IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE

DAVID CHASE,	)	
	)	
Plaintiff,	)	
	)	**Case No. 2015-200**
v.	)	
	)	**JURY DEMANDED**
CHRIS STEWART, *et al.*	)	
	)	
Defendants.	)	

NOTICE OF FILING

Comes now the Plaintiff, David Chase, and hereby gives notice of filing the following in support of his Responses and Objections to Defendants' Statements of Undisputed Material Facts in Support of their Motions for Summary Judgment:

1. Sworn Second Declaration of David Chase
2. WSMV.com article "Motion filed to have charges dropped against David Chase"
3. Newschannel5.com article "Legal Expert Questions DA's Deal"
4. Testimony excerpts of Detective Cahill from May 29, 2015 hearing transcripts

Respectfully submitted,

Philip L. Robertson, Esq. (BPR 21668)
Brittany M. Bartkowiak, Esq. (BPR 31637)
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify a true and exact copy of the foregoing has been sent via US Mail, postage pre-paid on April 11, 2016 to the following:

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Plaintiff,	)	
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	)	
Defendants.	)	

SWORN SECOND DECLARATION OF DAVID CHASE PURSUANT TO TENN. R. CIV. P. 72 IN SUPPORT OF HIS RESPONSE TO DEFENDANTS' MOTIONS (AS MAY BE AMENDED/ SUPPLEMENTED) FOR SUMMARY JUDGMENT

COMES THE DECLARANT David Chase, pursuant to Tenn. R. Civ. P. 72 and hereby declares the following under penalty of perjury from personal knowledge:

1. My name is David Chase and I am over the age of 21 and am competent to make this Sworn Declaration.

2. On July 1, 2015, I was contacted at the behest of the District Attorney's office. The District Attorney's Office conveyed to me that it was going to dismiss the charges against me that day; but only if I dismissed my Federal civil lawsuit (David Chase v. Metro, *et al*/3:15-cv-00631) first, that very morning.

3. I had been told for weeks leading up to that date that the District Attorney's office had agreed to dismiss the criminal case against me. July 1, 2015 was the first I had heard anything about the District Attorney's demand that I dismiss my Federal civil suit, and that my criminal case dismissal was contingent on that.

4. I had approximately one hour to decide what to do. I felt then, and I still feel that I was blackmailed into dismissing my civil suit against the police and Metro, who I believe violated my constitutional rights, assaulted and wrongfully arrested, jailed and prosecuted me.

5. I did not enter into any written agreement or other contract.

6. The alleged Release-Dismissal Agreement referred to by Glenn Funk in his affidavit was not a consensual, negotiated deal. I dismissed my Federal civil case against Metro and the police officers only under coercion and duress because I was fearful after it was conveyed to me from the District Attorney's Office on the morning of July 1, 2015, that unless I acquiesced to that demand that morning, I would continue to be groundlessly prosecuted, embarrassed, and would ultimately be incarcerated - for crimes I did not commit.

7. Also, I have read Defendant Jason Ritzen's Declaration. My sources of information concerning Mr. Ritzen's defamatory remarks and social media posts came from Lee Kennedy and Austin Pennington. Mr. Ritzen is wrong when he claims that Lee Kennedy knew "everything" about the Virgin Hotel deal. He was a silent partner of mine. All management was handled by me.

8. Both Mr. Kennedy and Mr. Pennington independently approached me around March 2015 and asked me why Jason Ritzen was bashing and bad-mouthing me and why he was posting negative facebook messages concerning my criminal prosecution and related issues involving Ms. Bull. They conveyed to me that Mr. Ritzen had indicated to them both that he had "inside information."

9. When I testified that I was not suing Jason Ritzen for what he said at the dinner table, I meant I was not *just* suing him for that but for all of the claims set forth in my Verified Second Amended Complaint.

FURTHER AFFIANT SAYETH NOT.

Pursuant to Tenn. R. Civ. P. 72, I declare under penalty of perjury that the foregoing is true and correct.

David Chase

Date: 4-11-16

Motion filed to have charges dropped against David Chase

Posted: Mar 19, 2015 3:56 PM CDTUpdated: Feb 03, 2016 11:23 AM CST

David Chase

NASHVILLE, TN (WSMV) -

Next month, prominent Nashville developer David Chase will learn whether the domestic violence charges against him will be dropped.

Chase's attorneys filed a motion saying evidence in the case was either not saved, destroyed or attempted to be erased by the alleged victim in the case.

The motion contains Facebook messages between the woman Chase is accused of assaulting twice within a few hours and one of her friends. The page shows the alleged victim asking her friend to delete pictures from the night Chase was arrested.

"Evidence wasn't collected, wasn't preserved and we believe evidence proving the innocence of David Chase was erased," said Richard McGee, the lead defense attorney in the case.

A former prosecutor who looked at the motion said if even half of what's in it is true, the state will have a difficult time going forward with the case.

"It's a huge problem," attorney Rob McGuire said. "If I was a prosecutor looking at this case and having these issues raised, I'd be very concerned I'm getting the full story.

And obviously a prosecutor's job is to provide justice and if they look at this information and feel the defense is right, then they have an obligation to dismiss this case."

McGuire said he knows both the defense team and the prosecutors in this case very well. He called them among the most ethical and talented lawyers in the city.

He also said even though this is a high-profile case, if the defense can prove the allegations in this motion, be believes prosecutors will have no issue with dismissing the case.

At this point, these are just allegations made in a defense motion. Defense teams routinely file motions to dismiss. Judge Steve Dozier will hear arguments on this next month.

Channel 4 reached out to prosecutors on Thursday, but had not heard back by deadline.

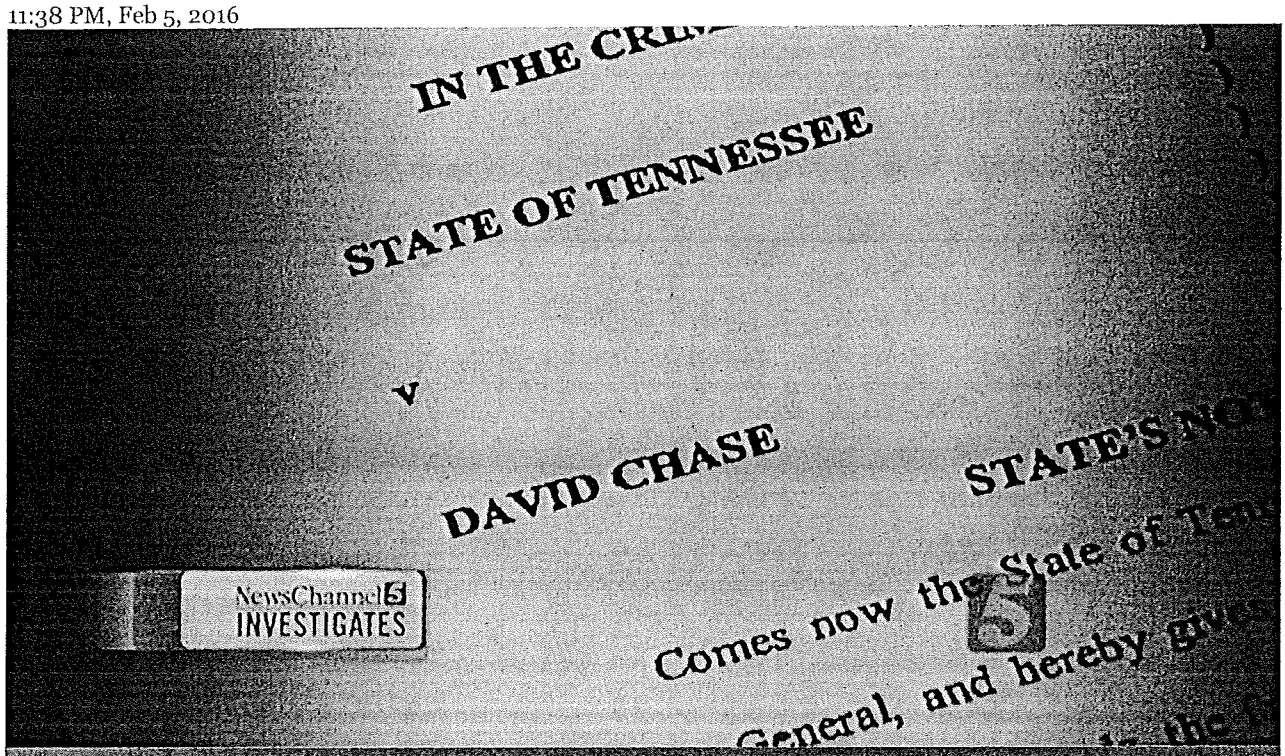
LOCAL HEADLINES

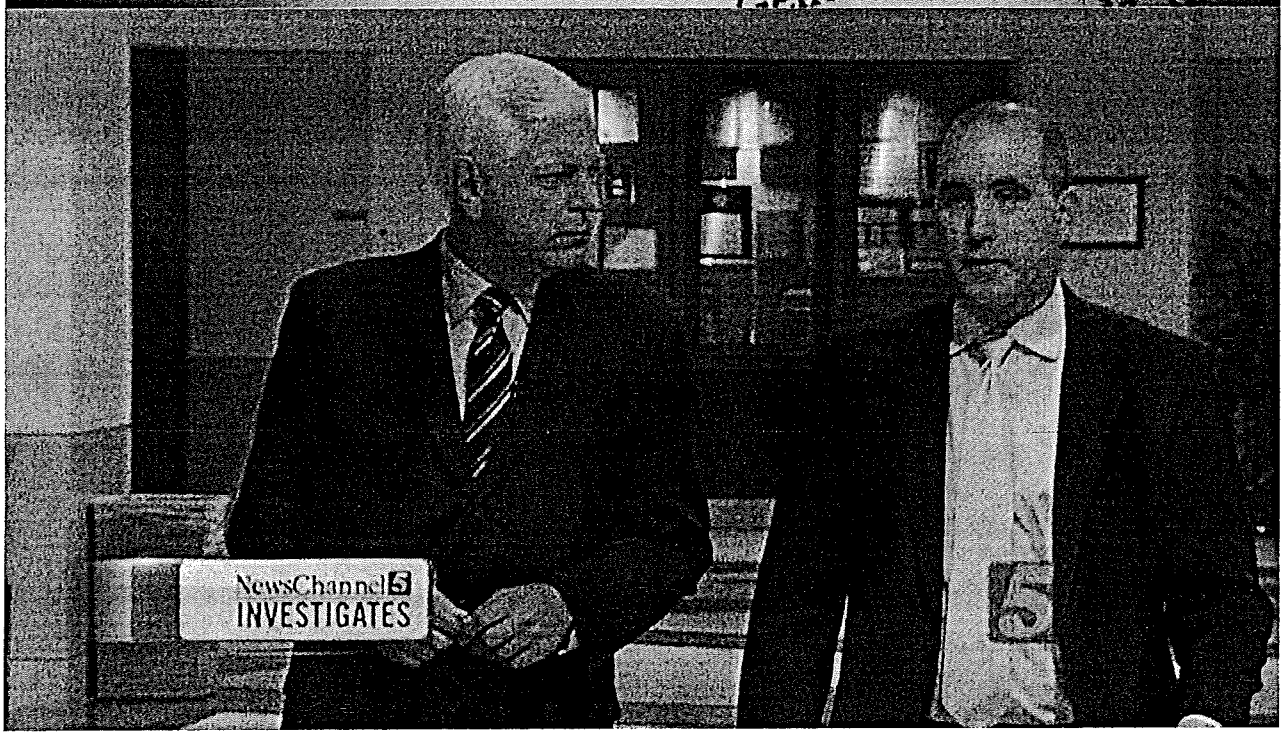
[redacted]

Read more: http://www.wsmv.com/story/28565728/motion-filed-to-have-charges-dropped-against-david-chase#ixzz45Xmn0gYt

WTVF
Legal Expert Questions DA's Deal

Ben Hall
7:38 PM, Feb 5, 2016
11:38 PM, Feb 5, 2016





NASHVILLE, Tenn. - A University of Tennessee law professor has concerns about the ethics of Glenn Funk's handling of the David Chase case.

NewsChannel 5 Investigates first reported that Funk told Chase he would have to drop his civil lawsuit against Metro in order for Funk to drop criminal charges in Chase's high-profile domestic violence case.

"It wasn't an ask," David Chase remembered. "It was 'we are not dismissing your criminal case unless you dismiss your federal case.'"

Chase said his rights were violated.

"In my opinion, he blackmailed me, using my criminal case and incarceration as leverage," Chase said in an exclusive interview with NewsChannel 5.

The same day Chase dropped his lawsuit, District Attorney Glenn Funk's office filed a Notice of Dismissal.

It detailed how investigators did not find enough evidence to prosecute the case.

It was something they had been telling Chase for months.

"At the point, they know they no longer have probable cause. There is no ethical question at that point. They simply have to drop the charges," said Alex Long, professor of law and associate dean at the University of Tennessee.

Long told NewsChannel 5 chief investigative reporter Phil Williams that he questions the ethics of Funk waiting to drop criminal charges, which Chase said Funk did for months, even though the case had fallen apart.

"The prosecutor is putting pressure on someone to drop a potentially valid claim through threat of prosecution that he doesn't have a right to bring in the first place," Long said.

Long said prosecutors should not bargain with criminal charges they know they can't prove in order to drop a civil case.

The law professor said, "As I read this Notice of Dismissal, it sounds as if the prosecution is conceding that there is no probable cause in this case.

NewsChannel 5 Investigates asked, "Which means what?"

Long responded, "That ethically they need to drop the case."

Glenn Funk defended his actions.

In a statement he told *NewsChannel 5 Investigates* that "release dismissal agreements are routinely use by prosecutors throughout the United States."

But Long said there is a clear rule in Tennessee.

"There is a rule of conduct in Tennessee that says a lawyer is prohibited from threatening a prosecution of a criminal charge in order to gain advantage in a civil matter," Long said.

Long pointed to other state opinions.

In Ohio, an Ohio Supreme Court Opinion states: "It is improper for the prosecutor to offer to dismiss a the criminal charge in exchange for the defendants promise to sign a release of all civil claims."

A Virginia opinion states: "If a prosecutor knows that a charge is no longer supported by probable cause she is obligated to dismiss the charge and may not condition that on dismissal of civil liability."

"It's not too much of a stretch to say there was pressure bordering on coercion at least in this case," Long said.

Funk said in his statement that the agreement was "designed to bring closure to the case."

He also said he did not want to "deter victims from reporting domestic violence" adding it saved taxpayers "the costs of defending against a federal lawsuit."

David Chase said he felt forced to take the deal.

"My initial reaction was: 'No, take the deal and shove it,'" Chase said.

He did take it, but questions if justice was served.

Long said that it would be up to the Tennessee Board of Professional Responsibility to investigate any ethics complaints filed in the matter.

But, he added, it would be a first in Tennessee. This issue has never come before the board before.

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IN THE CRIMINAL COURT
FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE, Plaintiff,	)	
vs.	)	2014-C-2484
	)	2014-C-2485
DAVID CHASE, Defendant.	)	

Transcript of Motions
Before the Honorable Steve Dozier
May 29, 2015

Appearances:

For the State:
Katie Miller
Assistant District Attorney General
Nashville, Tennessee

For the Defendant:
Mr. Rich McGee
Ms. Lisa Naylor
Mr. Kevin McGee
Attorneys at Law
Nashville, Tennessee

Shana Crawford, CCR

Official Court Reporter

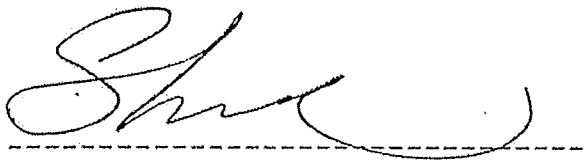
Division I

Nashville, Tennessee

*(931) 494-1191 * (615) 862-4200 X 71581*

I the undersigned, Shana Crawford, official court reporter for the 20th Judicial District of the State of Tennessee, do hereby certify the foregoing is a true accurate and complete transcript to the best of my knowledge and ability of the proceedings had and evidence introduced in the captioned cause.

I further certify that I am neither attorney for, nor related to the parties to this cause and furthermore that I am not a relative of any attorney or counsel of the parties hereto or financially interested in the action.



Shana Crawford, LCR

Official Court Reporter

THE COURT: I thought the text said they were on their way?

THE WITNESS: She was going to, but she never did.

THE COURT: Any questions from the State?

GENERAL MILLER: No, sir.

THE COURT: All right. You can step down.

We will take a 15-minute recess.

(Break taken.)

THE COURT: All right. Who is the next witness?

MR. MCGEE: Detective Cahill.

LARRY CAHILL,

Was called as a witness, and after having first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MCGEE:

Q. Would you state and spell your full name for the court, please?

A. Larry Cahill, L-A-R-R-Y, C-A-H-I-L-L.

Q. And you are a police officer?

A. Police, yes, sir.

Q. How long have you been a police officer?

A. Been working for the department since 2008, sworn since 2009. And domestic violence since 2012, a detective there.

Q. All right. Now, Detective Cahill, I want to talk to you real quick about dates about then some specific incidents. Of course we are here talk about the incidents that occurred on the apartment complex on Elliston Pike on 6/8. When did you first get assigned the investigation of the case?

A. I believe it was the 11th. I was at the office.

THE COURT: He didn't ask where you were, go ahead.

BY MR. MCGEE:

Q. And was that a paperwork assignment? In other words, were you just in the normal course of events or your specifically called in on the case?

A. The victim had called in to the domestic violence office. She had been -- contact had been attempted I believe by another detective and so she was returning the call. And it was -- I worked a B

detail.

Q. So that's how you got involved in the case?

A. That's how I got involved. She -- the intern told me that this victim was --

Q. She had -- all right. I was just trying to find out the dates.

Now, you met with her the first time on 6/12?

A. I didn't mean with her on 6/12. I can't remember the exact date that my phone was --

THE COURT: But you know it wasn't 6/12?

THE WITNESS: No. Contact was made by the intern do the victim of the --

THE COURT: Do you know when you first met with her.

THE WITNESS: Can I refer to my notes?

THE COURT: Sure. Get going to --

BY MR. MCGEE:

Q. That is the date you took the photographs, detective was Thursday the 12th?

THE COURT: He said it wasn't the 12th.

BY MR. MCGEE:

Q. Okay.

A. And I'm just referring to my notes for -- I became aware on the 11th --

Q. My question is: When did --

THE COURT: He asked when you first met with her.

BY MR. MCGEE:

Q. Did you meet with her on June the 12th?

A. June 12th.

Q. Perfect. Okay. We will come back in a moment. The next -- you met with her on July 1st. Detective, trust me on the dates. July 1st was the day you met her at the Jet Pizza across from the apartment, then you picked up the iPhone and the Samsung -- or I'm sorry, the iPhone and the about the bet?

A. That's correct.

Q. And you also met with her on July 24th where she gave you a photograph taken of the bathroom door in David Chase's apartment that she had taken on 6/26; is that correct?

A. That's correct.

Q. And you also took a message of some -- you took a picture rather of some text message that's she had on her phone on 7/24?

A. Right.

Q. Now, let's back it up real quick. As it relates to 6/8, incident number one, incident number one is the allegation of the misdemeanor assault, just so we are on the same page. For the record, police officers who responded did not take any photographs of Ms. Bull; is that right?

A. That is my understanding.

Q. They did not -- they didn't take any physical evidence into their possession?

A. That's my understanding.

Q. They didn't take any photographs of the apartment?

A. That is my understanding.

Q. So no physical evidence, no photographs whatsoever as a result of incident number one police involvement?

A. That's my understanding.

Q. Okay. Now, let's go to incident number two, it's a different set of officers , is that right?

A. That's my understanding.

Q. Because it's a different shift, all right?

A. Yes, sir.

Q. Okay. The police department did not take any photographs of Lauren Bull after incident number two and that's -- is that right?

A. That is my understanding.

Q. And so you and I are on the same page, incident number two is the incident where we have the allegation of strangulation?

A. Yes, sir.

Q. Okay. So we have no photographs taken by the police?

A. That's my understanding.

Q. Of either her or the place, the apartment, right?

A. Correct.

Q. No physical evidence was recovered by the police?

A. Correct.

Q. There was a vandalism warrant that was taken out and the items that were allege today have been damaged were the iPhone, right?

A. Yes, sir.

Q. And the tablet?

A. Yes, sir.

Q. And the police did not take possession of either of those items on that day?

A. That's correct.

Q. In your investigation as it relates to incident number two, there is no independent witness it is what happened inside the apartment; is that correct?

A. Correct.

Q. As to incident number one, there is a witness by the name of Kayla Howell who went into the apartment with Ms. Bull; is that your understanding?

A. That's my understanding.

Q. Have you interviewed days a howl?

A. No, I haven't.

Q. You were aware that Kayla Howell -- well, was the person that went into the apartment during incident number one?

A. When I talked to Ms. Bull she did not know her name, so we did not guilty have a name to go on to find that person.

Q. Okay.

THE COURT: But you have a name now?

THE WITNESS: I do.

THE COURT: You tried to find her?

THE WITNESS: No when we went to the order of protection hearing, she was there.

BY MR. MCGEE:

Q. Did you talk to her?

A. I did not.

Q. Did you try to talk to her?

A. No.

Q. So as to incident number one, we have some independent person but not for the entire incident, that's your understanding?

A. That's my understanding.

Q. All right. Now, let's talk about 6/12. On 6/12 Ms. Bull comes into the office, police department, domestic violence office?

A. Correct.

Q. She handed you a Samsung telephone; is that correct?

A. Yes, sir.

Q. And she showed you some photographs on the Samsung photograph?

A. Yes.

Q. And you made pictures of those pictures?

A. I did.

Q. Did you at that time take possession of the Samsung phone for investigative purposes?

A. No, I didn't.

Q. Did you ask Ms. Bull if you could have it for maybe 24 hours in order that you could get it to Detective Gish or Weaver and they could do the analysis on the phones that they do?

A. No. She said that that was her backup phone and that the phone that she had had during the incident was damaged.

Q. Well, we will get do that in a second. So you didn't make any efforts to have the Samsung on 6/12 examined?

A. No.

Q. And you didn't -- did you check to see if there was an SD card in the phone?

A. No.

Q. Do you know what an SD card -- do you know what an SD card is? I'm not trying to be funny with you, officer. I didn't know. I had to learn?

A. No. I believe the iPhones don't have an SD card.

THE COURT: He's talking about the Samsung.

Q. Okay. I understand. Of course he denied that he attacked her, didn't he?

A. He did deny it. He did say that he did damage the I pad -- not I pad but the tablet.

Q. Yeah. He said that they fought over the iPhone as he was attempting to call 911 for help, that's what he told you?

A. After he took her phone to do that.

Q. Yes, sir. Because his phone had been disabled by Ms. Bull in her efforts to hack into the phone?

A. That's what he said.

Q. Did you follow up on that?

A. No.

Q. All right. So you are the one that brought it up, I said a he said/she said case, and at the end of the day, that's what this case is. You don't have any independent proof that's going to backup her claim or backup his claim, I suppose, true?

A. True.

MR. MCGEE: One second, Judge.

THE COURT: And how did you -- this sheet here that I'm looking at, is that one of the

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CHRIS STEWART, *et al*	)	
	)	
Defendants.	)	

PLAINTIFF DAVID CHASE'S SUPPLEMENTAL OBJECTION TO ALL DEFENDANTS' MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT

COMES NOW Plaintiff David Chase, by and through his undersigned counsel, and hereby submits this, his Supplemental Objection to all Defendants' Supplemented Motions for Summary Judgment (the "Motions"). In opposition to the Motions, Mr. Chase relies upon the record in this cause, including but not limited to the following documents previously filed:

- Chase's Verified Second Amended Complaint;
- His Objection to All Defendants' Motions to Dismiss or For Summary Judgment and supporting Responses to Statements of Undisputed Material Fact (which is incorporated herein by reference) (the "Initial Objection");
- His prior declaration in support of his Initial Objection;
- The declaration of James Kempvanee;
- The Second Affidavit of Brittany Bartkowiak;
- Plaintiff's Notice of Filing;

In addition, Mr. Chase relies upon:

- the Second Declaration of David Chase (the "2nd Chase Dec.");

- Plaintiffs' Second Notice of Filing ("2nd NOF");
- The Affidavit of Glen Funk ; and
- Plaintiff's Responses to Cho's and Ritzen's Supplemental Statements of Material Fact.

INTRODUCTION

Defendants' supplemental filings raise little other than the affidavit of Glenn Funk (the "Funk Affidavit") which, they submit, conclusively precludes Chase's claims for malicious prosecution. As such and in light of the volume of papers already clogging the Court's file, Chase refers the Court to his prior Objection and supporting papers while using this opportunity to primarily address a few select matters. First, Chase will address Defendants' broad brush interpretation of the summary judgment standard, which overlooks the necessity that before Chase is forced to "put up or shut up," Defendants must first carry their own burden to show through their own evidence that Chase cannot demonstrate an element of one or more of his claims. In this case, they either offer no evidence at all other than a conclusory allegation that Chase cannot prove this or that, or their "evidence" consists of their own self-serving affidavits devoid of support and inherently subject to credibility questions for the jury.

Second, Chase will further address some issues re-raised by the Defendants relating to conspiracy, defamation, and other claims of Mr. Chase.

Finally, Chase will address in depth the issues raised by Defendants as to the effect, if any, of the allegation by General Funk that despite the State's clear independent duty to dismiss the criminal charges, Chase was forced to non-suit his unrelated civil filing against police as a condition precedent to the State's announcement of dismissal of the criminal charges.

A. Summary Judgment Standard

Defendants incorrectly submit that under the current summary judgment standard, Chase is automatically required to "put up or shut up" as to each and every element of his claims. This strained interpretation is simply not correct. To the contrary, before Chase has any obligation to put forth any evidence, Defendants have the initial burden of supporting - with sufficient evidence of their own - each assertion that Chase cannot bring forth evidence on a particular element of a particular claim.

The Tennessee Supreme Court recently provided further clarification on this burden in the case of *Rye v. Women's Care Ctr. of Memphis*, MPLLC, 477 S.W.3d 235, 264-65 (Tenn. 2015). Therein the Tennessee Supreme Court instructed:

> Our overruling of Hannan means that in Tennessee, as in the federal system, when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. **We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial."** Tenn. R. Civ. P. 56.03. "**Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record**." *Id.*

As such, *Rye* instructs that Defendants cannot simply recite conclusory assertions that Mr. Chase cannot prove the elements of his claims. Instead, Defendants must support each particular contention with their own statement of undisputed fact supported by a citation to the record in accordance with Tenn.R.Civ.P. 56.03. That means that the evidence in the record to which they are required to cite must be of the kind admissible in summary judgment proceedings. Such evidence is also subject to the same scrutiny, such as to credibility, before it can shift the burden to Plaintiff to come forward to address that particular contention or element of its claim. *Id;*

Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn. 1997) ("Summary judgment is not a substitute for the trial of issues of fact. Determinations of credibility, the weight to be given evidence, and the inferences to be drawn from facts proven are jury functions."); *McDowell v. Moore*, 863 S.W.2d 418, 421 (Tenn. Ct. App. 1992) (Finding that summary judgment was not appropriate based on movant's affidavit due to inherent questions of credibility arising from the fact that "he is a party and his testimony must be weighed in the balance against his natural bias, prejudice or interest in the outcome of the case."); *See also, Doby v. Safeway Stores, Inc.,* 1523 F.Supp.1662 (E.D.Va. 1981)(denying summary judgment in case alleging conspiracy and collusion because "The Court is guided by the principle that when state of mind may be an issue, summary judgment should be granted sparingly because state of mind must generally be inferred from the facts."). Moreover, the trial court always retains "discretion to deny [a motion for summary judgment] in order to give the parties the chance to fully develop the facts at trial." *In re Catfish Antitrust Litigation,* 908 F.Supp. 400 (N.D.Miss. 1995)(citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 255 (1986) and *Rodeway Inns Intern. v. Amar Enterp.,* 742 F.Supp. 365, 369 n.5 (N.D.Miss. 1990).

In this case, a careful review of the affidavits offered by Defendants reveals them to be mostly nothing but bald and conclusory self-serving statements referring either to their state of mind or to conduct which is generally only provable by indirect evidence. In contrast, the detailed Verified Second Amended Complaint and the other evidence, documentary and testimonial, adduced by Chase demonstrates the existence of evidence, direct and indirect, that directly evidence or give rise to permissible and reasonable inferences supporting each attacked element of his claims. Accordingly, Defendants' Motions are not due to be granted in the face of these inherently fact intensive questions that can only be fairly resolved at trial by the jury.

B. Response to Defendant Ritzen's supplemental arguments (not relating to Malicious Prosecution).

There is ample direct and indirect evidence to support a jury finding of liability on the part of Defendant Ritzen. Defendant claims he has never met any of the Defendants in person. Defendant Ritzen has never met David Chase. As such, he urges, as a matter of law he cannot not be liable for any actions harmful to Chase. Instead, he was merely acting as a "good Samaritan." That is one way the jury could perceive his involvement; but it is neither the only nor more likely way.

Instead, the facts tend to tell a different story. Indeed, as discussed and documented at length in Plaintiff's Verified Second Amended Complaint and in his initial Objection to the Motions, text messages on Lauren Bull's phone records that Mr. Ritzen intentionally interjected himself into Ms. Bull's scheme to continue to maliciously prosecute Chase and abuse the process in the ongoing prosecutions. Mr. Ritzen's text messages evince stated actions and communications with the DA's office, press and third-parties in an effort to exert pressure to continue the prosecution of Mr. Chase. All of these actions were coming from someone who readily admits that he does not know David Chase and claims he has "never met nor been in the same room with Ms. Bull." (*See Mr. Ritzen's response to Plaintiff's Request for Interrogatories No. 12).* Yet, he clearly knows Ms. Bull because even the phone records that he or Bull did not delete show a volume of texts and phone calls.[1] Moreover, though he tries to downplay it, Mr. Ritzen further admits he knows and had spoken to Defendant Susie Martin. *See Ritzen Responses to Plaintiff's Interrogatories at No. 7.*

[1] *See Ritzen's Responses to Plaintiff's First Set of Discovery* (Plaintiffs NOF) wherein he fails to produce any phone, text, or social media records because he regularly deletes them as a matter of course.

The fact remains that Mr. Ritzen voluntarily interjected himself into the circumstances underlying this case. While he purports to not know Mr. Chase or Ms. Bull, he sought out Ms. Bull in "apparent support." *(See Ritzen's Amended Motion for Summary Judgment p.3).* However, the evidence shows the malicious intent behind this purported "support." Mr. Ritzen's motivation for "supporting" Ms. Bull stems from the fact that Mr. Chase dated Mr. Ritzen's ex-wife during the time that she and Mr. Ritzen were separated, but still married. (*See Chase Decl. at 13)* Examples of the "support" offered by a complete stranger (Mr. Ritzen) to Ms. Bull via text messages include:

- "So I caused a stink today" "lots of private messages in support" "a few calls as to why"
- "I stirred some shit up. Caused a stink"
- "Homepage may run an update on the case"
- That's the DA I said to call. My high school ex"
- "You push and I'll push" [in response to Bull's message "unless you can get the das {DAs} to push it more and to get me justice there is nothing"]
- "I'll call Jan too"
- "With your permission may I intervene"
- "Got you a meeting with Kamie Hefner Monday at 5:15"
- "Kamie is putting in a call to the da office. Said hold off meeting her until tomorrow"
- "She's [presumably Kamie Hefner] gonna call me. Looking to set you up with the former da who will press glen funk hard"

In an effort to counter these obviously incriminating messages, Mr. Ritzen has obtained affidavits from Janice Norman and Katrin Miller in the DA's office, both of which state that neither of those individuals have had contact with Mr. Ritzen concerning Mr. Chase. Based solely on those two affidavits, Mr. Ritzen contends "*it is clear Rizen never contacted the*

Davidson County District Attorney's office in an attempt to influence the prosecution of Chase. (See Ritzen's Amended Motion for Summary Judgment p. 5). However, the major flaws in this rationale are two-fold. For one, there are numerous staff members in the DA's office, not just Ms. Norman and Ms. Katrin. And secondly, Mr. Ritzen's own text messages (admissions) contradict that theory.

Mr. Ritzen claims that he has not made any statements to authorities or press. *(See Ritzen's affidavit and Ritzen's Amended Motion for Summary Judgment)* However, his own text messages indicate otherwise. He specifically states that he will "call Jan" [presumably his ex-girlfriend Janice Norman], and he says he's contacted attorney Kamie Hefner and that "Kamie is putting in a call to the da [DA] office" and "She's [presumably Kamie] gonna call me. Looking to set you up with former da [DA] who will press glen funk hard." These text outline very specific actions and involvement by Mr. Ritzen and anyone he has connections with that have a direct connection with the DA's office. Mr. Ritzen's feigned innocence and lack of involvement and efforts are preposterous when the evidence clearly contradicts that.

Mr. Ritzen's true intentions to harm Chase are further evidenced by his defamatory statements. He admits he made such statements to a group of 20-30 individuals at a dinner in March of 2015, though he claims there was no harm because Lee Kennedy "corrected" him.

Even if it were true that the dinner was the only instance of defamation and that Mr. Kennedy mitigated any damage, that one episode shows Ritzen's true motives and controverts the benevolent façade he is trying to pass off. All of these things - the texts, the phone records of calls with Bull, the Facebook and social media posts, the rant to a restaurant full of people – demonstrate that Mr. Ritzen's credibility is at issue and that he did in fact take part in the bad acts. The jury will have to determine whether Mr. Ritzen was acting as a "good Samaritan" or whether he was acting, as his texts and the inferences to be drawn therefrom show, as a meddler,

instigator, and co-conspirator with Ms. Bull to harm Mr. Chase. The acts and statements of Mr. Ritzen, coupled with his motive and lack of credibility substantiate Mr. Chase's claims and as such, Mr. Ritzen's Amended Motion for Summary Judgment must be denied. Again, this casts serious doubt on Mr. Ritzen's credibility. His Affidavit and Supplemental Affidavit are self-serving and cannot be consider un-refuted proof. His involvement is clearly a matter for a jury to determine, and as such his Motion for Summary Judgment must be denied.

C. General Supplemental Response to Defendants Stewarts', Cho's, Lovrenovic's, McKenzie's and Martin's Supplemental Papers (not including Malicious Prosecution).

The Second Verified Complaint and the Initial Objection and related papers go into great detail to demonstrate the facts, reasonable inferences, and the motivations that bind these Defendants to Ms. Bull and to Mr. Chase. Defendants would have the Court believe their acts and involvements are all simply independent coincidences that in and of themselves are not tortious. That assertion is not availing. The coincidences are too numerous, too convenient, to be discounted.

These Defendants' supplemental papers raise nothing new other than the issue of whether Glenn Funk's affidavit precludes Chase's malicious prosecution claim as a matter of law. The remainder of their supplemental papers is merely a rehashing of unavailing arguments previously made. Despite their protests, the Verified Second Amended Complaint, Chase's Initial Objection and the papers filed in support thereof demonstrate a web of connections and communications between each of these Defendants and Ms. Bull at the time of the bad actions against Mr. Chase. Mr. Chase has further brought forth evidence of each of the parties' own "overt acts" despite the fact that only one conspirator's overt acts must be shown. Mr. Chase has further brought forth evidence supporting each Defendants' motive for their involvement with Ms. Bull and for their

participation in the various tortious actions. As such, Mr. Chase requests that the Court review again his Second Verified Complaint, his Initial Objection and Supporting Papers, in addition to this Supplemental Objection and the papers filed herewith.

D. Response to all Defendants' Supplemental Papers concerning Malicious Prosecution and the Effect of the Glenn Funk Affidavit.

As a preliminary matter, it should be noted that all of Defendants' arguments are focused on the criminal prosecution of Mr. Chase. However, Mr. Chase's malicious prosecution claims arise not only from the criminal prosecution, but also from Ms. Bull's civil order of protection prosecution. That prosecution cannot be affected by the alleged "Release-Dismissal Agreement" as it was a civil matter. Moreover, it cannot be alleged that that prosecution was compromised, as it was dismissed upon motion of Mr. Chase.

Second, regardless of the Court's finding on the issues raised by Defendants as to the malicious prosecution claims, the Verified Second Amended Complaint and the Initial Objection and Supporting Papers show that Chase can state claims for abuse of process, as there is evidence that both the criminal prosecution and the order of protection prosecution were continued and utilized by Defendants for the purposes of harassing, embarrassing, or extorting money from Chase, his parents, and his family's business.[2]

Returning to the malicious prosecution claim as to the criminal prosecution only, all Defendants submit that Mr. Chase cannot prevail on his claims for malicious prosecution because (1) he cannot show that a lack of "probable cause" and (2) because Mr. Chase allegedly made a "deal" with the District Attorney in which Mr. Chase purportedly agreed to dismiss his civil suit against Metro and certain officers in exchange for a dismissal of the criminal charges

[2] Of particular import, see the State's Notice of Dismissal (Chase's NOF).

instituted at Defendants' behest. Defendants' contention is without merit on a number of grounds.

1. Mr. Chase can prove lack of probable cause.

Defendants' contention that Mr. Chase cannot prove a lack of probable cause for his criminal prosecution is misplaced. They argue that the fact that Mr. Chase was indicted by a grand jury 3 months *after* his arrests and incarceration at the hands of defendants proves as a matter of law that he cannot show lack of probable cause. That argument is without merit. The appropriate element of a claim for malicious prosecution is whether "the **defendant** maliciously brought a prior suit...without probable cause". *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 248 (Tenn. 1992).

As such, the proper inquiry is not whether the arresting officers or the district attorney had probable cause to arrest and prosecute Mr. Chase, or whether the grand jury that indicted Chase three months later had probable cause. Rather the correct inquiry is whether Ms. Bull, and the other defendants who conspired with her, lacked probable cause to instigate the arrest and criminal proceedings that led to his arrests and subsequent prosecution. See *Martin v. Wahl*, 66 S.W.2d 608 (Tenn.Ct.App. 1933)(cert. denied); *see also*, *Miller v. Martin*, 10 Tenn.App. 149, 1929 WL 1627, (Tenn.Ct.App. 1929)(cert. denied). The Third Circuit case of *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782 (3rd Cir. 2000) very plainly explains the proper analysis as follows:

> We begin our analysis as to the District and Brown with the threshold question of **whether the presence of probable cause for Detective Hahn to make the arrest also imputes probable cause in behalf of the School Defendants to the criminal prosecution. The action of the School District in initiating the criminal proceedings and pressing unfounded criminal charges against Merkle can render the District liable for its major role in a malicious prosecution. Although the police may have acted on the reasonable belief that they had probable cause to arrest Merkle, whether the School Defendants had probable cause to pursue Merkle's prosecution**

> **is an independent inquiry, the outcome of which is not dictated by our holding that Hahn had probable cause to arrest Merkle.** Hahn acted only on what Principal Thomas told him. As instigators of the arrest, however, it is possible that the District and Brown were in possession of additional information, not provided to Detective Hahn, that would negate any probable cause they may otherwise have had to prosecute Merkle. **Thus, in analyzing the common law claim of malicious prosecution, we must consider the facts known to the District and its superintendent to determine whether they had probable cause to prosecute.**

Defendants offer no authority for the proposition that a grand jury indictment absolves them of their own responsibility for maliciously causing the arrest and *later* indictment and criminal prosecution of Mr. Chase. Indeed, the Tennessee Supreme Court has held that the action of the grand jury is not relevant to the issue of probable cause in a malicious prosecution case. In *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 249 (1992), the Tennessee Supreme Court stated

> Second, Plaintiff asserts that the grand jury's refusal to indict creates a presumption that the prosecution was initiated without probable cause. We disagree. Termination of the prior proceeding in Plaintiff's favor **has no bearing on whether probable cause existed at the time prosecution was initiated**, and, where relevant, the jury shall be specifically so instructed.

See also, e.g. Reece v. Whitley, 2016 WL 705265 (M.D.TN February 23, 2016)(Despite indictment, later acquittal would support claim for malicious prosecution); *Stafford v. Vance*, 1996 WL 106193 (Tenn.Ct.App. March 12, 1996)(malicious prosecution action will lie after acquittal at criminal trial; to wit, necessarily brought upon prior grand jury finding of probable cause); *Merkle*, 211 F.3d at 794-95, *supra.*

In the *Martin* case, the Tennessee Court of Appeals upheld a judgment for malicious prosecution against a private citizen who caused the arrest and criminal prosecution of the plaintiff through false and misleading statements to police. *Id.* at 614-615.[3] Like in this case, the arrest and commencement of criminal prosecution of the plaintiff was brought based on the false

[3] In that case, it is also of note that the question of whether probable cause existed was left to jury, to whose judgment the Tennessee Court of Appeals deferred. *Id.* at 615.

and misleading statements made by the defendant to a justice of the peace. *Id* at 613-615. Upon those false and misleading statements, the justice of the peace issued a warrant for the arrest of the plaintiff. *Id.* The plaintiff was thereafter arrested, but released and the charges dismissed after investigation by the prosecutor revealed that he could not prevail based on the evidence offered by the instigating citizen. *Id.* The Tennessee Court of Appeals explained,

> The declaration avers in substance that on or about the 6th day of January, 1928, the defendant, without probable cause, wrongfully and maliciously procured a justice of the peace in and for Knox county, Tenn., to issue a warrant falsely charging plaintiff with the crime of removing an automobile which had been purchased from the defendant under a conditional sales contract from the state of Tennessee without the written consent of the defendant; and that the defendant did thereupon further, falsely, wrongfully, and wickedly cause the plaintiff to be arrested on said warrant and incarcerated in jail in the city of Houston, Tex., and that said prosecution was shortly thereafter ordered stopped by the District Attorney General of Knox county, Tenn., because said charge in said warrant was false and groundless, and that said criminal suit was thereby finally terminated.
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> ...
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> The next question is with reference to the existence of probable cause for procuring the arrest of Wahl. Wallace Cable testified that he informed Mr. Martin at the time he delivered the title note to him that the car would be used by the purchasers in connection with their business, and which would take them out of the state, and explained that the words in the contract, "Will not take out of Knox County," which had been stricken out of the contract, was the result of the agreement that the car could be used by the purchasers in the prosecution of their business in other states. It is true that Mr. Martin denied that Cable made any such representation or statement to him. He admits, however, that he did observe that these words had been stricken out of the contract, but explained that he had no objection to them using the car in other counties in the state. However, there was a conflict in the evidence on this subject, and this made it necessary to submit the question to the jury. It is further contended by appellant that, even though Cable agreed with the purchasers of the automobile that they could take it outside of the state, this was not made known to Martin, and he did not know of such agreement at the time he procured the arrest of Wahl on the warrant, that he would still have had probable cause for the issuance of the warrant and the resultant arrest and imprisonment. Conceding this to be true, the fact remains that Cable testified that he did communicate this fact to Martin at the time he delivered the title note. There being some evidence that Martin had this information, under the well-settled rule the verdict of the jury cannot be disturbed on appeal.

Martin v. Wahl, 17 Tenn. App. 192, 66 S.W.2d 608, 614 - 615 (Tenn.Ct.App. 1933)

Defendants ask the Court to ignore the fact that Mr. Chase was first arrested twice and incarcerated, as well as publicly humiliated as a result of Ms. Bull's false statements to police and the magistrate nearly three months *prior* to the indictments. As such, the indictments, which were procured through the false statements and "evidence" offered by Ms. Bull and the conspiring defendants, could not absolve liability **for the malicious prosecution of the arrests of Mr. Chase**. As in the *Martin* case, Defendants' liability arose from the false statements made in order to induce the issuance of the arrest warrant. That liability is not absolved because the magistrate (or in the case of *Martin*, the justice of the peace) relied upon those false statements in determining in his mind that probable cause existed for the issuance of the warrants.

Likewise, there is no reason that the grand jury indictment based on Ms. Bull's false statements and testimony, and the altered photos of fabricated injuries she and Defendant Everett concocted, should be treated any differently than the issuance of the arrest warrants by the justice of the peace in *Martin.*[4] In both instances the criminal proceedings were instituted solely based on the presentation of the false and misleading testimony and "evidence" of the instigating private citizen. The grand jury relied on testimony of Defendant Bull and Detective Larry Cahill. During Mr. Chase's Motion to Dismiss, Detective Cahill testimony confirmed that the police relied solely on statements made by Ms. Bull and photographs provided from Ms. Bull. He gave the following relevant testimony:

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[4] The Indictments indicate that Ms. Bull and Detective Cahill gave testimony and presented evidence, such as the doctored photos created by Ms. Bull and Defendant Everett. *See Exhibit A to Cho's Statement of Undisputed Material Facts in Support of Supplemental Grounds for Amended Motion for Summary Judgment – Indictments; See also, Plaintiffs NOF - State's Notice of Dismissal outlining false, destroyed, and altered evidence* and *Exerpts from October 2, 2014 and May 29, 2015 Transcripts; See also, Plaintiff's Second Notice of Filing – Testimony of Detective Larry Cahill.*

Q. … As it relates to 6/8, incident number one, incident number one is the allegation of the misdemeanor assault, just so we are on the same page. For the record, police officers who responded did not take any photographs of Ms. Bull; is that right?

A. That is my understanding.

Q. They did not – they didn't take any physical evidence into their possession?

A. That's my understanding.

Q. They didn't take any photographs of the apartment?

A. That's my understanding.

Q. So no physical evidence, no photographs whatsoever as a result of incident number one police involvement?

A. That is my understanding.

Q. Okay. The police department did not take any photographs of Lauren Bull after incident number two and that's – is that right?

A. That is my understanding.

Q. And so you and I are on the same page, incident number two is the incident where we have the allegation of strangulation?

A. Yes, sir.

Q. Okay. So we have no photographs taken by the police.

A. That's my understanding.

Q. Of either her or the place, the apartment, right?

A. Correct.

Q. No physical evidence was recovered by the police?

A. Correct.

Q. …. I said a he said/ she said case, and at the end of the day, that's what this case is. You don't have any independent proof that's going to backup her claim or backup his claim, I suppose, true?

A. True.

A copy of excerpts from Detective Cahill's testimony is attached to Chase's Second Notice of Filing.

The fact that the grand jury determined cause existed to indict Mr. Chase on Ms. Bull's false statements is no different than the magistrate finding cause existed to arrest Chase three months earlier, or that the justice of peace found there to be cause for issuance of an arrest warrant based on the instigating citizen's false testimony in *Martin*.

The question of whether Ms. Bull and the other conspiring defendants lacked probable cause is a question of fact for the jury. *Roberts*, 842 S.W.2d at 246 (Tenn. 1992); *see also, Martin* at 615. In this case, there is ample evidence that defendants lacked probable cause, as evidenced by the Verified Second Amended Complaint, the Initial Objection and papers in support thereof, and by the Funk Affidavit and testimony of Detective Larry Cahill.

Accordingly, Defendants have failed to show that no genuine issue of material fact exists as to the element of Defendants' lack of probable cause.

2. Mr. Chase can show that the dismissal of the criminal charges was a favorable outcome.

Defendants further argue that Mr. Chase cannot show that there was a final and favorable outcome resulting from the dismissal of his criminal charges. They base their argument on two allegations: (1) that the voluntary dismissal by the District Attorney cannot in any case be a favorable outcome as it is not on the merits, and (2) that there was a release-dismissal agreement between Mr. Chase and the District Attorney that renders the dismissal of the criminal charges indecisive as a matter of law without further inquiry. These assertions are without merit.

(a) The voluntary dismissal by the District Attorney can be a favorable resolution that will support a claim for malicious prosecution.

Defendants argue that the dismissal at the District Attorney's behest is akin to a Rule of *Civil* Procedure 41 voluntary dismissal *without prejudice*. To that point, they turn the Court's attention to the recent case of *Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012). However *Himmelfarb* has no bearing on the distinct issue in this instance. In *Himmelfarb* the sole issue was whether a voluntary non-suit of a civil matter pursuant to Tenn. R. Civ. P. 41 constituted a final and favorable resolution. *Id.* at 38. This present case involves a dismissal of a *criminal* case *with prejudice.* The fact that the *Himmelfarb* court's holding was limited solely to civil non-suits under Rule 41 is evidenced further by the Tennessee Supreme Court's statement in that case that it was dealing with an "issue of first impression." *Id.* at 38. The Tennessee Supreme Court further affirmed that their holding was consistent with "prior case law." *Id.* at 40.

Prior caselaw has dealt with the voluntary pretrial dismissal of *criminal* proceedings and found that they can be construed as a final and favorable resolution for purposes of a malicious prosecution claim. As also discussed above, the *Martin* case is one such instance. In that case, the Tennessee Court of appeals sustained a jury verdict for malicious prosecution. The Tennessee Court of Appeals found that the voluntary dismissal instigated by the district attorney was in fact a final and favorable resolution supporting a judgment for malicious prosecution. *Martin,* 66 S.W.2d at 613, to wit,

> ...it is contended by the appellant that there had been no termination of the criminal prosecution, and no disposal of the matter on its merits, and that Wahl and his attorney had procured the dismissal of the charges on the ex parte request and procurement by Wahl and his attorney, and hence a suit for malicious prosecution could not be maintained.
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> ...
>
> In the present case, the Attorney General made an investigation as to the facts. He was not content to rely upon the representations made to him by Wahl's attorney. Before he took any action, he required the affidavit from Wallace Cable, who was the agent of Martin in selling this automobile. When this affidavit was procured, the Attorney General

> was of the opinion that, under the facts as disclosed by the affidavit, no criminal offense had been committed. He also knew that, in the event of a prosecution of Wahl and Miller, **the state would have to rely upon the evidence of Wallace Cable, and, under his evidence, certainly no conviction could have been had. It cannot, therefore, be said that the Attorney General did not make a fair investigation as to the merits of the matter.** It also appears that the Attorney General went fully into the matter with the attorney for Martin, and that, after a full consideration of the contention made by Mr. Key, the attorney for Martin, the Attorney General still insisted that no crime had been committed. In an effort to satisfy Mr. Key, he suggested that Mr. Key go with him to the criminal judge and submit the question to the criminal judge. The criminal judge agreed with the Attorney General that the prisoners should be released from custody.

Martin, 66 S.W.2d at 612-613. The Court of Appeals found that the voluntary dismissal by the attorney general was therefore sufficient upon which to base a jury verdict for malicious prosecution.

Further to this point is the related case of *Miller v. Martin*, 10 Tenn.App. at 151, *supra*, in which the Tennessee Court of Appeals upheld a malicious prosecution judgment upon a voluntary dismissal of criminal proceedings by the attorney general based on

> The testimony of the attorney-general was that he conferred with counsel representing the defendant in the criminal prosecution while the defendant was under arrest in Houston, Texas, on a warrant sworn out before a Justice of the Peace, and that due to the conversation they took the matter up before the criminal judge, when the prosecutor was advised that the prosecution would be unsuccessful, and to avoid an accumulation of costs for which the State would be liable, the attorney-general declined, with the advice of the criminal judge, to further prosecute the charge.

The Supreme Court of Tennessee has also held that the entry of a nolle prosequi is favorable and final outcome upon which a malicious prosecution suit can be predicated. *Scheibler v. Steinburg*, 167 S.W. 866 (Tenn. 1914). Likewise, in the seminal case of

Accordingly, clearly a voluntary dismissal by the prosecution after investigation can form the basis of a malicious prosecution action where it reflects on the merits of the case.

(b) the State's Notice of Dismissal and the Order of dismissal positively reflected on the merits (or total lack thereof) of the prosecution's claims.

The State's Notice of Dismissal could not be clearer as to the lack of merit of the criminal charges instigated by the defendants against Mr. Chase. After citing to a myriad of instances in which defendants' conduct reflected the lack of any evidence of Mr. Chase's actual guilt, the State gave its reasoning for the dismissal. These reasons included:

- **"The District Attorney General is under an ethical obligation and legal obligation from prosecuting a charge that the District Attorney knows is not supported by probable cause;"**
- **"As a result, this Office has a constitutional and ethical duty to refrain from prosecution of this case."**
- **"The State has a responsibility and duty to seek justice rather than advocate for victory at any cost; therefore, the ethical and legal obligations of the Office of the District Attorney require the State to dismiss this indictment."**

State's Notice of Dismissal, at 3, 6. (Emphasis supplied).

Defendants have secured and proffered an affidavit of General Funk that actually expressly reaffirms the foregoing bases for dismissal of the prosecution in Mr. Chase's favor, to wit,

- **"I approved the dismissal of the criminal prosecution of Mr. Chase for the reason set forth in the State's Notice of Dismissal (filed on July 1, 2015)** and because Mr. Chase agreed to dismiss his aforementioned Federal lawsuit.[5]

[5] For the reasons set forth below, Mr. Chase disputes that he voluntarily agreed to dismiss his federal suit against police or that the dismissal was a "compromise" of his criminal prosecution. He also asserts that the dismissal was the product of duress, coercion, and was procured by prosecutorial overreaching.

- "**After a thorough review of the evidence, General Miller decided to dismiss this case primarily** based on inconsistent statements made under oath by Lauren Bull, as well as other issues affecting Ms. Bull's credibility."
- "**The factual reasons for the dismissal** of the criminal charges against Mr. Chase **were filed in writing with the court** at the time the dismissal was announced and are a matter of public record."

Affidavit of Glenn Funk, p. 2 and Exhibit A to the Affidavit.

Accordingly, the voluntary dismissal was based on the merits – the lack of merits of the prosecution's claims. By his own admission, General Funk was under a (1) constitutional, (2) ethical, **and** (3) legal "**duty**" to dismiss the indictments against Mr. Chase. Moreover, as stated by General Funk above, **the decision to dismiss was actually made by General Miller**. That was prior to the later approval by General Funk and General Funk's 11th hour demand that Mr. Chase dismiss his federal lawsuit against police. Finally, General Funk makes clear that "**The factual reasons for the dismissal...were filed in writing with the court** [i.e. the State's Notice of Dismissal]." General funk did not equivocate. He did say "some" or "most" of the factual reasons, he said "the factual reasons" for the dismissal were set forth **in writing** in the State's Notice of Dismissal. Accordingly, there is clearly a question of material fact as to whether the voluntary dismissal was favorable.

(c) Whether there was a "release-dismissal agreement" is at best the starting point for a factual inquiry; evidence of it does not as a matter of law preclude Mr. Chase's malicious prosecution claims arising from the criminal prosecution.

Defendants assert that Mr. Chase's malicious prosecution claim is barred because (1) the have offered an affidavit by General Funk that there was a "release-dismissal agreement" and (2) ergo, a compromise of the criminal proceedings occurred and Tennessee law is crystal clear and

black and white that any claim for malicious prosecution is precluded as a matter of law without further inquiry. Case closed.

Actually, it could not be further from the truth. None of the Defendants actually provide any analysis on this point. Instead, they attempt to gloss over it with a couple of cherry-picked snippets, many from cases the careful reading of which the Court will realize actually do more harm than good to their motions.

(i) Only Compromises without regard to the merits or propriety can bar a claim for malicious prosecution.

Tennessee law is actually far from crystal clear and certainly contains more grey than black or white when it comes to this issue. However, the general rule that is recited by nearly every Tennessee case stems actually from New York case cited by defendants, *Halberstadt v. New York Life Ins. Co.*, 86 N.E. 801 (N.Y.Ct.App. 1909), in which it was stated

> From all of these authorities added to others which are more familiar I think two rules fairly may be deduced. The first one is that, where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official **in any way involving the merits or propriety of the proceeding** or by a dismissal or discontinuance based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, **a foundation in this respect has been laid for an action of malicious prosecution**. The other and reverse rule is that, where the proceeding has been terminated **without regard to its merits or propriety by agreement or settlement** of the parties, or solely by the procurement of the accused as a matter of favor or as the result of some act, trick, or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows.

Halberstadt, 86 N.E. at 803-04.

Defendants urge the Court to simply gloss over the quote and read only the phrase "by agreement or settlement." However, in doing so, the Court would be misled. First, the case stands for the proposition that malicious prosecution will not lie only "where the proceeding has

been terminated without regard for its merits or propriety by agreement or settlement." The fact that there may have been an agreement or settlement is not the end of the inquiry. The agreement or settlement must be "without regard for [the prosecution's] merits or propriety." The State's Notice of Dismissal and General Funk's Affidavit reveal that even if there was a "release-dismissal agreement," the dismissal was *with* regard for the merits and propriety of the prosecution, or rather the lack thereof.

Defendants also overlook the *Halberstadt* court's statement that a malicious prosecution action will lie when the prosecution's dismissal is "in any way involving the merits or the propriety of the proceeding." Again, the State's Notice of Dismissal and General Funk's affidavit evidence that the dismissal involved the merits or propriety of the proceedings against Mr. Chase.

Moreover, the reasoning for the two rules announced by *Halberstadt* are critical to the Court's analysis. The Court says

> The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows.

Thus, the Court's inquiry should always be to determine "whether the termination of the proceeding is of such character as establishes or fairly implies lack of a reasonable ground for his prosecution."

The Tennessee Court of Appeals discussed the *Halberstadt* ruling in the case of *Martin*, *supra*, at 614. After considering it, the Tennessee Court of Appeals affirmed the jury's verdict for malicious prosecution would lie even in the face of allegations that the dismissal was the result of an alleged deal made between the accused and the attorney general. *Id.* Instead of a "knee-jerk" reaction to the allegation, as encouraged by these Defendants, the Tennessee Court

of Appeals actually looked at the evidence and the reasoning of the attorney general, and affirmed because the dismissal succeeded the attorney general's review of the merits, to wit,

> Under these facts, it is contended by the appellant that there had been no termination of the criminal prosecution, and no disposal of the matter on its merits, and that Wahl and his attorney had procured the dismissal of the charges on the ex parte request and procurement by Wahl and his attorney, and hence a suit for malicious prosecution could not be maintained. Numerous authorities are cited and relied upon by appellant in support of this contention. Among other authorities cited and relied upon by appellant in the brief is the rule announced in 18 R. C. L. p. 25, § 13, wherein it is said:
>
> "It is generally held that where the original proceeding has been terminated **without regard to its merits or propriety** by agreement or settlement of the parties, or solely by the procurement of the accused as a matter of favor, or as the result of some act, trick, or device, preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of an action for malicious prosecution."
>
> Numerous cases are cited in support of the above rule. In Holliday v. Holliday, 123 Cal. 26, 55 P. 703, 705, a case relied upon by appellant, in the course of the opinion it is said:
>
> "It is, of course, true that the dismissal of a charge at the procurement of the accused cannot be construed as such a final determination of the matter in her favor as to support an action for malicious prosecution."
>
> **A reading of that case discloses that there was no investigation made to ascertain the merits of the charge.**
>
> In the present case, the Attorney General made an investigation as to the facts. He was not content to rely upon the representations made to him by Wahl's attorney. Before he took any action, he required the affidavit from Wallace Cable, who was the agent of Martin in selling this automobile. When this affidavit was procured, the Attorney General was of the opinion that, under the facts as disclosed by the affidavit, no criminal offense had been committed. He also knew that, in the event of a prosecution of Wahl and Miller, the state would have to rely upon the evidence of Wallace Cable, and, under his evidence, certainly no conviction could have been had. It cannot, therefore, be said that the Attorney General did not make a fair investigation as to the merits of the matter.

Martin, 66 S.W.2d at 612-13.

Likewise, in the *Miller* case, *supra*, the Tennessee Court of appeals, dealing with the same underlying facts as in *Martin,* held that the testimony of the Attorney General as to the grounds for the dismissal was material. *Miller,* 10 Tenn.App. at 151-152.

In the case of *Sewell v. Par Cable, Inc.,* 1988 WL 112915 (Tenn.Ct.App. October 26, 1988), also much referred to by Defendants, the Tennessee Court of Appeals cited to both Miller and Martin for the proposition that

> The prosecutor's reasons for not proceeding with a criminal prosecution are relevant to the favorable termination issue. Proof on this issue has been admitted in other malicious prosecution cases.

Sewell, 1988 WL 112915 at *5 (*citing Martin, supra,* and *Miller, supra*).

A review of the *Sewell* case cited by Defendants once again reveals that whether a "compromise" occurred is not the end of the inquiry. In that case, the Tennessee Court of Appeals affirmed a grant of summary judgment against a malicious prosecution plaintiff where the plaintiff, despite opportunity, failed to bring forth evidence that though a compromise of the criminal prosecution had been reached the dismissal considered the merits favorably, to wit,

> The only competent proof Mr. Sewell introduced on the favorable termination issue consisted of: (1) copies of the memorandum of understanding and the order dismissing the criminal charges, (2) his protestations of innocence, (3) his denial that he accepted the district attorney general's offer of statutory pretrial diversion, and (4) his lawyer's insistence that they were prepared to go to trial in June, 1983.
>
> ...
>
> **The Memorandum of Understanding and the order dismissing the charges are neutral on their face.**
>
> ...
>
> **The prosecutor's reasons for not proceeding with a criminal prosecution are relevant to the favorable termination issue. Proof on this issue has been admitted in other malicious prosecution cases.** *See Miller v. Wahl,* 17 Tenn.App. 192, 202-03, 66 S.W.2d 608, 613 (1933); *Miller v. Martin,* 10 Tenn.App. 149, 151-52 (1929). However, in order to be considered, the proof must be in admissible form. We have already determined that the statements Mr. Sewell and his attorney attributed to the two assistant district attorneys general are hearsay and do not meet the requirements of Tenn.R.Civ.P. 56.05.
>
> Mr. Sewell's complaint had been pending for over eighteen months when the motion for summary judgment was filed. During this time, the parties deposed Mr. Sewell, his wife, and two cable company employees. Mr. Sewell used these depositions, as well as numerous affidavits, to oppose the summary judgment motion. **Apparently he did not**

> **attempt to obtain affidavits or depositions from the two assistant district attorneys general who agreed to dismiss the criminal charges against him.** Since Mr. Sewell has never asserted that he was unable to obtain these affidavits, he is not entitled to the relief available in Tenn.R.Civ.P. 56.06.
>
> We have considered the competent proof supporting and opposing the summary judgment motion in the most favorable light to Mr. Sewell. *Blocker v. Regional Medical Center,* 722 S.W.2d 660, 660 (Tenn.1987); *Poore v. Magnavox Co.,* 666 S.W.2d 48, 49 (Tenn.1984). **The informal disposition of the charges against him is indecisive. It is not indicative of either guilt or innocence.**

Sewell, 1988 WL 112915, at *5-6.

Ignoring the fact that *Sewell*, in reliance upon *Miller* and *Martin*, stands for the rule that even where there is a compromise malicious prosecution may lie where the dismissal was indicative of innocence, Defendants merely point to Sewell for the proposition that "The termination of the charges against Mr. Sewell is indecisive because it resulted from an agreement between the district attorney general and Mr. Sewell's attorney." However, the prior and the next sentence, omitted by Defendants, show that the inquiry does not end there, but the issue of favorable determination is still subject to a factual dispute, to wit,

> An indecisive termination, **without more**, will not support a malicious prosecution action. **The plaintiff must go further and present evidence concerning the circumstances surrounding and the reasons for the dismissal of the charges.**
>
> The termination of the charges against Mr. Sewell is indecisive because it resulted from an agreement between the district attorney general and Mr. Sewell's attorney. Thus, Mr. Sewell's case must stand or fall on his proof that the charges against him were dismissed because of his innocence and not for some other reason.

Sewell, 1988 WL 112915 at *3.

Defendants further cite to the case of Bowman v. Breeden, 1988 WL 136640, at *2 (Tenn. Ct. App. Dec. 20, 1988) for their conclusory assertion that a compromise of the charge necessarily precludes a malicious prosecution case. However, again, a careful reading of the case reveals that the crux of the issue is whether the underlying facts of the dismissal, by compromise or otherwise, show an indicia of innocence or groundlessness:

> Despite Plaintiff's vehement denial to the contrary, the transcript of the criminal proceedings shows the dismissal of the charges against him were obtained pursuant to a compromise and settlement. The parties (i.e., the Plaintiff and the State) came to a "resolution" whereby the first count was dismissed without terms for being duplicative of, and thus replaced by, the second count. The second count was dismissed contingent upon Plaintiff's agreement to pay court costs. The fact that Plaintiff was relieved of payment of cost due to indigence is irrelevant to whether an agreement was reached and whether such was the reason for dismissal. **There is absolutely no indication the charges were dismissed either because they were unfounded or because victory for the prosecution was otherwise dubious.**

Id. at *2.

In this case, as shown by the State's Notice of Dismissal and the Funk Affidavit, the factual reasons for the dismissal were the lack of evidence and the perjury and destruction of evidence by defendant Bull. As a result, General Funk states that he had "a duty to seek justice" and an "ethical," "constitutional," and "legal obligation" to dismiss the indictments against Mr. Chase. None of the cases cited by Defendants or otherwise ascertainable in Tennessee jurisprudence contain an exculpatory statement anywhere close to as unequivocal as that given by General Funk in his Affidavit or in the State's Notice of Dismissal. Clearly, material facts exist as to whether the dismissal was favorable in light of this evidence and the foregoing case-law.

(ii) Even if Chase agreed to dismiss his civil complaint against third-parties, it was not a "compromise" of the criminal prosecution because it did not concede any part of the criminal prosecution.

A review of all Tennessee cases relating to a "compromise" of criminal charges reveal that they are fundamentally different from the "Release-Dismissal Agreement" alleged in the case at bar. Indeed, they as will be discussed below, "Release-Dismissal Agreements" are treated starkly different from compromised criminal charges the jurisdictions that have examined them.

A "compromise of a criminal proceeding" necessarily implies that the State has achieved some aim or validation of the prosecution and the accused has conceded some guilt or

consequence to the charges. In all of the Tennessee cases on point, the "compromise" involved the accused doing something or conceding something that (1) cast some question as to his guilt or innocence and that (2) related directly to the criminal prosecution itself. For instance, in *Bowman*, *supra*, the accused obtained dismissal based on his agreement to pay court costs of those very criminal proceedings. In *Landers v. Kroger*, 539 S.W.2d 130 (Tenn.Ct.App. 1976), in exchange for dismissal of the charges for writing a bad check, the accused paid the amount of that check. In *Dirks v. Tudors*, 2009 WL 1372180 (Tenn.Ct.App. May 18, 2009), other serious charges were dropped upon the accused pleading guilty to the charge of speeding. In *Sewell*, *supra*, the accused agreed to probation with the possibility of expungement of the criminal charges.

In this case, there was no such exchange or concession by Chase relating to the criminal charges. Chase did not plea to a lesser offense. He did pay court costs. He did not agree to probation. He is not alleged to have agreed to anything relating to the criminal prosecution. He was not present in court to acknowledge his waiver of his right to go to trial. Rather, the dismissal was presented to the Court as unilateral action of the State in fulfillment of its constitutional, legal, and ethical duty not to prosecute where no cause existed. It was flat out unilateral dismissal with prejudice. The Funk Affidavit unequivocally states that the factual reasons for the dismissal are those set forth in the State's Notice of Dismissal. All of those reasons for the dismissal reflect positively on Chase's innocence and the groundlessness of the charges.

(iii) The State's Notice of Dismissal and the Funk Affidavit indicate that the State had an independent and uncompromisable constitutional, legal, and ethical obligation to dismiss the indictments.

The fact that the State represented in its Notice of Dismissal (and General Funk affirmed in his Affidavit) that it had a "constitutional," "legal," and "ethical" "obligation" to dismiss the indictments because it "lacked probable cause" and because "justice" required it precludes the finding of any compromise. The State could not bargain with a criminal prosecution it admittedly had an independent obligation to dismiss. As the Court is well aware, doing or promising to do that which one is already under an obligation to do cannot form valid consideration for an agreement. *See Romero v. Buhimschi*, 396 F. App'x 224, 234 (6th Cir. 2010)("the performance of a preexisting duty is not consideration when the legal duty is owed by a public official.")(*citing* Restatement (Second) Contracts s73, cmt b); *see also, Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002)(agreeing to perform preexisting obligation not valid consideration). Accordingly, the dismissal was and could only have been the fulfillment by the State and Generals Miller and Funk of duties that were owed regardless of whether Chase non-suited[6] his civil suit against police. As such, there was no consideration and thus no compromise.

(iv) Chase's dismissal of his civil suit was not voluntary.

Even if there was a "compromise of the criminal proceeding" (which there was not) Chase's malicious prosecution claims are not barred because he did not voluntarily dismiss his civil suit against police. See *Landers v. Kroger*, 539 S.W.2d at 133 (compromise must be "voluntarily and understandingly" entered into). In this case, the Second Declaration of David Chase demonstrates that a factual question exists as to whether he agreed to dismiss the civil suit against police voluntarily. He states that:

> 2. On July 1, 2015, I as contacted at the behest of the District Attorney's office. The District conveyed to me that was going to dismiss the charges against me that day; but only if I dismissed my Federal civil lawsuit (David Chase v. Metro, *et al*/3:15-cv-00631) first, that very morning.

[6] Without prejudice.

3. I had been told for weeks leading up to that date that the District Attorney's office had agreed to dismiss the criminal case against me. July 1, 2015 was the first I had heard anything about the District Attorney demanding a "Release-Dismissal Agreement."

4. I had approximately one hour to decide what to do. I felt then, and I still feel that I was blackmailed into dismissing my civil suit against the police and Metro, who I believe violated my constitutional rights, assaulted and wrongfully arrested, jailed and prosecuted me.

5. I did not enter into any written agreement or other contract.

6. The alleged Release-Dismissal Agreement referred to by Glenn Funk in his affidavit was not a consensually negotiated deal from my perspective. I did it only under coercion and duress because I was fearful after it was conveyed to me from the District Attorney's Office on the morning of July 1, 2015, that unless I acquiesced to that demand that morning, I would continue to be groundlessly prosecuted, embarrassed, and ultimately be incarcerated, all for crimes I did not commit.

Indeed, the Funk Affidavit, when read in the light most favorable to Chase, supports Chase's contention. It indicates that the demand that Chase dismiss the civil suit came from General Funk only after General Miller had already decided that the charges should be dropped. Funk Affidavit at Exhibit A – Statement of Glenn Funk, to wit:

> Assistant District Attorney Katy Miller handled the David Chase case from the time of his arrest in June 2014, through the dismissal in July 2015.General Miller is a veteran trial attorney who has worked in the office for over 30 years. After a thorough review of the evidence, General Miller decided to dismiss this case primarily based on inconsistent statements made under oath by Lauren Bull, as well as other issues affecting Ms. Bull's credibility. The state agreed to dismiss the charges on June 28, 2015.

On June 28, 2015, the State agreed to dismiss the charges and presumably notified the court that it would be appearing July 1, 2015. Then, 3 days later, a couple of hours before the State would appear in court and announce the dismissal, General Funk made the demand that Chase non-suit his unrelated civil case against police. *See Glenn Funk Affidavit; Chase Dec.*

As such, Chase was placed in the position of either non-suiting his civil case against police or continuing to be criminally prosecuted and threatened with bodily incarceration despite the State's acknowledgement that it lacked probable cause and that it maintained a "constitutional," "legal," and "ethical" obligation to justice to dismiss those charges. Under such

circumstances, a jury could reasonably find that Chase was under such an imminent threat and fear so as to compel him to dismiss the civil suit against his will.

Threat of imprisonment or confiscation is sufficient to support a showing of duress that will render the coerced act or agreement "utterly null and void." *See Bogle v. Hammons,* 49 Tenn. 136 (Tenn. 1870). Moreover, Tennessee Court of Appeals has fairly recently dealt with a case directly on point. In the case of *Reynolds v. Metropolitan Nashville-Davidson County,* 1991 WL 20408 (Tenn.Ct.App. February 21, 1991) the Tenessee Court of Appeals found that a question of fact of whether a civil release of officers and Metro signed in the face of a threat of criminal prosecution precluded summary judgment as to the releasor's civil claims. In that case, the Tennessee Court of Appeals explained

> The sole issue presented by appellant is:
> Whether the Circuit Court erred in granting the defendants summary judgment where a factual dispute exists whether plaintiff was coerced by defendants into signing a release.
> The complaint alleges the following facts:
> 1. Plaintiff was an "undercover" employee of the Police Department.
> 2. As such, he was present at a scene where a drug sale was to take place and arrests were expected to occur.
> 3. On this occasion, he was shot by a Metropolitan Police Officer.
> 4. Thereafter, "defendants" threatened to arrest plaintiff for a criminal offense and thereby coerced him into signing an instrument entitled "Memorandum of Understanding and Release." ....
>
> As stated, plaintiff insists that summary judgment was inappropriate because the evidence is controverted on the issue of the voluntariness of the release upon which the summary judgment was based.
> The affidavit of plaintiff states plainly that, at the time he signed the release he was shown a warrant for his arrest for aggravated assault, and told that, if he did not sign the release, he would be charged and taken into custody. ....
>
> Where personal fear is aroused by threats, so as to compel a person to make a contract, or do an act, which he would not otherwise have done, such contract or act is utterly null and void. *Bogle v. Hammons,* 49 Tenn. (2 Heisk) 136 (1870).
>
> In cases of duress, the threatening or imprisonment must be the alternative held out to the other party to the end of enforcing the making of the contract sought to be avoided on account of duress. *Hamilton v. Saunders,* 3 Tenn.Cas. (3 Shannon) 789 (1870).

> **The better and more modern rule is to the effect that a contract which is induced by threats of criminal prosecution is invalid and unenforceable.** 17 C.J.S. *Contracts* § 175, p. 960. *Ingalls v. Neidlinger,* 70 Ariz. 40, 216 P.2d 387 (1950).
>
> **A threat to press prosecution already instigated, or a promise to desist, made to gain consent to a claimed obligation would fall under a statutory meaning of "duress" which, when present, destroys the consent necessary to a binding obligation.** *Kremer v. Black Hills Dude Ranch & Development Co.,* 75 S.D. 26, 58 N.W.2d 304 (1953).
>
> A release is contractual in nature, and has been held to be a contract or species of contract. 75 C.J.S. *Release* § 1, p. 629.
>
> A release given under duress, intimidation, oppression or coercion is invalid and not binding on the releasor. 76 C.J.S. *Release* § 28, p. 627.
>
> It is true that the release itself proclaims its voluntariness and asserts the opportunity to consult with legal counsel, but nothing in the release expressly negates duress or coercion.

Reynolds v. Metro. Nashville-Davidson Cty., No. 01-A-019010CV0363, 1991 WL 20408, at *3-4 (Tenn. Ct. App. Feb. 21, 1991)

In this case, as in *Reynolds v. Metro*, there is clearly a question of whether Chase's non-suit of his civil lawsuit against police and Metro was voluntary or the product of duress. If it was, then under *Landers*, *Bogle*, and *Reynolds* it was null and of no effect.

General Funk asserts in his affidavit that there was a "Release-Dismissal Agreement." *Reynolds* clearly prohibits the use of threats of criminal prosecution to obtain a civil release. The fact that the State admittedly threatened continued criminal prosecution of Chase in spite of its acknowledged "constitutional," "legal," and "ethical" obligation to dismiss those charges places this case directly within the purview of *Reynolds.*

Other jurisdictions expressly considering "Release-Dismissal Agreements" have held that such agreements are not presumptively valid and must be proved valid by the party seeking to enforce them as a bar to a subsequent malicious prosecution action. *See Coughlen v. Coots*, 5 F.3d 970 (6th Cir. 1993). As a result, it is error for a court to grant summary judgment unless the court has determined that (1) the agreement was truly voluntary, (2) there is no evidence of

prosecutorial misconduct, and (3) that the enforcement will not adversely affect public interests. *Id.* at 974. In that case the Sixth Circuit instructed

> In sum then, the *Rumery* opinion instructs us that before a court properly may conclude that a particular release-dismissal agreement is enforceable, it must specifically determine that (1) the agreement was voluntary; (2) there was no evidence of prosecutorial misconduct; and (3) enforcement of the agreement will not adversely affect relevant public interests. The burden of proving each of these points falls upon the party in the § 1983 action who seeks to invoke the agreement as a defense.
>
> Here, the district court did not conduct the analysis called for by *Rumery.* Instead, the court concluded that "such releases have been held not to be against public policy in ... *Rumery,*" and, in effect, treated the release as presumptively valid.
>
> We must therefore remand this cause to the district court in order that it may make the specific determinations required by *Rumery,* as enumerated above. Should the court conclude on remand that the release portion of the agreement is invalid, then it follows that the provision precluding the government from further prosecution would be likewise negated.
>
> *Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993)

As discussed above, clearly there is a genuine question of material fact as to whether the dismissal of the civil suit demanded by the State was voluntary. There is also a question of fact as to whether there was prosecutorial overreaching or misconduct. Our rules of professional conduct prohibit a lawyer from threatening criminal prosecution in order to obtain an advantage in a civil matter. (*See Tennessee Rules of Professional Conduct* 4.4(a)); *See also*, WTVF Feb, 5, 2016 article and WSMV March 19, 2015 article, attached to Plaintiff's Second Notice of Filing. The State's Notice of Dismissal itself acknowledges the district attorney's ethical duty not to prosecute Chase and to dismiss the indictments. *Tennessee Rules of Professional Conduct 3.8 as quoted and relied upon in the State's Notice of Dismissal states:*

> ***Special Responsibilities of a Prosecutor***
> The prosecutor in a criminal case:
> (a) Shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

As such, in keeping with Tennessee authority, there are clearly myriad genuine questions of material fact that exist as to whether there was a "favorable resolution" from which Chase's malicious prosecution claim will lie, each of which precludes the entry of summary judgment as requested by Defendants.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, David Chase requests that the Court DENY all of Defendants Motions for Summary Judgment, as amended or supplemented, and for such other relief as may be appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and exact copy of the foregoing has been sent via US Mail, postage pre-paid on April 11, 2016, to the following:

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