IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

DANIEL SKOOG, Plaintiff, v. CLACKAMAS COUNTY, MARK FRESH, HERBERT ROYSTER, and JOHN and JANE DOES 1 through 18, Defendant.	)	Civil No. 00-1733-MO OPINION

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MOSMAN, J.:

This case arises from officers' alleged retaliation against plaintiff Daniel Skoog for filing this lawsuit and an unusual encounter at a convenience store, followed by armed

officers raiding plaintiff's office in search of a videotape. Based on these events, plaintiff makes a variety of state and federal law claims. Plaintiff seeks leave to add new claims in a fourth amended complaint, while defendants seek summary judgment on the claims lodged in plaintiff's third amended complaint. For the reasons discussed below, the court concludes plaintiff cannot add his newly proffered claims, and defendants are entitled to summary judgment with the exception of plaintiff's defamation claim against defendant Clackamas County and retaliation claim against defendant Herbert Royster.

I. BACKGROUND

Construed in favor of plaintiff Daniel Skoog, the party opposing summary judgment, the facts are as follows. In the early morning hours of December 2, 2000, plaintiff left a Christmas party. At about 1:00 a.m., defendant Clackamas County Deputy Mark Fresh saw plaintiff illegally roll through a "yellow curb." Deputy Fresh pulled him over. Plaintiff failed field sobriety tests, so Deputy Fresh handcuffed and arrested him for driving under the influence of intoxicants ("DUII"). As a result of the arrest the county suspended plaintiff's drivers license.

Plaintiff originally filed this lawsuit against the county and Deputy Fresh on December 13, 2000, thirteen days after his arrest. He alleged Deputy Fresh had no probable cause to arrest him, Fresh's handcuffing constituted excessive force, and county officials unconstitutionally denied him medical treatment during his eleven-hour stay in the county jail. Plaintiff's most recent complaint adds an array of additional claims based on the following allegations:

In January 2001, county officers began heightened surveillance of plaintiff's house and family. Plaintiff and his family have lived in the small Clackamas County town of Estacada, Oregon for over thirty years. On January 21, County Deputy Nathan Thompson tailgated plaintiff's wife through town. Spinning his tires and flashing his lights, Thompson

stormed out of his car and approached her with his hand on his gun. In response, plaintiff warned Thompson to stay away from his family. On February 15, 2001, Deputy Dan Kraus stopped plaintiff's wife. Plaintiff, however, called county headquarters and commended Kraus for how he acted towards his wife.

Officers' close surveillance of plaintiff and his family continued. Plaintiff observed Deputy Kraus sneaking around near plaintiff's house on several occasions in early 2001. In February or March, a county car followed plaintiff's tenant. Finally, on February 16, 2001, plaintiff's attorneys sent a letter to County Counsel Doug McGlone demanding that officers cease their harassment.

At some point in early 2001, Deputy Kraus told officers to keep an eye on plaintiff and posted his photograph on a bulletin board in the County's Estacada office. After Kraus posted plaintiff's photograph on the bulletin board, sometime in late February 2001, Kraus provided information to other officers for an "officer safety bulletin," which was distributed to county officers and employees. Plaintiff's photograph, this time with a caption, appeared in the bulletin under the heading "officer safety." Next to plaintiff's picture were pictures of "recent parolees," "sex offenders on parole," and "wanted subjects." The caption read as follows:

> Deputy Kraus provided information regarding this subject. During a contact with him in his office Kraus saw a car door and a Kevlar panel above it. Both had bullet holes in them. Deputy Kraus believes he was testing the panel for his protection as an insert in a door. This subject has been aggressive in his mannerisms around some deputies. He has followed deputies, appeared at traffic stops, and driven past them while investigating calls.

Plaintiff never purposefully followed officers or drove past them while they were investigating calls; nor did plaintiff intentionally appear at traffic stops. And, although Kraus had known plaintiff's identity for years, Kraus never asked him about the door and Kevlar panel, items which were associated with plaintiff's lawful protective-armor business. In this

business, plaintiff had provided armor and other protective gear to county and state law enforcement officers.

In response to the officers' conduct and for purposes of his DUII defense and this case, plaintiff began using his video equipment to record and monitor officers. Plaintiff also used his "still" digital camera to take photographs of officers in preparation for his legal matters. He captured on film officers watching his house and following people who left his house. He compiled his observations in a file directory on his computer. Much of the information in this file constituted attorney-client communications.

On February 19, 2001, an Oregon State Police Officer, defendant Herbert Royster, first entered the picture. That day, Officer Royster was at a convenience store, the Get & Go, supervising a teenage undercover decoy in a successful effort to catch the Get & Go's cashier illegally selling tobacco to a minor. At some point, plaintiff entered the store (to buy some tobacco for himself). While there, plaintiff noticed a man (who turned out to be Royster) talking loudly and obnoxiously. Curious, but not knowing exactly what was going on, plaintiff ran to his office, in the same building as the Get & Go, and grabbed his video camera. Upon returning to the store, he began recording the scene through the store window. Since plaintiff's tape of this event is in the record, many of the following details are gleaned from the tape.

The store was crowded; at least three customers stood close to Officer Royster while he was speaking with the store cashier. Since plaintiff began recording while standing outside the store, he did not come close enough to the store counter to record Royster's conversations with the cashier. After plaintiff had been recording the scene for almost two minutes, the teenage decoy alerted Royster to plaintiff's presence.

Officer Royster then approached plaintiff, flashed his badge, and asked, "Why are you video taping me sir?" Royster also asked plaintiff whether he was an attorney, to which

plaintiff answered no. Royster continued to ask about plaintiff's motives for recording the scene. Royster explained to plaintiff he was there conducting an undercover "tobacco sting." He expressed concern about an official investigation involving a 15-year-old undercover witness being recorded. After this initial conversation, Royster turned to walk back inside the store, and plaintiff followed him with his camera. When Royster saw plaintiff behind him, Royster asked the cashier whether plaintiff was her attorney.

Royster again asked plaintiff whether he had a professional relationship to "this incident"; plaintiff responded he just enjoys "photographing things." Royster then pointed out they were already being recorded by the store's security camera.

A few seconds later Royster informed plaintiff he might have committed a crime:

> Plaintiff: It's a criminal charge to video tape?
>
> Royster: No sir, what I said is that . . . you've recorded my voice and to record me and not only by my face or by other means you're to advise me of this fact. . . . I can only assume that that's only a video [which is] not recording my words; if you are recording my words, sir, without notifying me, that is a felony offense in the State of Oregon . . . . If you are recording my voice, you must advise me before you do so, to not do so is a criminal offense . . . .

Eventually Royster asked plaintiff, "Did you record my voice without notifying me?" Plaintiff answered, "Well, I guess I did." Royster then asked for and obtained plaintiff's identification, and again notified him, "to audio record a person's conversation you need to first identify [sic] that you are recording."

Royster asked plaintiff to turn over the tape. Plaintiff refused but promised Royster a copy. Royster told plaintiff he would inform the Clackamas County District Attorney's Office, which would decide whether to pursue the matter.

In an attempt to make a copy for Royster, plaintiff went to his office and plugged the camera into his computer. Royster then called the County Sheriff's office to request a uniformed deputy to go with him to plaintiff's office. Deputy Kraus eventually arrived.

From his conversation with Kraus, Royster learned for the first time about plaintiff's lawsuit against the county and Deputy Fresh.

When Kraus and Royster arrived at plaintiff's office, they saw him using his computer to attempt to make a copy of the tape. They viewed a portion of the tape on plaintiff's computer screen and heard Royster and plaintiff's conversation from the tape. Plaintiff eventually gave them what purported to be a copy of the tape.

After his encounter with plaintiff, Royster told officers he did not like plaintiff's demeanor and plaintiff had been "venomous." Royster also spread the message to other officers plaintiff presented a danger to law enforcement, noting the protective armor, large caliber shells, and bullet-riddled car door he had seen while in plaintiff's office. Based on Royster's message, one officer stated he told his colleagues about the danger plaintiff posed and refused to go near his office.

Eighteen days after the incident at the Get & Go, on March 9, Royster finally viewed the tape plaintiff had given him. For the first time, Royster discovered the tape contained only the first fourteen seconds of footage.

Royster met with his superior officer and a criminal sergeant to discuss obtaining a complete tape through a search warrant. The sergeant reviewed Royster's proposed affidavit and warrant and advised Royster to consult with the District Attorney's office. An assistant district attorney reviewed the paper work and informed plaintiff there was sufficient evidence to approach a judge. On March 13, a state magistrate issued a search warrant. The only expressed reason in Royster's search-warrant affidavit for obtaining a warrant was to obtain evidence of an unlawful-interception crime under ORS 165.543. In his search-warrant affidavit and an accompanying attachment, Royster emphasized plaintiff's failure to specifically advise him about whether plaintiff was recording his conversations.

In the accompanying attachment to his affidavit, Royster also delineated the items he

had seen in plaintiff's office: bulletproof vests, a camouflage and bullet-riddled door, and 20-30 rounds of loose ammunition. Along with the search warrant officers were given an "Operation Plan," which listed the items Royster saw in plaintiff's office and mentioned plaintiff's lawsuit against the county.

The warrant gave officers authority to seize plaintiff's computer system, including its associated hardware. The warrant further specified officers were to seize "cameras that record and reproduce video images." In addition to video cameras, the warrant also directed officers to seize the following: "a small silver-colored camera with integrated flash unit and the recorded images it may contain, along with any components of like camera that has been used to record any images or other recorded data." Plaintiff refers to this latter small silver camera as his "still" digital camera, which he used to take photographs in preparation for his DUII case and this litigation. Officers, including Royster, had heard plaintiff had been photographing officers. In his affidavit, Royster explained the still camera should be seized because, when he was at plaintiff's office on February 19, he witnessed plaintiff use the camera to take photographs of himself, the teenage decoy, and Deputy Kraus. According to the affidavit, these "photographs are of additional evidentiary value as they are independent evidence of our contact that day in [plaintiff's] office and may depict [plaintiff's] computer and digital [video] camera at his desk area."

On March 13, 2001, twelve armed officers raided plaintiff's business, some with their guns drawn. As officers were collecting plaintiff's computer equipment and copying his hard drive, he repeatedly protested about the attorney-client communications on the computer. Plaintiff offered to make a copy of the tape, but officers refused. And at some point during the search, Royster stated, "people shouldn't sue cops" or "it wasn't right to sue an officer."

Of the property seized from plaintiff's office on March 13, he has not recovered two tapes, which contained privileged information for his DUII defense and for this case.

During the DUII proceedings, plaintiff repeatedly demanded the seized tapes. The district attorney refused, stating there was an ongoing investigation of an unlawful-interception violation. During the DUII proceedings, Clackamas County Circuit Court Judge John Lowe ordered the seized evidence returned. After the prosecution refused to return the evidence, Judge Lowe ultimately dismissed the DUII charge, finding officers had improperly reviewed the privileged communications contained on the seized tapes. Judge Lowe further found the search warrant had been issued without probable cause.

From these allegations, plaintiff's third amended complaint makes various claims. Seeking leave to file an array of new claims, plaintiff moves for leave to file a fourth amended complaint.

Also before the court are defendants' summary judgment motions, in which defendants move for summary judgment on the claims asserted in plaintiff's third amended complaint. As an initial matter: Plaintiff either did not brief in response to defendants' summary judgment briefing on, or abandoned at oral argument, the following claims: (a) all claims against defendant Mark Fresh; (b) Section 1983 claims and state law conversion, battery, and negligence claims against the county; and (c) the state law tortious-interference-with-economic-advantage and conversion claims against defendant Royster. Accordingly, the court grants summary judgment on these claims and in full as to defendant Mark Fresh.

Left for decision are plaintiff's Section 1983 illegal-search and retaliation claims against defendant Royster and the state law defamation and negligent-supervision claims against the county.

II. MOTION TO FILE FOURTH AMENDED COMPLAINT

On November 5, 2003 plaintiff filed a motion for leave to file a fourth amended complaint, in which plaintiff sought to add the following new claims against existing and three new defendants: (1) a conspiracy claim under 42 U.S.C. § 1985 against the county,

Royster, and non-parties Deputies Kraus and Thompson; (2) Section 1983 claim against non-party Ken Ruecker in his official capacity as the superintendent of the state police; (3) defamation claims against defendant Royster and non-party Kraus; (4) trespass-to-chattels claims against defendant Royster and non-party Ruecker. For the reasons discussed below, plaintiff's motion is denied. (Doc. #119).

A. Standard of Review

After an answer has been filed, a plaintiff must seek leave of court to amend the complaint and "leave shall be freely given when justice so requires." See Fed. R. Civ. 15(a). Rule 15's liberal policy in favor of amendment is subject to qualification. Leave to amend should not be permitted when amendment would cause undue prejudice to the other parties, was sought in bad faith, or would be futile. See Schlacter-Jones v. Gen. Tel, 936 F.2d 435, 443 (9th Cir. 1991), abrogated on other grounds by, Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 692 (9th Cir. 2001); DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). In addition, a district court may consider a plaintiff's undue delay in seeking amendment. See Schlacter-Jones, 936 F.2d at 443. As discussed below, plaintiff's motion for leave comes after undue delay, which in this case gives rise to a significant risk of undue prejudice, and seeks to assert a number of claims for which amendment would be futile.

B. Undue Delay

The Ninth Circuit has determined undue delay "by itself" is insufficient to justify a district court's denial of leave to amend. Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999). But in certain circumstances, delay in seeking amendment can weigh heavily in the balance, for example: "The timing of the motion, when a plaintiff files the motion for leave to amend the complaint after the parties ha[ve] conducted discovery and a pending summary judgment motion ha[s] been fully briefed, weighs heavily against allowing leave." Schlacter-Jones, 936 F.2d at 443. Moreover, an inherent risk of prejudice to the opposing parties arises

in permitting a plaintiff to raise new issues "at the eleventh hour, after discovery [is] virtually complete and [defendant's] motion for summary judgment [is] pending before the court." Roberts v. Ariz. Bd. of Regents, 661 F.2d 796, 798 (9th Cir. 1981). Permitting amendment in such circumstances gives rise to concern the motion for leave is merely "a vehicle to circumvent summary judgment." Schlacter-Jones, 936 F.2d at 443; see also Cowen v. Bank United of Tex., FSB, 70 F.3d 937, 944 (7th Cir. 1995) ("A plaintiff who proposes to amend his complaint after the defendant has moved for summary judgment may be maneuvering desperately to stave off the immediate dismissal of the case.").

In this case, plaintiff filed his motion for leave almost two months after the discovery deadline (which the court extended no less than six times), after he already had filed three amended complaints, after twelve amendments to the scheduling order, after defendants' motions for summary judgment had been on file for about one-and-a-half months, and about two months before trial was scheduled to begin. Moreover, not only does plaintiff seek to add new claims, he seeks to add three new defendants, which at the very least would delay trial and prolong this three-year-old case far beyond the new year. Under these circumstances, plaintiff's motion comes after undue delay and gives rise to a very real risk of undue prejudice to the opposing parties.

Plaintiff's justification for his delay–that he could not have known the facts upon which he bases his new claims until recently–is not persuasive. For example, plaintiff seeks to add a conspiracy claim against defendant Royster and non-parties Deputies Kraus and Thompson based on their alleged retaliatory conduct; plaintiff, however, as he admits in his motion, alleges the same facts to support this claim as he had previously alleged months ago. Moreover, to the extent plaintiff suggests he did not know until recently about the deputies' involvement, plaintiff's argument is baseless, as he has known their identities and about their alleged retaliation since early 2001. Plaintiff's counsel in fact wrote a letter to the county on

February 16, 2001 complaining about the deputies' alleged harassment of plaintiff's wife.

In addition, plaintiff seeks to state a new claim against the superintendent of the Oregon State Police based on the county's alleged mishandling of plaintiff's property during the DUII case. Plaintiff has known about the facts underlying this allegation since the DUII proceedings in 2001. And plaintiff's suggestion he could not have discovered the identity of the police superintendent rings hollow, especially since plaintiff seeks to sue him in his official capacity. Cf. Figueroa v. Gates, 120 F. Supp. 2d 917, 920 (C.D. Cal. 2000) ("An official capacity Section 1983 suit is really asserted against the entity represented by that official."). Finally, as with the other claims, plaintiff relies on facts he has known for over two years to support his proffered defamation and trespass-to-chattels claims against defendant Royster.

In sum, under the circumstances presented and based on plaintiff's cursory assertions in support of his motion for leave, "justice [does not] require[]" leave in this case. See Fed. R. Civ. P. 15(a); see also Allen v. City of Beverly Hills, 911 F.2d 367, 374 (9th Cir. 1990) (upholding denial of motion to amend where movant presented no new facts but only new theories and did not provide a satisfactory explanation for his failure to fully develop contentions originally).

C. Futility

Futility by itself can justify denying an amendment. See Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Plaintiff's amendments would be exercises in futility.

(1) Section 1985 Conspiracy Claim

Plaintiff seeks to sue the county, Royster, and new defendants Thompson and Kraus for conspiracy under 42 U.S.C. § 1985. Plaintiff does not even attempt to explain how this proffered claim has factual and legal support. Nor does plaintiff cite the Section 1985 subsection upon which he is relying. The Ninth Circuit, for example, has strictly limited the

scope of conspiracy claims asserted under 42 U.S.C. § 1985(3): "To state a claim for conspiracy under this section, 'a plaintiff must show, inter alia, that 'some racial or perhaps otherwise class-based invidiously discriminatory animus [lay] behind the conspirators' actions.'" Butler v. Elle, 281 F.3d 1014, 1028 (9th Cir. 2002) (quoting Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-68 (1993)); see also Bagley v. CMC Real Estate Corp., 923 F.2d 758, 762-63 (9th Cir. 1991). And to the extent plaintiff is relying on subsection (2), he does not attempt to explain how those he seeks to sue conspired (*i.e.*, agreed and acted in concert) to prevent him or his witnesses from attending court or testifying. See Schmitz v. Mars, Inc., 261 F. Supp. 2d 1226, 1234 (D. Or. 2003) ("Plaintiff must plead specific material facts that show the existence of a [Section 1985] conspiracy."). Nor does plaintiff show how any injury has resulted. Plaintiff simply does not explain Section 1985's applicability.

(2) Section 1983 Claim Against Ruecker

Plaintiff also seeks to sue non-party Ruecker in his *official* capacity for alleged improper policies regarding the preservation of evidence. As a result, the Eleventh Amendment bars this claim. See Butler, 281 F.3d at 1023 (9th Cir. 2002) (holding Eleventh Amendment "bars suits in federal court for damages" against state officer sued in his "official" capacity).

(3) State Law Claims

Plaintiff also seeks to add defamation claims against defendant Royster and non-party Kraus as well as trespass-to-chattels claims against defendant Royster and non-party Ruecker.

Under the Oregon Tort Claims Act, the sole cause of action for a governmental official's tortious conduct is against the official's employer unless the conduct occurred outside the scope of the official's duties or employment. ORS 30.265; see also Ctr. for Legal

Studies v. Lindley, 64 F. Supp. 2d 970, 974 (D. Or. 1999). Despite the extensive discovery in this case, plaintiff does not cite any evidence suggesting, nor does he attempt to explain how, the officials were acting outside the scope of their employment or duties for purposes of these claims. Thus plaintiff's proffered state law claims would be barred.

(4) Statute of Limitations

Plaintiff suggests he should be permitted to name new defendants because he is merely replacing them for the "John Doe" defendants. But most of plaintiff's proffered claims against new defendants plainly fall beyond the applicable limitations periods. A defamation claim (which plaintiff seeks to assert against non-party Kraus) is subject to a one-year limitations period under Oregon law. ORS 12.120(2). The statute of limitations for Section 1983 and Section 1985 claims is Oregon's general two-year limitations period for personal-injury actions. See Sain v. City of Bend, 309 F.3d 1134, 1139 (9th Cir. 2002); McDougal v. County of Imperial, 942 F.2d 668, 673 (9th Cir. 1991). Plaintiff seeks to state a new Section 1983 claim against non-party Ruecker, and Section 1985 claims against non-parties Thompson and Kraus. Because the events at issue occurred in 2001, limitations has run unless the new claims "relate back" to the original pleading.

Federal and Oregon Rules of Civil Procedure permit a claim brought against a new party to relate back only when the new party "knew or should have known that, but for a mistake concerning the identity of the proper party," the claim would have been asserted against the new party. Fed. R. Civ. P. 15(c); Or. R. Civ. P. 23C.

The weight of authority interpreting the mistake requirement concludes relation back does not apply when a plaintiff seeks to replace a Doe defendant with a newly named party, essentially reasoning "mistake concerning identity" does not, by its plain language, include a lack of knowledge regarding the proper defendants. See, e.g., Jacobsen v. Osborne, 133 F.3d 315, 320-21 (5th Cir. 1998); Barrow v. Wethersfield Police Dep't, 66 F.3d 466, 470, as

amended by, 74 F.3d 1366 (2d Cir. 1996); Butler v. Robar Enterps., 208 F.R.D. 621, 623 (C.D. Cal. 2002) (observing "the courts of appeal that have confronted the issue are in near-unanimity that lack of knowledge is not a 'mistake'"). Thus, even assuming plaintiff named "John Doe" defendants because he did not know the identities of the proper defendants, his proffered claims against new parties are nonetheless futile.[1]

In sum, given the combination of undue delay, risk of prejudice, and futility of plaintiff's amendments, plaintiff's motion for leave to file a fourth amended complaint is denied.

III. Defendant Royster's Summary Judgment Motion

Plaintiff continues to pursue two claims against defendant Royster: (1) Section 1983 illegal-search claim, and (2) Section 1983 retaliation claim.

Royster moves for summary judgment on these claims on qualified-immunity grounds. Qualified immunity requires a two-step inquiry: First, the court must determine whether, construing the facts in the light most favorable to plaintiff, the facts show the officer's conduct violated a constitutional right. Saucier v. Katz, 522 U.S. 194, 201 (2001). Second, assuming the facts could allow the plaintiff to establish a constitutional violation, the court must determine whether a reasonable officer would understand what he is doing violates the constitutional right at issue. Id. at 202. If a reasonable officer "could have believed" the conduct at issue comported with the constitution, the defendant is entitled to immunity. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

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[1] The exception is plaintiff's proffered trespass-to-chattels claim against Ruecker; this claim, it appears, would be governed by a six-year limitations period. See ORS 12.080(4) (providing for six-year limitations period for actions based on damages to personal property). However, as mentioned above, plaintiff cannot sue Ruecker individually, but must sue his employer, the state, for this claim. See ORS 30.265. Moreover, plaintiff does not discuss the elements of a trespass-to-chattels claim; nor does he explain how Ruecker's individual conduct gives rise to such a claim.

A. Illegal Search Claim

Plaintiff argues a constitutional violation occurred because the search of his office was pursuant to a warrant issued without probable cause. And because Royster obtained the warrant, plaintiff argues, Royster is subject to liability. See Malley v. Briggs, 475 U.S. 335, 344-45 & nn.6-7 (1986) (recognizing officer obtaining a magistrate-issued warrant can be subject to liability if it was unsupported with probable cause).

Plaintiff further argues collateral estoppel prevents Royster from challenging probable cause, because Judge Lowe in the DUII proceedings already found there was no probable cause for the search warrant. Plaintiff further argues, even assuming collateral estoppel does not apply, no probable cause existed to believe an interception-of-communications crime occurred under ORS 165.543, the statute cited in the search warrant and Royster's affidavit. Defendant Royster responds collateral estoppel does not apply and, in any event, probable cause existed to believe an offense under ORS 165.543 occurred. Royster additionally argues that even assuming no probable cause existed to believe a crime under ORS 165.543 occurred, for purposes of qualified immunity, Royster's conduct also must be evaluated under a closely-related statute, ORS 165.540.

1. Collateral Estoppel

Because the dismissal of plaintiff's DUII charge occurred in state court, Oregon law governs the dismissal's preclusive effect. See 28 U.S.C. § 1738; Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Under Oregon law, collateral estoppel precludes re-litigation of an issue only when: (1) the issue in the two proceedings is identical, (2) the issue was actually litigated and necessary to a final decision on the merits of the prior proceeding, (3) the party sought to be precluded had a full and fair opportunity to be heard on the issue, (4) the party sought to be precluded was a party or in privity with a party to the prior proceeding, and (5) the prior proceeding was of a type to which the court will give

preclusive effect. Nelson v. Emerald People's Util. Dist., 318 Or. 99, 104 (1993).

The court need only discuss one element in this case: Collateral estoppel does not apply here because Royster was not a party or in privity with a party to the prior proceedings. Royster clearly was not a party to the DUII proceedings; the question is whether he was in privity with the state. An amorphous concept, privity has been defined to include "'[t]hose who control an action although not parties to it, [t]hose whose interests are represented by a party to an action, and [s]uccessors in interest to those having derivative claims.'" State Farm & Cas. Co. v. Reuter, 700 P.2d 236, 240 (Or. 1995) (en banc) (quoting RESTATEMENT JUDGMENTS § 83 comment a)).

A law enforcement officer who acts as a witness in a criminal case generally does not have control over the details of a prosecution or a personal stake in the case's outcome. Thus witnesses generally should not be bound by a criminal court's decisions. While no Oregon case appears to be directly on point, federal cases applying a privity requirement have considered the issue of when law enforcement officers can be precluded from litigating issues decided in a prior criminal case. In Davis v. Eide, 439 F.2d 1077, 1078 (9th Cir. 1971), for example, Section 1983 defendants were not precluded from re-litigating the state criminal court's holding their search violated the constitution. Cases from other circuits, too, have refused to apply offensive collateral estoppel to preclude a law enforcement officer, sued in his individual capacity in a Section 1983 action, from litigating issues decided against the state in prior criminal proceedings. See, e.g., Kinslow v. Ratzlaff, 158 F.3d 1104, 1105-06 (10th Cir. 1998); Tierney v. Davidson, 133 F.3d 189, 195 (2d Cir. 1998); Duncan v. Clements, 744 F.2d 48, 51-52 (8th Cir. 1984); Padilla v. Miller, 143 F. Supp. 2d 453, 465-66 (M.D. Pa. 1999).

Consistent with this federal case law, fairness concerns weigh heavily against the application of collateral estoppel in this case. Cf. Parklane Hosiery Co. v. Shore, 439 U.S.

322, 331 (1979) ("The general rule should be that in cases where . . . the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel."). There is no indication defendant Royster had any control over the DUII prosecution against plaintiff. Royster was not even involved in the DUII arrest or investigation. At most, Royster's role was limited to acting as a witness in a suppression hearing, at which he "'could not call witnesses . . . direct the examination of the State's witnesses . . . [or] choose the counsel who represented the State at the suppression hearing. Nor could [he] appeal the ruling once it was made.'" Kinslow, 158 F.3d at 1106 (quoting Harris v. Jones, 471 N.W.2d 818, 820 (Iowa 1991)).

This court recognizes in Davis the officers at issue were employed by the city and not the state. Davis, 439 F.2d at 1078. But the Ninth Circuit also emphasized the officers' lack of control and interest in the prior criminal case. Id. Thus the fact Royster was a state officer makes the privity issue a little closer, but it does not overcome his lack of control and personal stake in the prior DUII proceedings. See, e.g., Padilla, 143 F. Supp. 2d at 466 ("[I]t would be unfair to [State] Trooper Miller to apply offensive collateral estoppel here. As noted above, he did not control the decisions in the state court prosecution."). Accordingly, the court refuses to apply offensive collateral estoppel, and thus turns to the merits of the probable-cause issue.[2]

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[2] Even if the court were to hold collateral estoppel applied to preclude Royster from litigating the probable cause issue, he would not be precluded from litigating the remaining qualified-immunity question: whether a reasonable officer could have believed the conduct at issue was lawful. As explained by the Ninth Circuit in a case in which the state criminal judge had ruled no probable cause existed for an officer's search, the immunity and probable cause issues are not "identical":

> In civil rights actions, qualified immunity turns on the objective unreasonableness of the law enforcement officer's conduct in light of clearly established law. The state court, ruling in the context of a motion to suppress in [plaintiff's] criminal proceeding, had no occasion to make this determination.

(continued...)

2. Constitutional Violation

As noted, the search warrant, along with Royster's affidavit, sought evidence of an interception-of-communications offense under ORS 165.543. No other statute was mentioned. ORS 165.543 provides:

> [A]ny person who willfully intercepts, attempts to intercept or procures any other person to intercept or attempt to intercept any wire or oral communication where such person is not a party to the communication and where none of the parties to the communication has given prior consent to the interception, is guilty of a Class A misdemeanor.

ORS 165.543(1). "Oral communication," as used in ORS 165.543, means "any oral communication, other than a wire or electronic communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." ORS 165.543(2) (incorporating definition set forth in ORS 133.721(7)).

Thus a violation under ORS 165.543 occurs only when (1) a suspect intercepts or attempts to intercept communications to which the suspect is not a party, (2) the suspect does not obtain the parties' consent, and (3) the person whose communications are at issue has a reasonable expectation the communications are not subject to interception. For the reasons that follow, the court concludes an issue of material fact exists as to whether probable cause existed to believe plaintiff's conduct violated ORS 165.543.

As its language shows, ORS 165.543 contemplates an expectation-of-privacy requirement. Oregon's statutory definition of "oral communication" is almost identical to, and was specifically intended to track, the "oral communication" definition in the federal Wiretap Act. See State v. Wischnofske, 129 Or. App. 231, 235 & n.18 (1994); see also

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[2] (...continued)
Lombardi v. City of El Cajon, 117 F.3d 1117, 1121 (9th Cir. 1995).

18 U.S.C. § 2510(2). Therefore, federal law construing the Wiretap Act is a persuasive guide. See Wischnofske, 129 Or. App. at 235. Federal cases generally have equated "expectation that such communication is not subject to interception" with the more familiar "expectation of privacy." See generally Kristine C. Karnezis, Construction & Application of Omnibus Crime Control & Safe Streets Act of 1968, 164, A.L.R. Fed. 139, § 2 (2000) ("The statutory definition [of 'oral communication'] has been referred to in short-hand fashion as a reasonable expectation of privacy."). The Wiretap Act's legislative history shows "oral communication" was intended to parallel the reasonable-expectation-of-privacy test established in Katz v. United States, 389 U.S. 347 (1967). See United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973).

Accordingly, the Supreme Court's two-part inquiry developed in the Fourth Amendment context can be applied to evaluate interception claims: "First, we ask whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he [sought] to preserve [something] as private . . . . Second, we inquire whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable." Bond v. United States, 529 U.S. 334, 338 (2000) (citations omitted).

While applying Katz involves a fact-intensive inquiry, courts are hesitant to find a reasonable expectation of privacy when the conversation at issue occurred openly on public grounds in close proximity to others. See, e.g., Kee v. City of Rowlett, 247 F.3d 206, 215-16 (5th Cir. 2001) (finding no expectation of privacy as a matter of law where, *inter alia*, even though individuals were conversing at a funeral: they did not specify "which conversations were conducted in a manner inaudible to others and provide[d] no information about who was present," "third parties were in close proximity," and they "fail[ed] to allege they took any steps to ensure that unwanted individuals were excluded"); In re John Doe Trader Number One, 894 F.2d 240, 243 (7th Cir. 1990) (finding no reasonable expectation of

privacy for comments made on trading floor of Mercantile Exchange because other people were nearby); United States v. Agapito, 620 F.2d 324, 329 (2d Cir. 1980) (finding conversations loud enough to be heard by others in adjoining room to undermine expectation of privacy). Ultimately, the question is one of context: "Legitimate privacy expectations cannot be separated from a conversation's context. Bedroom whispers in the middle of a house on a large, private tract of land carry quite different expectations of privacy, reasonably speaking, than does a boisterous conversation occurring in a crowded supermarket or subway." United States v. Burns, 624 F.2d 95, 100 (10th Cir. 1980).

The circumstances surrounding the event at issue here lack indicia of probable cause to believe an offense under ORS 165.543(1) occurred. Royster's search-warrant application makes clear he was in an open store, in and out of which other members of the public were freely walking. Royster's application further shows he was speaking with the cashier while standing at the store counter; he also indicated he stepped away only when customers were directly behind him and ready to make purchases. In short, the warrant application shows Royster engaged in conversation at a public store's counter amidst strangers. Moreover, Royster states in his application he returned to the cashier and continued his investigation with her, even though he had just spoken with plaintiff about plaintiff's videotaping the investigation. If Royster hoped to keep the matter with the cashier private, it is unlikely he would have attempted to continue his investigation at the store counter while a customer who had a video camera and who had been recording the scene was present. These circumstances as recounted in the warrant application do not conclusively show Royster held a reasonable expectation of privacy. And the application failed to recount other facts sufficiently establishing he held a reasonable expectation of privacy despite the public context.

In fact, other parts of the record, as viewed in favor of plaintiff, only support the

position Royster lacked a reasonable expectation of privacy. The videotape shows at least three people standing nearby when the cashier was speaking with Royster. In addition, according to plaintiff's deposition, Royster was acting boisterously when plaintiff first entered the store as a customer. And at his deposition, Royster indicated awareness of the ease by which conversations in the store could be overheard: he explained he would allow the teenage decoy to approach the counter while Royster would act like the next customer, staying within earshot and witnessing the transaction. Royster Depo. at 44. In addition, while in the store, Royster expressly acknowledged the existence of the store's security camera.

Based on this record, viewing the later search as one seeking evidence of a violation of ORS 165.543, a fact issue exists whether a constitutional violation could be made out. Saucier, 533 U.S. at 202. This is not, however, the end of the inquiry.

3. Objective Reasonableness

Assuming a constitutional violation could be made out, the next question becomes whether Royster's conduct was nevertheless objectively reasonable. See Hunter v. Bryant, 502 U.S. 224, 227 (1991); Anderson, 483 U.S. at 641. Plaintiff argues, because no reasonable officer could have believed a violation of ORS 165.543 occurred, Royster is not entitled to immunity. Plaintiff further argues, assuming probable cause existed to get the warrant, Royster lost immunity because he obtained the warrant through material misrepresentations and omissions. Royster responds, even assuming immunity would be inappropriate as analyzed under ORS 165.543, his conduct also must be evaluated under the closely-related statute ORS 165.540, under which a reasonable officer could have believed probable cause for the search warrant existed. Under the particular circumstances presented here, defendant's argument is persuasive. As a result, for the reasons discussed below, the Court holds Royster is entitled to immunity in light of the closely-related statute

ORS 165.540 (and, therefore, does not need to consider whether a reasonable officer could have believed a violation of ORS 165.543 occurred).

As an initial point, neither party cites, and the court could not find, a case involving a situation in which a search was conducted pursuant to a warrant citing a specific statute for which probable cause did not exist and an officer who later invokes a closely-related, uncited statute to justify the search on immunity grounds.

In evaluating the parties' positions on this point, it is therefore helpful to bear in mind the overarching policy behind the qualified-immunity doctrine. Against the legitimate interest in compensating victims for public officers' tortious acts is the legitimate concern the "fear of personal monetary liability . . . will unduly inhibit officials in the discharge of their duties." Anderson, 483 U.S. at 638. Qualified immunity seeks to accommodate these policies by protecting "all but the plainly incompetent or those who knowingly violate the law." Malley, 475 U.S. at 341. If officers believed every mistake could put them personally at risk, the persistent threat of suit could "dampen the ardor of all but the most resolute, or the most irresponsible [officers]." Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); see also Rowland v. Perry, 41 F.3d 167, 172 (4th Cir. 1994) (observing immunity was formulated with "a desire to avoid overdeterrence of energetic law enforcement").

As a result, immunity is not susceptible to bright-line rules; rather, the ultimate inquiry for purposes of immunity is designed to carefully take into account the particular circumstances in a given case: "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202; see also Hunter, 502 U.S. at 227 ("Our cases establish that qualified immunity shields [officers] from suit for damages if a reasonable officer could have believed [the conduct at issue] to be lawful, in light of clearly established law and the information the officers possessed."); Anderson, 483 U.S. at 638 ("[Q]ualified immunity shield[s] [officers] from civil damages

liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

In light of immunity's overarching policy to protect "all but the plainly incompetent" and its fact-intensive nature, the court believes Royster is not prohibited from invoking a statute simply because he did not cite the statute in his warrant or affidavit. Instead, the ultimate question to be answered is whether "on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue." Malley, 475 U.S. at 342. This standard "gives ample room for mistaken judgments." Id. at 343. Accordingly, for purposes of evaluating an officer's claim of immunity, the question should be less focused on legal nuance and more so on the particular facts underlying the officer's ultimate belief a crime has been committed. See, e.g., Saucier, 533 U.S. at 205 ("It is sometimes difficult for an officer to determine how the relevant legal doctrine [applies] to the factual situation the officer confronts."); Anderson, 483 U.S. at 641 ("[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and in such cases those officials–like other officials who act in ways they reasonably believe to be lawful–should not be held personally liable."); Gasho v. United States, 39 F.3d 1420, 1428 (9th Cir. 1994) ("Because probable cause must be evaluated from the perspective of 'prudent men, not legal technicians,' an officer need not have probable cause for every element of the offense." (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

Nevertheless, the court is mindful of the risks involved in permitting officers to later cite crimes which were not originally cited to justify their conduct. Permitting officers to rely on previously uncited crimes should be carefully cabined. Accordingly, after analyzing whether a reasonable officer could have believed an offense under ORS 165.540 occurred, the Court next will analyze the particular circumstances presented to determine whether

allowing Royster to now invoke ORS 165.540 is appropriate.

ORS 165.540(1) provides:

[N]o person shall:

> [o]btain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if all participants in the conversation are not specifically informed that their conversation is being obtained.

ORS 165.540(1)(c). For purposes of this statute, "'conversation' means the transmission between two or more persons of an oral communication which is not a telecommunication or a radio communication." ORS 165.535(1). Thus it is fair to say both ORS 165.540, which the warrant did not cite, and ORS 165.543, which the warrant did cite, involve the interception of communications. See, e.g., State v. Knobel, 97 Or. App. 559, 562 (1989) (interpreting ORS 165.540(1)(c) to "prohibit only the use of a device, contrivance, machine or apparatus to *intercept*" communications (emphasis added)). However, some important differences between ORS 165.540 and ORS 165.543 must be noted.

First, ORS 165.540(1)(c), unlike ORS 165.543(1), requires a person obtaining communications to affirmatively inform parties their communications are being obtained. Compare ORS 165.540(1)(c) (making it a crime to obtain a conversation when "all participants in the conversation are not specifically informed that their conversation is being obtained"), with ORS 165.543(1) (making it a crime to intercept oral communication when "none of the parties to the communication has given prior consent to the interception"). Oregon cases have strictly applied ORS 165.540(1)(c)'s "specifically informed" requirement. In State v. Bichsel, 101 Or. App. 257, 262 (1990), for instance, the defendant was convicted for violating ORS 165.540(1)(c) after recording a police officer's conversation with her outside a shopping mall in Eugene. On appeal, defendant argued there was no evidence she failed to specifically inform the officer about the recording, given that the tape recorder was

in plain sight and the officer's colleagues had specifically informed him she was carrying a tape recorder. Id. According to the defendant, the officer had "reason to know" his conversation was being recorded and, therefore, had been "specifically informed" within the meaning of the statute. Id. The court of appeals rejected defendant's argument and upheld the conviction:

> The clear language of the statute requires otherwise. . . . Rather than using ["reasonably should have known" type] language in ORS 165.540(1)(c), however, [the legislature] has required that persons being recorded be "specifically informed." The legislature clearly intended to require persons recording the conversations of others to give an unequivocal warning to that effect.

Id. (citations omitted); see also State v. Haase, 134 Or. App. 416, 419 (1995). While the "unequivocal warning" need not be comprised of particular language, the test under ORS 165.540(1)(c) "is not whether defendant was aware that the conversation was being recorded [but] whether the [the party recording the conversation] gave defendant the required information." Haase, 134 Or. App. at 419-20. And as the case law makes clear, ORS 165.540(1)(c) can apply even if the party recording the conversation is a party to it. See, e.g., Bischel, 101 Or. App. at 262.

In contrast to ORS 165.540(1)(c), ORS 165.543(1) does not concern itself with whether the suspect expressly issued an "unequivocal warning," but rather focuses on whether parties to the communication gave their consent to the recording. In addition, ORS 165.543(1) applies only when the party acquiring the communication is not a party to it.

Another important difference between the two statutes is, unlike ORS 165.543(1), ORS 165.540(1)(c) does not incorporate a privacy requirement. As already discussed, ORS 165.543 expressly gives the term "oral communication" a meaning which requires a person to "exhibit[] an expectation that such communication is not subject to interception under circumstances justifying such expectation." ORS 165.543(2) (providing, "[a]s used in

this section, the term[]. . . 'oral communication' ha[s] the meaning provided under ORS 133.721"). In contrast, while ORS 165.540's definition of "conversation" includes the term "oral communication," neither ORS 165.540 nor ORS 165.535 (where "conversation" is defined) incorporates ORS 133.721, where the federally derived definition for "oral communication" appears. Nor does ORS 133.721 reference ORS 165.535 or ORS 165.540. See ORS 133.721 (specifically listing other statutes as those for which the ORS 133.721 definitions apply). In sum, as the Oregon Court of Appeals has observed, "ORS 165.540(1)(c) includes no language indicating that a reasonable expectation of privacy is required." Knobel, 97 Or. App. at 563 n.1; see also Bischel, 101 Or. App. at 262.

In light of the differences between ORS 165.543(1) and ORS 165.540(1)(c), the court concludes under the facts confronting Royster a reasonable officer could have believed a violation of ORS 165.540(1)(c) occurred. Plaintiff however argues he did sufficiently warn Royster: When Royster asked, "Did you record my voice without notifying me," plaintiff answered, "I guess I did," reasonably imparting to Royster their conversation was being recorded. But since the exchange on this point was stated in the past tense, plaintiff's statement did not act as an "unequivocal warning" *before* plaintiff began recording Royster while he was at the counter. See Haase, 134 Or. App. at 419 (party must receive warning the conversation is "*being*" recorded (emphasis added)). Nor, from the perspective of what a reasonable officer could have believed, did the exchange inform Royster his conversation with plaintiff was going to be recorded prospectively. See Bischel, 101 Or. App. at 262 (applying ORS 165.543(1)(c) where officer whose communications were recorded was party to conversation at issue). Moreover, ORS 165.540(1)(c) prohibits "attempt[s] to obtain" conversations. Accordingly, even assuming plaintiff was never close enough to record Royster's conversations with the store cashier, a reasonable officer could have believed plaintiff had at least attempted to obtain the conversations, given plaintiff's statement he

"guess[ed]" he had recorded Royster's voice. Finally, as discussed, Royster's expectations of privacy are immaterial for purposes of evaluating ORS 165.540(1)(c); or, regarding this point, at the very least, reasonable officers could differ "as to what the law requires." Saucier, 533 U.S. at 205.

In sum, a reasonable officer could have believed probable cause existed for an offense under ORS 165.540(1)(c). The next question is whether it is appropriate to permit Royster to rely on this statutory provision, even though he did not originally cite it. Under the particular circumstances presented, the court holds it is appropriate.

First, Royster relies on the same facts and circumstances he recited in his search-warrant application to show an offense occurred under ORS 165.540. That is, the alleged conduct Royster described in the context of his citation to ORS 165.543 in his application could have served as the basis for a charge under ORS 165.540(1)(c). In addition, permitting Royster to now rely on this statute does not threaten the privacy concerns underlying the requirement a warrant particularly describe the "things to be seized" as evidence of a crime. Because the core facts and potential evidence are the same for both alleged offenses, in searching plaintiff's office for evidence of an offense under ORS 165.543, for which probable cause did not exist, the officers did not need to search for evidence of a broader scope than that which would have been appropriate for an offense under ORS 165.540(1)(c).

Furthermore, the court is reassured Royster is not engaging in an "'ex post facto extrapolation of a crime designed to justify a sham'" search. Bingham v. City of Manhattan Beach, 341 F.3d 939, 945 (9th Cir. 2003). Repeatedly, during Royster's encounter with plaintiff at the Get & Go, Royster expressed his view recording a person's voice without first "advising" the person of the recording violates Oregon law. In addition, in his search-warrant application, Royster emphasizes plaintiff's failure to "specifically advise" Royster his voice was being recorded. In his application he also repeatedly uses the term "conversation." In

short, it is obvious from the record Royster was invoking ORS 165.540(1)(c)'s core requirement when alleging plaintiff had committed a crime. See Bischel, 101 Or. App. at 262 (observing ORS 165.540(1)(c) offense occurs when a person whose "conversation" is being recorded is not "specifically informed" of that fact).[3] Moreover, Royster testified in his deposition he had received training on the offense set out in ORS 165.540(1)(c) as "part and parcel" of his training in "interception" laws. Royster Depo. at 118. Given the somewhat complicated statutory scheme at issue, it would not be unreasonable for a police officer to confuse specific statutory citations.[4]

In sum, the record indicates Royster essentially made a citation error, while reasonably believing plaintiff's conduct violated the law. Officers are not required to be "legal scholars"; instead the officer's "knowledge of facts sufficient to support probable cause" should be a court's focus. Williams v. Jaglowski, 269 F.3d 778, 783 (7th Cir. 2001); see also WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE–FEDERAL RULES OF CRIMINAL PROCEDURE, Ch. 10 § 670 ("The Supreme Court has said that affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.").

Furthermore, Royster discussed in detail the underlying facts of the incident at issue with his sergeant, an assistant district attorney, and a magistrate. Thus Royster's careful approach in this case reasonably could have led him to believe the facts gave rise to a

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[3] While the statute uses the language "specifically inform," and Royster kept saying "advise," "advise" commonly is defined to mean "to inform." See AMERICAN HERITAGE DICTIONARY 11 (1974 ed.).

[4] In fact, for example, another state police officer, in response to whether he had heard of the crime "unlawful interception of communication," testified: "I know [the offense] has something to do with, I believe, unlawful recording somebody's voice, maybe when you tape record somebody without letting them know . . . . Like when we do it, we're supposed to say, '*We advise you that our conversation is being recorded* . . . .'" Allori Depo. at 21 (emphasis added).

criminal offense. Given immunity's "ample room for mistaken judgments," Malley, 475 U.S. at 343, Royster hardly should be liable for citing the wrong statute, especially since his sergeant, a district attorney, and a magistrate approved his warrant application.

Plaintiff nevertheless argues Royster cannot invoke any "closely related" crime doctrine, because that doctrine has been applied only to warrantless arrests. The court agrees this doctrine has not been applied to the search-warrant context. However, the court is guided by the policy underlying the qualified-immunity doctrine, which necessarily requires fact-intensive judgments, rather than by technical distinctions arising from the closely-related-crime doctrine. Under the circumstances here, the record does not show Royster is a "plainly incompetent" officer or "knowingly violate[d] the law." See Malley, 475 U.S. at 341; see also Bingham, 329 F.3d at 950-51 (concluding closely-related-offense doctrine did not apply to arrest, because the two offenses at issue did not involve the same facts, but nevertheless granting immunity because the officer was not making an "ex post facto" rationalization and otherwise acted reasonably under general immunity standard).

Finally, plaintiff also argues, even assuming the warrant sufficiently shows there was probable cause to believe a crime occurred, Royster is still liable because any probable cause was based on his material misrepresentations and omissions. Plaintiff first alleges the following statement in Royster's warrant application is false: "Skoog never advised me that he was recording our conversation." This statement is not false, and in fact forms the crux of an ORS 165.540(1)(c) offense. As discussed, plaintiff only told Royster he had recorded his voice; he never warned Royster, in present and prospective terms, he "was recording" Royster's voice. Plaintiff lists further alleged omissions and misstatements. Many of these, however, bear on Royster's expectation of privacy, an issue immaterial under ORS 165.540(1)(c). The majority of the alleged omissions and misstatements are simply irrelevant to the central issue whether the warrant application established probable cause a

crime had been committed. Incorporating the alleged omissions into the application and excising the alleged misstatements, the conclusion a reasonable officer could have believed an offense under ORS 165.540(1)(c) occurred is unaltered. See Galbraith v. County of Santa Clara, 307 F.3d 1119, 1126 (9th Cir. 2002) (holding plaintiff alleging warrant's probable cause arises from officer's falsehoods must show the falsehoods were "material" to the finding of probable cause).

In summary, under the facts of this case, Royster is entitled to invoke ORS 165.540(1)(c) to establish immunity. Plaintiff does not allege any misstatements or omissions in the warrant application which bear on whether an officer could have believed the application shows a crime occurred under that statute. As a result, Royster is entitled to immunity on the illegal-search claim.

B. Retaliation Claim

Next, plaintiff alleges Royster retaliated against him for filing this lawsuit, in violation of his First Amendment rights. Specifically, plaintiff argues Royster's March 13 search pursuant to the search warrant was motivated by his desire to teach plaintiff a lesson about "suing cops." Defendant moves for summary judgment, asserting qualified immunity. The first question therefore becomes whether the facts, read in plaintiff's favor, show a First Amendment violation. Even if a constitutional violation occurred, the next question becomes whether Royster's conduct was such that a reasonable officer would understand it to have been unconstitutional.[5]

(1) First Amendment Violation

"'State actions designed to retaliate against and chill political expression strikes at the

[5] At oral argument, the court ordered the parties to submit supplemental briefing to address the retaliation claim against Royster. In his initial response brief, plaintiff suggests the court ordered briefing solely on the issue whether Royster was "surprised" by plaintiff's assertion of this claim. The transcript, however, shows the court ordered Royster to brief why the retaliation claim "should not be in the case, either because of surprise or otherwise."

heart of the First Amendment.'" Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) (quoting Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986)). It is well established, and the parties agree, plaintiff has a protected interest in seeking redress in the courts. See id.

Royster, however, argues a retaliation claim is appropriate only if the plaintiff's First Amendment rights actually have been "chilled," which he emphasizes has not occurred in this case. While defendant is correct a plaintiff must show the defendant deterred or chilled the plaintiff's First Amendment rights, the test (at least as applied to non-prisoner plaintiffs) is not nearly as strict as he suggests. Rather, a retaliation plaintiff need only show defendants "*intended* to interfere" with plaintiff's First Amendment rights. Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999) (emphasis in original). On this point, the proper inquiry is whether an "'official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.'" Id. (quoting Crawford-El v. Britton, 93 F.3d 813, 826 (D.C. Cir. 1996), vacated on other grounds, 520 U.S. 1273 (1997)).

A plaintiff also must show the protected conduct was a "substantial" or "motivating" factor in defendant's decision. Soranno's Gasco, 874 F.2d at 1314. If plaintiff can show this, the defendant then must show he "would have reached the same decision even in the absence of the protected conduct." Id.

In this case, plaintiff alleges Royster obtained and executed a search warrant in retaliation for plaintiff's filing this lawsuit. Reading the record in favor of plaintiff, the search in this case was such that a jury could conclude it would have persuaded a person of ordinary firmness to refrain from future First Amendment activities. The search involved a number of armed officers who disrupted plaintiff's business and sought plaintiff's computer and cameras, items containing very private matters. The fact plaintiff himself persisted in pursuing this litigation despite the search is not determinative for purposes of his stating a

retaliation claim.

The next question is whether the record supports an inference Royster was motivated at least in part to obtain the warrant by plaintiff's filing this lawsuit. Plaintiff sets forth the following evidence: During the execution of the warrant, Royster stated plaintiff should not be "suing cops." Cf. Soranno's Gasco, 874 F.2d at 1315 (finding jury issue on motivation existed where official indicated he would "somehow get even" with plaintiff for his protected conduct). Royster had also spread the word plaintiff was "anti-law enforcement" and a danger to officers. In addition, as the officers were leaving plaintiff's office, an officer told Royster this was "his deal and he would have to buy the steaks," indicating a degree of unwillingness to go along with the warrant execution and that Royster was its leader. These facts satisfy plaintiff's burden to create a fact issue on whether Royster was motivated at least in part by the filing of this lawsuit.

To show he is nonetheless entitled to judgment, Royster must set forth evidence showing he would have made the same decision absent plaintiff's filing this case. See Sorranno's Gasco, 874 F.2d at 1314. In response, Royster emphasizes, before he knew about plaintiff's lawsuit, he told plaintiff he would be contacting the district attorney's office about the incident. Thus Royster plainly intended to turn the matter over to the judicial process before he knew about plaintiff's protected conduct (*i.e.*, filing this lawsuit). He expressed his concern about a sting operation involving a minor who was videotaped. Royster therefore held a proper motive before he even knew about plaintiff's lawsuit. Furthermore, the record conclusively establishes he asked plaintiff for the tape before he knew about plaintiff's lawsuit. Royster called for a county deputy to help him retrieve a copy of the tape from plaintiff's office before Deputy Kraus had told Royster about the lawsuit. He sought a search warrant only after he discovered the tape plaintiff had given him was incomplete. Under these facts, the court agrees no constitutional violation can be made out insofar as plaintiff's

retaliation claim is based on Royster's obtaining the search warrant.

However, the court views plaintiff's retaliation claim to go beyond Royster's obtaining the warrant. Plaintiff also essentially complains about Royster's conduct relevant to the manner in which the warrant was executed. The court construes plaintiff's argument on this point to essentially consist of two sub-parts: First, plaintiff complains about the aggressive nature of the search, in that numerous armed officers raided his office in search of evidence of a misdemeanor.[6] Second, plaintiff complains the search was overbroad, in that the warrant sought plaintiff's still camera which had nothing to do with the alleged interception offense.

The initial question is whether plaintiff's lawsuit was a "motivating" factor in defendant's decisions regarding the manner in which officers executed the search. See Soranno's Gasco, 874 F.2d at 1314. The evidence discussed above regarding Royster's obtaining the search warrant also satisfies plaintiff's burden on this initial question regarding the warrant's execution.

The next question becomes whether Royster satisfied his burden to show the same decisions would have been reached even absent plaintiff's lawsuit. See id. On this issue, the aggressive nature of the execution and the breadth of the search warrant must be evaluated separately.

Royster argues the participation of armed officers would have been no different even in the absence of this lawsuit. Plaintiff emphasizes Royster spread the message he presented a danger to officers, therefore causing the search to be carried out in a raid-like fashion with armed officers. Plaintiff also points out one officer testified he found it "unusual" Royster did not attempt to determine why plaintiff had bullet-proof vests and ammunition in his

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[6] Although Royster told plaintiff at the Get & Go an interception offense is a "felony," an offense under either ORS 165.543 or 165.540 is a misdemeanor.

office. This, according to plaintiff, further shows Royster sought to cause an armed raid in retaliation for plaintiff's lawsuit.

The court concludes Royster has carried his burden to show the aggressive nature of the search would have occurred no differently in the absence of his knowledge of plaintiff's lawsuit. First, as Royster emphasizes, he was not even in charge of executing the warrant; rather, Detective Ken Poggi, an officer with many years experience executing search warrants, was in charge of the warrant's execution. And while Royster told his colleagues about the evidence of weapons in plaintiff's office without mentioning plaintiff's lawful armor business, Detective Poggi testified he would have had the same officer-safety concerns even had he known about plaintiff's lawful business. In short, in Detective Poggi's view, the essential point was the possible presence of weapons in plaintiff's office, regardless of their purpose. Furthermore, as plaintiff conceded at the December 29 oral argument, there is no evidence suggesting Royster (or Poggi) knew about plaintiff's lawful armor business. Even assuming knowledge of the lawful nature of the bullet-proof vests and ammunition would have caused officers to execute the warrant less aggressively, the record does not show Royster held such knowledge to pass along. Instead, the record shows armed officers were involved in the search of plaintiff's office out of concern for officer safety. Plaintiff concedes officers may execute warrants to obtain evidence of misdemeanors and does not argue they cannot do so in a manner to guard against potential threats. The court in sum holds plaintiff's retaliation claim cannot be based on the aggressive nature of the search.

As for the breadth of the search warrant, however, the court concludes there is sufficient evidence to create a fact issue whether Royster would have sought plaintiff's still camera absent this lawsuit.[7]

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[7] While plaintiff generally argues the search was overbroad, he only specifically briefs the issue of the still camera's seizure. See Plaintiff's December 3, 2003 Letter Brief at 3.

(continued...)

Royster emphasizes the reason he sought the camera was simply because he saw plaintiff using it to take photographs while Royster was at plaintiff's office to obtain the videotape of the Get & Go encounter. According to Royster, the photographs taken by the still camera had evidentiary value because they showed Royster had contact with plaintiff on the day of the encounter and may have depicted plaintiff's computer equipment.

Read in favor of plaintiff, however, the record creates a fact issue whether Royster acted out of retaliation in specifying plaintiff's still camera in his warrant application. It is undisputed Royster knew about plaintiff's lawsuit prior to drafting his search-warrant application. The record also shows Royster had reason to know plaintiff had been photographing officers. Specifically, a secretary for the Oregon State Police–who is also the juvenile undercover witness's mother–informed Royster plaintiff had been "photographing" law enforcement personnel in Estacada. Thus, apart from Royster's proffered reason for obtaining the camera, the record suggests an alternative reason, related to this lawsuit, for Royster's seeking the camera: plaintiff had been gathering information about officers, in part, by photographing them. Moreover, the still camera had no relationship to the allegedly illegal recording at the Get & Go. Other officers who were involved in the warrant's execution in fact could not explain why the still camera might have been subject to seizure. Coupled with Royster's statement plaintiff should not be suing cops–which was made in the context of plaintiff complaining about officers seizing allegedly privileged information central to plaintiff's legal matters–Royster's reason to know plaintiff had been photographing officers, along with the marginal relevance of the still camera to the alleged offense, are sufficient to create a fact issue.

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[7] (...continued)
While the warrant also specified an array of computer equipment, plaintiff does not argue the equipment was unrelated to the purported interception offense. As a result, the court interprets plaintiff's overbreadth argument to be based on the seizure of the still camera.

In summary, plaintiff's retaliation claim cannot be based on Royster's obtaining the warrant. Nor can the retaliation claim be based on the aggressive manner in which the warrant was executed. However, a fact issue remains as to whether Royster "would have" sought to obtain the still camera absent plaintiff's filing this lawsuit. See Sorrano's Gasco, 874 F.2d at 1314.[8]

(2) Reasonableness

The second question is whether, with respect to the First Amendment right at issue, it would have been "clear to a reasonable officer that [Royster's] conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202.

The plaintiff answers the issue thusly: "No reasonable police officer could reasonably believe that obtaining a search warrant and conducting a raid on a citizen in retaliation for filing a suit against law enforcement personnel and agencies is a lawful use of power." Relying on cases from other circuits, Royster responds immunity inherently attaches, regardless of an officer's motives, whenever an officer had probable cause to act and thus did not violate the Fourth Amendment.

As Royster recognizes, courts in other circuits have considered the interplay of a First Amendment retaliation claim and a Fourth Amendment claim which failed because officers had probable cause to engage in the conduct at issue. For example, in Mozzochi v. Borden, 959 F.2d 1174, 1180-81 (2d Cir 1992), the Second Circuit declined to recognize a retaliation claim where the official possessed probable cause to inform the town's police chief about a threatening letter which plaintiff had written and which gave rise to probable cause to believe

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[8] While plaintiff also suggests Royster might have retaliated against him for withholding evidence (*i.e.*, the videotape), he does not show how this involves the exercise of well established First Amendment rights. See Soranno's Gasco, 874 F.2d at 1314 (observing retaliation claim depends upon showing official retaliated against plaintiff because of plaintiff's exercise of First Amendment rights). Accordingly, to the extent his retaliation claim is based on such a motive, the claim is not viable.

a harassment statute violation occurred. The circuit court noted the record showed the plaintiff had not been "actually prevented from" exercising his First Amendment rights. Id. at 1181. The court concluded, "because there was probable cause . . . to believe [plaintiff] violated the harassment statute, we will not examine the defendants' motives in reporting [plaintiff's] actions to the police for prosecution." Id. at 1179.

When an officer had probable cause but also a retaliatory motive, the Fifth Circuit has observed, "the objectives of law enforcement take primacy over the citizen's right to avoid retaliation." Keenan v. Tejeda, 290 F.3d 252, 262 (5th Cir. 2002). In sum, under this analysis, "[i]f probable cause exists . . . or if reasonable officers could believe probable cause existed, [defendant-officers] are exonerated." Id.; see also Wood v. Kesler, 323 F.3d 872, 883 (11th Cir. 2003) (granting immunity to officer on retaliation claim because the officer had probable cause to initiate prosecution); Singer v. Fulton County Sheriff, 63 F.3d 110, 120 (2d Cir. 1995) ("[I]f the officer either had probable cause or was qualifiedly immune from subsequent suit (due to an objectively reasonable belief that he had probable cause), then we will not examine the officer's underlying motive in arresting and charging plaintiff."). But see Greene v. Barber, 310 F.3d 889, 895 (6th Cir. 2002) ("[T]he existence of probable cause is not determinative of the constitutional question if, as alleged here, the plaintiff was arrested in retaliation for his having engaged in constitutionally protected speech.").

Plaintiff takes issue with Royster's proffered approach and cites two Ninth Circuit cases to support the argument Royster's motive must be analyzed under the qualified immunity standard. See Soranno's Gasco, 847 F.2d 1310; Gasho, 39 F.3d at 1438. Soranno's Gasco, however, does not involve a retaliation claim based on conduct at issue under the Fourth Amendment and for which probable cause existed. And Gasho did not involve a First Amendment retaliation claim. See Gasho, 39 F.3d at 1438-39. Moreover, while Gasho

involved arrests under the Fourth Amendment, no probable cause existed to support the arrests. See Gasho, 39 F.3d at 1429-30, 1432, 1438-39; see also Duran v. City of Douglas, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (holding summary judgment was inappropriate on Fourth Amendment claim because officer *lacked legal cause* to detain the plaintiff, and further holding summary judgment was inappropriate on plaintiff's retaliation claim because a fact issue existed whether the detention was in retaliation for plaintiff's expressive conduct).

The court finds persuasive those cases reasoning immunity is appropriate when a retaliation claim implicates conduct for which a reasonable officer could have believed probable cause existed. First, as a general policy matter, subjecting officers to liability, even though a reasonable officer could have believed probable cause existed, might encourage officers to shirk their duty to enforce the law whenever the suspect has in some way expressed an opinion adverse to law enforcement. In contrast, when the officer has not acted with probable cause, it is more likely the officer has acted to silence criticism, rather than to enforce the law. Furthermore, it is difficult to say "clearly established" law provides that an officer who acts pursuant to a reasonable belief probable cause exists but who also acted with some retaliatory motive towards the plaintiff violates the constitution. See Saucier, 533 U.S. at 202 ("The contours of the [constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). The cases cited above indicate this issue is not clearly settled.

In this case, as the court held above, a reasonable officer could have believed Royster had probable cause to believe a crime had been committed, therefore justifying the issuance of the search warrant. Moreover, while not probative of plaintiff's prima facie case, the court also notes there is no indication Royster's conduct has "actually chilled" plaintiff's pursuit of this case. See Mozzochi, 959 F.2d at 1178-79.

Thus, under the facts presented, Royster makes a strong argument the court should apply the analysis set out in the out-of-circuit cases upon which he relies. However, as discussed above, the court holds Royster carried his burden to show he would have sought a warrant regardless of this lawsuit; a constitutional violation therefore cannot be made out insofar as plaintiff's retaliation claim is based on Royster's obtaining the warrant. Accordingly, the court does not decide whether the analysis in the out-of-circuit cases cited above gives Royster immunity from a retaliation claim that is based on the warrant's issuance. See Saucier, 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity.").

But, again, the court views plaintiff's retaliation claim to also rely on the manner in which the warrant was executed. Even if the court were inclined to apply the analysis advocated by Royster and his out-of-circuit cases, however, that analysis nevertheless would be inapplicable to the extent the retaliation claim is based on the manner in which the warrant was executed. The warrant's execution, unlike its issuance, is not inextricably intertwined with the probable cause issue. Royster's competing motives for how the warrant was executed turn on, for instance, whether it was reasonable for him to believe plaintiff posed a danger or to believe the property seized was proper evidence of the alleged interception offense. But his motives on these issue are separable from whether probable cause existed for the issuance of the warrant. In resolving the immunity issue for retaliation claims not based on decisions which are separately supportable by probable cause, there is ample Ninth Circuit precedent.

While the Supreme Court has emphasized the qualified-immunity test is an objective one, the defendant's motive is not entirely irrelevant when plaintiff's affirmative claim requires him to prove motive. See Jeffers v. Gomez, 267 F.3d 895, 906 (9th Cir. 2001)

(citing Crawford-El v. Britton, 523 U.S. 574 (1998)). As recently explained by the Ninth Circuit:

> Crawford-El states that, "although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case." Crawford-El, 523 U.S. at 589. In context, Crawford-El appears to be speaking about the kind of motive considered in Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982), where the plaintiff alleges that the defendant's objectively reasonable conduct was motivated by malice. But some constitutional rights involve freedom *only* from governmental action taken because of a bad motive. In such cases, the question whether the officer's conduct was "objectively" reasonable inevitably requires us to look at whether a reasonable officer could have known that acting with a particular mental state violated the plaintiff's rights.

Jeffers, 267 F.3d at 906 (emphasis in original). Thus, when, as here, the plaintiff must prove motive to state a claim, fact issues regarding the defendant's motive can preclude qualified immunity. For example, "it may be clear to any reasonable officer that engaging in Conduct X with Motive Y is unconstitutional, but there is a factual question whether the conduct occurred." Id. Or: "Conduct X is undisputed, but it is disputed whether the defendant possessed Motive Y. No reasonable defendant could believe that doing X with Motive Y is constitutional; but *every* reasonable defendant would believe that doing X with Motive Z is constitutional." Id. (emphasis in original).

The execution of the warrant falls most comfortably in this latter category. Conduct X for the most part is undisputed but the parties dispute Royster's motivation. And, the Ninth Circuit has held, "an individual ha[s] a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected" exercise of First Amendment rights. Soranno's Gasco, 874 F.2d at 1319; see also Duran, 904 F.2d at 1378 ("[It is] well established . . . government officials in general, and police officers in particular, may not exercise their authority for personal motives . . . . Surely anyone who takes an oath of office knows–or should know–that much."). Thus, the issue is

whether plaintiff "'put forward specific, nonconclusory factual allegations' that establish improper motive." Jeffers, 267 F.3d at 907 (quoting Crawford-El, 523 U.S. at 598). And, while "specific, nonconclusory" allegations" are necessary to create a fact issue, in resolving retaliation claims, the Ninth Circuit has emphasized: "'Questions involving a person's state of mind . . . are generally factual issues inappropriate for resolution by summary judgment.'" Mendocino Envtl. Ctr., 192 F.3d at 1303-04 (quoting Braxton-Secret v. Robins Co., 769 F.2d 528, 531 (9th Cir. 1985)); see also Soranno's Gasco, 874 F.3d at 1315. In sum, when specific allegations show fact issues regarding the defendant's motive exist, qualified immunity on a retaliation claim is inappropriate. See, e.g., Mendocino Envtl. Ctr., 192 F.3d at 1303-04; Chateaubriand v. Gaspard, 97 F.3d 1218, 1223 (9th Cir. 1996); Soranno's Gasco, 874 F.2d at 1319 & n.7 (citing cases); Duran, 904 F.2d at 1378.

Although the court finds the issue close, there is sufficient evidence of improper motive to create a jury issue and, therefore, render qualified immunity on the retaliation claim inappropriate. As more fully discussed above, while a material fact issue regarding the nature of the raid does not exist, there is sufficient evidence to get to a jury on the retaliation claim to the extent it is based on plaintiff's contention the warrant was overbroad. Royster, for example, may be able to show he would have sought plaintiff's still camera regardless of this lawsuit, because he witnessed plaintiff using the camera at plaintiff's office on the day of the Get & Go incident. But, "'[t]he possibility that other inferences could be drawn that would provide an alternate explanation for [Royster's] actions does not entitle [him] to summary judgment.'" Mendocino Envtl. Ctr., 192 F.3d at 1303 (quoting United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989) (inference need not be most likely but merely a "rational" or "reasonable" one)).

IV. Defendant Clackamas County's Summary Judgment Motion

Two claims against the county remain before the court, a defamation claim and

negligent supervision claim. The county moves for summary judgment on both claims. For the reasons discussed below, summary judgment is denied as to defamation, and granted as to negligent supervision.

Summary judgment is appropriate only when there is not any genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Metro Indus., Inc. v. Sammi Corp., 82 F.3d 839, 847 (9th Cir. 1996). The moving party can satisfy this burden by showing an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The burden then shifts to the non-moving party to set forth facts demonstrating there is a genuine issue of fact for trial. Id. All justifiable inferences, however, must be viewed in the light most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

A. Defamation Claim

Plaintiff bases his defamation claim against the county on the photograph Deputy Kraus posted on the county's "safety board" and which was disseminated with a caption in an "officer safety bulletin." The county moves for summary judgment, arguing the defenses of truth and qualified privilege protect it from liability. The county makes no other arguments in its summary judgment briefing.

At oral argument, however, for the first time in the case, the county argued plaintiff's defamation claim should not include the caption found in the officer-safety bulletin but should be limited to Kraus's posting the photograph, without a caption, on the bulletin board. The county's argument is based on the fact plaintiff's third amended complaint fails to specifically mention the caption or the safety bulletin. The court rejects the county's belated

attempt to narrowly confine the defamation claim. Under the Federal Rules' liberal "notice" pleading standards, the county cannot now complain the third amended complaint failed to give it fair notice of a claim encompassing the captioned photograph in the officer-safety bulletin. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-14 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."). The third amended complaint alleges a claim based on the posting of plaintiff's photograph, thereby imputing dangerous criminal conduct to plaintiff. Thus the context in which the photograph appeared is key to evaluating plaintiff's defamation claim. See Reesman v. Highfill, 327 Or. 597, 603 (1998). The record conclusively establishes that the photograph's context includes, in addition to the bulletin board, the safety bulletin in which the caption appeared.

Most important for purposes of analyzing whether the county had "fair notice" of the defamation claim's scope, in moving for summary judgment, the county interpreted the claim as one based on the safety bulletin's captioned photograph. The county cannot move for summary judgment on a claim as defined one way and then argue, after plaintiff has responded to the county's summary judgment briefing, the claim is actually defined more narrowly. In sum, the county cannot, at this late stage, claim it did not have "fair notice" of a defamation claim including the captioned photograph. Accordingly, the court concludes the claim includes the context of the captioned photograph appearing in the bulletin, and turns to the merits of the county's summary judgment arguments, which are based entirely on the captioned photograph.

A defamatory communication is one that would tend to "diminish the esteem, respect, goodwill, or confidence in which [the plaintiff] is held or to excite adverse, derogatory or unpleasant feelings or opinions against [the plaintiff]." Reesman, 327 Or. at 603. The court, not the jury, determines whether a communication is capable of defamatory meaning. Id. In

making that determination, as already indicated, the court looks to the context in which the communication was made. Id.

The photograph and its caption, especially when viewed in context, was capable of defamatory meaning. The photo appears under the heading "officer safety" and with convicted criminals. The caption recounts the bullet-riddled door and states plaintiff has been "aggressive" around officers. Reasonably read in its context, the implication arising out of the captioned photograph is plaintiff, a well-established businessman and active member in the community, poses a danger to the community and officers in particular.[9]

The county argues the caption is true. Plaintiff concedes the literal truth of the caption's statements except for the statements, "[h]e has followed deputies" and "this subject has been aggressive in his mannerisms around some deputies."[10] Plaintiff conceded at his deposition he acted aggressively on one occasion when he told Deputy Thompson to stay away from his family. The particular statement about plaintiff being aggressive is therefore "substantially true." See Volm v. Legacy Health Sys., Inc., 237 F. Supp. 2d 1166, 1178 (D. Or. 2002) ("A statement is true or substantially true if the 'gist' or 'sting' is true, even if the statement contains slight inaccuracies.").

The record, however, creates a fact issue whether plaintiff "followed" deputies. While it is true deputies often saw plaintiff around Estacada (which, the record shows, is a very small town) this does not mean plaintiff actively pursued the deputies as the statement

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[9] The document on which the photograph appears states it was "for law enforcement only." Nevertheless, "publication," a necessary element of a defamation claim, is satisfied. Cf. Wallulis v. Dymowski, 323 Or. 337, 346 (1996) ("'The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership, or a corporation.'" (quoting RESTATEMENT (SECOND) OF TORTS § 577 comment i)). In any event, the county does not argue publication did not occur.

[10] The county argues plaintiff in his summary judgment response abandoned his position the statement about him "following" deputies was false. The court does not read plaintiff's response so strictly.

suggests. Rather, the record suggests encounters with deputies resulted because they were staking out plaintiff's home. And given the statement's context, as discussed above, it is capable of defamatory meaning.

In any event, even when statements literally are true, the statements can be actionable if they give rise to false and defamatory implications. See Reesman, 327 Or. at 604; Crane v. Arizona Republic, 972 F.2d 1511, 1523 (9th Cir. 1992) (recognizing, while all statements in a publication may be true, the publication may nevertheless convey a substantially false and defamatory impression by suggestively juxtaposing true facts); Volm, 237 F. Supp. 2d at 1178 (recognizing if statements are capable of a false defamatory implication, they may be actionable); see also Turner v. KTRK Television, Inc., 38 S.W.3d 103, 116 (Tex. 2000) (observing, in light of recent U.S. Supreme Court precedent, courts should evaluate falsity "based on the meaning a reasonable person would attribute to a publication and not on a technical analysis of each individual statement"). The link between the communication and the defamatory inference must not be "too tenuous." Reesman, 327 Or. at 604. Thus the issue is "whether the context in which the statement appears creates a reasonable implication" which is false and defamatory. Id. at 605.

As mentioned, a reasonable reader could determine the captioned photograph, appearing in an "officer safety" bulletin, implies the existence of facts showing plaintiff was violent and presented a danger to officers, implications the record does not conclusively show are true. And while the record shows plaintiff might have appeared at or drove by traffic stops, the record does not establish plaintiff was purposefully targeting deputies to threaten their safety, as the caption suggests. In addition, the caption's mention of the bullet-riddled car door and Kevlar panel suggest he had these items for "his protection," supporting an implication these items were not part of a valid business but rather associated with

improper purposes.[11]

The county further argues it cannot be liable for defamation because the statements about plaintiff were privileged. A qualified privilege exists when an otherwise actionable statement (1) was made to protect the defendant's interests, (2) was made to protect the interests of plaintiff's employer, or (3) was on a subject of mutual concern to the defendant and the persons to whom the statement was made. Wattenburg v. United Med. Lab., 269 Or. 377, 380 (1974). Defendant sufficiently shows the captioned photograph was privileged because it was made to protect the defendant's interests, in that the caption was meant to alert officers to a perceived threat.

But even when a defendant shows the elements of qualified privilege, the plaintiff can defeat the privilege by showing the defendant "abused the privilege[]." Wallulis v. Dymkowski, 323 Or. 337, 348 (1995). To show an abuse of the privilege, the plaintiff must show evidence of "improper motive" on the part of the defendant. Wattenburg, 269 Or. at 380. The privilege can be lost when the speaker did not in fact believe the statement or when it was "uttered for a motive unrelated to the purpose of the privilege." Muresan v. Philadelphia Romanian Pentecostal Church, 154 Or. App. 465, 472 (1998).

The evidence, viewed in favor of the plaintiff, creates a jury question on the issue of

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[11] For example, an Oregon state police supervisor testified at his deposition as follows:

> A: [A]s a law enforcement officer, nobody needs to explain to me, you know, if you see a car door with holes, bullet holes, in it with circles around the holes, protective vests and bullets, nobody has to explain to me something like that, I pretty much can draw my own conclusions.
>
> Q: What conclusions would you draw, or did you draw?
>
> A: Well, my conclusion would be that someone's been shooting at car doors to see [sic] for penetration, which raises red flags to me for officer safety.

Lucas Depo. at 28-29.

improper motive. This evidence includes deputies' following and surveillance of plaintiff and his wife, occurring shortly after plaintiff sued the county. For example, plaintiff saw Deputy Kraus and other deputies parked within view of plaintiff's home on numerous occasions. As plaintiff put it, deputies were "staking him out." While plaintiff had a suspended drivers license, which might help explain some of the surveillance, the facts give rise to a jury issue whether the surveillance was undertaken for purposes connected to plaintiff's lawsuit. For instance, Kraus testified it was not "typically [his] practice . . . to increase patrols near residences . . . where an occupant has a suspended license." Kraus Depo. at 58. While Kraus indicated it was not uncommon for officers to "pay more attention" to people known to be prohibited from engaging in certain conduct, such as driving, the record construed in favor of plaintiff does not show officers' surveillance of plaintiff's home was within standard practice. Moreover, officers, including Deputy Kraus, never asked plaintiff why he had the armor and related items, which he supplied to county officers through his business. Cf. Wallulis, 323 Or. at 351 n.7 (finding evidence of improper motive where defendant stated plaintiff had "a substance abuse problem" without verifying the accuracy of the statement, where evidence suggested he only had a drinking problem). As Kraus testified, Estacada is a "small town" where "there's not that many people." Kraus Depo. at 58. And plaintiff had lived in Estacada for about thirty years. In addition, his armor business was well known throughout the town, as, for example, it had been reported on in an article in the local newspaper. Moreover, Kraus had known plaintiff's identity for years; Kraus, for example, knew where plaintiff lived and worked. Kraus also personally signed, on at least four occasions, fireworks-display permits submitted by plaintiff. Based on the record, a jury reasonably could infer Kraus had notice that plaintiff did not present a danger and that the presence of the bullet-riddled car door and Kevlar were not cause for concern regarding officer safety. In sum, summary judgment is inappropriate on

the defamation claim.

B. Negligent Supervision

Plaintiff argues the county failed to supervise and train county deputies to prevent them from violating his rights. More specifically, plaintiff's complaint shows this claim is based on the county's failure to prevent its deputies from engaging in retaliatory conduct. The county moved for summary judgment, arguing no evidence existed showing deputies engaged in improper conduct or the county should have known about any misconduct.[12]

To establish a claim for negligent supervision, plaintiff must, at the least, show the county knew or should have known about improper conduct by its employees presenting a risk of injury to the plaintiff. See Whelan v. Albertson's, Inc., 129 Or. App. 501, 507 (1994).[13] Plaintiff does not come forward with sufficient evidence to meet this standard.

Plaintiff first argues the county should have known about its employees' conduct when he originally filed his complaint in December 2000. But the one county deputy defendant named in the complaint, Mark Fresh, plaintiff no longer even seeks to sue. And, as the county points out, the original complaint made no allegations of retaliation.

Plaintiff also relies on the fact Deputy Thompson notified his supervisor after, on January 21, 2001, Thompson had stopped plaintiff's wife and plaintiff told him to stay away from plaintiff's family. But this evidence goes no further than "he contacted his supervisor." It does not show Thompson gave his supervisor any reason to think he had acted inappropriately during the encounters with plaintiff and plaintiff's wife. The more reasonable

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[12] At oral argument, the Court ordered supplemental briefing on this claim. The parties' arguments are gleaned from that briefing, as well as the summary judgment briefing.

[13] Albertson's did not definitively accept the viability of a negligent-supervision cause of action under Oregon law. See Albertson's, 129 Or. App. at 507 (stating, "[e]ven if we accept [negligent supervision theory in] Restatement (Second) of Torts § 317," liability was inappropriate in that case). The court need not determinatively decide the viability of the negligent-supervision theory under this case's circumstances, as the parties do not brief it and it is unnecessary for the court's disposition.

inference is Thompson, without admitting any retaliatory or otherwise improper conduct on his part, simply complained about plaintiff's conduct. In fact, plaintiff relies on a letter Thompson's supervisor drafted in which he evaluated Thompson's conduct; the letter does not suggest the supervisor found Thompson's conduct inappropriate. And rather than showing any negligence on the part of the county, the letter shows the county investigated Thompson's stopping plaintiff's wife. Even assuming Thompson's account was false, there is no evidence showing the county had reason to know it was false.

Finally, plaintiff relies on his letter to the county attorney, dated February 16, 2001. In that letter, plaintiff's attorneys complained about deputies "harass[ing] Daniel Skoog's wife," and discusses two incidents, when Thompson stopped her on January 21 and when Deputy Kraus stopped her on February 15. This letter states the deputies justified their stops by stating plaintiff's license was suspended, suggesting the deputies thought plaintiff, not his wife, was driving. Thus, from the county's perspective, the letter suggests the deputies had a proper reason to stop plaintiff's wife. Moreover, as discussed above, the county had already investigated the incident involving Thompson, accepting his explanation he did not know plaintiff's wife was driving. With respect to the incident involving Kraus, plaintiff had in fact called the county to pass along his appreciation for Kraus's politeness towards his wife. While plaintiff now argues this call was sarcasm, the content of his message did not suggest to the county Kraus had acted out of retaliation or otherwise improperly.

In sum, in responding to the county's motion on negligent supervision, plaintiff has failed to set forth "'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Accordingly, summary judgment is GRANTED on the negligent supervision claim.

CONCLUSION

For the reasons discussed above, Defendant Royster's motion for summary judgment

(Doc.#85) is GRANTED in part and DENIED in part. Defendants Mark Fresh and Clackamas County's motion for summary judgment (Doc. #90) is GRANTED IN PART, DENIED IN PART. As for Fresh, summary judgment is GRANTED in full. As for the county, summary judgment is GRANTED on all claims except the defamation claim.

Plaintiff's motion for leave to file fourth amended complaint (Doc. #118) is DENIED.

IT IS SO ORDERED

DATED this 12 day of January, 2004.

/s/ Michael W. Mosman
Michael W. Mosman
United States District Judge