RECORD NO. 18-40491

In The
United States Court of Appeals
For The Fifth Circuit

COURTNEY MORGAN,

***Plaintiff – Appellee*,**

v.

MARY CHAPMAN; JOHN KOPACZ,

***Defendants – Appellants*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, VICTORIA DIVISION CIVIL ACTION NO. 6:17-cv-0004

BRIEF OF APPELLEE

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MARY CHAPMAN; JOHN KOPACZ,
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On Appeal from the United States District Court for the
Southern District of Texas, Victoria Division
Civil Action No. 6:17-cv-0004

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Defendants/Appellants

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John Kopacz, in his individual capacity

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/s/ Tommy E. Swate
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STATEMENT REGARDING ORAL ARGUMENT

Dr. Courtney Morgan (Dr. Morgan) requests that oral argument be denied so that this 42 U.S.C. §1983 case may expeditiously proceed to discovery. Two courts (state and federal) have already determined that Appellants violated Dr. Morgan's Fourth Amendment rights based on the facts in the complaint. Appellants have not provided any defense during this case for their alleged manufacture of false criminal evidence in violation of Dr. Morgan's Fourteenth Amendment rights. Hence, there is nothing for the Court to hear regarding Appellants' fabrication of evidence. *Castellano v. Fragoza,* 352 F.3d 939 (5th Cir. 2003) clarified that the elements of a federal malicious prosecution claim must include *allegations* of the denial of federal rights, not a separate independent claim for one. In *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017), the Supreme Court acknowledged that the Fifth Circuit has held that a Fourth Amendment malicious prosecution claim is cognizable through 42 U.S.C. §1983. *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018) reiterated that the statute of limitations for a federal malicious prosecution claim does not accrue until a favorable termination occurs. Therefore, this instant case is not time barred by the statute of limitations. In the Appellee's view, this appeal involves the application of clearly established law, and oral argument is unnecessary to aid the Court's decisional process. However, Dr. Morgan stands ready and willing to present oral argument if the Court finds it helpful in its decisional process.

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STATEMENT OF ISSUES

Dr. Morgan sued the Appellants after the favorable termination of his criminal proceeding and within two years of having discovered the causal connection between the violation of his U.S. Constitutional rights and his prosecution. Reasonable access to sufficient information to know that he could file suit and obtain relief occurred only after the multiple-day suppression hearings which revealed said causation. The question presented here is whether the court below properly denied Appellants' Rule 12(b)(6) motions to dismiss because:

1) Dr. Morgan's right to be free from Appellants' deliberate manufacture of false criminal evidence was clearly established;

2) The searches and seizures conducted without a warrant or any exception to the Fourth Amendment's requirement for a warrant were clearly unreasonable;

3) The right to be free from arrest without a good faith showing of probable cause was clearly established (regardless of whether that right should have been labeled the right to be free from malicious prosecution or something else);

4) Appellants' immediate enforcement of Texas Medical Board (TMB) subpoenas through acts of intimidation to pursue criminal

prosecution, but not to further the TMB's regulatory scheme, was an abuse of TMB's subpoena process; and

5) Chapman was not entitled to Absolute Immunity for her acts of investigation.

STATEMENT OF THE CASE

I. Statement of Facts

Dr. Morgan was a sole practitioner family medicine physician who owned two clinics in Victoria, Texas, since 2007. ROA.314. He never stored, maintained or dispensed any controlled substances from either clinic. ROA.314. On July 17, 2013, Chapman (a TMB investigator) and Kopacz (a Department of Public Safety (DPS) agent), showed up together at both of Dr. Morgan's family medicine clinics to "serve" TMB administrative *instanter* subpoenas and force immediate compliance. ROA.314-17. Appellants forced compliance through intimidation, such as by confining Dr. Morgan in an examination room, preventing communication between employees, preventing access to and seizing cell phones. ROA.318, 320, 327, 449. Appellants searched the medical offices and seized confidential documents, including documents that were not listed in the subpoenas and all patient medical records for March 2013. ROA.317-20.

In Texas, a clinic that prescribes four specific categories of controlled substances to greater than half of its patients on a monthly basis must obtain a pain

management clinic certification. ROA.324. Although less than half of the patients at Dr. Morgan's clinic received prescriptions for the designated controlled substances in March 2013, Chapman deliberately inflated the percentage in her report to greater than half by including all patients who received prescriptions for *any* controlled substance. ROA.325. The report was fabricated with the intent to cause Dr. Morgan's criminal prosecution. ROA.321, 325. Dr. Morgan was then indicted and arrested for the third-degree felony of "Non-certification of a Pain Management Clinic" solely based on Appellants' fabricated evidence. ROA.328, 332.

On September 3, 2015, Chapman testified in a *Motion to Suppress* hearing, where Dr. Morgan first learned: (1) extensive communication and coordination occurred between Appellants prior to the service of the TMB administrative *instanter* subpoenas; (2) the sole evidence used to support the indictment was the fabricated report; (3) Appellants worked together to encourage prosecution based solely on the fabricated report. ROA.317, 335.[1] The state court granted Dr. Morgan's *Motion to Suppress*, finding that: (1) Appellants conducted a warrantless search of and seizure at Dr. Morgan's medical offices; (2) No exception to the Fourth Amendment warrant requirement existed, specifically, no exigency or

[1] No evidence suggests that Dr. Morgan knew prior to the suppression hearings anything other than the criminal charge against him.

consent; (3) Appellants enforced the TMB subpoenas immediately to ensure that there was no opportunity for Dr. Morgan to seek pre-compliance judicial review, which was also in violation of the Fourth Amendment; (4) Chapman's testimony was "less than credible"; (5) the TMB acted with bad faith in partnering up with law enforcement to conduct the search of the medical offices; and (6) the intent behind the warrantless search and seizure was not to further the TMB's regulatory scheme, but to pursue criminal charges. ROA.323, 449. The state court dismissed the charge on January 20, 2016. ROA.329.

On July 11, 2016, Dr. Morgan learned through the TMB administrative process that: (1) Chapman deliberately overinflated the numbers in her report in order to encourage and ensure his prosecution; and (2) Chapman deliberately excluded evidence that Dr. Morgan met an exemption to the certification requirement. ROA.325-26. Under Texas law, a clinic is exempt from obtaining a pain management clinic certification under certain conditions which Dr. Morgan met. ROA.324-25. Dr. Morgan was innocent of the criminal charge against him, which was known to Appellants before the indictment, yet they still encouraged his prosecution based on the fabricated evidence. ROA.324-25, 328, 333.

II. Course of the Proceedings

Dr. Morgan and his two clinics filed the initial complaint on January 20, 2017, under 42 U.S.C. § 1983 alleging violations of the Fourth and 14th

Amendments of the United States Constitution, Article I Section 9 of the Texas Constitution as well as malicious prosecution with Chapman and Kopacz as defendants in their individual capacities and Scott Freshour as a defendant in his official capacity as Interim Executive Director of the TMB. ROA.11-39. The initial complaint pled that Chapman and Kopacz searched his clinics and certain patients' entire medical files based on TMB *instanter* subpoenas. Dr. Morgan amended his complaint after defendants filed motions to dismiss, in the process dropping his clinics as plaintiffs and Scott Freshour as a defendant. ROA.131-136, 141-151, 157-158.

The remaining defendants filed separate motions to dismiss the amended complaint with a response from Dr. Morgan and a reply by defendants. ROA.177-181, 184-95, 198-211, 213-30, 237-39, 243-52. The court below granted Dr. Morgan's request for leave to file a second amended complaint. ROA.501. The second amended complaint ("the complaint") is the live, operative complaint for the purposes of this appeal.

The complaint pled an additional legal theory and additional facts. The additional facts concerned Chapman manufacturing false evidence against Dr. Morgan for the purpose of encouraging his criminal prosecution, in addition to the date when he learned Chapman fabricated the evidence. ROA.325. The complaint also pled the date when Dr. Morgan had sufficient information to know that the

Appellants' purpose in enforcing the TMB subpoenas was not to further the TMB's regulatory scheme, but rather to circumvent the Fourth Amendment's requirement for a warrant in furtherance of the pursuit of criminal charges. ROA.335. Furthermore, the complaint added the legal theory of Abuse of Process related to the Appellants' abuse of the TMB's subpoena process to conduct an unreasonable search for an ulterior motive. ROA.334-36. The complaint continued to assert the legal theories of Fourth and 14th Amendment violations as well as malicious prosecution. ROA. 313, 326, 330.

Chapman and Kopacz each filed their own separate motions to dismiss pursuant to Rule 12(b)(6). ROA.339-43, 345-66. Kopacz's defenses included qualified immunity, the statute of limitations and a challenge against the legal theory of malicious prosecution. ROA.340-41. Chapman's defense was based on qualified immunity, absolute immunity and failure to plead plausible facts for which relief could reasonably be granted. ROA. 346-65. Dr. Morgan filed separate responses to each motion to dismiss then Chapman replied. ROA.369-82, 386-411, 423-33.

The court below denied each Appellant's motion to dismiss, quoting extensively from the state court's judicial findings of fact and conclusions of law included in the state court's order granting Dr. Morgan's motion to dismiss in the criminal case. ROA.445-449. The court below stated that "the defendants'

motions to dismiss based on failure to plead sufficient facts to support a plausible cause of action, should be denied". ROA.449-50.

SUMMARY OF ARGUMENT

The court below correctly denied Appellants' Rule 12(b)(6) motions to dismiss. The court below based its decision on Dr. Morgan's *Second Amended Complaint* and the state court's *Judicial Findings of Fact and Conclusions of Law and Order Granting the Defendant's Motion to Suppress*. Appellants unlawfully searched Dr. Morgan's two clinics and seized patient medical files based on TMB *instanter* subpoenas. Both the state and federal courts below found that the searches were conducted without a warrant or any applicable exception to the Fourth Amendment warrant requirement. The Fifth Circuit similarly recently reached the same conclusion in an analogous case, *Cotropia v. Chapman*, No. 16-20766 (5th Cir. 2018), which also involved the search of a Houston physician's office based on TMB *instanter* subpoenas. In that case, Fifth Circuit found the search was conducted in violation of the physician's Fourth Amendment. The Fifth Circuit also found that Chapman was not entitled to qualified immunity.[2]

Appellants have never attempted to defend their manufacture of false criminal evidence in violation of Dr. Morgan's clearly established Fourteenth Amendment rights. Appellants merely claim that Dr. Morgan "abandoned" his

[2] *Cotropia v. Chapman*, No. 16-20766 (5th Cir. 2018).

Fourth and Fourteenth Amendment claims, even though the complaint clearly alleges violations of Dr. Morgan's Fourth and Fourteenth Amendment rights. Federal plaintiffs are not required to plead legal theories, but instead notice pleading, meaning a short plain statement of the facts that show the pleader is entitled to relief. Dr. Morgan has clearly stated that Appellants manufactured and used false evidence to ensure his prosecution.

Based on these Fourth and Fourteenth Amendment claims alone, Dr. Morgan has pled sufficient facts to be entitled to relief. In addition, sufficient facts were pled to show that: (1) Appellants violated Dr. Morgan's right to be free from unreasonable searches and seizures; (2) Appellants violated Dr. Morgan's right to be free from arrest and prosecution without a good faith showing of probable cause, regardless of the title of such claim; (3) Appellants' conduct at that time was a violation of clearly established law; and (4) Appellants' egregious abuse of the TMB's subpoena process was for the purpose of circumventing the Fourth Amendment in pursuit of criminal charges and not for the purpose of furthering the TMB's regulatory scheme. Appellants were investigators, functioned as such, and committed these acts during the investigative phase prior to the establishment of probable cause through fabricated evidence, thereby making Absolute Immunity defense unavailable.

ARGUMENT

I. Appellants Fabricated Evidence in Violation of the Fourteenth Amendment

A. Appellants fabricated evidence to unlawfully prosecute Dr. Morgan.

A pain management clinic is defined as a facility for which a majority of patients are issued on a monthly basis a prescription for certain categories of controlled substances, being opioids, benzodiazepines, barbiturates or carisoprodol.[3] In Texas, a pain management clinic must receive a certification from the TMB unless it meets an exemption. A facility is exempt from certification if it is owned or operated by a physician who treats patients within the area of the physician's specialty and who personally uses other forms of treatment with the issuance of a prescription for a majority of the patients.[4]

Appellants seized all medical records for patients for March 2013. ROA.320 at ¶43. Chapman then deliberately used the seized March 2013 medical records to create a false report that resulted in the conclusion that Dr. Morgan failed to obtain a pain management clinic certification, thereby encouraging and ensuring his prosecution. ROA.325-26. Chapman deliberately and falsely inflated the number of patients to over fifty percent for those receiving prescriptions for the designated category of controlled substance. ROA.325. Chapman did this by knowingly and

[3] TX Occ Code § 168.001.
[4] TX Occ Code § 168.002(7).

deliberately tabulating **all** patients who received prescriptions for **any** controlled substances in her report. ROA.325. This tabulation goes far beyond the scope of the statutory definition for a pain management clinic to purposely inflate the numbers. Chapman also excluded from her report evidence that Dr. Morgan met the exemption in March 2013. ROA. 325 at ¶69-70. Kopacz requested the false report from Chapman, knew it was false, and then used it to encourage the prosecution of Dr. Morgan. ROA.321, 327-28. Appellants' purpose for seizing the patient records and compiling the false report was to ensure that criminal charges were brought against Dr. Morgan. ROA. 325 at ¶56.

B. The complaint sufficiently pled That Appellants violated Dr. Morgan's clearly established Fourteenth Amendment rights

The right for criminal defendants to be free from fabricated evidence was clearly established well before Chapman created the false report.[5] Chapman's knowing and deliberate creation of a materially inaccurate report qualifies as "false or fabricated" evidence based on controlling precedent. In *Brown v. Miller*, 519 F.3d 231 at 237 (5th Cir. 2008), the Fifth Circuit found that "[t]he deliberate or knowing creation of a misleading and scientifically inaccurate serology report

[5] *Brown v. Miller*, 519 F.3d 231 (5th Cir. 2008) ("The right of criminal defendants to be free from false or fabricated evidence was well settled by 1959 or earlier.") Appellants referenced a dissenting opinion in *Manuel v. City of Joliet*, 137 S. Ct. at 923, in which Justice Alito wrote that malicious prosecution may belong to "some other home [instead of the Fourth Amendment], presumably the Due Process Clause". If Justice Alito's dissenting opinion does, in fact, become the law, Dr. Morgan's malicious prosecution claim could also be founded in the 14th Amendment's Due Process Clause due to the manufacture of false evidence.

amounts to a violation of a defendant's due process rights." "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."[6] Kopacz knew the report was false, yet he used the report to encourage the prosecution of Dr. Morgan. ROA.328 at 81, 82, 86. As a result, Dr. Morgan was indicted and prosecuted for a third-degree felony of Non-certification of a Pain Management Clinic. ROA.321 at 49.

Although the complaint states that it was brought pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment, such information is not required to survive a motion to dismiss. ROA.313. "No heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim. The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief."[7] Hence, "Plaintiffs in federal courts are not required to plead legal theories."[8] Accordingly, Dr. Morgan has sufficiently

[6] *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001); *see also Whitlock v. Bruegemann*, 682 F.3d 567 (7th Cir. 2012) (The right is in fact so clearly established that "all courts that have directly confronted the question before us agree that the deliberate manufacture of false evidence contravenes the Due Process Clause.").

[7] *Johnson v. City of Shelby*, 135 S. Ct. 136 (2014).

[8] *Hatmaker v. Memorial Medical Center*, 619 F.3d 741 (7th Cir. 2010); *see also Bennett v. Schmidt*, No. 97-4198 (7th Cir. 1998) ("Complaints need not plead law or match facts to every element of a legal theory… Bennett's complaint could be improved, but it is intelligible and gives the defendants notice of the claim for relief.").

pled a statement of the claim showing that he is entitled to relief related to Appellants' fabrication of evidence.[9]

C. Appellants have not provided any defense against fabrication of evidence

Appellants never addressed the fabrication of evidence claim, despite facts being pled with clarity and the serious nature of the claim. "We are unsure what due process entails if not protection against deliberate framing under color of official sanction."[10] Appellants have essentially conceded the manufacture of false criminal evidence claim by not addressing it.

D. The fabrication of evidence claim was timely filed

Appellants conceded that "Chapman's limitations defense, ROA.347-49, is outside the scope of this appeal."[11] Although Appellants are correct in that the Fifth Circuit has stated the denial of a statute of limitations defense is not an

[9] Fed. Rule Civ. Proc. 8(a)(2). Federal pleading rules call for a short and plain statement of the claim showing that the pleader is entitled to relief.
[10] *Limone v. Condon*, 372 F.3d 39 (1st Cir. 2004).
[11] *Appellants' Brief*, pg. 31.

immediately appealable final order (with rare exceptions).[12] In an abundance of caution, timeliness is addressed herein.

An affirmative statute of limitations defense must be found on the face of the complaint.[13] In Texas, the § 1983 statute of limitations is two years from the day the cause of action accrues.[14] The accrual date is determined by federal law and depends on when Dr. Morgan had sufficient information to know that he could file a suit and obtain relief. The Fifth Circuit has stated, "the rule is that accrual occurs when a plaintiff has 'a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.' In other words, accrual occurs 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'"[15] "When a defendant controls the

[12] *See Johnson v. Hind County Bd. of Suprs*, No.15-60665 (5th Cir. 2017) ("The denial of a statute of limitations defense is not an immediately appealable final order; therefore, we may consider such an order only if we exercise pendent jurisdiction. [*citations omitted*] 'Pendent appellate jurisdiction is only proper in rare and unique circumstances where a final appealable order is 'inextricably intertwined' with an unappealable order or where review of the unappealable order is necessary to ensure meaningful review of the appealable order.' [*citations omitted*] A statute of limitations defense is not 'inextricably intertwined' with the denial of qualified immunity, so as to give rise to pendent appellate jurisdiction. [*citations omitted*] Based on the foregoing, we conclude that we lack jurisdiction over the district court's denial of the defendants' motion to dismiss based on the statute of limitations defense, and do not reach the merits of that claim.")

[13] *EPCO Carbon Dioxide v. JP Dr. Morgan*, 467 F.3d 466 (5th Cir. 2006) ("Although dismissal under rule 12(b)(6) may be appropriate based on a successful affirmative defense, that defense must appear on the face of the complaint."); *Fernandez v. Clean House*, No.17-1230 (10th Cir. 2018) ("Only when the plaintiff pleads itself out of court—that is, admits all the ingredients of an impenetrable defense—may a complaint that otherwise states a claim be dismissed under Rule 12(b)(6).").

[14] *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995).

[15] *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011).

facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation, a cause of action accrues, but the statute of limitations is tolled."[16]

Appellants controlled the information surrounding causation. Kopacz withheld his report, although ordered to produce it by the state court. ROA.329, ¶87. Chapman's suppression testimony was heard on September 3, 2015, where she was found by the state court to be "evasive" and "less than credible" when testifying under oath. ROA.323. Dr. Morgan learned of Chapman's deliberate creation of the false report on July 11, 2016. ROA.321, ¶47 and ¶49. These facts, especially when viewed most favorably to Dr. Morgan, show that he could not have known about the deliberate fabrication of the report prior to July 11, 2016. Therefore, the facts alleged in the complaint show that the fabrication of evidence claim was timely filed, less than two years.

E. Neither qualified nor absolute immunity protects Appellants for fabrication of evidence.

Appellants are not entitled to qualified immunity since Appellants violated Dr. Morgan's clearly established Fourteenth Amendment rights by fabricating and

[16] *Piotrowski* at 517.

using fabricated evidence to encourage criminal charges against Dr. Morgan, while acting under color of law.[17] Appellants have not even attempted to claim qualified immunity for fabricating evidence.

Absolute immunity is also inapplicable based on the facts stated in the complaint. Even if Chapman were a prosecutor (which she was not) the fabrication of evidence prior to establishing probable cause would not be protected by absolute immunity. The fabricated evidence was the only basis for the criminal charge ROA. 332 at ¶107. It was created by Appellants during the investigative phase before they had probable cause and before any involvement by state prosecutors or a grand jury. In fact, in the absence of the evidence fabricated during the investigation, Appellants never had probable cause at all. "The reason that lack of probable cause allows us to deny absolute immunity to a state actor for the former function (fabrication of evidence) is that there is no common-law tradition of immunity for it, whether performed by a police officer or prosecutor."[18]

[17] The TMB and DPS are both government agencies. *See e.g.* Texas Occupations Code § 152.001. Therefore, Appellants were acting "under color of law."
[18] *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

II. Unreasonable Searches and Seizures

A. Dr. Morgan did not know until the suppression hearing that Appellants lacked an exigency, therefore the Fourth Amendment claim was timely filed.

The exigent circumstances exception to the warrant requirement has long been recognized. [19] The court below and the state court both addressed potential exigent circumstances before determining that the searches and seizures at Dr. Morgan's clinics were unreasonable. ROA.448, 450. The state court examined the testimony of both Appellants at the suppression hearings before determining that no exigency existed before the searches and seizures. Despite the state court's finding, Appellants still imply that exigent circumstances permitted the searches and seizures within Dr. Morgan's offices.[20] Appellants rely on 22 TAC § 179.4(a) to claim that Dr. Morgan has no cause of action under 21 U.S.C. § 1983 for unreasonable search and seizure. However, 22 TAC § 179.4(a) may only be invoked based on "the urgency of the situation or the possibility that the records may be lost, damaged or destroyed". The state court already gave consideration to

[19] *McDonald v. United States*, 335 U.S. 451 (1948) ("*A search without a warrant is not justified* ***unless the exigencies of the situation make that course imperative.***"); *see also City of Los Angeles v. Patel*, No.13-1175; 576 U.S. _ (2015) ("If **exigency** or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute.").

[20] *Appellants' Brief*, pg. 41.

this and found that "***no exigent circumstances existed*** to demonstrate that the notice provided to the defendant in this case was reasonable."[21] ROA.448.

The information available to Dr. Morgan on the date of the instant searches was that Appellants were required to have an exigency in order to demand immediate access to his office and records. Any claim that Dr. Morgan should have known otherwise would be unreasonable. It was far more reasonable for Dr. Morgan to presume that Appellants were law abiding government officials who had facts to support an exigency before conducting their warrantless searches as required by the Texas Administrative Code. Dr. Morgan's discovery that Appellants operated in violation of his Fourth Amendment rights, absent exigent circumstances was, at the earliest, after the suppression hearing on September 3, 2015, and at the latest, the date the state court issued its order with its findings that there was a Fourth Amendment violation and absence of exigency, on October 13, 2015. ROA.324, 443. Even with due diligence, Dr. Morgan could not have discovered this at an earlier point because Appellants had control over this information.[22] Dr. Morgan filed this instant suit on January 20, 2017, well within two years of the date of accrual. ROA.2. Therefore, Dr. Morgan did ***not*** abandon

[21] The court below found that "[t]he **evidence shows** that defendants entered the plaintiff's offices without a search warrant and conducted a search without the plaintiff's consent and in **the absence of exigent circumstances.**" ROA.450.

[22] Even under oath, Chapman was "less than credible" about her investigation; and Kopacz defied the court and failed to turn over his investigation reports as ordered by the court. ROA.323.

his "freestanding" Fourth Amendment claims as Appellants claimed[23], but sufficiently and timely alleged that Appellants' violated his Fourth Amendment rights. ROA.331-32 at ¶100.

B. Appellants violated Dr. Morgan's clearly established Fourth Amendment rights by searching and seizing patients' entire medical files in his offices without a warrant, in the absence of exigent circumstances and without consent.

Appellants did not have a warrant. ROA.317 at ¶29. Therefore, an exception to the Fourth Amendment's warrant requirement was necessary in order for the searches to have been reasonable.[24] There was no exigency and Dr. Morgan did not consent to the warrantless search and seizure. ROA.323 at ¶57; 327-331.

Furthermore, it is also clearly established law that "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker."[25] "[W]hile the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the

[23] *Appellants' Brief*, pg. 11.
[24] *See Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.").
[25] *City of Los Angeles v. Patel*, No.13-1175; 576 U.S. (2015).

reasonableness of the demand."[26] "Bifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power."[27]

Appellants searched and seized patients' entire medical files pursuant to TMB *instanter* subpoenas and forced immediate compliance with the subpoenas' demands (ROA.316 at ¶24) without exigency, consent or the opportunity for judicial review, in violation of clearly established law. ROA.448-49. Dr. Morgan was not afforded an opportunity to obtain precompliance review of the subpoenas.[28] Therefore, enforcement of the subpoenas violated the Fourth Amendment.

[26] *See v. City of Seattle*, 387 U.S. 541 (1967); see also *In re: Subpoena Duces Tecum*, 228 F.3d 341 (2nd Cir. 2000) ("In short, the immediacy and intrusiveness of a search and seizure conducted pursuant to a warrant demand the safeguard of demonstrating probable cause to a neutral judicial officer before the warrant issues, whereas the issuance of a subpoena initiates an adversary process that can command the production of documents and things **only after judicial process is afforded**.")

[27] *United States v. Bell*, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977).

[28] *See Hale v. Henkel*, 201 U.S. 43, 76 (a person served with a subpoena duces tecum is entitled to the **Fourth Amendment's** protection against unreasonableness."); *see also In re Subpoena Duces Tecum*, 228 F.3d 341, 347 (4th Cir. 2000).

C. The administrative search exception does not apply because all private practice physician clinics and all patient records were not closely regulated, and there was no constitutionally adequate substitute for a warrant.

There is a limited administrative search exception to the warrant requirement for "closely regulated" businesses.[29] The Supreme Court has made clear that such "closely regulated" businesses are the exception.[30] No federal court has ever determined that the entire medical profession, including records completely unrelated to controlled substances, is closely regulated and therefore subject to warrantless inspection; in fact, several federal courts have found the opposite.[31]

Closely regulated industries are those which involve "no reasonable expectation of privacy".[32] Any implication by the Appellants that there is no reasonable expectation of privacy in any portion of any patient's medical record is irresponsible since it is almost certainly harmful to the public's health, unsupported by precedent and contradicts a longstanding unchallenged Texas Attorney General

[29] *New York v. Burger*, 482 U.S. 691 (1987) ("Searches made pursuant to § 415-a5, in our view, clearly fall within this established exception to the warrant requirement for administrative inspections in "closely regulated" businesses.").
[30] *City of Los Angeles v. Patel* at III(B) ("Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy… could exist for a proprietor over the stock of such an enterprise,'…[t]he clear import of our cases is that the closely regulated industry . . . is the exception.'").
[31] *Texas Attorney General Opinion No.* JC-0274 by former TX AG (and current U.S. Senator) John Cornyn ("[T]he practice of medicine… is a profession with a history of respect towards the recognized need for privacy in the doctor-patient relationship…the health industry … is not a closely regulated industry within the meaning of *Marshall v. Barlow's*, *Inc*, 436 U.S. 307 (1978)."). In addition, there is no evidence in the record to show that the office of a physician in private practice had ever been subjected to warrantless inspections as of 2013.
[32] *City of Los Angeles v. Patel* at III(B).

Opinion.[33] Medical records contain some of the most sensitive and private information imaginable, such as information potentially concerning marital problems, child rearing and mental health issues. It is difficult to conceive of any papers for which there is a greater reasonable expectation of privacy.

The Supreme Court has noted that patients and physicians have a reasonable expectation of privacy in at least parts of their medical records.[34] Government employees have conceded that patients have a reasonable expectation of privacy in at least parts of their medical records.[35] Appellants have not made such a concession, instead implying that it may be reasonable for patients to have no reasonable expectation of privacy in any portion of their medical records by claiming Appellants "could have reasonably understood their challenged actions to be consistent with the Fourth Amendment" under an analysis for closely regulated industries.[36] Appellants seemingly believe that similar searches and seizures

[33] *Texas Attorney General Opinion No.* JC-0274 by former TX AG (and current U.S. Senator) John Cornyn.
[34] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent."); and *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011) ("for many reasons, physicians have an interest in keeping their prescription decisions confidential.").
[35] *FER v. Valdez*, 5 F.3d 1530 (10th Cir. 1995) ("The defendants concede the Patients have a legitimate expectation of privacy in the medical records.").
[36] *Appellants' Brief*, pg. 39.

providing law enforcement immediate warrantless access to patients' entire medical files outside of any judicial process would be reasonable today.[37]

For the administrative search exception to apply the regulatory scheme categorically ***must*** provide a constitutionally adequate substitute for a warrant.[38] The need for the regulatory scheme to limit officer discretion is particularly well defined as a matter of long standing settled law.[39] Appellants claim that the regulatory scheme provided an adequate substitute for a warrant.[40] However, Appellants just listed several statutes to support the claim without detailing at all how the regulatory scheme limited authorized inspections in time, place and scope. They were unable to do so because there were no such limitations, as recognized by the state court which concluded that "the actions by the TMB and law enforcement in this case do not provide a substitute for a warrant." ROA.448.

The TMB's regulatory scheme does not provide an adequate substitute for a warrant. Two other federal courts have come to the same conclusion as the state court, as noted in *Barry v. Freshour*, No.H-17-1403 (SD Texas 2017):

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[37] *Contra. United States v. Zadeh*, No.15-10195 (5th Cir. 2016) ("the DEA does not dispute that Dr. Zadeh's patients have a reasonable expectation of privacy in their medical records.).

[38] *Club Retro v. Hilton*, 568 F.3d 181 (5th Cir. 2009) (the regulatory statute **must** perform the two basic functions of a warrant: it **must** advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it **must** limit the discretion of the inspecting officers.

[39] *Club Retro v. Hilton* at 197 (5th Cir. 2009) ("To limit officer discretion under the second function, the regulation **must** carefully limit authorized inspections "`in time, place, and scope.'").

[40] *Appellants' Brief* pg. 41.

"The regulatory scheme does not limit the Texas Medical Board's discretion. The statute imposes no restrictions on when and to whom subpoenas may be served. The alleged search violates the Fourth Amendment even if the medical profession was a 'closely regulated' industry."

Since the administrative search exception does not apply (and absent exigency) the instant search violated Dr. Morgan's clearly established Fourth Amendment rights.

D. *Beck* is irrelevant for purposes of a qualified immunity defense.

Appellants seem to concede that their administrative search exception claim is baseless by subsequently claiming: "a reasonable person would have understood Kopacz's and Chapman's actions to be lawful under *Beck*.[41] For that reason, even if the Court rejects all of their other arguments, the defendants are entitled to qualified immunity."[42] Appellants' Fourth Amendment qualified immunity argument is based exclusively on *Beck*. Appellants' reliance on *Beck* is misplaced, at best.

First, in *Beck v. Texas State Board of Dental Examiners*[43], at the summary judgment stage, rather than motion to dismiss, qualified immunity was granted to an investigator because the warrantless administrative or regulatory search itself was constitutional under the regulatory scheme.[44] The search of a dentist's office

[41] *Beck v. Texas State Board of Dental Examiners*, 204 F.3d 629 (5th Cir. 2000).
[42] *Appellants' Brief* pg. 42.
[43] *Beck v. Texas State Board of Dental Examiners* at 633.
[44] *Id*. at 639.

in *Beck* was conducted pursuant to a regulatory scheme[45] which provided **an adequate substitute for a warrant**, in sharp contrast to the instant searches.[46] In that case, the regulatory inspection program included language that gave officers the "right to enter premises and conduct such inspections" after presenting to the owner "appropriate credentials and written notice of his inspection authority."[47] The *Beck* case contains completely different regulatory language from that which was contained in this instant case. Therefore, *Beck* is irrelevant, as this instant search was ***not*** conducted pursuant to a regulatory scheme that provided an adequate substitute for a warrant. In the instant case, as in *Cotropia*, Appellants have not proffered any statute which expressly allowed on demand warrantless inspections of Dr. Morgan's office as a source of authority for their actions.[48] Appellants failed to do so because there were no such relevant statutes.

Second, *Beck* is also distinguishable because the dentist whose office was searched pursuant to the TCSA had physical stockpiles of controlled substances onsite in his office. The dentist was using those controlled substances by

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[45] *Cotropia v. Chapman*, No.16-20766 (5th Cir. 2018) ("In *Beck*, the inspection of a dentist's office was conducted in conjunction with a Department of Public Safety ("DPS") agent and pursuant to the Texas Controlled Substances Act ("TCSA"). [*citations omitted*] The TCSA expressly gave the investigator and DPS agent authority to conduct an on demand warrantless inspection of the dentist's office.[citation omitted]. Here, Chapman has not proffered the TCSA or another controlled substances statute as a source of authority for her actions.").

[46] *Beck v. Texas State Board of Dental Examiners* at 638 (finding "the inspection programs provided an adequate substitute for a warrant.").

[47] *Id*. at 638-639.

[48] *Appellants' Brief* pp. 41 and 42.

physically administering them to patients in his office.[49] The search was of those physical stockpiles of controlled substances and records related to those stockpiles.[50] The Fifth Circuit's holding in *Beck* was limited to the ***use*** of controlled substances in a dentist's office. In sharp contrast with *Beck*, Dr. Morgan never used, stored, maintained or dispensed controlled substances in his clinics. ROA.315 at ¶15. Consequently, Appellants reliance on *Beck* (and only *Beck*) for qualified immunity was misplaced; and therefore, *Beck* is at least as irrelevant here as it was in *Cotropia*.

E. Chapman was not protected by absolute immunity for acts of investigation.

Appellants concede that Kopacz did not claim absolute immunity during the proceedings below and therefore waived the defense for the purposes of this interlocutory appeal.[51] Chapman has claimed absolute immunity but unconvincingly so.

Beck v. Texas State Board of Dental Examiners addresses absolute and qualified immunity. In that case, a dentist sued the members of the dental board of

[49] *Beck v. Texas State Board of Dental Examiners* at 632 ("Beck had ordered unusually high volumes of controlled substances.").
[50] *Beck v. Texas State Board of Dental Examiners* at 632 ("The inspection revealed, inter alia, an unaccounted shortage of certain controlled substances.").
[51] *Appellants' Brief*, pg. 43

examiners and a staff investigator in their individual capacities, alleging retaliation through investigation and revocation of his license.[52] That court held that:

> "Although a state prosecutor is absolutely immune when she acts in her role as an advocate for the state by initiating and pursuing prosecution, or when her conduct is intimately associated with the judicial phase, she does not enjoy absolute immunity for her acts of investigation or administration."[53]
>
> "Non-appointed staff-investigator for the state board of dental examiners, who conducted a warrantless search of the dentist's office, but neither initiated disciplinary proceedings against dentist nor pursued prosecution of disciplinary complaint, *was not* entitled to absolute immunity" in dentist's § 1983 claims."[54]
>
> "Staff member's role as investigator was not at the heart of the board's adjudicative function," and therefore was not entitled to absolute immunity.[55]

In *Buckley v. Fitzsimmons*, the court held that the prosecutor's alleged misconduct, when endeavoring to determine whether a boot print at a crime scene had been left by a suspect was an investigatory and administrative function rather than a prosecutorial function, for which prosecutors were entitled to only qualified immunity."[56] *Buckley* clearly states that *investigatory* functions of a government agent are not entitled to absolute immunity.[57]

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[52] *Beck* at 624-635.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).
[57] *Buckley v. Fitzsimmons* at 260.

Chapman was a TMB investigator and functioned as an investigator in Dr. Morgan's case when searching Dr. Morgan's offices and medical records ROA.314 at ¶5 and 315 at ¶16). She was also functioning as an investigator when she created the fabricated report. ROA.325-26. The fabricated evidence which served as probable cause for Dr. Morgan's indictment was not created until after the medical records were seized. Chapman's role and function was that of an investigative agent, and is therefore not entitled to consideration of absolute immunity.

III. The Malicious Prosecution of Dr. Morgan by Any Other Name Still Violated His Clearly Established Federal Rights

A. *City of Manuel v. Joliet* and *Winfrey v. Rogers*

In *City of Manuel v. Joliet* the Supreme Court recognized that:

> "[T]here is now broad consensus among the circuits that the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period." *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017).

It did so by recognizing cases supporting such a right from ten United States Courts of Appeal in total, with the exceptions being the 7th and 8th Circuits. The Supreme Court specifically cited the Fifth Circuit's en banc decision in *Castellano*

v. Fragozo, 352 F.3d 939, stating: "the Fourth Amendment right to be free from seizure but upon probable cause extends through the pretrial period."[58]

With respect to the date of accrual for such a claim the Supreme Court stated:

> "[A]ll but two of the ten Courts of Appeals that have recognized a Fourth Amendment claim like his have incorporated a 'favorable termination' element and so pegged the statute of limitations to the dismissal of the criminal case."[59]

In a footnote the Supreme Court went on to recognize that the Fifth Circuit had "pegged the statute of limitations to the dismissal of the criminal case" by noting that it was not one of the two exceptions. The two exceptions were the Ninth and D.C. Circuits and only because those two circuits had not yet weighed in on the issue.[60] The Supreme Court did not ultimately reach the issue of whether a malicious prosecution claim may be brought under the Fourth Amendment. However, the Supreme Court did give strong indications of its leanings. In dicta, the Supreme Court noted that it would be "untenable" "that a person arrested pursuant to a warrant could not bring a Fourth Amendment claim challenging the reasonableness of even his arrest, let alone any subsequent detention."[61]

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[58] *Manuel v. City of Joliet* at 917.
[59] *Manuel v. City of Joliet* at 921.
[60] *Manuel v. City of Joliet* at 929 ("The two exceptions — the Ninth and D.C. Circuits — have not yet weighed in on whether a Fourth Amendment claim like Manuel's includes a "favorable termination" element.").
[61] *Manuel v. City of Joliet* at 929.

Subsequent to *Manuel v. City of Joliet*, the Fifth Circuit in *Winfrey v. Rogers* had occasion to provide further clarification on its jurisprudence concerning the proper legal theory to support the facts alleged in Dr. Morgan's complaint. In *Winfrey v. Rogers*, the affidavits used to obtain search warrants and the arrest warrants contained material omissions. [62] As a result, Winfrey was arrested and charged with murder. [63] The jury acquitted him in less than fifteen minutes, but after awaiting trial in jail for over 16 months. [64] Winfrey subsequently filed suit against the officers involved in the investigation. [65] In *Winfery*, the Fifth Circuit reiterated its agreement with nine other Courts of Appeal by holding: "the clearly established constitutional right asserted by Winfrey is to be free from police arrest without a good faith showing of probable cause."[66] This determination was made in *Winfrey*, which was filed under 42 U.S.C. § 1983 in **2010**, well before the events detailed in Dr. Morgan's complaint. Therefore, "the right to be free from police arrest without a good faith showing of probable cause" was clearly established by 2010 at the latest. In addition, the Fifth Circuit further reiterated its agreement with every other circuit court which has determined the issue of whether a Fourth Amendment claim such as Dr. Morgan's requires a "favorable termination"

[62] *Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. 2018).
[63] *Winfrey v. Rogers* at 187.
[64] *Id.*
[65] *Id.*
[66] *Winfrey v. Rogers*, 882 F.3d 187 at 198 (5th Cir. 2018).

element: "because [Winfrey] was arrested through the wrongful institution of legal process…his claim accrued when his criminal proceedings ended in his favor."[67] Therefore, Winfrey's 1983 malicious prosecution claim tethered to a Fourth Amendment violation did not begin to accrue until his acquittal. [68]

B. Appellants violated Dr. Morgan's clearly established federal rights no matter which label is applied

Dr. Morgan was arrested through the wrongful institution of legal process as in *Winfrey*. His arrest for "Non-certification of a Pain Management Clinic" came after his indictment. The indictment and subsequent arrest were based solely on evidence knowingly fabricated by Appellants to frame Dr. Morgan for a crime which he did not commit and to encourage his prosecution. ROA.329 at ¶49; 328 at ¶84; 335 at ¶120).

Dr. Morgan has pled a claim showing that he is entitled to relief. Whether this claim is called malicious prosecution or a violation of the Fourth Amendment or a violation of the Fourteenth Amendment (as suggested by Justice Alito in his dissenting opinion in *Manuel v. City of Joliet*) does not matter. Appellants' actions noted in this section violated Dr. Morgan's clearly established federal rights.

[67] *Winfrey v. Rogers* at 197.
[68] *Id*.

IV. Abuse of Process

A. Appellants abused the TMB's subpoena process to violate the Fourth Amendment

The Fifth Circuit has outlined the elements for a federal claim of abuse of process:

> "The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required."[69]

The TMB issued administrative *instanter* subpoenas to Dr. Morgan. ROA.445. After the administrative subpoenas were issued, Appellants used them not to further the regulatory scheme, but rather for the purpose of pursuing criminal charges against Dr. Morgan. ROA.448. Appellants improperly enforced the subpoenas without affording any opportunity for precompliance judicial review, without consent and without exigency in violation of the Fourth Amendment. ROA.449.

The complaint has met the elements for a federal abuse of process claim. First, Appellants pursued an "ulterior purpose" in enforcing the subpoenas after they were issued (i.e. to pursue criminal charges and not to further the regulatory scheme). Second, they enforced the subpoenas improperly through "acts of intimidation" without affording judicial process to further their criminal

[69] *Brown v. Edwards*, 721 F.2d 1442 (5th Cir. 1984).

investigation (i.e. a "willful act in the use of the process not proper in the regular conduct of the proceeding"). Enforcement of an administrative subpoena by agents in the field is not permitted under *See v. City of Seattle* (387 U.S. 541) and many other longstanding precedents and therefore was "not proper in the regular conduct of the proceedings". Essentially, the TMB administrative subpoena process was abused by enforcing compliance through intimidation to circumvent the Fourth Amendment's requirement for a warrant and to search patients' entire medical files in a doctor's office for a criminal investigation. This abuse of process claim is ***not*** free standing. It is grounded in the Fourth Amendment since Appellants' abused the TMB administrative subpoena process to conduct unreasonable searches and seizures.

B. Appellants' abuse of process was egregious

The Supreme Court has termed similar behavior an "outrage."[70] The actions by Appellants here are arguably even more egregious than the "outrage" condemned by the Supreme Court nearly a century ago in *Silverthorne*. The instant searches involved extremely private and sensitive papers (i.e. patients' entire medical files) being searched immediately and warrantlessly by law

[70] *Silverthorne v. United States*, 251 U.S. 385 at 390 (1920) ("[T]he United States marshal without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there…of course its seizure was an outrage.").

enforcement in clear violation of the Fourth Amendment, whereas the search in *Silverthorne* involved corporate records.

The state court also found the abuse of the TMB's subpoena process to be egregious. Specifically, the state court found that Appellants acted with "bad faith" in conducting the searches of Dr. Morgan's clinics by immediate enforcement of TMB instanter subpoenas. ROA.449.

CONCLUSION

Appellants' immediate searches of Dr. Morgan's medical offices and seizure of over 14,500 confidential documents and medical records, including patients' entire medical files, papers which include some of the most conceivably private information, was accomplished by Appellants through intimidation and threats. ROA. 320-21. Appellants conduct to "serve" subpoenas was clearly unreasonable in the absence of an exception to the Fourth Amendment's requirement for a warrant; unreasonable in the absence of exigency, consent, or the opportunity for judicial review. In addition, the manufacture of false criminal evidence clearly violated the Fourteenth Amendment. Any notion that such activities are constitutional is beyond imagination. Based on Appellants' violations of clearly established law and their conduct as investigators, performing investigatory and administrative functions, Appellants are entitled to neither absolute nor qualified immunity. Furthermore, Dr. Morgan has pled in his *Second Amended Complaint*,

sufficient facts to satisfy the federal standard of notice pleading, where he is entitled to relief.

Accordingly, Dr. Morgan respectfully requests that the Court affirm the order of the court below which denied Appellants' motions to dismiss.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 31st day of August, 2018, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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Upon acceptance by the Clerk of the Court of the electronically filed document, the required number of bound copies of the Brief of Appellee will be filed with the Clerk of the Court via UPS Next Day Air.

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Dated: August 31, 2018

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