police reports, witness statements, photographs and particularly the admission of Mr. Young that Appellant was "on his property." (R. 440; *Aff. Dunn*, ¶ 5)

15. Deputy Clements has testified that he did not hold any malice or ill-will toward Appellant. He has explained that he did not act with deliberate indifference to any of Appellant's constitutional rights. He has explained that he responded to the trespass call according to his training, he investigated the facts, gathered evidence, and submitted the facts to the Prosecuting Attorney's office. (R. 462; *Aff. Clements*, ¶ 4-6)

16. Deputy Clements was not personally involved in the decision to charge Appellant with trespass. That decision was made by the prosecuting attorney. *Id.*

17. Sheriff Olsen has explained that he was aware of the facts associated with the trespass charge in August of 2011, and to his understanding all proper policies and procedures were followed by the Jefferson County Sheriff's Office and Deputy Clements. Sheriff Olsen confirmed that Deputy Clements was POST certified and properly trained in regard to the handling of a trespass call. Sheriff Olsen explained that the Jefferson County Sheriff's Office did not have any policy that authorized or allowed malicious prosecution. There was no formal policy or informal practice of authorizing or allowing a deputy to exert improper influence over a charging decision. (R. 436; *Aff. Olsen*, ¶ 3-5).

18. Sheriff Olsen did not hold any personal ill will or malice toward Appellant. He did not exert any influence (undue or otherwise) in regard to the criminal trespass charges filed against Appellant. All charging decisions in regard to the August 30, 2011 criminal complaint were made by the Prosecuting Attorney's Office. (R. 436; *Aff. Olsen*, ¶ 6).

19. Appellant admitted that she did not have any direct evidence that Sheriff Olsen acted with "malice" in regard to her. (R. 485; *Dep. Elliott*, 195:11-14) Appellant also acknowledged that she did not have any evidence that Sheriff Olsen had anything to do with the decision to issue the criminal charge of trespass on August 30, 2011. (R. 485; *Dep. Elliott*, 193:14-16)

20. Though he is named in the Complaint, Commissioner Gerald Raymond did not have any personal participation in any of the events. He also stated that he had no knowledge of,

and he did not exert any influence one way or the other in regard to the charging decisions related to the criminal trespass charge in 2011. He has stated that he did not hold any malice or ill-will toward Appellant. (R. 466; *Aff. Raymond*, ¶ 3-4)

21. Appellant has stated that her allegations against Commissioner Raymond simply arise out of what she calls "the chain of command" in that she believes that Commissioner Raymond had supervisory authority or some type of authority over the sheriff's office. (R. 483; *Dep. Elliott*, 139:1-7).

22. Commissioner Raymond has explained that he does not have any direct supervisory authority over the Sheriff of Jefferson County, and that he is not in the "chain of command" for the Sheriff's Office. The Sheriff is a separately elected official, and is ultimately in charge of the functions and responsibilities of the Sheriff's Office. (R. 466; *Aff. Raymond*, ¶ 5)

23. The Board of Commissioners had a statutory obligation to review and approve the budget for each County department or Office. This budgetary review did not include any supervisory authority over the day-to-day conduct of the Sheriff or his deputies. (R. 467; *Aff. Raymond*, ¶ 6)

IV.
ARGUMENT

Appellant has filed this appeal listing seven issues (a –g) in her opening brief. This Court has been unwavering in holding that "[w]here an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court." *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146,

1152 (2010)(*citing Randall v. Ganz*, 96 Idaho 785, 788, 537 P.2d 65, 68 (1975)). "A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue." *Id.*, (*citing Michael v. Zehm*, 74 Idaho 442, 445, 263 P.2d 990, 993 (1953)). "This Court will not search the record on appeal for error." *Id.*, (*citing Suits v. Idaho Bd. of Prof'l Discipline*, 138 Idaho 397, 400, 64 P.3d 323, 326 (2003)". Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Id.* As a final note, this Court has been clear that "[p]ro se litigants are not accorded any special consideration simply because they choose to represent themselves, and 'are not excused from adhering to procedural rules.'" *Woods v. Sanders*, 150 Idaho 53, 57, 244 P.3d 197, 201 (2010); (*citing Sammis v. Magnetek, Inc.*, 130 Idaho 342, 346, 941 P.2d 314, 318 (1997). Rather, "pro se litigants are held to the same standards and rules as those represented by an attorney." *Id.*, (*citing Twin Falls Cnty. v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003)).

Based upon the foregoing case law, Appellant has only appropriately identified one "issue" for appeal (whether the District Court erred in granting summary judgment on her malicious prosecution claims). Appellant has not specifically identified *any other* legal or factual issue on appeal and has not argued in her brief for reversal of *any other* factual or legal issue on appeal. This Court is not required to "search the record on appeal for error." For example, even though Appellant has attempted to appeal the District Court's grant of summary judgment, she has not identified which, if any, of the legal rulings in the Order granting summary judgment that she intends to appeal. "A general attack on the findings and conclusions of the district court,

without specific reference to evidentiary or legal errors, is insufficient to preserve an issue." *Bach*, 148 Idaho at 790. Accordingly, Respondents will address the single issue appropriately before this Court on appeal (malicious prosecution).

A. THE DISTRICT COURT PROPERLY DISMISSED APPELLANT'S MALICIOUS PROSECUTION CLAIM.

While it is difficult to frame any specific issue on appeal, Appellant has referenced "repeated prosecution" in part (b) of her "Issues Presented On Appeal" and has alluded to "multiple malicious prosecutions" in paragraph one of her "Argument". The gravamen of the allegations in Appellant's Complaint centered on state and federal malicious prosecution claims. With regard to the malicious prosecution claims, the District Court correctly applied the law to the facts (which were construed in a light most favorable to Appellant). Following that analysis, the District Court found that summary judgment was appropriate on both of Appellant's malicious prosecution claims. (R. 723) In the "Nature of the Case" portion of her Brief, Appellant suggests that she "appeals the dismissal on summary judgment in her 1983 Civil Rights claim against the respondents, for their repeated malicious, baseless, and coordinated charges filed against Appellant and for the failure of the Respondents (Commissioners) to intercede when informed of the actions against her." *Appellant's Brief*, pg. 12. Respondents view this as the only issue that Appellant has appropriately raised on appeal, *i.e.*, the dismissal of her § 1983 and state law malicious prosecution claims against the Respondents.

1. The District Court applied the correct standard for dismissal of the state and federal malicious prosecution claims.

To establish a § 1983 malicious prosecution claim, a petitioner must allege "that the defendants prosecuted her with malice and without probable cause, and that they did so for the purpose of denying her equal protection or another specific constitutional right." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 919 (9th Cir. 2012)(*citing Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir.1995).

In *Freeman*, the plaintiff alleged that she was subjected to malicious prosecution when charges were brought against her and later dropped. The 9th Circuit held that "although she alleges that the defendants acted with intent to deprive her of constitutional rights, Freeman is unable to show that she was prosecuted without probable cause." *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995), as amended on denial of reh'g and reh'g en banc (Dec. 29, 1995)(*citing Brown v. Selfridge*, 224 U.S. 189, 192, 32 S.Ct. 444, 446, 56 L.Ed. 727 (1912) (holding that plaintiff bears the burden of proving malice and lack of probable cause). In *Freeman*, the 9th Circuit dismissed the malicious prosecution claim noting that the plaintiff:

> merely lists the series of citations that were issued against her and notes that they were dismissed. However, the mere fact a prosecution was unsuccessful does not mean it was not supported by probable cause. She does not point to any evidence indicating that probable cause was lacking. Thus, even if the defendants acted with the purpose of denying Freeman's constitutional rights, the district court did not err by directing a verdict on Freeman's malicious prosecution claims.

Id.

The District Court analyzed the § 1983 malicious prosecution claim in conjunction with the state law malicious prosecution claim, as the facts supporting each claim were the same.

With regard to the state law malicious prosecution claim, the District Court properly held that under Idaho law "[a]n action for malicious prosecution . . . requires proof of the following requisites: (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 want of probable cause, and (6) that damages were sustained." *Howard v. Felton*, 85 Idaho 286, 290, 379 P.2d 414, 416 (1963). "The action of malicious prosecution has never been regarded with favor by the courts." *Id.* The defense of advice of counsel is equivalent to a showing of probable cause, and "generally precludes an action for malicious prosecution." *Id.*

Under these state and federal standards the issue of whether there was "probable cause" for the charge filed is the fundamental analysis. The District Court properly held that Appellant did not establish a genuine issue of fact for trial on either her § 1983 or state law malicious prosecution claim because (as the District Court held) there was probable cause for the trespass citation issued in 2011. The District Court separately analyzed the malicious prosecution claims as they related to the conduct of each Respondent.

a. The District Court correctly held that the malicious prosecution claims should be dismissed as against Deputy Clements.

With regard to Deputy Clements, the District Court noted that Appellant's primary argument in opposition to summary judgment was the contention that Deputy Clements "lied" in his probable cause affidavit. The District Court compared the probable cause affidavit against Plaintiff's summary of Deputy Clements' statements, and against the "lapel audio" submitted by Plaintiff in opposition to summary judgment. The District Court noted that:

> In her statement before the Court, the Plaintiff alleged that Deputy Clements falsely stated in his affidavit that he possessed pictures of the Plaintiff trespassing on the Young's property . . . Nowhere in the affidavit does Deputy Clements state that the photos were even claimed by Mr. Young to depict the Plaintiff trespassing. Just that he had photos of Candace, given to him by Mr. Young. After reviewing Deputy Clements' lapel cam video submitted to the Court, it is clear that the affidavit contains no false information. Since the only allegation against Deputy Clements was that he lied on his Probable Cause Affidavit, and that allegation is not backed by any evidence, the Plaintiff has provided no evidence that Deputy Clements acted outside his discretion or that he provided false information to the Jefferson County Prosecutors.

(R. 717) The District Court was not able to find any issue of fact created by Appellant that Deputy Clements "lied" in his probable cause affidavit. On appeal, Appellant has not offered any further argument for reversal of the District Court's decision in regard to Deputy Clements.

The District Court properly found that Appellant had not established a genuine issue of material fact for trial on elements (4) and (5). The District Court found that "no reasonable mind could argue that there was lack of probable cause when multiple eye witness statements were received and photographs showed the [appellant] was at the place at the time of the event, so that her opportunity to trespass existed, it is proper for the Court to determine that there was probable cause to charge the Plaintiff with the original office." (R. 722) The District Court noted that "the only material fact that was not stipulated to is whether Deputy Clements submitted a false probable cause affidavit, and there is no evidence supporting such an allegation." (R. 723) The District Court also found that "the Plaintiff produced no evidence proving that the witness statements were unreliable or that the Jefferson County Prosecutors acted unreasonably by relying on them." (*Id.*)

The District Court correctly held that Deputy Clements did not make the charging decision, which shielded him from a claim of malicious prosecution. (R. 715). The District Court held that "since he was not the individual making the charging decision, nor did he sign the citation, Deputy Clements cannot he held liable on a 1983 claim for making that decision". (*Id.*) Instead Deputy Clements presented the investigation to the Jefferson County prosecuting attorney for review. (*Id.*) Deputy Prosecuting attorney Amelia Sheets reached a charging decision based upon her experience as a prosecuting attorney and based upon the facts in the record. Independent review by a prosecutor precludes a claim of malicious prosecution against a police officer. In this case, the District Court held that "Plaintiff has not provided any evidence to prove" that Deputy Clements "falsified his affidavit" of probable cause. (R. 715).

In sum, the Appellant did not present any evidence at the District Court level that would establish that Deputy Clements was actuated by "malice" or that the 2011 trespass charge lacked probable cause. Deputy Clements submitted an affidavit at the District Court level verifying that he did not act with "malice" toward Plaintiff in regard to the investigation of the 2011 trespass. The investigation was completed by Deputy Clements and the facts were presented to the Prosecuting Attorney for review. The prosecutor made the decision to charge Appellant with trespass. The independent review of the prosecutor demonstrates probable cause for the citation. The District Court properly found that these facts preclude a claim of malicious prosecution, and that the Appellant failed to create a genuine issue of fact for trial on each required element of her state law malicious prosecution claim.

On appeal, Appellant has not made any argument that the District Court was incorrect in its findings. This Court should affirm the District Court's finding with regard to Respondent Clements.

b. The District Court correctly held that the malicious prosecution claims should be dismissed as against prosecutors Robin Dunn and Amelia Sheets.

With regard to the Jefferson County Prosecuting Attorneys, the District Court properly held that they were entitled to prosecutorial immunity from Appellant's claim of malicious prosecution. The District Court correctly held that to overcome the immunity afforded to prosecutors, Appellant had to establish that there was a want of probable cause and that the prosecutors acted with "malice". In *Buckley v. Fitzsimmons*, 509 U.S. 259, 125 L. Ed.2d 209, 113 S. Ct. 2606 (1993), the Court restated the application of absolute immunity in claims brought against a prosecuting attorney:

> We expressly stated that "the duties of the prosecutor in his role as advocate for the state involve **actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity**. . . . We have not retreated, however, from the principle that acts undertaken by a prosecutor in pre-proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protections of absolute immunity. **Those acts must include the professional evaluation of the evidence** assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

509 U.S. at 272-73 (citations omitted) (emphasis added). Absolute immunity applies when a prosecutor performs traditional prosecutorial functions connected with hearings, such as drafting affidavits, selecting the information to put in them, determining whether evidence meets the

probable cause standard, deciding to file charges, and presenting affidavits to the court. *See Kalina v. Fletcher*, 522 U.S. 118, 131, 118 S.Ct. 502 (1997); *Imbler v. Pachtman*, 424 U.S. 409, 424-25, 96 S.Ct. 984 (1976). Thus, where a prosecutor is "providing information concerning the pertinent procedures and criminal statutes as well as the underlying evidence to the court," the prosecutor will enjoy absolute immunity. *Uribe v. Cohen*, 2006 WL 2349567 (D. Conn. 2006).

The District Court found that because the evidence presented to the prosecutors did not "include any evidence that the Prosecutors had evidence contradicting Deputy Clements' probable cause affidavit or the witness statements, there is no genuine issue of fact as to whether a reasonable person would suspect that the Plaintiff trespassed on the Young's property on July 24, 2011." (R. 719) The District Court properly held that because there was probable cause for the charges issued by the prosecuting attorney there was no evidence to support a malicious prosecution claim. (*Id.*)

Appellant did not present any evidence at the District Court level that would establish that either prosecutor was actuated by "malice" or that the 2011 trespass charge lacked probable cause. Prosecutors Dunn and Sheets each submitted an affidavit at the District Court level verifying that he/she did not act with "malice" toward Plaintiff in regard to the investigation or charging of the 2011 trespass. The investigation was completed by Deputy Clements and the facts were presented to Ms. Sheets for review. Ms. Sheets made the decision to charge Appellant with trespass. The District Court properly found that these facts preclude a claim of malicious prosecution, and that the Appellant failed to create a genuine issue of fact for trial on each required element of her state law malicious prosecution claim.

On appeal, Appellant has not made any argument that the District Court was incorrect in its findings. Instead, Appellant has made spurious factual arguments against Mr. Dunn without citation to any fact in the record (such as, "Dunn called a radio talk show host . . . calling Plaintiff a hillbilly from Tennessee"). *See, Appellant's Brief*, pg. 22. Appellant has not made any factual or legal argument that Ms. Sheets was actuated by malice. It was Ms. Sheets that made the charging decision. (R. 459-460) Appellant has argued, again without citation to the record and by way of hearsay, that Ms. Sheets admitted to her attorney during a break in the criminal trial that she had not viewed the evidence before charging Appellant. *See, Appellant's Brief*, pg. 24. However, this fact is not in the record. It was not in the record before the District Court. The District Court correctly held that Appellant had failed to establish facts in the record to create a genuine issue of fact for trial against Dunn and Sheets. (R. 719) Appellant argues (without citation to the record) that Dunn was removed from the case by Judge Stephens, which is simply not true. Appellant argues that Dunn was involved in the charging decision (without citation to the record), when the evidence before the Court is clear that Dunn assigned Sheets to handle the case, and Ms. Sheets made the charging decision. (R. 440; 459-460)

This Court should affirm the District Court's finding with regard to Respondents Dunn and Sheets.

c. The District Court correctly held that the malicious prosecution claims should be dismissed as against Jefferson County, Jefferson County Commissioners, Jefferson County Sheriff's Office, Sheriff Olsen and Commissioner Raymond.

The District Court correctly held that "Plaintiff has not provided any evidence" of a policy or practice sufficient to establish a genuine issue of fact against these Respondents on a *Monell* liability claim. (R. 720) The law is clear that governmental entities and/or supervising officials cannot be vicariously liable in § 1983 claims. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Under *Monell*, requisite elements of a § 1983 claim against a municipality (or entity) are the following: (1) the plaintiff was deprived of a constitutional right; (2) the municipality (or entity) had a policy or custom; (3) the policy or custom amounted to deliberate indifference to plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the constitutional violation. *See Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110–11 (9th Cir. 2001)(citing *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996)(internal quotation marks omitted)). The District Court held that *Monell* requires:

> The Plaintiff must prove all of the elements outlined previously and establish that the alleged unwritten policy be so "persistent and widespread" that it constitutes a "permanent and well settled . . . policy".

(R. 720) To be actionable, an unwritten policy or custom must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Monell*, 436 U.S. at 691. "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency, and consistency that the conduct has become a

traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)(emphasis added).

In regard to this standard, the District Court held that "Plaintiff has not provided any evidence that this sort of policy exists, except the evidence that she has been charged three times with the same offense and only convicted once." (R. 720) The District Court went on:

> Even if all three charges brought against her were clear malicious prosecution cases, it most likely would not be enough to establish a persistent and widespread policy. However, the first charge was clearly not a malicious prosecution case because Plaintiff essentially stipulated that there was probable cause to charge her when she submitted her Alford plea.

(R. 721) The District Court properly held that because there was no policy or custom sufficient to subject these Respondents to *Monell* liability. On appeal, Appellant has not made any argument that the District Court was incorrect in its findings. This Court should affirm the District Court's finding with regard to Respondents Jefferson County, Jefferson County Sheriff's Office, Sheriff Olsen, and Commissioner Raymond.

B. APPELLANT HAS IMPROPERLY REFERENCED MATERIALS NOT INCLUDED IN THE RECORD ON APPEAL, AND THIS COURT MUST IGNORE SUCH REFERENCES.

Appellant has not made a single citation to any fact in the Record on Appeal. Appellant served her Brief on Respondents on April 12, 2016, more than a month before the Record on Appeal was lodged with this Court—rendering it impossible for Appellant to cite to any portion of the Record on Appeal. This Court has held that "[i]t is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error." *Kugler*

v. Nelson, No. 41039, 2014 WL 4197547, at *3 (Idaho Ct. App. Aug. 25, 2014); (*citing Belk v. Martin*, 136 Idaho 652, 660, 39 P.3d 592, 600 (2001); *State v. Murphy*, 133 Idaho 489, 491, 988 P.2d 715, 717 (Ct.App.1999)).

Here, Appellant has not cited to any portion of the Record on Appeal at any place in her Brief. This Court should ignore any fact referenced by Appellant that is not accompanied by a citation to the Record on Appeal. There are various purported facts regaled by Appellant in the "Nature of the Case" section of her Brief (pgs. 12-14), the "Statement of Facts" section of her Brief (pgs. 19-27), and in the "Brief Summary of Facts" section of her Brief (32-33). None of these purported facts comes with a citation to the Record on Appeal.

For example, in Appellant's Brief on Appeal there is a section beginning on page 33 entitled "Brief Summary of Facts" in which Appellant references a list of facts—almost none of which exist in the Record on Appeal. There is no citation to the record to support any of the facts. In addition, each item listed by Appellant in her "Brief Summary of Facts" has been paraphrased and/or re-characterized by Appellant in such as fashion as to render the "fact" completely unreliable. For instance, in the first item on the list Appellant asserts that "Plaintiff worked for years with the Jefferson County Sheriff's Office concerning animal welfare." This fact is categorically untrue. Appellant never "worked for" Jefferson County in any formal or informal capacity. Appellant was never an employee, contractor or volunteer for Jefferson County. Instead, Appellant operates an animal humane society and goes about snooping over fences in Jefferson County reporting what Appellant and Appellant alone deems to be "animal welfare" concerns. As a result of these efforts Appellant has been cited on three occasions for

trespassing—one of which she pled guilty. For Appellant to characterize her conduct as "working with" Jefferson County is unsupported by any fact in the record and untrue. The remainder of the "facts" listed at various places in Appellant's Brief suffer from similar problems.

This Court should ignore any fact submitted by Appellant that is not accompanied by a citation to the Record on Appeal. Every fact listed on pages 12-14, 19-27, and 32-33 of Appellant's Brief should be excluded from consideration.

C. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO ALL CLAIMS.

While Appellant has not challenged other claims dismissed by the District Court at summary judgment (neither has the Appellant challenged defenses relied upon by the District Court in dismissing Appellant's claims) the remaining claims were properly dismissed. For example, in the Decision and Order Re: Defendants' Motion for Summary Judgment the District Court dismissed all of Appellants claims arising prior to September 16, 2012 on the basis that any such conduct was barred by the statute of limitations. (R. 707) Appellant has not appealed this legal ruling, and as such, it should be affirmed. This ruling is important because Appellant has argued before this Court (without citation to the record) various facts that occurred long before September 16, 2012. In her "Statement of Facts" section of her Brief, Appellant discusses the first two trespass citations, both of which were resolved prior to 2011. *See, Appellant's Brief*, pgs. 19-21. These arguments (and/or facts) were barred under the statute of limitations, and should be disregarded by this Court.

The District Court correctly dismissed all state law claims alleged "against all Defendants except Commissioner Raymond pursuant to Idaho Code § 6-610 for the Plaintiff's failure to submit a bond prior to initiating" the action. (R. 707) Appellant has not appealed this legal ruling, and as such, it should be affirmed. This Court has held that it shall decline to consider any requests which are not sufficiently defined and referenced in the appeal. *Woods*, 150 Idaho at 60, 244 P.3d at 204;("[Appellant's] other arguments similarly lack support in the record or in legal authority. This Court will not consider issues cited on appeal that are not supported by propositions of law, authority or argument. [internal quotation omitted] Therefore, this Court declines to review these arguments.").

Similarly, this Court should decline to review other arguments raised by Appellant that are not based upon legal authority or factual references to the Record on Appeal.

D. APPELLANT DID NOT RAISE ANY ISSUE REGARDING DISCOVERY AT THE DISTRICT COURT LEVEL.

In part (e) of her "Issues Presented On Appeal", Appellant has questioned whether the District Court erred in granting summary judgment "before Plaintiff had the opportunity to depose Defendants that had already been scheduled." *See, Appellant's Brief*, pg. 27. This Court has long held that "[s]ubstantive issues will not be considered for the first time on appeal." *Woods*, 150 Idaho at 57, 244 P.3d at 201; (*citing Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007)). Therefore, "[a] litigant may not remain silent as to claimed error during a trial and later urge his objections thereto for the first time on appeal." *Hoppe v. McDonald*, 103 Idaho 33, 35, 644 P.2d 355, 357 (1982).

Appellant did not challenge any discovery issue or request additional time to respond to summary judgment at the District Court level. There is no evidence in the record that Appellant sought to raise the issue of whether or not she had sufficient time to conduct discovery prior to the District Court's issuance of its decision on Respondents' motion for summary judgment. There were remedies available to Appellant to ensure that she had an opportunity to take depositions (or other discovery) prior to the District Court's ruling, and "pro se litigants are held to the same standards and rules as those represented by an attorney." *Twin Falls Cnty*, 139 Idaho at 445, 80 P.3d at 1046. This Court should decline to review any discovery issues as they were not raised at the District Court level.

V.
ATTORNEY FEES

Pursuant to Idaho Appellate Rule 41, Respondents seek an award of attorney fees and costs in accordance with Idaho Code § 12-117 and/or Idaho Code § 6-918. Section 12-117 provides for a municipal entity to recover attorney fees when "the party against whom the judgment is rendered acted without a reasonable basis in fact or law." Section 6-918 provides for an award of costs and fees where the prevailing party demonstrates "by clear and convincing evidence, that the party against whom or which such award is sought was guilty of bad faith in the commencement, conduct, maintenance or defense of the action." *Idaho Code Ann.* § 6-918A (West). These sections provide that a County is entitled to an award of attorney fees on appeal inasmuch the appeal has been brought frivolously, in bad faith, and without foundation in fact or law. Case law has held that an appeal is deemed frivolous when a party fails to make a legitimate

showing that the district court misapplied the law. *Bowles v. Pro Indiviso, Inc.*, 132 Idaho 371, 973 P.2d 142 (1999).

Here, Appellant has filed an appeal without any citation to any fact in the record on appeal. In addition, the evidence is clear and convincing that Appellant has acted with bad faith in the commencement of this appeal in that she has not submitted any argument or authority for her appeal. Appellant has not made a "legitimate showing" that the District Court misapplied the law. Attorney's fees and costs on appeal are warranted.

VI.
CONCLUSION

Based on the foregoing, Respondents respectfully request that this Court affirm the District Court's grant of summary judgment dismissing Appellant's Complaint in its entirety, and grant an award of attorney's fees and costs on appeal to Respondents.

Dated this 3 day of June, 2016.

BLAKE G. HALL

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following person this 3 day of June, 2016 by the method indicated below.

Candace (Andi) W. Elliott
2498 East 2100 North
Hamer, Idaho 83425
Email: straighttalkidaho@yahoo.com

[X] Mailing
[ ] Hand Delivery
[ ] Fax
[ ] Overnight Mail
[ ] Email

Blake G Hall

BLAKE G. HALL