IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION, AT NASHVILLE

KENNETH J. MYNATT,	§	
	§	
Plaintiff-Appellant,	§	
	§	
v.	§	Case: M2020-01285-COA-R3-CV
	§	
NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 39, *et al.*	§	Rutherford County Circuit Court Case No.: 75CC1-2020-CV-77158
	§	
	§	
Defendants-Appellees.	§	

REPLY BRIEF OF APPELLANT KENNETH J. MYNATT

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III. INTRODUCTION

The trial court's order granting the Defendants' 12.02(6) motion to dismiss was plagued by both factual and legal errors. Factually, the trial court failed to treat as true the allegations in the Plaintiff's Complaint, and it erroneously drew inferences in *the Defendants'* favor when ruling on their motion to dismiss. Legally, the trial court erroneously held that the intermediate "retirement" of a criminal case categorically precludes any subsequent malicious prosecution claim. As grounds for this unprecedented ruling, the trial court held—as a matter of law—that a retirement is necessarily a settled disposition akin to diversion, even though retirements: (1) are not always settled dispositions, (2) are never final dispositions, and (3) are not akin to any form of diversion at all.

In response, the Defendants unpersuasively address the defects in the trial court's order; they materially mischaracterize precedent, the record, and the Plaintiff's briefing; and they ask this Court to affirm on other grounds. All of the Defendants' claims are meritless. Reversal is warranted accordingly.

IV. ARGUMENT

A. THE TRIAL COURT FAILED TO TAKE THE FACTS OF THE PLAINTIFF'S COMPLAINT AS TRUE.

"In considering a motion to dismiss, courts must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (cleaned up). Applying these rules, the following facts are

controlling:

(1) The Plaintiff's criminal proceedings were "dismissed";[1]

(2) The Plaintiff's criminal proceedings did not terminate via a settled resolution;[2] and

(3) The Plaintiff's "criminal prosecution terminated in the favor of the Plaintiff."[3]

The trial court disregarded these facts. Notwithstanding Mr. Mynatt's allegation that he "repeatedly refused all 'deals[,]'"[4] the trial court held, categorically, that where retirements are concerned, "the defendant and the State agree to retire their case."[5] Further, notwithstanding Mr. Mynatt's allegation that this action arises from charges that were "dismissed[,]"[6] the trial court held that "there is no set of facts that Mr. Mynatt could prove that would make the retirement of the criminal charges against him a determination on the merits[.]"[7] Further still, despite Mr. Mynatt's allegation that his "criminal prosecution terminated in the favor of the Plaintiff[,]"[8] the trial court held that "the 'retirement' of the underlying criminal charges against Mr.

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[1] R. at 23, ¶102.

[2] *Id.* at ¶100.

[3] R. at 25, ¶110.

[4] R. at 23, ¶100.

[5] R. at 85.

[6] R. at 23, ¶102.

[7] R. at 86.

[8] R. at 25, ¶110.

Mynatt was not a favorable termination on the merits of the underlying action[.]"[9]

These errors are fatal. The trial court replaced Mr. Mynatt's allegations—that his criminal proceedings were not settled—with citationless findings about what (the Defendants asserted[10]) happens "all the time for various reasons" in *other* cases.[11] It also reconstituted Mr. Mynatt's "dismiss[al]"-based[12] malicious prosecution claim as one premised upon a retirement. It further replaced the Plaintiff's allegation that his "criminal prosecution terminated in [his] favor"[13] with a finding that it did not.

Rather than acknowledging these errors, the Defendants boldly insist that Mr. Mynatt "has not alleged that the prior action terminated in his favor on the merits" at all.[14] The Plaintiff's Complaint—which alleges that "[t]he criminal prosecution terminated in the favor of the Plaintiff"[15]—reflects otherwise, though, and the trial court's contrary order must be reversed accordingly.

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[9] R. at 84.

[10] Even on appeal, the Defendants discuss what (they claim) "normally" and "[t]ypically" occurs, *see* Defendants' Brief at 16, rather than what occurred in *this* case.

[11] R. at 85.

[12] R. at 23, ¶102.

[13] R. at 25, ¶110.

[14] Defendants' Brief at 15.

[15] R. at 25, ¶110.

B. THE TRIAL COURT ERRONEOUSLY HELD THAT THE INTERMEDIATE RETIREMENT OF A CRIMINAL CHARGE CATEGORICALLY PRECLUDES A MALICIOUS PROSECUTION CLAIM.

The Defendants also advance a modified version of the argument that they convinced the trial court to adopt. Specifically, despite telling the trial court that "retirement does not reflect on the merits just by its nature" and that "case law in the treatise cited all points in the same direction[,]"[16] they now admit that some retirements "truly are an intermediate step on the way to a merits-based dismissal[,]"[17] and they concede that no Tennessee court has *ever* "squarely addresse[d] this issue."[18] Thus, the Defendants characterize the trial court's order as one restricted to retirements that are "alleged to be part of a package deal with a dismissal[.]"[19]

The trial court's order was *not* so restricted,[20] though. Instead, the trial court held that retirements are *always* agreed resolutions;[21] that a dismissal "does not reflect a determination on the merits" when preceded by a retirement;[22] and that "[a] retirement of charges is similar to a

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[16] Tr. at 13, lines 10–14.

[17] Defendants' Brief at 25–26 n.4

[18] *Id.* at 17.

[19] *Id.* at 25–26 n.4

[20] R. at 83–86.

[21] R. at 85 ("the defendant and the State agree to retire their case").

[22] *Id.*

pretrial diversion[.]"[23] All of these holdings are wrong. Reversal is warranted accordingly.

Critically, Mr. Mynatt also did not allege that his criminal proceedings resolved as part of "a package deal." Instead, he alleged the opposite—that he "repeatedly refused all 'deals[.]'"[24] Thus, this Court cannot affirm the trial court's order on the narrowed basis the Defendants propose.

It is true that—contrary to the allegations in Mr. Mynatt's Complaint—*the Defendants* maintain that a "package deal" retirement and dismissal occurred.[25] But this is a factual dispute between the Parties to be resolved by a factfinder. *See Sewell v. Par Cable, Inc.*, No. 87-266-II, 1988 WL 112915, at *2 (Tenn. Ct. App. Oct. 26, 1988) ("[T]he circumstances under which the underlying proceeding were terminated are questions of fact for the jury."), *no app. filed*; *Collins v. Carter*, No. E2018-01365-COA-R3-CV, 2020 WL 1814905, at *5 (Tenn. Ct. App. Apr. 9, 2020) ("[T]he circumstances under which the prior action terminated remains a question of fact.") (citation omitted), *app. denied* (Tenn. Oct. 22, 2020). It is not a basis for granting a motion to dismiss. Accordingly, the trial court's order should be reversed.

C. THE DEFENDANTS' CONTRARY LEGAL ARGUMENTS ARE MERITLESS.

The Defendants make several contrary legal arguments. Each is

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[23] *Id.*

[24] R. at 23, ¶100.

[25] Defendants' Brief at 25.

unpersuasive.

1. *Anderson v. Wal-Mart Stores, Inc.* supports the Plaintiff's position.

The Defendants concede that *Anderson v. Wal-Mart Stores, Inc.*, No. 1:07-00024, 2008 WL 1994822 (M.D. Tenn. May 2, 2008)—the only case that the Defendants contend "squarely addresses" retirements in the context of malicious prosecution claims—"at some points refers to a diversion instead of a retirement[.]"[26] They nonetheless maintain that *Anderson* "does not turn on any distinction between a retirement and a diversion; the court held that neither disposition was inconsistent with guilt."[27] This is not just a misreading of *Anderson*, though—it is a mischaracterization of it.

As *Anderson* itself made clear, its use of the term "retired" reflected the parties' terminology—it did not reflect the disposition of the criminal charges at issue in the case. *Id.* at *4 ("The parties have agreed that the charges were 'retired' by the Attorney General, but it may be more precise to refer to the disposition as a 'diversion.'"). And the charges in *Anderson*, it is clear, were diverted under "the Pretrial Diversion Act, Tenn. Code Ann. § 40-15-101, et seq.," which *Anderson* emphasized "provides that a prosecution can be suspended for a maximum of two years **upon the agreement of the defendant and the prosecutor**." *Id.* (emphasis added).

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[26] *Id.* at 17; *id.* at n.3.

[27] *Id.*

In every material way, Mr. Mynatt's case ended differently. While diversion requires an agreement with prosecutors, *see id.*; *see also* Plaintiff's Principal Brief at 42–43, Mr. Mynatt's charges were dismissed after he "repeatedly refused all 'deals[.]'"[28] And given this distinction, *Anderson* supports Mr. Mynatt's position, rather than the Defendants'.

Specifically, *Anderson* correctly emphasized that *at the summary judgment stage,* plaintiffs must come forward with evidence regarding the reason why a case concluded. *Anderson*, 2008 WL 1994822, at *6 ("[T]he plaintiff has not come forward with any explanation for the diversion.") (collecting cases). Here, Mr. Mynatt has alleged why his criminal charges were dismissed: It was because "he was innocent[,]"[29] maintained his innocence,[30] demanded *Brady* material that proved his innocence,[31] and refused to take any "deal[][.]"[32] These facts are taken as true. Accordingly, the circumstances of Mr. Mynatt's non-settled, dismissed-due-to-innocence charges have nothing in common with *Anderson*, and they are in a materially different procedural posture that is outcome-determinative. The Defendants' contrary claims fail accordingly.

2. *Sewell v. Par Cable* supports the Plaintiff's position.

The Defendants also contend that this Court's holding in *Sewell v.*

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[28] R. at 23, ¶100.

[29] *Id.*

[30] *Id.* at ¶101.

[31] *Id.* at ¶98.

[32] *Id.* at ¶¶99–100.

Par Cable, Inc., 1988 WL 112915, supports dismissal, stating:

> [I]n *Sewell*, the court of appeals found that the defendant's malicious prosecution suit failed where the defendant and the prosecutor agreed to retire the charges for six months and dismiss them assuming the defendant committed no further infractions, because that disposition did not indicate innocence.[33]

But *Sewell* did not hold what the Defendants claim, either. What *Sewell* actually held was that a plaintiff had failed to meet his evidentiary burden *at the summary judgment stage*, because he had not introduced admissible evidence regarding the prosecutor's reasons for abandoning his criminal prosecution. Verbatim, the relevant section states:

> 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.
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> . . .
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> 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

[33] Defendants' Brief at 18.

> guilt or innocence. Therefore, in accordance with Restatement (Second) of Torts § 660(a), it is not sufficient as a matter of law to support a malicious prosecution action.

Id. at *5.

Again, this case is not before the Court on a motion for summary judgment. Instead, it is here on a motion to dismiss—where Mr. Mynatt's allegations are taken as true, and where all reasonable inferences must be drawn in his favor. *Webb*, 346 S.W.3d at 426. That distinction is controlling. The trial court's holding must be reversed accordingly.

3. ***Himmelfarb v. Allain*** **does not stand for the proposition for which the Defendants have cited it.**

The Defendants accuse Mr. Mynatt of mischaracterizing the Supreme Court's holding in *Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012), as it pertains to *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005). Specifically, the Defendants claim, *Himmelfarb* "overruled *Parrish* on *precisely* the proposition for which Mynatt cites it," and they suggest that "Mynatt's assertion as to what *Himmelfarb* overruled is not only false, it is revealing."[34]

The Defendants again misrepresent the matter. As part of a larger string cite, Mr. Mynatt cited *Parrish* for the proposition that a fact-specific inquiry is required regarding the circumstances that gave rise to a criminal case's dismissal, stating:

> [A]lthough it would be wrong to suggest that every post-retirement dismissal of a criminal case will satisfy the favorable termination element of a malicious prosecution claim, it would also be wrong to hold—as the trial court did—

[34] *Id.* at 19.

that none will.

> Instead, a fact-specific inquiry into the circumstances that gave rise to dismissal—an inquiry that the Defendants are free to conduct through discovery upon remand—is required. *See, e.g.*, *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005) ("In determining whether a specific result was a favorable termination, a court must examine the circumstances of the underlying proceeding.") (cleaned up), *overruled on other grounds by Himmelfarb v. Allain*, 380 S.W.3d 35 (Tenn. 2012); *Sewell*, 1988 WL 112915, at *2 ("the circumstances under which the underlying proceeding were terminated are questions of fact for the jury"); *Collins*, 2020 WL 1814905, at *5 ("the circumstances under which the prior action terminated [is] a question of fact") (citation omitted).[35]

The cited proposition is correct, and *Himmelfarb* did not hold otherwise. *Himmelfarb* held that "[a] voluntary nonsuit without prejudice does not relate to the merits of the claim as *Parrish* defined that phrase. To the extent that *Parrish* can be read as adopting the Restatement (Second) approach, it is overruled." *Himmelfarb*, 380 S.W.3d at 41. The referenced "approach" concerned voluntary non-suits in civil cases. As the *Himmelfarb* court had noted earlier in the opinion:

> Most jurisdictions follow the approach recommended by comment j to the Restatement (Second) of Torts section 674 (1977), which instructs that a voluntary dismissal may constitute a favorable termination but that courts must examine the circumstances 'under which the proceedings are withdrawn' when a suit is withdrawn or abandoned.

Id. at 38. Thus, rejecting this "approach," *Himmelfarb* explained that: "We hold that a voluntary nonsuit taken pursuant to Tennessee Rule of Civil Procedure 41 is not a favorable termination on the merits for

[35] Plaintiff's Principal Brief at 26–27.

purposes of a malicious prosecution claim." *Id.* at 36–37.

Given this context, did *Himmelfarb* "overrule[] *Parrish* on *precisely* the proposition for which Mynatt cites it"[36]—that "a fact-specific inquiry into the circumstances that gave rise to dismissal" of a criminal case is required?[37] No. The Defendants' own brief reflects as much. *Compare* Defendants' Brief at 15 (noting that "[a] procedural dismissal or a settlement will not do"), *with* Defendants' Brief at 23–24 (acknowledging that several non-procedural dismissals will support a malicious prosecution claim). Post-*Himmelfarb* cases are also in accord and cite *Parrish* for the same proposition. *See, e.g.*, *Harris v. Wal-Mart Stores, Inc.*, 48 F. Supp. 3d 1025, 1043 (W.D. Tenn. 2014) ("In determining whether a specific result was a favorable termination, a court must examine the circumstances of the underlying proceeding." (citing *Parrish*, 172 S.W.3d at 531)); *In re McKenzie*, No. 08-16378, 2013 WL 1091634, at *10 (Bankr. E.D. Tenn. Mar. 5, 2013) ("'In determining whether a specific result was a favorable termination, a court must examine the circumstances of the underlying proceeding.'" (quoting *Parrish*, 172 S.W.3d at 531)).

4. <u>The Defendants mischaracterize Mr. Mynatt's position regarding the need to clarify *Sewell*.</u>

The Defendants also assert that Mr. Mynatt "[i]mplicitly acknowledg[es] that his claim fails under current Tennessee law as expounded by this State's highest court."[38] But Mr. Mynatt has said

[36] Defendants' Brief at 19.

[37] Plaintiff's Principal Brief at 26–27.

nothing of the sort, and the Tennessee Supreme Court hasn't, either.

Mr. Mynatt's Principal Brief states that "reversal of the trial court's Order is warranted regardless" of whether this Court clarifies *Sewell's* internally dissonant language regarding "indicat[ing] . . . innocence[.]"[39] The Tennessee Supreme Court also has never held that a dismissed criminal charge must "indicate" innocence, and just last year, this Court suggested that "indicat[ing] . . . innocence[,]" *Sewell*, 1988 WL 112915, at *3, is not really the standard, *see Collins*, 2020 WL 1814905, at *5 (holding that "[a] favorable termination **should allow an inference that the accused was innocent** of wrongdoing") (citation omitted; emphasis added). And while the Defendants concede that not a single Tennessee case "squarely addresses" their position,[40] Mr. Mynatt's contrary argument—that the dismissal of his criminal proceedings permits his malicious prosecution claim—prevails based on Tennessee precedent spanning *centuries*. *See Williams v. Norwood*, 10 Tenn. 329, 336 (1829) (permitting malicious prosecution claim following magistrate's dismissal of a warrant); *Martin*, 10 Tenn. App. at 152 (permitting malicious prosecution claim following district attorney general's decision to "terminate[] the prosecution"); *Massingille v. Vandagriff*, No. M2012-01259-COA-R3CV, 2013 WL 5432893, at *1 (Tenn. Ct. App. Sept. 24, 2013) (affirming jury's finding of liability in malicious prosecution claim arising from dismissed criminal charges

[38] Defendants' Brief at 20.

[39] Plaintiff's Principal Brief at 47.

[40] Defendants' Brief at 17.

where "[t]he case was to be heard on July 6, but was rescheduled to August 17 for the District Attorney to perform further investigation. On the second court date the charge was dismissed."), *app. denied* (Tenn. Feb. 13, 2014).

Nonetheless, *Sewell* should be clarified, because it is internally dissonant. The dispositions that *Sewell* recognizes are satisfactory do not "indicate . . . innocence[,]" *Sewell*, 1988 WL 112915, at *3, because there is no actual procedural mechanism that enables criminal defendants to indicate innocence in criminal proceedings. What those dispositions *do* allow, however, is "an inference" that a defendant was innocent. This standard—which this Court applied last year, *see Collins*, 2020 WL 1814905, at *5—is consistent with the standard used by the "clear majority of American courts" that have held that "a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence is a favorable termination." *Laskar v. Hurd*, 972 F.3d 1278, 1289 (11th Cir. 2020).

D. THE DEFENDANTS' CONTRARY FACTUAL ARGUMENTS ARE MERITLESS.

The Defendants also make contrary <u>factual</u> arguments. Each of those is unpersuasive, too.

1. <u>The Defendants' factual claims regarding the Plaintiff's retirement conflict with the Plaintiff's Complaint.</u>

Because dismissed criminal charges support malicious prosecution claims, the Defendants seek to avoid reversal by arguing that:

Mynatt's Complaint makes clear that the dismissal in this

> case was not a separate act from the retirement, but rather that the retirement and dismissal were part and parcel of a single package deal: the charges would be retired for one year and would be dismissed when the end of that one-year period arrived. R. at 23-24, ¶¶ 101-02.[41]

This is a factual claim. More specifically, it is a false factual claim that conflicts with the allegations in the Plaintiff's Complaint, which asserts that the "Plaintiff repeatedly refused all 'deals[.]'"[42]

Nor do the cited paragraphs support the Defendants' brazenly false representation that "Mynatt's Complaint makes clear that . . . the retirement and dismissal were part and parcel of a single package deal[.]"[43] Instead, those paragraphs allege:

> 101. After Plaintiff's repeated claims of innocence, refusal to plead guilty or resign, and his continued demand for documents under the previously filed discovery request, MILAM, on November 24, 2015, filed a motion in State court with Judge Seth Norman to "retire" all charges against Plaintiff for a one (1) year period.
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> 102. On November 28, 2016 all charges against Plaintiff were formally dismissed. The documents requested via the Plaintiffs discovery request were never produced during the pendency of the criminal case.[44]

Thus, the Defendants have misrepresented the record, and their contrary factual claims fail accordingly.

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[41] *Id.* at 25.

[42] R. at 23, ¶100.

[43] Defendants' Brief at 25.

[44] R. at 23–24, ¶¶101–02.

2. Plaintiff's counsel did not concede that the Plaintiff compromised to secure the dismissal of his charges.

Mr. Mynatt's Complaint alleges that his proceedings were not dismissed due to a compromise resolution.[45] Because that allegation is controlling, the Defendants encourage this Court to consider evidence beyond Mr. Mynatt's Complaint based on what they claim were "conce[ssions]" by Plaintiff's counsel,[46] stating:

> [C]ontrary to the repeated representations in Mynatt's brief that the resolution of his criminal case was "not due to a settled resolution or any deal," Br. at 23 (internal quotation marks omitted), Mynatt's counsel conceded at oral argument before the trial court that (1) as a matter of law, a "defendant has to . . . waive his rights to a speedy trial" to give the prosecutor discretion to retire a case, and (2) as a matter of fact, Mynatt actually "waive[d] his right to a speedy trial" to secure the retirement and dismissal here.[47]

Again, the Defendants have misrepresented the record. The "and dismissal" portion of this passage is a fabrication.

In truth, Plaintiff's counsel argued that a reviewing court "just looks at the pleadings only[,]" and thus, he argued that the trial court should "look at the complaint."[48] Plaintiff's counsel also argued that while Mr. Mynatt waived his speedy trial rights before his charges were

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[45] R. at 23, ¶100.

[46] Defendants' Brief at 27.

[47] *Id.* at 27–28.

[48] Tr. at 7, line 24–8, line 1.

retired, as to the dismissal of those charges from which this action arises, "[t]here was no agreement with the State."[49]

Consequently, the Defendants' assertion that Mr. Mynatt's counsel "conceded" that Mr. Mynatt compromised to secure the dismissal of his charges is false. No portion of the record supports the Defendants' claim. Plaintiff's counsel argued the opposite.[50]

Significantly, the extra-Complaint discussion of waiving speedy trial rights before the intermediate retirement of the Plaintiff's charges also supports *Mr. Mynatt's* claims. Specifically, it evidences that Mr. Mynatt's retirement was—as he alleged—an *intermediate* stage of his criminal proceedings, and that the state reserved the right to prosecute him after his charges were retired. In light of his innocence, though, "all charges against Plaintiff were formally dismissed" instead,[51] resulting in the final, favorable, merits-based termination that gave rise to this action. Under these circumstances, precedent dictates that Mr. Mynatt's malicious prosecution claim can go forward. *Martin*, 10 Tenn. App. at 151; *Massingille*, 2013 WL 5432893, at *1.

To reiterate the point: A retirement also is not a termination of proceedings. Thus, this action necessarily arises out of the final, favorable, non-compromised *dismissal* of Mr. Mynatt's criminal charges, rather than their pre-dismissal retirement (which is irrelevant). Mr. Mynatt's counsel did not "concede" otherwise.

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[49] *Id.* at 12, line 14.

[50] *Id.*

[51] R. at 23, ¶102.

3. This Court should decline the Defendants' invitation to consider extraneous evidence outside the record.

The Defendants also ask this Court to take judicial notice of allegations in the Plaintiff's previous federal lawsuit, which the Defendants claim conflict with the allegations in his Complaint here.[52] For several reasons, it should not.

First, "appropriate references to the record" and "citation[s] to the record" regarding the Plaintiff's federal lawsuit are absent from the Defendants' brief, because that lawsuit is not in the record. *But see Prewitt v. Saint Thomas Health*, No. M2020-00858-COA-R3-CV, 2021 WL 1406013, at *2 (Tenn. Ct. App. Apr. 14, 2021) (slip copy). The Defendants never filed it in the trial court, and they never asked the trial court to take judicial notice of it in the first instance. *But see Moore v. Hill*, No. E2019-01692-COA-R3-CV, 2020 WL 5989881, at *3 (Tenn. Ct. App. Oct. 8, 2020), *appeal denied* (Feb. 4, 2021)). Neither do the Defendants identify their judicial notice claim in their statement of the issues on appeal.[53] *But see Champion v. CLC of Dyersburg, LLC*, 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011) ("An issue not raised in an appellant's statement of the issues may be considered waived.") (citation omitted).

Accordingly, the claim is improperly presented and waived. Even if it were not, though, it lacks merit. Assuming the Plaintiff's federal lawsuit contained different allegations, they do not control this case,

[52] Defendants' Brief at 29–30.

[53] *Id.* at 8.

because allegations in pleadings are conclusive only "in the proceedings in which they were filed[.]" *Pankow v. Mitchell*, 737 S.W.2d 293, 296 (Tenn. Ct. App. 1987). By contrast, with respect to "other actions," statements contained in pleadings are only "evidentiary admissions." *Id.* Thus, although nothing precludes the Defendants from introducing as evidence, at a later point, any statement that Mr. Mynatt made in a previous pleading, when ruling on the Defendants' motion to dismiss, the allegations in the Plaintiff's Complaint control, and this Court cannot consider "'extraneous evidence.'" *Patton v. Est. of Upchurch*, 242 S.W.3d 781, 786 (Tenn. Ct. App. 2007) (citation omitted).

4. <u>The Defendants mischaracterize the Plaintiff's claim regarding discovery.</u>

The Defendants also make a discovery-related waiver argument, though again, the issue is not in their statement of the issues. *But see Champion*, 359 S.W.3d at 163. Specifically, they assert:

> Mynatt . . . argu[es] for the first time that factual discovery is necessary to determine whether he compromised his claim. But "[t]he trial court will not be put in error for matters not called to his attention," *Sears-Roebuck & Co. v. Finney*, 89 S.W.2d 749, 751 (Tenn. 1936), as this argument was not.[54]

Again, the Defendants misrepresent the matter. Mr. Mynatt is not the one who needs discovery regarding his claim that he "refused all 'deals[.]'"[55] What he said, instead, is that while this allegation must presently be taken as true, *the Defendants* are free to test this allegation

[54] *Id.* at 30.

[55] R. at 23, ¶100.

through discovery upon remand.[56]

E. THE DEFENDANTS' CLAIMS AS CROSS-APPELLANTS[57] ARE MERITLESS.

1. The Plaintiff alleged that the Defendants procured a prosecution without probable cause.

The Defendants also assert that "Mynatt's malicious prosecution claim [] fails because he has not alleged that the Defendants procured a prosecution without probable cause."[58] This is false. Paragraph 109 of the Plaintiff's Complaint settles the matter. R. at 25, ¶109 ("The Defendants without probable cause and with malice caused a criminal prosecution to be instituted or continued against the Plaintiff.").

Relatedly, although the Defendants complain that they should be free from accountability because "[a] private citizen cannot bring a criminal prosecution in Tennessee state courts," they acknowledge that "[t]here is an exception to this rule, however, when the private citizen knowingly gives false information to the prosecutor, because in that situation "'an intelligent exercise of the officer's discretion becomes impossible.'"[59] This is the situation alleged. *See, e.g.*, R. at 21, ¶90.

Further, while the Defendants maintain that inferences regarding

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[56] Plaintiff's Principal Brief at 26–27.

[57] The Defendants acknowledge that "the trial court did not decide the case on the basis of" the remaining issues presented, Defendants' Brief at 32, though that is an understatement. The trial court held that all other elements were *satisfied*. Tr. at 12, lines 20–23.

[58] Defendants' Brief at 32.

[59] *Id.* (cleaned up).

omissions should be parsed to favor the Defendants,[60] a motion to dismiss does not permit that approach. Instead, "[i]n considering a motion to dismiss, courts must . . . giv[e] the plaintiff the benefit of all reasonable inferences[,]" *Webb*, 346 S.W.3d at 426 (cleaned up), and Mr. Mynatt is entitled to have "all doubt" resolved in his favor, *Duncan v. Duncan*, No. 85-264-II, 1986 WL 15666, at *3 (Tenn. Ct. App. Oct. 1, 1986), *app. denied* (Tenn. Jan. 5, 1987). Notably, the absence of evidence regarding a plea agreement also supports *the Plaintiff's* theory of this case, not the Defendants'. *See* DAVID LOUIS RAYBIN, 10 TENN. PRAC. CRIM. PRAC. & PROCEDURE § 22:18 (2007) (stating that when a retirement "is part of a plea agreement," that fact "should be disclosed to the court at the time of entering a plea").

2. <u>The Plaintiff alleged a civil conspiracy.</u>

Last, the Defendants assert that the Plaintiff failed to state a claim for civil conspiracy.[61] This claim, too, is meritless.

A civil conspiracy "may be proven by evidence which is largely circumstantial." *Prism Partners, L.P. v. Figlio*, No. 01A01-9703-CV-00103, 1997 WL 691528, at *6 (Tenn. Ct. App. Nov. 7, 1997) (citation omitted), *no app. filed*. This rule applies because "[c]onspiracies are by their very nature secretive operations that can seldom be proved by direct evidence. Therefore, the existence of the conspiracy may be inferred from the relationship of the parties or other circumstances." *Brown v. Birman Managed Care, Inc.*, No. M1999-02551-COAR3CV, 2000 WL 122208, at

[60] *Id.* at 33.

[61] *Id.* at 35.

*3 (Tenn. Ct. App. Feb. 1, 2000) (citation omitted), *aff'd*, 42 S.W.3d 62 (Tenn. 2001).

To state a claim for civil conspiracy, a plaintiff must allege facts demonstrating a "'combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means.'" *Chenault v. Walker*, 36 S.W.3d 45, 52 (Tenn. 2001) (quoting *Dale v. Thomas H. Temple Co.*, 208 S.W.2d 344, 353 (Tenn. 1948)). The Plaintiff's Complaint does so. Among other details, it alleges that the Defendants resolved that it was "'time to do something about Mynatt[,]'"[62] and following "an apparent effort to conspire with IRS management to retaliate against the Plaintiff"[63]—including "jointly try[ing] to get the Plaintiff indicted by the federal government"[64]—the Defendants "continued their conspiracy by pressuring the U.S. Department of Labor to have the Plaintiff indicted by a State grand jury for theft of union funds which they knew was false and politically motivated."[65]

Specifically, Mr. Mynatt alleges that the Defendants "suggested a local prosecution be tried as they had used that tactic before to deal with their adversaries[.]"[66] He alleges that one of the Defendants generated and then provided to an assistant district attorney "false testimony and

[62] R. at 10, ¶44.

[63] R. at 12, ¶57.

[64] R. at 13, ¶61.

[65] R. at 13–14, ¶61.

[66] R. at 21, ¶89.

forged documents[,]"[67] and that "a portion of the planning and execution of the civil conspiracy occurred in Rutherford County, Tennessee."[68] He alleges further that the Defendants "created a false narrative, manufactured phony evidence, and tampered with witnesses as part of a conspiracy[,]"[69] and that at least two Defendants, "each having the intent and knowledge of the other's intent, accomplished by concert an unlawful purpose, or accomplished by concert a lawful purpose by unlawful means"[70]—all as part of "a politically motivated conspiracy to retaliate against the Plaintiff for exposing governmental waste."[71] Accordingly, Mr. Mynatt's civil conspiracy claim "survive[s]." *See PNC Multifamily Cap. Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp.*, 387 S.W.3d 525, 556 (Tenn. Ct. App. 2012) ("[G]iving Appellants the benefit of any reasonable inference, we conclude that . . . . a claim of conspiracy to commit that tort may also survive the motion to dismiss.").

V. CONCLUSION

For the foregoing reasons, the trial court's order should be reversed.

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[67] *Id.* at ¶90.

[68] R. at 3, ¶9.

[69] R. at 22, ¶92.

[70] R. at 25, ¶113.

[71] R. at 20, ¶84.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, § 3.02, the relevant sections of this brief contain 4,998 words pursuant to § 3.02(a)(1)(b), as calculated by Microsoft Word, and it was prepared using 14-point Century Schoolbook font pursuant to § 3.02(a)(3).

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2021, a copy of the foregoing was served via the Court's electronic filing system upon:

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