SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0631-21

THOMAS ALETTA,

Plaintiff-Appellant,

v.

BERGEN COUNTY PROSECUTOR'S OFFICE (BCPO) (its directors, officers, servants, agents, assignees, delegates, and/or employees), STATE OF NEW JERSEY, (its directors, officers, servants, agents, assignees, delegates, and/or employees), BERGEN COUNTY PROSECUTOR JOHN MOLINELLI (in his individual, administrative and official representative capacity), BCPO LIEUTENANT JAY HAVILAND (in his individual, administrative and official representative capacity), and BCPO AP DANIEL KEITEL, (in his individual, administrative and official representative capacity),

Defendants-Respondents.

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Argued January 9, 2024 – Decided May 29, 2024

Before Judges Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7873-15.

Eric Victor Kleiner argued the cause for appellant (Eric Victor Kleiner, and Lawrence H. Kleiner, LLC, attorneys; Eric Victor Kleiner and Lawrence Herman Kleiner, on the briefs).

Jae K. Shim, Deputy Attorney General, argued the cause for respondents (Matthew J. Platkin, Attorney General, attorney; Donna S. Arons, Assistant Attorney General, of counsel; Justine M. Longa, Deputy Attorney General, on the brief).

PER CURIAM

After plaintiff Thomas Aletta, a former police officer for the Hackensack Police Department (HPD), was acquitted of official misconduct, conspiracy and evidence tampering, he sued defendants Bergen County Prosecutor's Office (BCPO), State of New Jersey, then-Prosecutor for Bergen County John Molinelli, BCPO Investigator Lieutenant Jay Haviland, and BCPO Assistant Prosecutor Daniel Keitel (collectively, defendants) in an eight-count complaint alleging a politically motivated conspiracy to prosecute him contrary to state and federal law. Following protracted and contentious motion practice, the court granted defendants' Rule 4:6-2(e) motion and dismissed all of plaintiff's claims.

In an oral decision, the court concluded defendants were entitled to immunity from liability for all of plaintiff's claims on various grounds, including common law prosecutorial immunity and several provisions of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12-3, specifically prosecutorial immunity under N.J.S.A. 59:3-8, discretionary immunity under N.J.S.A. 59:2-3, and plaintiff's failure to vault the verbal threshold for pain and suffering damages under N.J.S.A. 59:9-2(d).

For the reasons detailed in this opinion, we affirm the court's decision to dismiss plaintiff's claims in part. As to the entity defendants, we are satisfied the claims against each were properly dismissed, albeit for different reasons than those stated by the court. We also conclude the court correctly determined the individual defendants were entitled to immunity for their roles in plaintiff's prosecution, except as to the allegations that (1) Molinelli, Keitel, and Lt. Haviland pressured witnesses to lie or change their statements, (2) Lt. Haviland destroyed exculpatory evidence, and (3) Molinelli and Keitel presented false testimony to the court and/or grand jury.

Properly and indulgently reading the complaint as we are obligated under Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989), plaintiff alleged individuals associated with BCPO improperly coerced

witnesses to conform their statements to a particular prosecution theory. The record before us provides insufficient information, however, to determine whether Molinelli, Keitel, or Lt. Haviland were entitled to common law or TCA immunity for those actions, however, and we remand with direction for plaintiff to precisely identify each instance forming the basis for his claims.

Additionally, again taking plaintiff's allegations as true, Lt. Haviland would not be entitled to common law or TCA immunity for his alleged willful destruction of exculpatory evidence, as his conduct would constitute willful misconduct outside the scope of his employment, and a violation of a plaintiff's clearly established rights under the Fourteenth Amendment. Similarly, Molinelli and Keitel would not be entitled to TCA immunity for their purported knowing presentation of false testimony at the grand jury and/or at trial, as that would also constitute willful misconduct.

We accordingly affirm in part, reverse in part, vacate in part, and remand for proceedings consistent with this opinion.

I.

We discern the following facts from the motion record, taking the facts as pled to be "true" and according plaintiff "all legitimate inferences," as required under Banco Popular N. Am. v. Gandi, 184 N.J. 161, 166 (2005). As noted,

plaintiff was a police officer with the HPD for twenty-five years, attaining the ranks of detective and sergeant. In 2004, when the events underlying plaintiff's prosecution occurred, he was assigned to the Youth Division, investigating major crimes involving juveniles.

Plaintiff was finishing his shift just after midnight on September 1, 2004 when HPD received a 911 call involving a potential assault and robbery. Along with Laura Campos, another HPD officer, plaintiff responded to the scene where he met the victim, fifteen-year-old A.A.[1] After being transported to the hospital, A.A. reported a silver vehicle pulled up to him and two of his friends while they were riding their bicycles. He told the officers five males then "got out of the car and cornered him," and one of the assailants punched him in the face, knocking out one of his teeth. A.A. stated the assailants took his cell phone, which he was able to get back, his helmet, and his baseball cap, before fleeing in their car. A.A. identified the assailants as attending Hackensack High School but would not provide any further details. Officer Campos prepared the initial police report in the A.A. incident in the early morning hours of September 1, 2004. No initial suspect was identified in the report.

[1] We use initials to protect the identity of the juveniles involved. See R. 1:38-3(d)(5).

Later that day, plaintiff went to a 7-11 store near the location of the assault, as he knew many juveniles frequented the store and hoped to identify a suspect in the A.A. case. He and HPD Detective Sara Malvasia viewed 7-11's surveillance video from the previous night, where they observed A.A. and another juvenile, who they both recognized as either R.T. or M.T. R.T. and M.T. are brothers, and the sons of K.T., who at that time was the girlfriend of then-Chief of Police of the HPD Charles "Ken" Zisa. Although the 7-11 video did not show the assault, plaintiff and Det. Malvasia retained a copy on VHS tape.

Subsequently, plaintiff and Det. Malvasia went to K.T.'s home, where Chief Zisa also lived, to show her the video and investigate whether her children knew anything about the incident. K.T. questioned R.T. and M.T., but the brothers were not shown the video. Chief Zisa and K.T. identified M.T. in the 7-11 video.

Shortly after midnight on September 2, 2004, plaintiff and Det. Malvasia returned to HPD headquarters, and Chief Zisa, K.T., R.T., and M.T. arrived separately. Plaintiff processed both R.T. and M.T. and provided K.T. with "a report/standard juvenile release form" informing her that her sons had been accused of the assault on A.A., and conspiracy to aid the assault, respectively.

Plaintiff advised R.T. of his Miranda[2] rights at approximately 1:15 a.m. on September 2, 2004. R.T. signed a form agreeing to waive his Miranda rights, which was mistakenly dated September 1, 2004 at 2:15 a.m. rather than September 2, 2004 at 1:15 a.m., and made a statement to plaintiff. After conducting further investigation, plaintiff completed a police report on September 15, 2004 listing R.T. and two other juveniles as responsible for the assault on A.A.

According to plaintiff's report, A.A.'s father "did not wish to pursue criminal complaints" but sought only restitution for medical expenses. Consistent with that desire, HPD did not initiate formal juvenile delinquency proceedings for any of the juveniles, including R.T. and M.T., but instead completed "station house adjustment[s]." This was a common practice at that time for juvenile cases at HPD, with "[a]s many as 40% of juvenile cases that were investigated or reported" being deferred through station house adjustment. R.T. and M.T. wrote apology letters and K.T. paid A.A.'s parents for their incurred medical expenses.

In September 2004, the HPD Youth Division had no evidence locker and plaintiff often kept video tapes in cases that did not lead to arrests or prosecution,

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

including the 7-11 video from the A.A. case, "on his desk in plain view." When plaintiff was promoted to sergeant, his work area was moved out of the Youth Division and accordingly, he "was ordered to remove from HPD all these tapes and either throw them away or keep them somewhere out of the office." Plaintiff took the tapes to his home, where he stored them in his attic.

Plaintiff alleged his prosecution arose from a political conspiracy. Specifically, he asserted that in 2005, Chief Zisa and then-member of the New Jersey General Assembly, Loretta Weinberg, fought for an open seat in the State Senate, leading to what plaintiff describes as "a political war for control over the Bergen County Democratic Party." Weinberg prevailed in the Senate race and, according to plaintiff, offered her support to others at HPD seeking to "oust" Chief Zisa beginning in 2009.

Plaintiff alleged Senator Weinberg "opposed and blocked defendant Molinelli's bid to be approved for his renomination as Bergen County Prosecutor" in 2007. He averred Senator Weinberg's subsequent withdrawal of her opposition, permitting Molinelli's confirmation for another term, gave her control over Molinelli, which she used to direct BCPO to investigate and prosecute Chief Zisa and his allies, including plaintiff and HPD Captain Danilo Garcia.

Molinelli and his staff in BCPO's Confidential Investigations Unit, including defendants Lt. Haviland and Assistant Prosecutor Keitel, began to investigate Chief Zisa, plaintiff, and Captain Garcia in approximately February of 2010. Plaintiff alleges Senator Weinberg, acting through unidentified "intermediaries" offered "favorable treatment" to HPD officers facing administrative or criminal charges who were willing to provide "inculpatory evidence against Zisa." Ultimately, BCPO's investigation narrowed to the A.A. incident in 2004 and another, unrelated incident involving K.T. and Chief Zisa in 2008. BCPO suspected plaintiff improperly sought to obscure R.T.'s involvement in the A.A. case, disclosed the 7-11 video to K.T. contrary to police procedure, concealed the 7-11 video by removing it from HPD headquarters, and failed to properly charge R.T. for A.A.'s assault.

Officer Campos provided two sworn statements to BCPO regarding the A.A. case. Plaintiff alleged BCPO directed her to falsify her statements to inculpate plaintiff by threatening her with administrative discipline and/or criminal prosecution. Officer Campos stated Captain Garcia "pressured her to remove the name [R.T.] from her police report" in the A.A. case "to protect [Chief] Zisa's girlfriend's son," and "plaintiff told her to do whatever Captain

Garcia instructed her to do," despite HPD duty logs reflecting Captain Garcia's shift did not start until 8:30 a.m. on September 1, 2004.

Additionally, Officer Campos initially stated Chief Zisa was not present at HPD headquarters when she returned in the early morning of September 1, 2004, but in her second statement, reversed course and, according to plaintiff, "indicat[ed] falsely that [Chief] Zisa was in the police station when [Officer] Campos was preparing her report." Officer Campos explained she changed her statement after reviewing her private journal which refreshed her recollection about Chief Zisa's involvement in the A.A. matter. Later, however, following subpoenas for the journal in the ensuing criminal cases, Officer Campos admitted to the court the journal was destroyed in 2008, approximately two years before either of her statements to BCPO.

HPD Lieutenant Fred Puglisi also made two statements to BCPO. In his first statement, Lt. Puglisi "swore that the identity of [R.T.] was not known and he was not in HPD during [Lt. Puglisi's] shift that ended in the morning hours of September 1, 2004." Subsequently, however, plaintiff alleged he also changed his testimony to reflect that R.T. was at HPD headquarters on that date. Lt. Puglisi also stated "he never saw a report from [Officer] Campos that ever

listed [R.T.] or any actor as being identified in any drafts of reports" he reviewed.

Det. Malvasia also provided multiple statements to BCPO. In the first statement, she confirmed she was present when plaintiff advised R.T. of his Miranda rights and completed the form, and "she was positive that plaintiff had made an error" in the date on the form. She explained "she knew that it was 1:15 a.m. on September 2, 2004 because at 2:15 a.m. the daily activity logs clearly show that [Det.] Malvasia was dispatched with [Officer] Campos to handle a transport of a juvenile to a location that was outside the city limits." Det. Malvasia also noted she was off duty on September 1, 2004.

In Det. Malvasia's second statement on April 20, 2010, however, she too changed positions. According to plaintiff, she "feared being placed under arrest and being charged interdepartmentally unless she provided the defendants . . . with inculpatory evidence as to plaintiff[,] [Captain] Garcia, and/or [Chief] Zisa." In particular, Det. Malvasia reported R.T. was "known by plaintiff to have been involved in the assault" on A.A. on the morning of September 1, 2004, "plaintiff purposely tried to suppress the identity of [R.T.] from being discovered as an actor in the case," and plaintiff did not follow "established procedure" in his retention of the 7-11 video tape.

According to plaintiff, BCPO also misled HPD Officer James Prise to obtain his statement that he saw Chief Zisa, K.T., R.T., and M.T. come into HPD headquarters on the morning of September 1, 2004 rather than September 2. As reflected in Officer Prise's daily activity log, he was out responding to calls beginning around midnight and did not return until approximately 4:00 a.m. Additionally, HPD Civil Dispatcher William Connelly, who plaintiff alleged "had animus against [Chief] Zisa" and was "eager" to "give false testimony" and "manufacture false evidence in the form of a calendar or journal he kept at the HPD," stated to BCPO "he saw [Chief] Zisa enter the HPD in the early morning hours of September 1, 2004 and that [Chief] Zisa proceeded to open the rear HPD door and let in [K.T.], her son [R.T.], and plaintiff."

Finally, BCPO interviewed A.A. as part of their investigation of Chief Zisa, Captain Garcia, and plaintiff. A.A. confirmed "[h]e had not identified anyone as the assailant . . . at any time on September 1, 2004" and did not know who R.T. was. According to plaintiff, A.A. spontaneously stated unnamed representatives of BCPO "prepped him to be able to identify [R.T.]'s picture to give the false appearance that [A.A.] had identified" him in 2004.

Plaintiff's complaint does not specify when the statements of A.A., Connelly or Officer Prise were made, nor when Det. Malvasia gave her first

statement. Further, plaintiff does not precisely identify who from BCPO was present or involved with any of the witnesses.

Armed with these statements, BCPO arrested plaintiff on May 26, 2010, and sought and obtained an indictment against Chief Zisa, Captain Garcia and plaintiff on October 19, 2010. Plaintiff was charged with conspiracy to commit official misconduct, official misconduct by knowingly committing unauthorized acts, official misconduct by knowingly refraining from performing a duty, and tampering with evidence, all related to the A.A. case.

On two occasions, September 23, 2010 and October 19, 2010, plaintiff's, Captain Garcia's, and Chief Zisa's defense attorneys sent the BCPO a letter advising "all notes made by law enforcement and other tangible evidence in existence must be retained and not destroyed." Despite this demand, plaintiff averred Lt. Haviland, at the direction of Prosecutor Molinelli and Assistant Prosecutor Keitel, ordered BCPO investigators to "immediately destroy everything they had in their offices on the cases involving [Chief] Zisa, plaintiff, and [Cpt.] Garcia."

As BCPO Investigators Gary Robinson, Robert Pasquariello,[3] and Dave Rodgers testified during Chief Zisa's trial,[4] Lt. Haviland instructed them on approximately October 21, 2010, to "get rid of all [their] notes and [their] emails on the Zisa case," including those pertaining to the 2004 incident. Investigator Robinson testified Lt. Haviland stated he was "getting a burn box" which he then instructed the investigators to use to "get rid of their notes and everything [they] don't need." Additionally, on October 21, 2010, Lt. Haviland sent an email to Investigator Rodgers titled "Zisa," which instructed him to "[g]et rid of what we do not need."

According to plaintiff, every BCPO Investigator assigned to the case, except Investigator Robinson, "complied with [Lt. Haviland's] order causing a massive burning of case files related to [the] matter." Investigators Pasquariello and Rodgers testified they were not aware of the preservation notices BCPO had received until the day after Lt. Haviland instructed them to destroy their notes. Investigator Robinson, however, stated Lt. Haviland informed him Chief "Zisa's

[3] Investigator Pasquariello's name is spelled "Pasquerillo" at times in the record. We utilize the spelling he provided during his testimony at Chief Zisa's trial.

[4] The transcript containing the testimony of Investigators Robinson, Rodgers, and Pasquariello was attached to plaintiff's complaint as an exhibit and referenced therein.

attorney just put [BCPO] on notice to retain everything . . . so get rid of everything you don't need and get rid of your notes." When Investigator Robinson challenged the instruction, he testified Lt. Haviland responded "just do it," but Investigator Robinson did not destroy anything.

On approximately October 21, 2010,[5] plaintiff alleges Lt. Haviland destroyed everything produced by the investigators, including "emails, threads, documents, reports, statements, discs, and other tangible items." Investigator Pasquariello stated he "thought it was peculiar that we were told to shred our notes." Investigator Rodgers agreed "[t]his case was run differently than any case [he] ever worked," and in his forty years in law enforcement, he never "received an instruction to destroy [his] notes."

Ultimately, on December 10, 2012, the criminal proceedings against plaintiff culminated in a bench trial in which the court found plaintiff and Captain Garcia not guilty. After his acquittal, plaintiff filed his first complaint against defendants on October 30, 2014, alleging tortious and criminal conduct in furtherance of a conspiracy against him. On June 30, 2015, the trial court struck the complaint without prejudice because certain sections of it "were

[5] Plaintiff's complaint lists the date as October 21, 2014. Context indicates the date was likely October 21, 2010.

deemed not to be relevant . . . 'scandalous and impertinent.'" On August 18, 2015, the court denied plaintiff's motion for reconsideration, finding plaintiff did not offer any new evidence or arguments that were sufficient to warrant disturbing the prior order. The court also denied plaintiff's request it strike only the irrelevant and scandalous portions of the complaint.

Plaintiff thereafter filed an amended complaint on September 1, 2015. The trial court dismissed the complaint with prejudice on May 27, 2016, finding the amended complaint identical to the one dismissed previously. We reversed and remanded, see Aletta v. Bergen Cnty. Prosecutor's Off., No. A-5347-15 (App. Div. Apr. 13, 2018) (slip op.), and held the dismissal should have been without prejudice. We also instructed the court:

> [o]n remand, the court may itself strike the offending paragraphs of the complaint, or the court may appoint an attorney to assist the court at plaintiff's expense to conform the extremely lengthy complaint to the court's direction. The court may also impose another remedy in conformity with this opinion. We see no reason to return this matter to a different judge as requested by plaintiff.
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> [Id. at 9.]

Plaintiff thereafter filed the instant amended complaint on May 17, 2021. His eight causes of action include: violation of his constitutional rights under 42 U.S.C. § 1983 (§ 1983) and the New Jersey Civil Rights Act, N.J.S.A. 10:6-

1 to -2 (NJCRA); malicious prosecution; civil conspiracy; intentional infliction of emotional distress; abuse of process; destruction, manufacturing, and tampering with evidence; and negligent management/supervision against the State and BCPO only.

All defendants again moved to dismiss pursuant to Rule 4:6-2(e). On September 24, 2021, the court granted the motion and dismissed the complaint. It explained its reasoning in an oral ruling the same day, concluding "[d]efendants have absolute prosecutorial immunity from claims under [§] 1983 in [sic] the New Jersey Civil Rights Act, NJCRA, and immunity from State law claims pursuant to [N.J.S.A.] 59:3-8." The court also reasoned the BCPO defendants enjoyed qualified immunity due to the existence of probable cause for the charges against plaintiff and the complaint's failure to "assert that the evidence was fabricated or withheld from his defense, only that the BCPO [d]efendants failed to preserve some written notes."

As to the TCA, the court found the State and BCPO were entitled to discretionary immunity pursuant to N.J.S.A. 59:2-3 on the negligent management/supervision claim. It explained the decision whether to "indict or not to indict" was within the discretion of the BCPO and therefore not actionable. Further, the court found "there is no claim . . . that there was a loss

of bodily function or any medical expenses in excess of . . . $3,600 as required by the [TCA]." The court found the amended complaint failed to establish a basis for relief and explained "none of the . . . purported claims were ever substantiated in th[e] earlier [pretrial] proceedings and cannot be now made up." The court did not specify whether its dismissal was with or without prejudice, but in its written order, the words "with prejudice" appear but are crossed out. This appeal followed.

II.

We review orders granting dismissal pursuant to Rule 4:6-2(e) de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). We apply "the same standard under Rule 4:6-2(e) that governed the motion court," Wreden v. Twp. of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014), which is whether the pleadings even "suggest[]" a basis for the requested relief, Printing Mart-Morristown, 116 N.J. at 746.

A reviewing court assesses only the "legal sufficiency" of the claim based on "the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown, 116 N.J. at 746). The court may consider "allegations in the complaint, exhibits attached to the

complaint, matters of public record, and documents that form the basis of a claim." Banco Popular, 184 N.J. at 183 (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004)). The court must "search[] the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing-Mart Morristown, 116 N.J. at 746 (quoting Di Cristofaro v. Laurel Grove Mem'l Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). Consequently, "[a]t this preliminary stage of the litigation the [c]ourt is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint," ibid., rather the facts as pled are considered "true" and accorded "all legitimate inferences," Banco Popular, 184 N.J. at 166.

A. Constitutional Claims – Individual Defendants

We examine each of plaintiff's claims in turn, beginning with his constitutional § 1983 and NJCRA claims and then turning to the common law claims. Plaintiff argues the motion court erred in finding defendants were entitled to absolute immunity from his § 1983 and NJCRA claims because defendants "allegedly coerced witnesses, fabricated testimony, and destroyed exculpatory evidence while acting in their investigative roles," not prosecutorial roles. He asserts Lt. Haviland is an investigator, not a prosecutor, and should

not receive prosecutorial immunity. He also contends the harmful conduct occurred prior to trial, removing it from the purview of absolute immunity. Plaintiff also maintains further investigation through discovery is necessary to determine defendants' "actions, motivations, and decision-making" to confirm their conduct was investigative and thus outside the scope of immunity.

Defendants respond the court did not err in finding them absolutely immune from plaintiff's § 1983 and NJCRA claims. In support, they argue they are entitled to absolute immunity because it is well established under Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976), that "prosecutors enjoy absolute immunity from liability in civil suits for actions taken in their role as prosecutors." They note absolute immunity has been found to extend to prosecutorial acts occurring prior to the initiation of a criminal prosecution if said acts are necessary to the decision whether to initiate the prosecution, as here. Defendants also maintain investigators of a prosecutor's office are protected by absolute immunity because their function is closely related and aligned with the judicial process.

Plaintiff also argues Lt. Haviland is not entitled to qualified immunity because the "pretrial fabrication of evidence and deliberate destruction of evidence constitute[d] due process violations." He maintains both fabrication

and destruction of evidence by a prosecutor or their staff were clearly established constitutional due process violations as of 2010, and, relying upon Reichle v. Howards, 566 U.S. 658, 670 (2012), qualified immunity is not "available to those with improper or retaliatory motives," like Lt. Haviland. Defendants respond Lt. Haviland was properly granted immunity because "the alleged instruction to destroy handwritten investigators' notes did not involve conduct that violated constitutional or statutory obligations that were clearly established at the time of such conduct."

Prosecutors have long been awarded absolute immunity from claims arising out of their governmental function. Imbler, 424 U.S. at 421-22; Loigman v. Twp. Comm., 185 N.J. 566, 581 (2006). The immunity is based on "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from [their] public duties, and the possibility that [they] would shade [their] decisions instead of exercising the independence of judgment required by [their] public trust." Loigman, 185 N.J. at 581 (quoting Imbler, 424 U.S. at 423). The Court recognized absolute immunity "leave[s] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," but nonetheless concluded "it serves the 'broader public interest' of ensuring that vexatious

litigation not suppress 'the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.'" Id. at 581-82 (quoting Imbler, 424 U.S. at 427-48).

In determining whether a prosecutor should receive immunity, we "focus upon the functional nature of the activities rather than [the defendant's] status." Imbler, 424 U.S. at 430. Traditionally, activities which are "an integral part of the judicial process" are protected. Ibid. In particular, "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [their] role as an advocate for the State, are entitled to the protections of absolute immunity," including "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury." Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).

Courts have granted immunity from claims alleging a prosecutor "fail[ed] to disclose exculpatory evidence" and "us[ed] false testimony in connection with [a] prosecution," "so long as they did so while functioning in their prosecutorial capacity." Yarris v. Cnty. of Del., 465 F.3d 129, 137 (3d Cir. 2006); see also Burns v. Reed, 500 U.S. 478, 486 (1991) (noting "the alleged knowing use of false testimony at trial" was "intimately associated with the judicial phase of the

criminal process" and thus entitled to absolute immunity (quoting Imbler, 424 U.S. at 430)).

On the other hand, a prosecutor's actions outside their role as advocate are not protected by absolute immunity. As the United States Supreme Court explained, a prosecutor is not entitled to absolute immunity when performing "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." Buckley, 509 U.S. at 273. It reasoned "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" Ibid. (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)). Further, "some acts fall wholly outside the prosecutorial role no matter when or where they are committed." Odd v. Malone, 538 F.3d 202, 211 (3d Cir. 2008). "For example, prosecutors never enjoy absolute immunity for deliberately destroying exculpatory evidence." Ibid. (citing Yarris, 465 F.3d at 136).

The "timing of the prosecutor's action (e.g. pre-or postindictment), or its location (i.e. in-or out-of-court)" is not "dispositive." Fogle v. Sokol, 957 F.3d 148, 163 (3d Cir. 2020) (quoting Odd, 538 F.3d at 211). Rather, the "key to the

absolute immunity determination" is "the underlying function that the investigation serves and the role the [prosecutor] occupies in carrying it out." Ibid. (quoting B.S. v. Somerset Cnty., 704 F.3d 250, 270 (3d Cir. 2013)).

In addition, an investigator for the prosecutor's office may be entitled to immunity "when the employee's function is closely allied to the judicial process." Davis v. Grusemeyer, 996 F.2d 617, 631 (3d Cir. 1993), overruled on other grounds by Rolo v. City Investing Co. Liquidating Tr., 155 F.3d 644 (3d Cir. 1998). "[A]n investigator performing investigative work related to a criminal proceeding enjoys the same scope of immunity that a prosecutor performing such tasks would." Murphy v. Middlesex Cnty., 361 F. Supp. 3d 376, 385 (D.N.J. 2019).

New Jersey courts have further limited the immunity's bounds. Our Supreme Court concluded a prosecutor is not entitled to absolute immunity if they "acted out of personal motive, with malicious intent, or in excess of [their] jurisdiction." Cashen v. Spann, 66 N.J. 541, 552 (1975). It explained the "presumption that [prosecutors] act legally in the discharge of their public duty . . . is overcome by convincing proof that they acted in excess of and distinct from their required official duty for personal reasons of their own." Id. at 549 (quoting Earl v. Winne, 14 N.J. 119, 134 (1953)).

Even where absolute immunity does not apply, a government official may nevertheless be entitled to qualified immunity "for discretionary acts that do 'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Baskin v. Martinez, 243 N.J. 112, 127 (2020) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). In considering qualified immunity, the court must determine "(1) whether the evidence, viewed in the light most favorable to the plaintiff, establishes that the official violated the plaintiff's constitutional or statutory rights, and (2) whether the right allegedly violated was 'clearly established' at the time of the [defendant]'s actions." Id. at 128.

Failure to preserve potentially exculpatory evidence may violate constitutional rights to due process under the Fourteenth Amendment if done in bad faith. Yarris, 465 F.3d at 142. A determination of bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." Ibid. (quoting Arizona v. Youngblood, 488 U.S. 51, 57 (1988)).

Because plaintiff's constitutional claims under the NJCRA and § 1983 involve several events, we divide the bases for those claims into four distinct groups, alleging defendants (1) improperly charged and prosecuted plaintiff

based on personal and/or political motives, (2) pressured witnesses to lie or change their statements to conform to a particular prosecution theory, (3) used those false statements to further the prosecution, and (4) purposely destroyed exculpatory evidence. With respect to the individual defendants, we are satisfied the court did not err in granting them absolute prosecutorial immunity as to groups one and three. We find the record insufficient to determine whether defendants were entitled to either absolute or qualified immunity as to group two. We are convinced the court erred in concluding Lt. Haviland was entitled to either absolute prosecutorial immunity or qualified immunity with respect to group four for the reasons that follow, but reach the opposite conclusion with respect to Molinelli and Keitel.

Turning first to the claims in group one, that defendants prosecuted plaintiff based on a purported improper motive, even taking the facts as pled to be "true" and according plaintiff "all legitimate inferences," as required under Banco Popular, 184 N.J. at 166, plaintiff's allegations that Molinelli, Keitel, or Lt. Haviland acted out of personal motive or malice are purely speculative and insufficient to support his causes of action. See AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co., 256 N.J. 294, 311 (2024) ("the essential facts supporting plaintiff's cause of action must be presented in order for the claim to survive;

conclusory allegations are insufficient in that regard" (quoting Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012))). Plaintiff provided nothing beyond conclusory allegations of political conspiracy and a tenuous chain of unsupported inferences to even suggest the prosecution was based upon any improper motive. The decision to charge and prosecute plaintiff was clearly encompassed by absolute prosecutorial immunity.

Next, as to plaintiff's allegations in group two, that defendants allegedly coerced witnesses to lie or change their statements, we are unable to determine based on the record before us whether any defendant was entitled to immunity. Plaintiff alleged in his complaint that "all named defendants" were involved in the coercion or pressuring of numerous witnesses, including Officer Campos, Det. Malvasia, Lt. Puglisi, Officer Prise, Connelly, and A.A. As noted, however, the complaint and attached materials did not specify which defendant(s) were involved in the procurement of each statement. Plaintiff similarly failed to identify when defendants allegedly engaged in this improper conduct. Indeed, the complaint provides no date for several of the statements, particularly those of A.A., Officer Prise, Connelly, and Det. Malvasia. Finally, it is unclear whether the statements could have been considered preparation for trial, as the

complaint does not state whether several of the witnesses testified before the grand jury or at plaintiff's trial, particularly Det. Malvasia.

As a result, although the timing of the conduct in relation to plaintiff's indictment is not "dispositive," Fogle, 957 F.3d at 163, we are unable to determine whether Keitel, Molinelli, and/or Lt. Haviland were even involved in obtaining these statements, and if so, whether their actions were "an integral part of the judicial process," Imbler, 424 U.S. at 430, in preparing for the grand jury or a trial. The court's order granting Molinelli, Keitel and Lt. Haviland absolute immunity from plaintiff's § 1983 and NJCRA claims as to the allegations of pressuring or coercing witnesses was thus erroneous. On remand, however, plaintiff must precisely identify each instance forming the basis for his claims, including the specific defendant(s) alleged to be involved, when the conduct occurred, and whether the witness later testified before the grand jury or at plaintiff's trial. Defendants may then renew their motion as appropriate.

Notwithstanding that determination, however, we conclude the allegations in group three, that defendants purportedly knowingly relied upon and presented false statements to the grand jury and/or at trial, are encompassed by absolute prosecutorial immunity. See Burns, 500 U.S. at 486 (finding prosecutor entitled to absolute immunity for "the alleged knowing use of false testimony at trial");

Yarris, 465 F.3d at 139 (finding prosecutor entitled to absolute immunity for "using false testimony in connection with [a] prosecution"). Presentation of testimony, even false testimony, to a judge or jury is clearly "an integral part of the judicial process." Imbler, 424 U.S. at 430.

As to group four, we find plaintiff fails to identify any specific details establishing either Molinelli or Keitel was involved in the destruction of exculpatory evidence. That either had authority over the case against Chief Zisa, Captain Garcia, and plaintiff does not necessarily lead to the conclusion that either of them gave an order to destroy evidence. Again, plaintiff's allegations on this point are, at best, speculative and conclusory.

With respect to Lt. Haviland, however, we are convinced the court erred in concluding he was entitled to either absolute prosecutorial immunity or qualified immunity on this point. As noted, destroying potentially exculpatory evidence is "wholly outside the prosecutorial role" and thus plainly not encompassed by prosecutorial immunity. Odd, 538 F.3d at 211.

As to qualified immunity, viewed in the light most favorable to plaintiff, the allegations in the complaint suggest Lt. Haviland violated plaintiff's clearly established constitutional right to due process under the Fourteenth Amendment by destroying evidence which may fairly be inferred to have been exculpatory.

Yarris, 465 F.3d at 142. The right was clearly established, as the Third Circuit's decision in Yarris outlining that right was issued in 2006, four years prior to Lt. Haviland's alleged conduct. Further, plaintiff's allegations of the context surrounding the destruction support a legitimate inference that Lt. Haviland was aware the evidence was exculpatory and thus acted in bad faith.

B. Constitutional Claims – Entity Defendants

Turning to the claims against the State and BCPO, plaintiff asserts the entity defendants may be held liable for failing to "properly train, implement policies, . . . properly supervise" and "disregard[ing] established protocol and guidelines designed to effectuate compliance with law." Specifically, he contends "when a prosecutor acting in the scope of employment seeks to conceal exoneration or exculpatory evidence from the accused . . . this requires introspection as to how the BCPO could allow such unlawful act" and the need for "more or different training" is obvious.

Defendants respond the claims against BCPO and the State were properly dismissed because such claims "cannot be asserted against a public entity that is considered an arm of the state," such as BCPO, and "a government entity cannot be held liable under § 1983 or the NJCRA for the actions of its employees purely

under the theory of respondeat superior," under Bayer v. Twp. of Union, 414 N.J. Super. 238, 270 (App. Div. 2010). We agree with defendants.

Claims under § 1983 and the NJCRA may not be asserted against the State because "Congress did not intend to override well-established immunities or defenses under the common law" in enacting § 1983, and the New Jersey Legislature similarly declined to include "an express waiver of sovereign immunity" in the NJCRA. Brown v. State, 442 N.J. Super. 406, 425-26 (App. Div. 2015), rev'd on other grounds, 230 N.J. 84 (2017); see also Will v. Mich. Dep't of State Police, 491 U.S. 58, 67 (1989) (holding "[w]e cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent").

Further, "when [New Jersey] county prosecutors engage in classic law enforcement and investigative functions, they act as officers of the State" and thus are similarly immune to such claims. Est. of Lagano v. Bergen Cnty. Prosecutor's Off., 769 F.3d 850, 855 (3d Cir. 2014) (alteration in original) (quoting Coleman v. Kaye, 87 F.3d 1491, 1505 (3d Cir. 1996)). Prosecutors performing "administrative functions 'unrelated to the duties involved in criminal prosecution,'" on the other hand, "act as county officials," and may be liable in certain circumstances. Ibid. (quoting Coleman, 87 F.3d at 1505-06).

A public entity may be held liable under the NJCRA or § 1983 "only if it causes harm through 'the implementation of "official municipal policy."'" Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 190-91 (2021) (quoting Lozman v. City of Riviera Beach, 585 U.S. 87, 95 (2018)); see also Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978) (holding "Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort"). In other words, an entity is "not legally accountable solely because of the acts of one of its employees—acts that do not represent official policy—under the doctrine of respondeat superior." Winberry Realty, 247 N.J. at 191. As the Third Circuit explained, "[l]iability is imposed 'when the policy or custom itself violates the Constitution or when the policy or custom, while not unconstitutional itself, is the "moving force" behind the constitutional tort of one of its employees.'" Thomas v. Cumberland Cnty., 749 F.3d 217, 222 (3d Cir. 2014) (quoting Colburn v. Upper Darby Twp., 946 F.2d 1017, 1027 (3d Cir. 1991)).

Further, where the policy or custom at issue is "a failure to train or supervise . . . , the plaintiff must show that this failure 'amounts to "deliberate indifference" to the rights of persons with whom [the municipality's] employees

will come into contact.'" Johnson v. City of Phila., 975 F.3d 394, 403 (3d Cir. 2020) (second alteration in original) (quoting Thomas, 749 F.3d at 222). Typically, this requires the plaintiff establish either "a 'pattern of similar constitutional violations by untrained employees' that 'puts municipal decisionmakers on notice that a new program is necessary'" or "that failure to provide the identified training would 'likely . . . result in the violation of constitutional rights.'" Ibid. (omission in original) (first quoting Thomas, 749 F.3d at 223, and then quoting City of Canton v. Harris, 489 U.S. 378, 390 (1989)).

Although the court dismissed the constitutional claims against the entity defendants on different grounds than those just explained, we conclude the ultimate outcome was appropriate. See Hayes v. Delamotte, 231 N.J. 373, 387 (2018) ("it is well-settled that appeals are taken from orders and judgments and not from opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion" (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001))).

Plaintiff's NJCRA and § 1983 claims against the State fail because, as noted, it is not amenable to suit under either statute. See Brown, 442 N.J. Super. at 425-26. Even assuming any individual defendant was not performing "classic

law enforcement and investigative functions," rendering them an officer of the state, Est. of Lagano, 769 F.3d at 855 (quoting Coleman, 87 F.3d at 1505), plaintiff's NJCRA and § 1983 claims against the BCPO cannot proceed on a respondeat superior theory. See Winberry Realty, 247 N.J. at 191 (holding a public entity is "not legally accountable solely because of the acts of one of its employees—acts that do not represent official policy—under the doctrine of respondeat superior").

With respect to the execution of a custom or policy, plaintiff alleged generally BCPO had a custom of "condon[ing] the actions of their agents, servants and/or employees by virtue of their training, supervision, policies, procedures, and/or directives." This conclusory, undetailed statement identifies no specific unconstitutional component, or how this custom was the "moving force" behind any allegedly tortious conduct. Thomas, 749 F.3d at 222. To the contrary, plaintiff also alleged "[a]ll named BCPO defendants failed to follow proper and lawful guidelines, policies, procedures, and methods for conducting criminal investigations and prosecutions." (emphasis supplied).

Plaintiff further fails to identify any specific training he claims would be necessary, nor any pattern of similar constitutional violations to "put[] municipal decisionmakers on notice that a new [training] program is necessary." Johnson,

975 F.3d at 403 (quoting Thomas, 749 F.3d at 223). Indeed, the BCPO investigators testified at Chief Zisa's trial that this was the only case to be handled in this manner. For the same reasons, plaintiff's negligent management and supervision claims, premised on the same arguments, also fail.

III.

A. Common Law Claims – Individual Defendants

We turn next to the common law claims against the individual defendants. Plaintiff argues the court erred in granting defendants immunity under N.J.S.A. 59:3-8 because they acted with malice and committed willful misconduct, triggering the immunity exception set forth in N.J.S.A. 59:3-14. He maintains defendants acted "to settle a private score" and "knowingly presented false and fabricated testimony to the grand jury," which is "sufficient to infer malice." Defendants respond they were entitled to immunity as plaintiff made only "vague, conclusory assertions" of malice or misconduct insufficient to strip them of the protections of N.J.S.A. 59:3-8. They maintain plaintiff's "tale of political infighting" involved none of the named defendants and asked the court to take "enormous leaps of inference."

Because it is undisputed the individual defendants are public employees, see N.J.S.A. 59:1-3, the TCA governs plaintiff's common law claims against

them. The "guiding principle" of the TCA is that "immunity from tort liability is the general rule and liability is the exception." H.C. Equities, LP v. Cnty. of Union, 247 N.J. 366, 381 (2021) (quoting D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 133-34 (2013)). Accordingly, the TCA provides various immunities.

N.J.S.A. 59:3-8 codified a version of common law prosecutorial immunity, specifically providing a "public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment." Additionally, a "public employee is not liable for an injury resulting from the exercise of judgment or discretion vested in him." N.J.S.A. 59:3-2(a). N.J.S.A. 59:3-14 limits TCA immunity by excepting conduct "outside the scope of [the employee's] employment" or which constitutes "a crime, actual fraud, actual malice or willful misconduct."

"[W]illful misconduct is not immutably defined but takes its meaning from the context and purpose of its use." Fielder v. Stonack, 141 N.J. 101, 123-24 (1995). It "ranges in a number of gradations from slight inadvertence to malicious purpose to inflict injury." Id. at 124 (quoting McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970)). "[P]rior decisions have suggested that

willful misconduct is the equivalent of reckless disregard for safety [and] more than an absence of 'good faith.'" Alston v. City of Camden, 168 N.J. 170, 185 (2001) (quoting Fielder, 141 N.J. at 124). It "need not involve the actual intent to cause harm" but requires "the commission of a forbidden act with actual (not imputed) knowledge that the act is forbidden." Fielder, 141 N.J. at 124 (quoting Marley v. Borough of Palmyra, 193 N.J. Super. 271, 295-95 (Law Div. 1983)).

As with plaintiff's constitutional claims, we group plaintiff's allegations based upon the purported underlying conduct: (1) improper charging and prosecution of plaintiff based on personal and/or political motives, (2) coercion of witnesses to lie or change their statements, (3) use of those false statements, and (4) purposeful destruction of exculpatory evidence. We also reach a similar result, concluding all the individual defendants were entitled to prosecutorial immunity under N.J.S.A. 59:3-8 as to group one, the record is insufficient to decide immunity as to group two, and Molinelli and Keitel were entitled to prosecutorial immunity as to group four, but Lt. Haviland was not. Due to the willful misconduct exception to the TCA, N.J.S.A. 59:3-14, we find Molinelli and Keitel were not entitled to prosecutorial immunity for group three, allegedly presenting false testimony.

We are satisfied all three individual defendants are entitled to the protection of N.J.S.A. 59:3-8 with respect to the allegations in group one that their motivation to charge and prosecute plaintiff was improper, because, as noted, plaintiff's allegations of willful misconduct and malice on that point are entirely speculative, conclusory and wholly insufficient to support his claims. See AC Ocean Walk, 256 N.J. at 31. The decision to charge and prosecute plaintiff was clearly conduct "instituting or prosecuting any judicial . . . proceeding within the scope of [defendants'] employment." N.J.S.A. 59:3-8.

Next, we again conclude the record is insufficient for a determination of whether defendants were entitled to TCA immunity for the allegations in group two that they pressured witnesses to lie or change their statements. We cannot determine which defendants were involved with which witnesses, when many of the statements were made, or whether obtaining those statements was purely investigative or related to "prosecuting any judicial . . . proceeding within the scope of [defendants'] employment." N.J.S.A. 59:3-8. Again, plaintiff must specify each instance forming the basis for his claims, and defendants may then renew their motion as appropriate.

Turning to group three, the alleged knowing use of false testimony before the grand jury and/or at trial, we find plaintiff adequately pled this conduct

constituted willful misconduct. Specifically, an attorney would be aware eliciting testimony they know to be false is forbidden. See State v. Carter, 85 N.J. 300, 312 (1981) (identifying knowing use of perjured testimony that could affect outcome of trial as grounds to vacate criminal conviction); R.P.C. 3.4(b) (prohibiting attorneys from "counsel[ing] or assist[ing] a witness to testify falsely"). Accordingly, Molinelli and Keitel are not entitled to immunity for this alleged willful misconduct. N.J.S.A. 59:3-14.

As to group four, we again find plaintiff provided no specific details establishing either Molinelli or Keitel was involved in the destruction of exculpatory evidence. His speculative and conclusory statements cannot support his claims. See AC Ocean Walk, 256 N.J. at 31.

With respect to Lt. Haviland, however, we are convinced plaintiff has presented sufficient facts suggesting he was not entitled to immunity for purportedly ordering and/or participating in the destruction of evidence. The allegations in the complaint, supported by the testimony of the BCPO investigators at Chief Zisa's trial, indicated Lt. Haviland deliberately destroyed or ordered the destruction of exculpatory evidence despite being aware of a preservation notice. Taken as true, this would be both outside the scope of his

employment, see Odd, 538 F.3d at 211, and in light of the preservation notice, willful misconduct, see Fielder, 141 N.J. at 124.

Based on Investigator Robinson's testimony, Lt. Haviland knew his conduct was forbidden as he was aware of the preservation notice at the time he allegedly ordered the other investigators to destroy their notes. Although the content of the destroyed documents is unknown, an adverse inference may be taken from destruction of notes in similar situations. See State v. Dabas, 215 N.J. 114, 140 (2013) (holding court should have instructed the jury "it was permitted to draw an inference that the contents of the notes were unfavorable to the State" where the State destroyed interrogation notes). Accordingly, on the record before us as viewed through the Printing Mart prism, we conclude Lt. Haviland is not entitled to prosecutorial immunity under N.J.S.A. 59:3-8 or discretionary immunity under N.J.S.A. 59:3-2(a) for allegedly destroying evidence, see N.J.S.A. 59:3-14, and the court erred in dismissing the claims against him on those grounds.

B. Common Law Claims – Entity Defendants

Turning to the entity defendants, although a public entity may be held responsible for acts or omissions of its employees under a theory of respondeat superior, it is "not liable for an injury resulting from an act or omission of a

public employee where the public employee is not liable," N.J.S.A. 59:2-2, or where the employee's acts or omissions constitute "a crime, actual fraud, actual malice, or willful misconduct," N.J.S.A. 59:2-10.

Accordingly, to the extent we have determined any of the individual defendants are entitled to immunity under N.J.S.A. 59:3-8, neither BCPO nor the State may be held liable on a respondeat superior theory related to those claims. N.J.S.A. 59:2-2. To the extent that we found any individual defendant engaged in willful misconduct or acted outside the scope of their employment such that they were not entitled to immunity, the entity defendants cannot be held liable for those actions under N.J.S.A. 59:2-10.

C. The TCA Verbal Threshold

Plaintiff also argues he was not required to "establish the verbal threshold [in N.J.S.A. 59:9-2(d)] in cases under the TCA where willful misconduct is alleged" under Toto v. Ensuar, 196 N.J. 134, 137-38 (2008). He maintains "[c]oncealing and then destroying exculpatory or exonerating evidence from the county prosecutor" constitutes misconduct and "renders the TCA's verbal threshold requirement nonapplicable."

The TCA limits the damages a successful plaintiff may collect. N.J.S.A. 59:9-2(d) provides "[n]o damages shall be awarded against a public entity or

public employee for pain and suffering resulting from any injury" except in the case of "permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00."

As our Supreme Court has explained, "emotional distress is considered pain and suffering under the TCA." Nieves v. Off. of the Pub. Def., 241 N.J. 567, 584 (2020). To satisfy the requirements for the exception to N.J.S.A. 59:9-2(d), a "plaintiff must show '(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial.'" Id. at 581 (quoting Toto, 196 N.J. at 145). The objective permanent injury need not be physical but may be psychological or emotional. Id. at 584 (citing Collins v. Union Cnty. Jail, 150 N.J. 407, 422-23 (1997) and Ayers v. Jackson, 106 N.J. 557, 577 (1987)). As plaintiff correctly noted, however, "when a public employee's actions constitute willful misconduct, the plaintiff need not satisfy the verbal threshold and may instead recover the full measure of damages 'applicable to a person in the private sector.'" Toto, 196 N.J. at 137-38 (quoting N.J.S.A. 59:3-14(a)).

Here, we agree the motion record reflects no medical treatment expenses over $3,600. As noted, however, plaintiff has sufficiently alleged, at minimum,

Lt. Haviland's purported destruction of evidence and Molinelli's and Keitel's alleged use of false testimony constituted willful misconduct, making N.J.S.A. 59:9-2(d) inapplicable. See Toto, 196 N.J. at 137-38. The verbal threshold will be similarly inapplicable if, on remand, plaintiff provides sufficient specific information to demonstrate the individual defendants engaged in willful misconduct as to coercion of witnesses. Accordingly, it was improper to dismiss plaintiff's claims solely because he failed to vault the verbal threshold.

IV.

Finally, plaintiff contends the court erred in dismissing his complaint with prejudice because dismissals pursuant to Rule 4:6-2(e) are typically without prejudice, and he should have been permitted to cure any shortcomings by filing an amended complaint. Defendants respond the court was within its discretion to dismiss the complaint with prejudice, noting this was plaintiff's third attempt to present actionable claims.

Plaintiff correctly notes "[d]ismissals under Rule 4:6-2(e) are ordinarily without prejudice." Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022). However, a complaint shall be dismissed with prejudice if "'the factual allegations are palpably insufficient to support a claim upon which relief can be granted,' . . . or if 'discovery will not give rise to

such a claim.'" Ibid. (first quoting Rieder v. State, 221 N.J. Super. 547, 552 (App. Div. 1987), and then quoting Dimitrakopoulos, 237 N.J. at 107). Further, the court may grant the dismissal with prejudice if further amendment would be futile. Johnson v. Glassman, 401 N.J. Super. 222, 246-47 (App. Div. 2008).

The record is not clear as to whether plaintiff's complaint was dismissed with prejudice or not. The court's dismissal order has "with prejudice" language in it, but that language in the order appears crossed out. Both parties in their merits briefs concede, however, they considered the dismissal to be with prejudice, and the court's oral decision substantively addressed the issues. In any future orders, the court shall clearly specify whether it intends to dismiss any claims with or without prejudice.

We decline to reach the additional arguments in support of dismissal advanced by defendants but not addressed by the court, as we exercise our original jurisdiction under Rule 2:10-5 "sparingly and only in clear cases that are free of doubt." Henebema v. Raddi, 452 N.J. Super. 438, 452 (App. Div. 2017).

In sum, we affirm the dismissal of the following claims: all claims against BCPO and the State, all claims based upon defendants' allegedly improper motivation to prosecute plaintiff, the constitutional claims based upon

defendants' alleged knowing use of false testimony before the grand jury or at plaintiff's trial, and all claims against Molinelli and Keitel based upon their alleged destruction of evidence. We reverse and vacate the dismissal of all claims against Lt. Haviland based upon his alleged destruction of evidence, all claims against Molinelli, Keitel, and Lt. Haviland based upon their alleged coercion of witnesses, and the common law claims against Molinelli and Keitel based upon their alleged presentation of false testimony to the grand jury and/or at trial. On remand, plaintiff is ordered to provide specific details about the purported coercion, including the specific defendant(s) alleged to be involved, when the conduct occurred, and whether the witness later testified before the grand jury or at plaintiff's trial.

Affirmed in part, reversed in part, vacated in part, and remanded. We do not retain jurisdiction.